COMMISSIONER FOR HUMAN RIGHTS

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Address by Thomas Hammarberg
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Two years ago, in September 2008, I carried out an assessment visit to the Netherlands as part of a continuous process of evaluating the respect for human rights of all the Council of Europe member states. During the visit I had the opportunity to engage in a constructive dialogue with the Dutch authorities, and had fruitful discussions with civil society organisations.

Following the visit to the Netherlands, on 11 March 2009, I published a report together with a response from the government. I focused on the human rights of asylum seekers and immigrants, trafficking in human beings, children's rights, the fight against various forms of discrimination, and anti-terrorism measures.

All of the issues raised in the report cannot be mentioned here. Let me concentrate on three, which in my view are the most pressing today and to which I would like to draw special attention: (1) the fight against racial discrimination, (2) the protection of the human rights of asylum seekers, and (3) the human rights of children.

Fight against racial discrimination

The fight against racism, xenophobia and intolerance towards migrants and ethnic minorities is one of the biggest challenges facing European states today. Discrimination on ethnic grounds remains a serious problem in various fields. Extremism and racial violence are on the rise. Some European politicians resort to discriminatory rhetoric and shape their policies accordingly, which can have disastrous consequences, as we have been able to observe recently in connection with the collective expulsions of Roma migrants from France.

Sadly, the problem of racial discrimination also concerns the Netherlands. In its observations on the Netherlands, published on 16 March 2010, the UN Committee on the Elimination of Racial Discrimination expressed concern at "the incidence of racist and xenophobic speech emanating from a few extremist political parties, the continuing incidence of manifestations of racism and intolerance towards ethnic

minorities and the general deterioration in the tone of political discourse around discrimination".

I urge the country's political leaders and authorities to step up their efforts in the fight against racism and intolerance and the social marginalisation of ethnic minorities, and to strongly oppose any xenophobic speech in public discourse.

I remain concerned over the continued lack of an action plan against racism, xenophobia and intolerance in the Netherlands, which was due to appear in 2008 to replace the comprehensive plan in force until 2007.

I urge the Dutch authorities to swiftly adopt such a plan, promote it publicly, and ensure its implementation. I trust that the Netherlands – a country which for decades had been known for its tolerance and openness towards migrants and ethnic minorities – will continue to be an example for other nations in the fight against racial discrimination.

My attention has recently been drawn to reports that the local authorities in at least two Dutch municipalities are collecting personal data concerning persons of Roma origin living in the neighbourhood, and are entering such information into special databases. The databases reportedly include information received among others from the police and justice authorities, child protection services, social welfare institutions and juvenile probation institutions, and only hold data concerning persons of Roma origin. This practice raises serious concerns as it seems to involve a form of ethnic profiling.

The collection, processing and retrieving of sensitive personal data should be subject to the fundamental principle of necessity, which has been established in Council of Europe standards for data protection. This is particularly pertinent in the case of data relating to one's ethnic origin ("special" or "sensitive" data). Relevant guidelines are found in the case law of the European Court of Human Rights, the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and the later European Community Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

On the basis of these legal sources, the following principles may be usefully recalled:

a) All processing of personal data must be based on a domestic law that satisfies the quality criteria provided for by the European Convention on Human Rights; that is, it should be characterised by precision, accessible and foreseeable and afford a degree of effective legal protection against arbitrary interference by the authorities;
b) The collection of sensitive data on individuals, such as those relating to their ethnic origin, is prohibited as a matter of principle. Exceptions may be provided for through a law that conforms to the aforementioned quality criteria and strictly in the cases provided for by Article 8, paragraph 2, of Directive 95/46/EC;

c) There must be limits to the length of time for which information can be retained once collected;
d) All personal data processing operations should be subject to close and effective supervision by independent and impartial data protection authorities.

Protection of the human rights of asylum seekers

In the report I expressed concern that a great deal of asylum applications in the Netherlands are processed under the so-called “48-hour accelerated procedure”, which due to time constraints is bound to be less thorough than the “prolonged/extended” or “general” procedure.

At the time of the visit, amendments to legislation dealing with the asylum procedure had been proposed, and the government thus argued in its response to the report that its policy was already in accordance with my recommendations.

I am aware of the changes introduced to the Aliens Act as of 1 July 2010, as a result of which there is currently one general asylum procedure which lasts eight days, and applications are only considered under the prolonged procedure in a limited number of cases. This does raise some concern, as now even complex cases, which require a scrupulous and extensive examination, might be considered under the first procedure.

