

The Effectiveness of the use of Soft Power of the Council of Europe, in Safeguarding the Rights of Asylum Seekers who Face Administrative Detention in the Netherlands

Dissertation

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# Executive Summary

The main purpose of this research is to explore the effectiveness of the use of soft power of the Council of Europe (CoE), in safeguarding the rights of asylum seekers who face administrative detention in the Netherlands. The research focusses on the implementation of different human rights rules and regulations set out universally, regionally and nationally. In addition, the execution of the powers of the CoE are discussed and the effectiveness is measured according to the theory of the American political scientist, Joseph Nye.

The primary method of analysis is qualitative research and the main sources of the research are two Commissioner’s reports with recommendations published after visiting the Netherlands, together with resolutions and reports of the Parliamentary Assembly. Furthermore, two interviews were conducted to retrieve primary data to explore the Dutch asylum policy and the working of the CoE.

This research shows that the CoE is able to demand action from the Dutch Government, however, the rights of asylum seekers are still at stake as asylum seekers are (systematically) placed in administrative detention. Asylum seekers cannot rely on the CoE, to safeguard their rights stated in the European Convention of Human Rights. The implementation of Resolutions and recommendations made by the CoE, could take up to 2 years and implementation depends on the willingness of the Netherlands to adjust the asylum policy. In addition, the enforcement power of the CoE is limited.

The main findings of this research is that the CoE is not as effective as it could be in achieving its goals to maintain, protect, monitor and improve its core values, mainly human rights, for all people within the borders. In addition, the CoE could also improve on the safeguarding of the rights of the asylum seekers in the Netherlands.

Several recommendations are suggested to improve the effectiveness of the CoE. The Committee of Ministers of the CoE are advised to meet the Ministers of the Netherlands and other member states more regularly to give more feedback to the Netherlands. More specifically, it is recommended to give more positive feedback to the Netherlands when the provisions that are stated in the European Convention on Human Rights are complied with. In addition, the research also emphasizes that the Netherlands should attach more value on the importance of reports by the CoE.

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# Abbreviations

AIDA Asylum Information Database

CFR EU Charter of the Fundamental Rights

CoM Committee of Ministers

CoE Council of Europe

COA Central Agency for the Reception of Asylum Seekers

EAP Extended Asylum Procedure

ECHR European Convention on Human Rights and Fundamental Freedoms

ECtHR European Court of Human Rights

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

IGO International Governmental Organization

NAPHR National Action Plan on Human Rights

NGO Non- Governmental Organization

OP-CAT Optional Protocol to the United Nations Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment

OPICESCR Optional Protocol to the International Covenant on Economic, Social and Cultural

Rights

PACE Parliamentary Assembly of the Council of Europe

RAP Regular Asylum Procedure

R&DS Repatriation and Departure Service

SBC Schengen Borders Code

TEU Treaty of the European Union

UDHR Universal Declaration of Human Rights

UNHCR United Nations Refugee Agency

# Glossary of terminology

**Administrative detention** Administrative detention is a form of detention whereby the asylum seeker either faces detention (1) at the border upon arrival to prevent unauthorised entry, or (2) in view of deportation to facilitate the removal of a person

**Arbitrary detention in view**

**of deportation** Arbitrary detention in view of deportation is the length of the detention which cannot be justified properly

**Accession condition** An accession condition is an additional condition for membership

**Culture** Culture is the shared patterns of behaviours and interactions, cognitive constructs, and affective understanding that are learned through a process of socialization

**Fundamental principle of non-penalization** The fundamental principle of non-penalization is the principle whereby refugees coming directly from a territory where their life or freedom was threatened, shall not be penalized for their illegal entry or presence if they present themselves to the authorities without delay and show good cause for their illegal entry or stay

**Fundamental principle of non-refoulement** The fundamental principle of non-refoulement is the principle whereby no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion

**Fundamental principle of proportionality** The principle of proportionality is the principle whereby any measure by a public authority that affects a basic human right must be:

* appropriate in order to achieve the objective, which is intended,
* necessary in order to achieve the objective, which is intended, i.e. there are no less severe means of achieving the objective, and
* reasonable, i.e. the person concerned can reasonably be expected to accept the measure in question

**Fundamental principle of subsidiarity** The fundamental principle of subsidiarity is the principle whereby the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken. The applicant has to exhaust all domestic remedies before lodging an application to the European Court of Human Rights

**Hard power** The ability to use an enforcement method to achieve the desired outcomes

**Legitimacy** The belief that a rule, institution or leader has the right to govern

**Soft power** The ability to achieve desired outcomes without using force

# Introduction

The Council of Europe (CoE) is an International Governmental Organization (IGO), which is focused on maintaining, protecting, monitoring and improving its core, mainly human rights focused, values for all persons within its border. The CoE was established in 1949, when the Treaty of London entered into force. It started with 10 member states and grew significantly throughout the years. Currently, the CoE has 47 member states.

The Statute of the CoE declares that the aim of the CoE is “to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress”(Council of Europe, 1949, “Chapter I – Aim of the Council of Europe” section, para. 1). However, it faces challenges due to its limited enforcement power.

This research explores the effectiveness of the CoE, in achieving its goals (to maintain, protect, monitor and improve its core, mainly human rights focused, values for all people within her borders).

The CoE has warned the Dutch government in 2014 for the second time within six months, regarding its treatment of asylum seekers. According to the CoE’s High Commissioner for Human Rights, Nils Muižnieks (2014), human rights are consistently breached when asylum seekers are administratively detained. The Netherlands has received numerous recommendations and criticisms as early as 2008 by the CoE.

Furthermore, the high influx of asylum seekers, which is growing significantly, gives the CoE the difficult task to maintain, protect, monitor and improve its core, mainly human rights focused values for all persons within her borders (European Union, 2015). Due to this, the Council of Foreign Relations (2015) expressed that more violations occur in member states. Therefore, it is interesting to research how effective the CoE is, in safeguarding the rights of asylum seekers, by using soft power.

This research especially focuses on asylum seekers who face administrative detention at the Application Centre of Schiphol Amsterdam airport.

**Central question**

The central question of this dissertation is: *how effective is the use of soft power of the Council of Europe, by safeguarding the rights of asylum seekers who face administrative detention in the Netherlands?*

The reason for specifically focusing on asylum seekers who face detention at the Application Centre of Schiphol Amsterdam airport is, due to the fact that the Netherlands places asylum seekers (systematically) in detention, after arriving through the International Airport Schiphol (UNHCR, 2013). This research does not elaborate on asylum applications lodged in different application centers in the Netherlands, since the Application Centre of Schiphol Amsterdam airport is the only centre where asylum seekers are detained.

According to Article 6 of the Dutch Aliens Act 2000 (2001):

1. An alien who has been refused entry into the Netherlands may be required to stay in a space or place designated by a border control officer.

2. A space or place as referred to in subsection 1 may be secured against unauthorised departure. (p.4)

**Sub questions**

In order to answer the central question, the following sub questions were formulated:

* What is an asylum seeker?
* What is the asylum procedure in the Netherlands
* What is administrative detention?
* Which relevant human rights are at stake?
* How does the CoE safeguard these human rights?
* What is soft power and how effective is it?

Each sub question contributed to gathering the information needed for the writing of this dissertation.

**Chapters**

The dissertation is divided into six chapters. Chapters one and two contain the context of this dissertation. The first chapter discusses the definition of asylum seeker and mentions the relevant treaties and chapters. In chapter 2, the asylum procedure in the Netherlands is explained and its use of administrative detention is stated. Subsequently, the universal, regional and national rights and regulations for human rights and refugee protection are described, considering that the Dutch asylum procedure has to be in accordance with signed international treaties, directives and agreements. The fourth chapter explains which powers the CoE possesses and uses to safeguard the rights of asylum seekers in the Netherlands. The fifth chapter states the complex process of how to measure the effectiveness of the power of the CoE and gives examples of achieved outcomes.

Finally, a conclusion is given and recommendations are made in order to improve the effectiveness of the CoE in safeguarding human rights of asylum seekers in the Netherlands.

**Methodology and justification**

This dissertation is descriptive and explanatory as it describes what the role of the CoE is, in the process of safeguarding the rights of asylum seekers who face administrative detention in the Netherlands and explains how the CoE is able to influence the behaviour of its member states and why its power is effective or not effective.

Qualitative methods are used for this research. These methods are suitable in descriptive and explanatory research as it contributes to describing and explaining the process and role of the CoE regarding the rights of asylum seekers who face administrative detention in the Netherlands.

The answers to the sub questions are retrieved through desk research, by studying (mostly) legal documents, academic articles, and (annual-) reports and by doing interviews. This data is divided into primary and secondary data.

Two interviews are collected to retrieve primary data to explore the Dutch asylum policy and the working of the CoE. These interviews are non-standardised or unstructured, based upon Gilbert’s (2008) work. Furthermore, as suggested by O’Leary (2014), these interviews are conducted in an informal manner. During these interviews, only the topic was prepared and questions were not asked in a specific order. Questions were formulated regarding the Commissioner’s reports, in order to illustrate which recommendations the Netherlands has implemented. With this information, together with the secondary data, the effectiveness of the CoE is analysed and explored is whether the CoE achieved the desired outcome of safeguarding the rights of asylum seekers who face administrative detention in the Netherlands. Interviews were the most suitable method of data collection as not every question and not all information could be answered or retrieved by secondary data. In addition, interview data provided more rich data concerning the asylum policy and procedures in the Netherlands. An internship at the Immigration and Naturalisation Service (IND) gave the opportunity to ask questions to a Senior Operational Manager of the Centre for Reception and Asylum during a visit to the Application Centre Ter Apel. In addition, a colleague from the IND guided me through the closed Application Centre of Schiphol Amsterdam airport. However, due to a confidentiality agreement at the IND, this dissertation only contains the transcript of the interview with the Senior Operational Manager of the Centre for Reception and Asylum, which could be found in the appendices.

The following persons were interviewed:

|  |  |  |
| --- | --- | --- |
| **Name** | **Position** | **Organization** |
| Hessel de Vries | Senior Operational Manager | Centre for Reception and Asylum |
| Nicolette Ligtermoet | Medical Documentalist | Immigration Naturalisation Service |

Secondary data is used to collect information about the asylum procedure and the working of the CoE. Reliable documents were collected such as: legal documents, academic articles, and (annual-) reports. The documents are obtained from i.e.: The United Nations, The European Commission, The Council of Europe, The Dutch government and Amnesty International. These documents set out rules, regulations and workings regarding the asylum procedure in the Netherlands and set out the international rules and regulations the Netherlands has to comply with.

In addition, two reports are discussed to complement the theory. The reason for choosing these reports is, that an analysis of these reports shows which recommendations the Netherlands has implemented to improve the treatment of the asylum seekers. Furthermore, it gives an insight in how the CoE tries to achieve its goals.

Furthermore, the theory on the power of the CoE is analysed and discussed, to illustrate in which way the CoE is able to achieve its goals and to explore its effectiveness. However, due to the complexity of the subject matter, in this case, it can only be measured according to specific cases. Therefore, the CoE’s influence, such as its capacity to achieve its desired outcomes, is used as an indicator of its power.

# 1 Definition

## The definition of asylum seeker

The research of this paper focuses on the safeguarding of human rights of asylum seekers in the Netherlands, and therefore the term asylum seekers is defined first.

An asylum seeker is often confused with a refugee, since the terms are so closely related (Immigration Naturalisation Service). The UNHCR (2015) states that “an asylum-seeker is someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated“ (para. 1.).

According to the UNHCR (2010) a refugee is a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (p.14)

The national asylum system decides if an asylum seeker actually qualifies for international protection and if he receives the status of refugee. Therefore, an efficient national asylum system is of crucial importance.

There are several situations in which an asylum seeker qualifies: People have a well-founded fear for being persecuted by the authorities of their own country, e.g. by the army, police or security services. They could be placed in prison and fear penalties for reasons of their political opinion or even sexuality (which is the case in Islamic countries, such as Iran). Another example is that people could be persecuted by other groups, such as rebels or insurgents, which could make life impossible by threats, torture or rape. In some of these cases the authorities are not able or not willing to protect their own people.

Furthermore, asylum seekers could receive status when they have left their country of origin because the situation is currently not safe or when they are a family member of someone who already received an asylum permit. For the latter, the foreign authorities are willing to offer them (temporary) protection.

# 2 Asylum in the Netherlands

In continuation of the previous chapter, the Dutch Aliens Act 2000 regulates the Dutch asylum system, which is executed by the Immigration Naturalisation Service (IND). This research focuses on safeguarding the rights of asylum seekers who face administrative detention, therefore, it is noteworthy to describe the different phases of the process which the asylum seekers face in the Netherlands. This information is obtained through documents of the United Nations Refugee Agency (UNHCR), the European and Dutch Council for Refugees and through a visit to the closed Application Centre of Schiphol Amsterdam airport and the Application Centre Ter Apel, where the asylum procedure was explained in detail. The application procedure at Schiphol is an exception to all other application centres in the Netherlands, by reason of being the only closed application centre (Ligtermoet, personal interview, April 28, 2015).

Since this research is mainly focussed on the asylum procedure when facing administrative detention in the Netherlands, this chapter first explains the term administrative detention, secondly an overview of the asylum procedure in the Netherlands is given and finally the Revised Dutch Aliens Act and the 48-hours procedure are explained.

## 2.1 Administrative detention

Asylum seekers face administrative detention in the Netherlands when they arrive through the International Airport Schiphol, which means that the asylum seekers do not yet have entered the Netherlands as this is international territory. The Asylum Information Database (AIDA) (n.d.) reports that “asylum seekers who are detained at Schiphol Airport are formally not on the territory of the Netherlands” (para. 1).

According to Article 6 of the Dutch Aliens Act 2000:

1. An alien who has been refused entry into the Netherlands may be required to stay in a space or place designated by a border control officer.

2. A space or place as referred to in subsection 1 may be secured against unauthorised departure. (National Authorities, 2001, p. 4)

The UNHCR (2012) states, that the lawfulness of the detention of asylum seekers is determined by national legislation and “detention must be in accordance with and authorised by law” (p.14). However, international legislation sets out rules and regulations to safeguard detention decisions.

According to Article 5 (10) (f) of the ECHR (1950) it is permitted to detain a person. It states that: “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition” (p.8). Based on those grounds, the Netherlands places asylum seekers in administrative detention. According to the ECHR (1950), an entry remains ‘unauthorised’ until it is formally authorised by the national authorities (p.8).

Accordingly, the Netherlands introduced administrative detention in the Dutch Aliens Act 2000 and there are two types of administrative detention for asylum seekers **(hereinafter referred to as detention).**

1. Detention at the border upon arrival to prevent unauthorised entry
2. Detention in view of deportation to facilitate the removal of a person (Dutch Government, 2015, “Artikel 6” section, para. 1).

**Detention at the border upon arrival**

The Dutch Aliens Act 2000 (2015) states that, when a person does not fulfil the requirements for entering the Netherlands as laid down in Article 5 of the Schengen Borders Code and Article 3 of the Dutch Aliens Act 2000, the Dutch government has de possibility to detain asylum seekers. AIDA (n.d.) reports that these asylum seekers are not able to enter the country and will be detained in a special detention facility, which is international property. During this detention period, research is done regarding the requirements fulfilments. If more research is necessary, this period could be extended. The length is this procedure has a maximum of 6 months (Dutch Refugee Council, 2011, p. 8).