I remain of the view that an accelerated procedure is suitable only for clear-cut cases, such as manifestly ill-founded or well-founded claims. However, it can be detrimental to other cases and might be clearly unsuitable for certain vulnerable groups, such as victims of violence and unaccompanied minors.

Another important issue is how asylum decisions are reviewed. Under the legislation in force at the time of my visit to the Netherlands, decisions of the Immigration and Naturalisation Office (“Immigratie- en Naturalisatiedienst” or “IND”) were subject to a limited scrutiny by the courts, which did not make an assessment on the merits but only on points of legal procedures.

I am pleased to note that following this year’s amendment of the Aliens Act, domestic courts will be obliged to take into consideration new circumstances and policy changes at the appeal stage. I hope that in practice the reformed appeal procedure will genuinely allow for a complete assessment of the first instance decision in both fact and law, and that evidence will be considered by the courts even if it could have been brought forward at an earlier stage.

I remain concerned with the large numbers of asylum seekers being detained in the Netherlands. According to statistics from the Dutch Ministry of Justice, in the year 2009 almost 8 000 migrants were detained in the Netherlands. This included asylum seekers, minors, pregnant women, victims of trafficking, disabled persons etc. Vulnerable persons are not excluded from the detention regime as a matter of principle; their exclusion from detention is possible only following an individual assessment of their situation.

Once again I urge the Dutch authorities to give substance to the assertions that the detention of asylum seekers is applied as a measure of last resort, and to guarantee a full judicial review of detention decisions. Detention of asylum seekers upon entry should be allowed only on grounds defined by law, for the shortest possible time and for specific purposes.

I have noted that in December 2010 the EU 'Return Directive' will be transposed into Dutch law, with the result of imposing a time-limit for the detention of aliens prior to their expulsion. Generally, alien detention will be limited to six months, with a maximum stay of up to 18 months in exceptional cases. While commending the authorities for this move, I would like to caution against the practice of detaining migrants on more than one occasion, which may result in their total detention time being excessive. I also encourage the authorities not to extend the detention period beyond the six month time-limit.

In this regard I would like to draw the authorities' attention to the Council of Europe Parliamentary Assembly's Resolution 1707(2010) on *detention of asylum seekers and irregular migrants in Europe*.

The recommendation to member states to consider alternatives to detention and provide for a presumption in favour of liberty under national law which should also contain a clear framework for the implementation of alternatives to detention is particularly useful. As stressed in the Parliamentary Assembly's Report and Resolution, alternatives to detention, such as release on bail/signing an agreement/provision of a guarantor or surety, are available in the United Kingdom, Slovenia, Finland and Denmark and are generally considered to be efficient as well as cost-effective.

As regards reception facilities, I recommended in my report that asylum seekers be provided with adequate shelter until the final closure of their cases. Under the amended legislation, asylum seekers whose applications have been rejected by the IND and are appealing the decision will as a rule be allowed to stay in reception facilities for a period of four weeks following the adoption of the first instance decision.

This amendment is a step in the right direction, and as such deserves praise. However, as it is probable that in certain cases the appeal procedure will take longer than four weeks, I encourage the authorities to ensure that asylum seekers are granted shelter until the final outcome of the procedure and that the appeal be granted suspensive effect.

Finally, I would like to take this opportunity to touch upon the issue of the transfer and forced returns of aliens. On 14 June 2010, Justice Minister Hirsch Ballin informed the Dutch Lower Chamber of Parliament about the suspension of returns of Somali asylum seekers to Greece, which is a decision I strongly support and I hope that it will be respected.

I consider necessary the suspension of transfers of asylum seekers to Greece under the Dublin Regulation until this country is able to guarantee basic safeguards to refugees. On 2 September 2010, I had the opportunity to present to the Court some of my

observations concerning the asylum system in Greece, following my visits in December 2008 and in February 2010, during the Grand Chamber hearing in the *M.S.S. v. Belgium and Greece* case, in which the Netherlands also intervened as a third party. The case concerns the return to Greece by Belgium of an Afghan national under the Dublin Regulation. I would like to repeat here what I said during the hearing: EU states need to halt all transfers of asylum seekers to Greece, as the asylum law and practice of the state are not in compliance with human rights, and persons sent back to Greece face extremely harsh conditions.

Recent reports of forced returns of asylum seekers from the Netherlands to Somalia and Iraq have raised my concern, however. In July 2010, the Dutch government announced its intention to deport, between July and October, at least eight Somalis whose asylum claims have been rejected, in spite of UNHCR guidelines advising against all deportations to south-central Somalia. In the first week of September a group of Iraqis were reportedly to be returned to Baghdad.