**Detention in view of deportation**

According to Article 59 of the Dutch Aliens Act 2000 (2015), the Dutch government has the possibility to detain foreigners with a view to their deportation (para. 1). This kind of detention measure is often used by the Dutch government in order to assure follow-up measures, such as deportation or expulsion.

The length of these detentions have to be justified by either a need for investigation or lack of cooperation. If the length of the detention cannot be justified properly, the detention may be considered arbitrary in accordance with Article 5 of the ECHR (Council of Europe, 1950, p. 7).

## 2.2 Procedure

The procedure for an asylum seeker who enters the Netherlands through the Dutch International Airport Schiphol differs from asylum seekers who enter by land. According to the Asylum Information Database (2013): “asylum seekers from a non-Schengen country, who arrive in the Netherlands by plane …, are refused entry to the Netherlands and are detained” (p.9, para. 1). In this case, the application needs to be lodged at the closed Application Centre of Schiphol Amsterdam airport. AIDA (2013) also reported that “the asylum seeker is refused entry to the Netherlands and is deprived of their liberty and asylum seekers who are detained at Schiphol Airport are formally not on the territory of the Netherlands” (p.24). This means that, although the asylum seeker is geographically within the country of the Netherlands, he is denied access to go through customs. Additionally, Ligtermoet (2015) explained that the asylum seeker faces an application procedure at the closed Application Centre of Schiphol Amsterdam airport, consisting of registration, photos and fingerprints, continued by the rest and preparation period, which prepares him for his procedure (Personal interview, April 28,).

**Rest and preparation period**

The first stage after arriving at the closed Application Centre of Schiphol Amsterdam airport, is the rest and preparation period. This period prepares the asylum seeker for the Regular Asylum Procedure (RAP) (Ligtermoet, personal interview, April 28, 2015). The AIDA report (2013) remarked, that during this rest and preparation period, the Royal Military Police executes investigations, Medifirst7 is involved concerning any medical check-ups, which includes a tuberculosis screening, and the Dutch Council for Refugees is available for counselling. Furthermore, each meeting is joined by an interpreter (Ligtermoet, personal interview, April 28, 2015).

**Regular Asylum Procedure and Extended Asylum Procedure**

In continuation of the rest and preparation period, the Regular Asylum Procedure (RAP) starts. This procedure has a duration of 14 days. During the RAP, the first and second hearing take place and the IND analyses if the asylum seeker has a legitimate right to asylum. This analysis is based upon the 1951 Refugee Convention, which sets out qualifications for the eligibility to an asylum permit and the status of a refugee. The first hearing discusses the identity, nationality, and travel route. The second hearing focuses on the reasons of the application and the situation in the country of origin. In general, both hearings are scheduled on the same day. On day five of the procedure, often the decision is made whether more research is necessary (Ligtermoet, personal interview, April 28, 2015).

When no further research is necessary, the IND decides on the application according to the Dutch Aliens Act 2000, 1951 Refugee Convention and the European Convention on Human Rights (ECHR). The Dutch authorities either grant or deny the application. The RAP takes in general eight days, however, the RAP can be extended to a maximum of fourteen days (Dutch Refugee Council, 2011, p. 8).

If the IND decides if more research is necessary concerning the nationality or identity, the asylum seeker is referred to the Extended Asylum Procedure (EAP). The EAP has a duration of 6 weeks and the asylum seeker remains detained, even when the IND is not able to come to a decision (AIDA, 2013, p. 24). In case of a rejection, the asylum seeker has the possibility to appeal. However, during the appeal stage he remains detained, pending expulsion (ibid).

In case of a rejection of the asylum seeker’s application, the lawyer of the asylum seeker is able to respond to the decision on day five. The Minister’s provides its disposal on day eight. In case of a rejection, the repatriation procedure starts and the asylum seeker has to leave the country on his own accord, within four weeks. The asylum seekers could be placed in detention, when he does not cooperate with the procedure and the Repatriation and Departure Service (R&DS) will guide him during the return (Ligtermoet, personal interview, April 28, 2015). De Vries explained that, in the RAP it is possible to appeal the rejection. However, the asylum seeker is not allowed to stay in the country during his appeal, only when pending expulsion. When the R&DS is not able to manage the return of the asylum seeker as a result of the county of origin not being cooperative regarding the provision of travel documents for example, the possibility exists of staying in a Freedom Restricting Location (de Vries, personal interview, April 15, 2015). This is a location where the asylum seeker is allowed to leave the location, however, he is not allowed to leave the municipality (Ministry of Security and Justice, n.d., para. 2). During these four weeks, the asylum seeker also has the possibility to appeal to the decision. This location could only be used to a maximum amount of twelve weeks (de Vries, personal interview, April 15, 2015). According to the representative of the Centre for Reception and Asylum, 37% of the applications are granted during the RAP and from all the asylum applications in the Netherlands, 16% starts the extended procedure (ibid.).

## 2.3 The Revised Dutch Aliens Act and 48-hours Procedure

In the year 2000, the Dutch Aliens Act 2000 was established. Officially this document was established in 1965, it was amended repeatedly and the revised Dutch Aliens Act 2000 entered into force in April 2001. This legally binding document, which respects the Universal Declaration of Human Rights (UDHR) and the ECHR, defines and explains access, residence, enforcement and return procedures for aliens. The aim was, to provide clarity concerning the granting or rejection of the asylum application as soon as possible and to come up with an improved asylum policy (Dutch Refugee Council, 2011, p. 5). Therefore, the IND established the 48-hours procedure. In this procedure, when possible, the application of the asylum seeker was being assessed within 48-hours. The Dutch Refugee Council (2011) noticed that the implementation of this new asylum policy did not reflect its original intention, a timely and efficient process and quality decisions (p6). Considering that preparation is one of the most important conditions for a good asylum procedure, the Dutch government abolished the 48-hours procedure on July 1, 2010 in the Revised Dutch Aliens Act (ibid.). The 48-hours procedure gave the asylum seeker and the IND too little time to come to a thorough decision. Furthermore, the Revised Asylum Procedure introduced the rest and preparation period, the Regular Asylum Procedure and the Extended Asylum Procedure (ibid.).

# 3 Human Rights and Refugee Protection

International human rights and refugee protection are set out by a series of international treaties and instruments, such as the United Nations (UN), especially with its 1951 Refugee Convention and its Protocol, and the CoE, with its European Convention on Human Rights. By being a member state of the United Nations, the European Union (EU), Europe and the Schengen area, the Netherlands has to comply with the signed human rights treaties, agreements and provisions. This chapter explains to which standards the Netherlands has to comply in the field of the human rights of asylum seekers. Furthermore it states the Universal, Regional and National institutions, conventions, agreements and directives related to the treatment of asylum seekers in the Netherlands, starting from its highest level.

## 3.1 UNIVERSAL

### 3.1.1 United Nations Charter

The United Nations Charter is the founding document of the United Nations (UN) and has nowadays 193 members (United Nations, 2015). The Charter was adopted and signed on June 26, 1945 and became effective on October 24, 1945 with its main goal of maintaining international peace and security. By signing the Charter, the Netherlands became a member of the UN and is legally bound by its provisions.

The Charter describes the basic principles of international relations for the UN, for the following purposes: “1. To maintain international peace and security … 2. To develop friendly relations among nations … 3. To achieve international cooperation … and in promoting and encouraging respect for human rights and for fundamental freedoms … 4. To be a centre for harmonizing the actions of nations” (United Nations, 2015, p. 3). In addtition, regarding human rights, the UN developed several binding treaties, such as the Universal Declaration of Human Rights (UDHR) and the 1951 Refugee Convention.

### 3.1.2 Universal Declaration of Human Rights

After World War II, the UN created the Universal Declarations of Human Rights (UDHR), which was adopted by the UN General Assembly in December 1948. The document states the basic human rights and fundamental freedoms and points out that these rights are universal and apply to everyone despite their geographical location or nationality. Since the UDHR is officially not a treaty, the Declaration is often interpreted as customary law. Moreover, it created two covenants in 1976: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). In addition, two Optional Protocols were added. Both covenants have legal binding obligations for those states that signed and ratified. The Netherlands signed and ratified both Covenants.

A number of 168 states are party to the ICCPR, which includes rights such as: (1) The right to life, (2) The right to liberty, (3) The right to free speech and (4) The right to privacy (United Nations, 2015).

A number of 164 States are party to the ICESCRR, which includes rights such as: (1) The right to social security, (2) The right to health and (3) The right to education (United Nations, 2015).

### 3.1.3 1951 Refugee Convention

The 1951 Refugee Convention is a multilateral treaty of the UN and sets out the standards for being a refugee, the rights of asylum seekers and the obligations for member states who signed the Treaty. The Treaty is based upon Article 14 of the UDHR, which states:

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. (United Nations, n.d., “Article 14” section)

Universal Declaration of Human Rights, Article 14 (1), (2)

The 1951 Refugee Convention is the core document for refugee protection. It explicitly lays down the definition of the term ‘refugee’ in the first of the 46 articles. According to the UN’s High Commissioner for Refugees (2010), the document is an instrument for the determination of rights and status, mainly focussed on the fundamental principles of: non-discrimination, non-penalization and non-refoulement (UNHCR). In addition, it ensures minimum standards of treatment. Currently 145 States are party to the Convention (United Nations, 2010).

## 3.2 REGIONAL

### 3.2.1 Council of Europe

The following is informed by the works of Boer (1997) and Carlier (1997).

The CoE is an International Governmental Organization (IGO) which is focused on maintaining, protecting, monitoring and improving its core, mainly human rights focused, values for all persons within its border. The CoE was established in 1949, when the Treaty of London entered into force. It started with 10 member states and grew significantly throughout the years. Currently, the CoE has 47 member states.

The structure of the CoE is defined in the Statute of the CoE, established in 1949 (Council of Europe, 1949). The statute defines four pillars. The first pillar is the Committee of Minsters (CoM), which has the decision-making power, the second pillar is the Parliamentary Assembly of the CoE (PACE), the third pillar is the Congress of Local and Regional Authorities in Europe and the fourth is the Conference of International Non-Government Organizations, consisting of representatives of the civil society.

The CoM is the executive body of the CoE. According to the CoE (n.d.): “it comprises the foreign ministers of all 47 member states and meets at [ministerial level](http://www.coe.int/T/CM/Sessions_en.asp) once a year” (para. 1). It adopts agreements and conventions and operates closely with the second pillar, the PACE, regarding drafts and recommendations. In addition, it has a supervisory role regarding the execution of judgments of the ECtHR. Each Minister of the Committee is responsible for the national coordination of the CoE activities. Decisions within the Committee are made by a two-thirds majority (ibid.).

The PACE plays a significant advisory and encouraging role and tries to influence state’s behaviour. According to the CoE (n.d.) “it consists of 324 members, who are either elected by or appointed from the Member States’ Parliaments and an equal number of substitute members” (para. 1). The PACE makes recommendations to the Committee, which is obligated to ensure the response of member states and to ensure an ongoing dialogue to set the agenda (Council of Europe, 2014). In this way it represents all European citizens.

Another aspect of the CoE is the fact that European Commissioners for Human Rights are appointed by the PACE, as investigators and interlocutors to promote member states’ human rights (Council of Europe, 2014). Tasks of the Commissioners are, to visit member states, to evaluate their human rights, to draw up conclusions and recommendations, to carry out investigations, and to monitor and assess the progress of member states (ibid.). All of these tasks are shared publically.

### 3.2.2 European Convention for the Protection of Human Rights and Fundamental Freedoms

The CoE established the European Convention on Human Rights (ECHR) in 1950 in Rome. This Convention was established as a legally binding instrument to promote, protect and guarantee human rights and fundamental freedoms in Europe. It fully respects the UDHR and contains civil and political rights and economical and social rights (Council of Europe, 1950). It entered into force in September 1953. Worth noting is, that the ECHR entered into force in 1953, years before the two covenants of the UN, the ICESCR and ICCPR, entered into force, in 1966. Therefore, the ECHR was the first convention protecting human rights.

### 3.2.3 European Court of Human Rights

The European Court of Human Rights (ECtHR) was established by the ECHR, 10 years after the CoE was created (Bond, 2012). This Court rules on individual and state cases concerning human rights violations of the ECHR and law enforcement of the civil and political rights set out in the ECHR. The CoE (2014) states that “since 1998 it has sat as a full-time Court and individuals can apply directly” (para. 1). Cases could be brought before Court by individuals, groups (NGOs) or states themselves. All 47 members of the CoE are a contracting party to the Court and provisions are binding for all member states. In 2014, the Court delivered judgements to 2.388 applications (European Court of Human Rights, 2015). The ECtHR (2015) reported that “of the total number of judgments delivered in 2014, the Court has found at least one violation of the Convention by the respondent State in 85% of the cases“ (p. 4). In the past 50 years, more than 10.000 judgments were delivered by the Court and these are binding on the countries concerned and have led governments to alter their legislation and administrative practice in a wide range of areas (ibid.). In addition, the ECtHR has the power to award damages and it is the CoM who ensures that these damages are payed.

### 3.2.4 Schengen Area

The Netherlands is part of the Schengen area, which is an area comprising 22 European Union countries, together with Switzerland, Liechtenstein, Norway and Iceland, established by the Schengen Agreement in 1985 (Dutch government). The agreement focuses on the free movement of goods and people, whereby internal borders no longer exist. It developed one internal area for signatories to the agreement. Common agreements on: visas, asylum requests, and border controls have been established. Within the Schengen area, cooperation is established between the police service and judicial authorities of the contracting parties. As a result of this cooperation, the Schengen Information System was created, in order to share information. The Council of the EU has supervision on a correct implementation of the agreement (European Union, 2009).

In 2006, the EU established a Schengen Borders Code (SBC), as a result of the expansion of the Schengen area. This code sets out rules and regulations on the internal and external borders in accordance with the Schengen Agreement. It contains rules and regulations for border crossing, visa applications, travel documents and definitions such as for third country nationals. The code states that a third country national can be refused entry to the national territory when the person does not meet the entry conditions. According to Article 13 of the SBC:

A third-country national who does not fulfil all the entry shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right to asylum and to international protection or the issue of long-stay visas. (European Union, 2006, “Refusal of entry” section, para. 1)

### 3.2.5 Return Directive (2008/115/EC)

In 2008, the European Council and the European Parliament established the Return Directive. This directive provides common standards and procedures regarding the return of “illegally staying thirdcountry nationals” (European Union, 2008, “GENERAL PROVISIONS” section, para. 1), which apply to asylum seekers. The directive provides standards concerning the amount of days within the third country national who applied for asylum has to leave the country voluntarily, after the rejection of the application. When he does not cooperate with the return procedure or if he risks fleeing, member states have the right to enforce removal or to use detention (Council of Europe, 2010, p. 134). In all cases, member states must respect the principle of non-refoulement and should only use administrative detention as a matter of last resort. The directive also sets out a maximum duration for the administrative detention of asylum seekers. As stated in the Directive:

detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient. (European Union, 2008, p.2, para. 16)

The Directive recognises that “states have a sovereign right to control aliens’ entry into and residence in their territory, and that detention is an adjunct of that right, the provisions of the ECHR, including Article 5, must be respected” (Council of Europe, 2010, p. 136).