I urge the Dutch authorities to reconsider their policy of returning people to these war-torn countries, which cannot guarantee their citizens a minimum of security, and are struggling with a humanitarian crisis.

I hope that the recently amended rules on the asylum procedure will in practice provide the grounds for a fair, efficient and humane system, which will genuinely enable persons who are entitled to protection under international law to seek recognition of their rights, and will fully respect their basic rights at all stages of the procedure.

Human rights of children

I was pleased to note that in June 2010 the Dutch senate adopted a draft law proposal on the establishment of a Children's Ombudsman within the office of the Netherlands Ombudsman. This is positive. I hope that the Children's Ombudsman will be able to enhance the co-ordination and visibility of children's issues.

An important development since the publication of my report as regards the rights of children was the decision of the European Committee of Social Rights of 20 October 2009, adopted following a collective complaint filed by Defence for Children International, and published on 28 February 2010.

In its decision the Committee found that Dutch legislation and practice violated the European Social Charter by not guaranteeing migrant children unlawfully present on the territory the right to shelter. I trust that the Dutch authorities will respect the findings of the Committee and will fulfil their commitment to provide shelter to children of failed asylum seekers without them being separated from their parents.

One of the most fundamental rights of a child, as laid down among others in the Convention on the Rights of the Child, is the right to live with his or her parents. Children may be taken away from their parents only in exceptional situations, when such separation is necessary in the best interest of the child, such as in the case of abuse or neglect. The place of migrant children, like any other children, is with their parents.

An issue which has recently drawn my attention is the Dutch government's policy of financing reception houses for unaccompanied or separated migrant children in third states, so as to be able to return minors who do not qualify for an asylum permit to their countries of origin.

I urge the Dutch authorities not to automatically send such children back to some of the most dangerous and poverty-stricken parts of the world, but to make an individual assessment in every case in order to decide whether it would be in the child's best interest to be integrated in the country of destination, relocated to another country or returned and reintegrated in the country of origin.

States have an obligation to protect all children within their jurisdiction, including migrant children, and to apply policies and practices that take into account their well-being. Automatic return to the home country without a thorough analysis of all the factors at stake is not the solution, and is not in compliance with international standards of child protection.

Also regarding migrant children, I remain concerned about the great number of unaccompanied minors being held in detention in the Netherlands. I am aware of the fact that the Dutch authorities have been working on a policy to change this situation. However, according to official statistics, in 2009 almost 300 unaccompanied children were detained in the so-called judicial youth institutions.

The recent proposal of the Minister of Justice to soften the regime of the youth institutions by opening the doors to the cells in which children are held does not change the fact that the children are deprived of their liberty without having committed any crime. I once again urge the authorities to limit the detention of minors, both as regards unaccompanied minors and children who are with their families, to exceptional circumstances precisely prescribed by law.

In this context I call on the authorities to draw upon the guidelines contained in the Council of Europe Committee of Ministers' Recommendation (2007)9 *on life projects for unaccompanied migrant minors*.

Such life projects should aim to develop the capacities of minors allowing them to acquire and strengthen the skills necessary to become independent, responsible and active in society. They promote the social integration of minors, personal development, cultural development, housing, health, education and vocational training, and employment.

Finally, the issue of juvenile justice: I was pleased to note that – following a judgment of the Supreme Court of 30 June 2009, in which the Court found that minors must be guaranteed additional rights in a criminal investigation – the Ministry of Justice adopted a new policy whereby a child must receive legal assistance from the first police interrogation. This is a positive development, for which I commend the Dutch authorities. However, I remain concerned by the large number of children held in pre-trial detention in the Netherlands. Reportedly, 265 children were held in pre-trial detention in 2009.

I note that the lower age boundary for bearing criminal responsibility has not been changed. Juveniles aged 16 and 17 can be tried under adult criminal law and condemned to prison sentences for as many as 30 years, and their sentences are executed in institutions for adults.

I reiterate my recommendation to the Dutch authorities to increase the age of criminal law responsibility in line with the majority of European states and to apply juvenile criminal law to all minors, even in the case of serious offences. In this regard, the guidelines contained in the Council of Europe Committee of Ministers' Recommendation (2008)11 *on the European Rules for juvenile offenders subject to sanctions or measures* are also very useful.

My attention has been drawn recently to the issue of DNA registration for minor offenders. DNA data is taken annually from almost 2 000 children as an element of a standard procedure. I encourage the authorities to reconsider this practice. DNA registration infringes a child's privacy and should only be applied when it is genuinely necessary – after a careful assessment of all the facts of the case and once the interests have been measured.