## 3.3 NATIONAL

### 3.3.1 Dutch Constitution and Aliens Act 2000

The 1951 Convention Relating to the Status of Refugees and its protocol together with the ECHR serve as the foundation of the Netherlands’ human rights and asylum regulation. However, the lawfulness of the detention of asylum seekers is determined by national legislation and according to the UNHCR “detention must be in accordance with and authorised by law” (UNHCR, 2012, p. 14).

In the Netherlands, the Constitution is the highest national law. This Constitution consists of 8 chapters that define the fundamental rights, legislation, administration and government which govern the Netherlands (Dutch Government, n.d.). Chapter one of the Constitution contains classical fundamental rights and social fundamental rights. The classical rights are protecting the citizens to the government and to governmental decisions, such as the freedom of expression. The social rights are providing the government with tasks to provide amenities for the functioning of its citizens (Dutch Government, n.d.). Article 2 of the first chapter, gives a specification of human rights and states that the law decides who is a Dutch citizen and that the law regulates the admission and expulsion of aliens. However, the Constitution does not explicitly lays down the provisions, it solely describes that there should be a regulation. Furthermore, the fundamental rights are elaborated in regulations and the rights regarding aliens are laid down the Dutch 2000 Aliens Act (ibid.).

### 3.3.2 National Action Plan on Human Rights

In 2014, the Dutch government established a National Action Plan on Human Rights (NAPHR) after a recommendation of the Commissioner for Human Rights of the CoE (Ministry of Home Affairs and Kingdom Relations, 2014, p. 7). The Ministry of Home Affairs and Kingdom Relations (2014) explains in the NAPHR that, “the National Action Plan sets out the ways in which the government fulfils its responsibility to protect and promote human rights in the Netherlands” (p. 4)*.* The outcomes and results of this action plan are shared publicly with stakeholders.

In the NAPHR, the Ministry also states that “the government is also responsible for ensuring its own observance”(ibid., p. 20). Therefore, it created an integrated Impact Assessment Framework, to assess its developments by for example a checklist.

To improve the monitoring process, in order to protect human rights, the government established the College for Human Rights, in 2012 (Ministry of Home Affairs and Kingdom Relations, 2014, p. 22). The College for Human Rights (2014) points out that this institute aims to guard and protect human rights, promotes human rights in practice and to increase the awareness of human rights in the Netherlands. The main tasks of the institute are to research, report and advice in the field of human rights regulations and recommendations.

To increase awareness for human rights on a local level, a network called The Local Network Human Rights was created, consisting of: the association of Dutch municipalities, the University College Roosevelt, the College of Human Rights, and Amnesty Netherlands (Ministry of Home Affairs and Kingdom Relations, 2014) . In addition, the government encourages NGOs to provide them with information. According to the Ministry of Home affairs and Kingdom Relations (2014):

Within this network, a range of activities are devised to enhance awareness and application of human rights at local level and to increase the effectiveness of the independent network, it was decided to continue it under the name ‘Local Human Rights Network’. Since the spring of 2013, support for the network has enabled its gradual expansion to include more municipalities and other civil society partners. (p.27)

In addition, the government ensures a constant dialogue with civil society by organising round-table talks, expert meetings and written consultations.

The NAPHR focusses on specific policy themes including immigration and asylum. Moreover, it describes how the government aims to provide a quick assessment and decisions. On the other hand, the government takes into account the importance for the asylum seeker to tell his story to the IND and therefore “the asylum seeker is given a period of at least six days to rest and prepare for the procedure” (Ministry of Home Affairs and Kingdom Relations, 2014, p. 41). The NAPHR (2014) states that “The aim is to communicate a clear decision to the asylum seeker as quickly as possible” (p. 41). Furthermore, it states that the government provides support for the return of aliens, and that they subsidize NGOs which assist in return procedures through for example offering education to provide asylum seekers with more opportunities in their country of origin. However, the government urges that the alien himself is responsible for his return (ibid.). Additionally, it gives information concerning the reception facilities of the asylum seekers, which are facilitated by Central Agency for the Reception of Asylum Seekers (COA). However, since this research is focused on asylum seekers who face administrative detention, which is organized by the Immigrations Naturalization Service (IND), this research does not further elaborate on this.

Finally, the NAHPR states that the government takes into account the rights and best interest of the child and therefore children in asylum facilities enjoy special procedures such as education, longer assessment duration, and they do not face any kind of detention (ibid.). Moreover, the child’s right to live with his or her parents is being protected. Moreover, it states that the detention of aliens is only used as a matter of last resort, unless certain special situations apply and possible alternatives are assessed (ibid.).

# 4 The powers of the Council of Europe

The CoE employs mostly soft power and is complemented by hard power (Nye, 1990). Therefore, this chapter further elaborates on both powers and on how each power is carried out by the CoE and its organs.

## 4.1 Soft power

According to Joseph Nye (2009), an American political scientist, soft power aims to govern and impose change, on any level or scale, without the use of force and “soft power is getting other countries to want the outcomes that a particular country wants” (p. 1, 2). In other words: soft power is the power to attract. A good reputation, due to achievement and merit, creates this power to attract. This automatically results in other countries following the same path, which is the case in world politics (ibid.).

Nye (2009) also states that “organization’s culture, political values and foreign policies and values could create the attractiveness of soft power” (p. 1, 2). This means that, first of all, the culture of the CoE should be attractive for member states. Secondly, the CoE should live up to what is agreed in the Statute and Conventions. Finally, states should view the CoE as legitimate. A combination of those three resources is the main ingredient for soft power being effective (ibid.).

The CoE carries out its soft power to influence its member states and to achieve improvements and correct implementation of its Conventions, by for example reports and resolutions established by the PACE, giving advice and opinions, which all are publically shared and used as a ‘pressure method’.

### 4.1.1 Parliamentary Assembly of the Council of Europe

The Parliamentary Assembly of the Council of Europe (PACE) is the organ with the most ‘soft power’ status. Although it has no binding power, the CoE (2014) mentions that it is responsible for “a constant dialogue with governments, national parliaments, other international organisations and civil society which "sets the agenda"” (para. 2.). Within the PACE, plenary sessions are held and country reports are debated. When the PACE finds that the Netherlands does not comply with the ECHR, it is able to ask for immediate action through the Committee of Ministers (CoM) (ibid.). The PACE also has the power to adopt non-binding resolutions. Although these resolutions are non-binding, they serve as advice for the ECtHR.

In addition, the PACE ensures that member states’ progress on human rights issues are monitored. When questions arise, the PACE demands answers from the Ministers of the National Parliaments, through the CoM (ibid.). When receiving recommendations from the CoE, the Ministers have a duty to reply through the CoM. Furthermore, the PACE has the power “to recommend suspending national delegations or depriving them of their voting rights and to recommends a state to be expelled” (ibid., “Sanction a member state by recommending its exclusion or suspension” section).

In 2010, the PACE established a report, stated that member states are not using the detention of irregular migrant as a last resort (Council of Europe, 2010). As stated in the report, it was established to “clarify 10 guiding principles on the legality of detention of asylum seekers and irregular migrants” (Council of Europe, 2010, p. 1). The report provides 10 guideline principles and aims to “encourages member states to use alternatives to detention in preference to detention” (ibid.).

In 2014, the PACE established a resolution, Resolution 2020 (2014)1, whereby the detention of children was criticized (Council of Europe, 2014). In this resolution, the PACE raises its concerns about the fact that member states increasingly detain migrant children. The PACE also states that this is a child right violation and that the right to respect for one's private and family life, health care, education and play was denied to those children. The PACE reiterates that unaccompanied children should never be detained. In addition, it criticizes that most member states are not applying the use of alternatives for detention. The PACE therefore recommends states to:

Introduce legislation prohibiting the detention of children for immigration reasons, if it has not yet been done, and ensure its full implementation in practice, to refrain from placing unaccompanied or separated children in administrative detention and to adopt alternatives to detention that meet the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved. (Council of Europe, 2014, page 2, ¶ 9.2)

Another resolution, Resolution 2059 (2015)1, focuses on the fact that detention should only be used as a matter of last resort. It states that “detention only be used as a last resort, in particular for asylum seekers, when it should be as short as possible, and that alternatives to detention should be used wherever possible” (Council of Europe, 2015, p 1, ¶ 7 ). According to this Resolution, asylum seekers are denied access to their social rights, which are stated in Article 5 of the ECHR (ibid.).

### 4.1.2 European Commissioners for Human Rights

Each five years, a Commissioner for Human Rights is appointed by the PACE. The Commissioner is responsible for the monitoring of its member states**.** According the CoE (2015): “t**he Commissioner conducts visits to help raise the standards of human rights protection in all Council of Europe member states, in accordance with his mandate” (para. 1.) The CoE (ibid.) mentions that the aims of the visits are: “**a direct dialogue with the authorities and looking into one or several specific issue” (para. 2). As a result, country reports are developed, published and shared publically, which contain conclusions and recommendations. As from the 1st of April 2012, **Nils Muižnieks is the Commissioner, following up Thomas Hammarberg. During both mandates the Commissioners visited the Netherlands in 2008 and in 2014 and wrote country reports with positives, concerns and recommendations.**

#### 4.1.2.1 Report by Mr. Thomas Hammarberg, September 2008

On the 21st of September 2008, Mr. Thomas Hammarberg visited the Netherlands for the duration of four days. One of the several focuses and priorities of his visit was the policies affecting refugees and asylum seekers. Besides meetings with Ministers, Parliamentarians and representatives he visited asylum seekers reception and detention centres. While meeting with several civil society representatives, the Commissioner gained knowledge on the Human Rights situation.

Status of international human rights standards

Being a member of the UN and the CoE, the Netherlands is party to several conventions and additional protocols. The Commissioner therefore is concerned about the fact that the Netherlands has signed the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (OP-CAT), however, still has not ratified it. This protocol mainly focusses on the assessment of the special asylum detention facilities.

The visit of the Commissioner brought to the attention that there seems to be no self-assessment for monitoring and evaluation of safeguarding human rights within the Netherlands. He therefore opted, to create a national human rights action plan in order to achieve this and involve all stakeholders.

The asylum framework and its proposed reforms

The first step in the asylum application of the Netherlands is the ‘48-hour accelerated procedure’. This procedure gives the IND 48 working hours, which could take up to several working days, to assess the application. This means that during these days, the asylum seeker is placed in a special detention centre. The Commissioner is concerned that this procedure is a risk for the non-refoulement procedure. As a result that decisions are made within 48 hours, an excessive time pressure exists. When the outcome of the assessment shows that more time needed, the possibility exists to extent the detention to a number of 100 days, and in extreme cases this could be 381 days. The Commissioner found no evidence to support the reason for the Dutch government in doing so, as according to Amnesty International (2008), the Dutch government stated that this detention procedure is necessary “to guarantee a fair and speedy determination of the asylum claims” (p. 16).

Judicial review of asylum decisions

During his visit, the Commissioner noticed that there are no full judicial reviews of asylum and detention decisions. The current review only is based on the examination of points of law, instead of on the merits of the case (Commissioner for Human Rights, 2009, p. 14). One positive development was the fact that a reform proposal was developed, giving the asylum seekers the right to enjoy the facilities during the appeal stage instead of no right to asylum centre facilities at all. However, the Commissioner is concerned about what happens to the applicant when his or her appeal is extended. He therefore urged that the applicant should enjoy the facilities until the final closure of the case.

Furthermore, the principle of proportionality should be carried out, which forces the government to assess every case individually and to make sure that all other alternatives for detention are considered (Commissioner for Human Rights, 2009, p. 16). Currently the governments’ practice, to detain all asylum seekers entering the Netherlands through the International Airport Schiphol is not in line with this principle (Commissioner for Human Rights, 2009, p. 16).

Administrative detention of asylum seekers

The Commissioner also made note of the fact that in the regular asylum procedure it could take up to 100 days in detention and in exceptional cases up to 380 days. The report stated that the CoE’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment already pointed out that the Netherlands should implement a maximum amount of time for detention of asylum seekers, in consistency with the EU-return directive. Another concerning development, according to the Commissioner, are the conditions of the detention facilities. As stated in the report, the asylum seekers do not have access to a full community regime, education, and to a possibility for employment and there is lack of training facilities. In addition, access to medical care is limited. During his visit to the closed Application Centre of Schiphol Amsterdam airport, the Commissioner spoke to several detainees and noticed that material conditions were satisfactory (Commissioner for Human Rights, 2009, p. 15). However, he noticed that detainees who face expulsion are not completely acquainted with the asylum procedure and that inadequate information is provided to them. Another remarkable situation the Commissioner described was that men and woman are sharing the same special detention facility, which results in no privacy and uncomfortable feelings for several women. He also reiterated the fact that detention could only be used as a matter of last resort and that other alternatives should be taken into consideration.

Children

In 2008, the Netherlands made a significant change in policy for the detention of children and their families (Commissioner for Human Rights, 2009, p. 17). The policy aims to reduce the detention period and to create or facilitate housing for children and their families. The government also pledged to give families more time to prepare their return. These changes in policy are positive developments, according to the Commissioner. However, the Commissioner is concerned about the fact that only one parent is able to join the child, while the other remains detained. The Commissioner urges to keep the families united.

**Conclusion**

According to the report, several human rights are at stake according to Mr. Hammarberg, which are: (1) Article 2 of the ECHR: The right to education, (2) Article 5 of the ECHR: The right to liberty and security, (3) Article 6 of the ECHR: The Right to a fair trial and (4) Article 8 of the ECHR: The right to respect for his private and family life.

In the report, the Commissioner made several recommendations: (1) to ratify the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (OP-CAT), (2) to create a national human rights action plan, (3) to adjust the extended and accelerated procedure in the 48-hours procedure, (4) to make sure that the applicant for asylum should enjoy all facilities until the final closure of the case, (5) to ensure that administrative detention is only used as a matter of last resort and that the government’s practice is in line with the principle of proportionality, (6) to implement a maximum amount of time of detention for the asylum seekers, in consistency with the EU-return directive, (7) to ensure that asylum seekers have access to education, health care and employment and (8) to ensure that families stay united.

#### 4.1.2.2 Report Mr. Nils Muižnieks, May 2014

Commissioner Nils Muižnieks visited the Netherlands from the 20th until the 22nd of May 2014. During his visit, he spoke with Dutch Ministers, representatives of NGO’s, and visited the special detention centre at Schiphol International airport.

Legal and institutional framework for the protection and promotion of human rights

The Commissioner recognised that the Dutch government ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (OP-CAT) in September 2010, and welcomes this. However, he is concerned about the fact that the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights OPICESCR still is not ratified. According to the Commissioner this importantly opposes the monitoring of the implementation of the Covenant, “which enables alleged victims of violations to file communications with the Committee monitoring the implementation of the Covenant for consideration” ( MUIŽNIEKS, 2014, p. 7).

The Commissioner made note of the fact that the Dutch government adopted a National Action Plan on Human Rights, which contains several topics, such as immigration, asylum and the detention of migrants. Although the NAPHR is a positive development, it still could be improved. The Commissioner states that the NAPHR is not assessed effectively and a good evaluation is important for monitoring its effectiveness.

Human Rights of Asylum Seekers and Immigrants

The Commissioner still is concerned with the fact that the Dutch government carries out administrative detention when persons arrive through the International Airport Schiphol. This detention automatically follows when an asylum seeker does not have the required documents for a visa. Important to notice is the fact that this procedure also affects families with children. The Commissioner welcomes that fact that from the 1s of September 2014 the Dutch government revised her policy and children are no longer automatically detained.

**Conclusion**

According to the report, Article 5 of the ECHR: The right to liberty and security is at stake according to Mr. Muižnieks. In the report the Commissioner made several recommendations: (1) to ratify the Optional Protocol to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights OPICESCR, (2) to improve the NAHPR with a critical self-analyses to monitor its effectiveness, (3) to ensure that administrative detention is only used as a matter of last resort and that the government’s practice is in line with the principle of proportionality, (4) to overthink the idea of giving asylum seekers access to Dutch territory on humanitarian grounds and (5) to use and assess alternatives more often, especially for alien who are pending deportation.

## 4.2 Hard power

As hard power is carried out to complement the CoE’s soft power, this is discussed in the following chapter.

Nye (2008) describes the term hard power as “the ability to use the carrots and sticks of economic and military might to make others follow your will” (p.94). Hard power is a coercion method and with creating the ECtHR, the CoE has the power to assess complaints by means of hard power. With singing and ratifying the ECHR, the Contracting Parties are legally bound by its provisions. According to the CoE (2014):

When the Court delivers a judgment finding a violation, the Court transmits the file to the Committee of Ministers of the Council of Europe, which confers with the country concerned and the department responsible for the execution of judgments to decide how the judgment should be executed and how to prevent similar violations of the Convention in the future. This will result in general measures, especially amendments to legislation, and individual measures where necessary. (p. 8)

### 4.2.1 The European Court of Human Rights

As the ECtHR is the judicial body of the CoE, it has jurisdiction to hear allegations of violations of the ECHR (Council of Europe, 2014). However, the principle of subsidiarity always should be implemented. According to the ECtHR (2014) this means that “violations of the Convention must be pleaded in the first instance before the national Court, so that a potential application to the ECHR can be prepared from the outset” ( “National proceedings prior to the submission of a case 1 to the ECHR” section, para. 1.). The applicant first should exhaust all domestic remedies, otherwise the ECtHR declares the application inadmissible, in accordance with Article 35 of the ECHR. When an individual, group or state finds that its rights, stated in the ECHR, are violated and when it exhausted all domestic remedies, an application could be lodged to the ECtHR against the state, within 6 months from the date on which the final (domestic) decision was taken, otherwise the Court declares the case inadmissible, according to Article 35 of the ECHR (Council of Europe, 1950).

The Court recognises two kinds of applications: individual application or inter-State applications. As pointed out by the CoE, when an application is lodged to the ECtHR, the ECtHR first checks if it received “a correctly completed form, accompanied by copies of relevant documents” (Council of Europe, 2015). When that is the case, the application is allocated to a judicial formation. The CoE (2015) expressed that “these applications will be examined by a single judge, a Committee or by a Chamber of the Court”. The next phase is analysing the admissibility of the case. When the case is decided admissible, the Court rules its judgment, finding a violation or no violation. After this judgment a re-examination of the case could be requested. When this re-examination is accepted, the case is transferred to the Grand Chamber which rules its final judgment (Council of Europe, n.d.).

In 2014, the ECtHR delivered 891 judgments concerning 2,388 applications and in 85% of these judgments one more violations to the ECHR were found (Council of Europe, 2015). The ECtHR examines cases which have a similar legal question together. Which means that in reality the total amount of decisions is higher.

In these judgments, violations of different ECHR-articles were stated, such as Article 2 and 3: The right to life and the prohibition of torture and inhuman or degrading treatment, Article 5: The right to liberty and security and Article 6: The right to a fair trial.

In recent years, the ECtHR delivered four judgments to the Netherlands, founding one or more violations of the ECHR (Council of Europe, 2015). These judgments, however, did not concern asylum seekers (European Court of Human Rights, 2015). When a judgement is made on the merits of the case, states are obliged to execute them.

### 4.2.2 Committee of Ministers

When the ECtHR found a violation of the rights stated in the ECHR, and after its judgment, the case is transferred to the CoM. This organ is responsible for monitoring and ensuring that judgments are executed (Council of Europe, n.d.). The CoM should ensure that the measures are adopted by the member state, which could contain: (1) payment of compensation, (2) adoption of general measures such as an amendment to the current legislation and (3) the adoption of individual measures such as restitution (Council of Europe, n.d.).

# 5 The effectiveness of the Council of Europe

This chapter explains the theory of Nye on how soft power could be measured. Furthermore, it shows to what extend the Netherlands has made reforms in its policy according to Resolutions and recommendations made by the PACE and both Commissioners for Human Rights.

## 5.1 The Theory of Nye

Following the theory of Nye, regarding the effectiveness of soft power, a combination of: (1) the attractiveness of the CoE, (2) the question whether the CoE is living up to what is agreed in the Statute and Convention and (3) whether the member states see the CoE as legitimate, results in soft power being effective.

According to Nye (2008): “in behavioural terms, soft power is attractive power” (p. 95). Achievements and establishments influence the CoE’s attractiveness, as it has a positive influence on its credibility.

The CoE achieved that no European country imposes the death penalty, is one example (Council of Europe, n.d.). Furthermore, it established the ECtHR, which is an achievement as this Court is the last resort where member states could rely on in case of questions concerning human rights. Moreover, the CoE offers member states to set the agenda themselves in sessions and debates which discusses human rights with all member states. These establishments make the CoE credible in their cooperation based on common values.

By offering a platform where all member states could discuss human rights and where common, human rights, values are shared and pursued, the CoE lives up to its aim to achieve a greater unity. In addition, by having jurisdiction to hear allegations of violations of the ECHR, the CoE safeguards the human rights stated in the Convention. However, the fact whether the CoE is maintaining, protecting, monitoring and improving its core, mainly human rights focused, values for all persons within her border, is arguable. This, due to the fact that the CoE does not always achieve its desired outcome in the Netherlands.

## 5.2 Reforms in the Netherlands

The effectiveness of the CoE is hard to measure as its power is relative and deducted of the outcomes of specific cases and instances. The CoE employs soft instruments, such as recommendations and resolutions. In this research, the CoE’s influence and its capacity to bring the desired outcomes (safeguarding the rights of asylum seekers in the Netherlands) was used as an indicator of power.

Following the recommendations made by the Commissioners for Human Rights in 2008 and 2014, the report of the PACE from 2010: The detention of asylum seekers and irregular migrants in Europe and Resolutions 2059 (2015)1 and 2020 (2014)1, the CoE achieved the following outcomes in the Netherlands:

In September 2010, the Netherlands ratified the Optional Protocol OP-CAT (United Nations, 2015), which was urged for in the recommendations of the Commissioner for Human Rights in 2008. In addition, it established a National Action Plan on Human Rights, in 2014.

Furthermore, regarding the assessment of an asylum application, the Dutch government implemented several changes. In 2010, the Dutch government revised its asylum policy (Dutch Refugee Council, 2011) . The 48-hours procedure is changed into a procedure where the asylum seeker is better prepared for the hearings and the authorities have more time to assess the application. In addition, the asylum seeker receives more time and the opportunity, to respond to the report, which is made during the hearing. The Dutch government also implemented a maximum time for being detained as an asylum seeker, which now is eighteen months (Dutch Refugee Council, 2011).

Finally, since the beginning of the year 2015, families with children are no longer automatically placed in detention. From then on, families stay united at all times and are placed in a family reception centre, following the Commissioner’s recommendations and the Parliamentary Assembly’s Resolution 2020 (2014 (AIDA, n.d.).

However, not every recommendation or resolution resulted in the desired outcome. Mr. Hammarberg urged in 2008, to ensure that asylum seekers have access to education, health care and employment. In a reaction, the Dutch government stated that reception facilities are provided to asylum seekers, only for a limited time. This is due to the fact that the Dutch government expects that, providing facilities to asylum seekers during their appeal stage influence the duration of the appeal stage. Therefore, the Dutch authorities do not offer facilities to the applicants until the final closure of the case (Commissioner for Human Rights, 2009). In addition, the Optional Protocol to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights still is not ratified.

Furthermore, the Netherlands has not implemented any recommendation regarding the fact that the Netherlands should not (automatically) detain asylum seekers and should only use detention as a matter of last resort, which violates the right to freedom and security, as stated in the ECHR.

# 6 Conclusion

The objective of this research was to explore the effectiveness of the use of soft power of CoE in safeguarding the rights of asylum seekers who face administrative detention in the Netherlands.

The relationship between all the effects in the different cases is difficult to recognise. In some cases the power instruments of the CoE achieve the desired outcome, in other cases they do not. As the CoE has no power to enforce its recommendations and resolutions, it is important to critically asses the policy of the Netherlands. The Dutch government does not always comply with recommendations and resolutions of the CoE regarding asylum seekers, as those recommendation and resolutions are not binding.

Although power is difficult to measure, the theory of Nye stated a method to measure the effectiveness of soft power. According to this method, the CoE is not as effective as it could be in using its soft power. Even though the CoE is an attractive organization for the Netherlands to cooperate with on the basis of common values, the CoE does not always achieve its desired effect, as the rights of asylum seekers in the Netherlands are still at stake.

Furthermore, it could be stated which power, soft power or hard power, is most effective in safeguarding the human rights of asylum seekers who face administrative detention in the Netherlands. The CoE could ask for immediate response and action during its ongoing dialogue in sessions, by using soft power, when concerning issues regarding asylum seekers arise in the Netherlands. In addition, Netherlands has a duty to respond through the CoM. However, it is worth noting that outcomes of recommendations made by the Commissioner for Human Rights in 2008 were first established in the Netherlands in 2010, 2 years after the recommendations were published. This means that, detained asylum seekers could not rely on the CoE in safeguarding their rights on short term.

When using hard power, the ECtHR could only use this enforcement method when a violation is found. The applicant faces several steps when an application is lodged to the ECtHR: a check if the application is complete, an admissibility check and the principle of subsidiarity should be taken into consideration, before the ECtHR can deliver its judgement and the CoM can execute its judgement. With regards to the effectiveness of hard power, no application was lodged to the Netherlands concerning asylum seekers, in recent years. Therefore, the effectiveness and outcome of judgments could not be measured.

The soft power of the CoE is an effective power with regards to the duration of the process. The CoE is able to demand, however could not enforce, immediate action from the Netherlands when the rights of asylum seekers who face administrative detention are at stake, without first lodging an application concerning a violation of the ECHR to the ECtHR, by a member state. However, much could be improved in order to become more effective and to achieve the desired outcome.

To conclude, although the soft power of the CoE is (in some cases) effective in achieving changes in the Dutch asylum policy by constantly monitoring the Netherlands through the Commissioners for Human Rights, the fact that the outcome of the CoE’s soft power is limited and could take up to 2 years or even more is not proving that the asylum seekers, which rights are being violated, can rely on the CoE. In addition, the CoE does not always achieve its desired outcome. Furthermore, the power of the CoE is limited to the point that the Dutch government is willing to adjust its asylum policy, unless an application against the Netherlands is lodged by either an individual, a group or a state.

## Recommendations

Therefore, significant changes are necessary to increase the effectiveness of the power of the CoE. The Committee of Ministers should gather with all representatives of the member states more often. During these meetings, the Dutch representatives could be held accountable by other member states regarding their non-compliance.

On the other hand, currently, the Netherlands is mostly criticized on its deficiencies, bad implementation, policies and non-compliance. When the Netherlands complies with the signed conventions and the Statute, it should receive more positive feedback, which should be shared publicly as well. The CoE should praise member states for their effort and cooperation more often. This way the CoE creates a more positive image and therefore it could be more effective in influencing and attracting other countries. As Joseph Nye stated in his research, a success-example is attractive to follow (Nye & Wang, 2009).

Further, this research expresses the importance of implementing the recommendations made by the CoE’s Commissioners for Human Rights, together with the resolutions made the PACE. It also emphasizes on the fact that the Netherlands should to attach more value to the importance of reports made by the CoE.

This conclusion is based on a review of the structure and workings of the Council of Europe and its published documents in the context of the Dutch asylum system and drawn on the theory of soft and hard power.

# 7 Appendices

## 7.1 Transcript

Transcript interview with Hessel de Vries, Senior Operational Manager of the Centre for Reception and Asylum during a visit to the Application Centre Ter Apel.

Date: April 15th, 2015

Duration: 10 minutes

Type of interview: Unstructured & non-standardized, according to a tour and presentation

**Pol** Mr. de Vries, I am Yvonne van de Pol, I am an intern at the IND and a currently a colleague of Victor. Thank you for the tour through the center.

**De Vries** Hi, Hessel de Vries. Thank you.

**Pol** I have some questions concerning the Freedom Restrictive Accommodation, which your colleague Jacqueline mentioned before. Could you please explain when an asylum seeker has to go to these accommodations?

**De Vries** These accommodations are mostly used prior to repatriation and departure. These accommodations are meant for asylum seekers who have no right to the facilities of the Asylum Seekers Centre.

**Pol** So, if I understand this correctly, these accommodations are only used prior to repatriation? (Would you mind if I take a few notes?)

**De Vries** Yes, go ahead. Prior to departure is mostly used. However, there are a few exceptions. It could be that for example the asylum seeker has no travel documents. These documents need to be arranged in cooperation with the country of origin. Is sometimes happens that the country of origin is not cooperative in providing these documents. During this process of contact with the country of origin, the asylum seekers is also allowed to stay in the Freedom Restricted Accommodation.

**Pol** Oke, so when an asylum seeker is rejected asylum he immediately has to go to the Freedom Restricted Accommodation?

**De Vries** No, when the asylum seeker is rejected asylum, he has to leave the country within 4 weeks. If he does not leave the country, the Repatriation & Departure Service will place the asylum seeker in the Freedom Restricted Accommodation and his return will be guided.

**Pol** So, the COA then provides a maximum of 4 weeks in the Freedom Restricted Accommodation?

**De Vries** The maximum is 12 weeks, under normal circumstances the asylum seeker has to leave within 4 weeks.

**Pol** And what happens when the asylum seeker appeals his decision? Is he then able to stay as well?

**De Vries** That depends on the procedure. When the asylum seeker appeals his rejection in the Regular Asylum Procedure, he is not allowed to stay in the country during his appeal. He has to wait his decision in his country of origin. However, in the extended procedure, he is allowed.

**Pol** What is the duration of the extended procedure?

**De Vries** The extended procedure can take up to 6 months. Together with the appeal stage it could take up to a maximum of 1,5 year.

**Pol** How much applications are granted a year in these two procedures? Approximately?

**De Vries** We recently published the new numbers. Last year 37% of the applications were granted in the Regular Asylum Procedure and only 16% started the extended procedure

**Pol** So, more than 60% gets rejected?

**De Vries** Yes, correct. It frequently happens that asylum seekers provide an untrue story and we have to send them all back.

**Pol** Oke, that is very clear. Thank you so much for your time. I have to get back to bus I see. Thank you for today.

**De Vries** You are welcome. Good luck with your internship.

**Pol** Thank you!

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