The human rights of irregular migrants in the Netherlands

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Chapter 1: Introduction

1.1 Problem

On 10 November 2014, the European Committee of Social Rights (ECSR), an organ of the Council of Europe, issued a decision in the case of Conference of European Churches (CEC) v. the Netherlands.¹ The CEC had filed a complaint before the ECSR, claiming that the Netherlands had violated articles 13(4) (the right to social and medical assistance) and 31(2) (the right to housing) of the European Social Charter (ESC), a treaty to which the Netherlands is a State Party. The CEC asserted that the Netherlands had violated these provisions due to its legislation and practice concerning irregular adult migrants. The CEC claims that irregular adult migrants should have access to food, clothing and shelter. Denial of this is in breach of articles 13(4) and 31(2).

When the decision of the ECSR was issued, a group of approximately 120 irregular migrants had been living in a squatted building in the southeast of Amsterdam since December 2013. This building was commonly known as the ‘Refugee Garage’ (Vluchtgarage). The Netherlands Institute for Human Rights (NHRI, College voor de Rechten van de Mens) called the situation in which these migrants were living inhumane, as there was a general lack of sanitary facilities, food and beds. The circumstances in which these migrants lived were also leading to tensions. In August 2014, a 32-year-old man died as a result of a fight with two other men.²

These migrants have been living in many different squatted buildings, getting evicted each time. These migrants living in places such as the ‘Refugee Garage’ and who are claimed to be victims of violations of the European Social Charter, are irregular. This means that they lack legal status and have stayed in the Netherlands for a longer time period than they had originally been authorized. Relevant definitions of different categories of migrants will be discussed in section 1.2.

The circumstances of these buildings in which irregular migrants are living, raised the question whether the Dutch government is obliged to provide these migrants with food, clothing and shelter. Until recently, the policy in the Netherlands was that only regular migrants receive access to food, clothing and shelter. This policy is commonly called “bed, bad, brood” in the Netherlands, which literally translates to bed, bath, bread. With regards to irregular migrants, the

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¹ ECSR 10 November 2014, 90/2013 (Conference of European Churches v. the Netherlands).
² Netherlands Institute for Human Rights 18 June 2014.
Dutch government was of the opinion that these migrants have to leave the Netherlands and, therefore, are themselves responsible to provide for their basic necessities, such as food, clothing and shelter. Irregular migrants were only entitled to necessary medical care, education for persons under the age of 18 and legal assistance.

The Netherlands may be obliged to provide irregular migrants with food, clothing and shelter because States are obliged to protect, respect and fulfil the human rights of every human being within their jurisdiction under various international and European human rights treaties, such as the United Nations International Covenant on Economic, Social, and Cultural Rights (ICESCR) or the European Convention on Human Rights (ECHR). One of these human rights is the right to an adequate standard of living, which entails a minimum entitlement to food, clothing and housing. This right can be found in, inter alia, article 25(1) Universal Declaration of Human Rights (UDHR) and article 11 ICESCR.

The question whether the Netherlands has this obligation resulted into the complaint filed by the CEC before the ECSR. The ECSR decided that there was indeed a violation of two articles of the European Social Charter. However, the European Social Charter explicitly mentions that irregular migrants fall outside of its scope. This could have negative effects for the ECSR’s authority and the ESC’s efficiency. The scope of the ESC will be further discussed in Chapter 3.

A decision taken by the ECSR is not directly binding on the ESC’s State Parties and is therefore forwarded for further decision-making to the Committee of Ministers. The Committee of Ministers can then adopt a legally binding resolution on the topic or provide the concerning State Party with a recommendation, assuming the correctness of the ECSR’s decision. The Committee of Ministers issued a resolution on the case of Conference of European Churches v. the Netherlands on 15 April 2015. This resolution and its consequences will be discussed in Chapter 2. Furthermore, in December 2014, the Dutch Administrative High Court (Centrale Raad van Beroep) issued an interim order on the obligation of the municipality of Amsterdam to provide irregular migrants with food, clothing and shelter, with the intention that other municipalities

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3 Barkhuysen, 2014/2055.
5 ECHR 1950; ICESCR 1966.
6 UDHR 1948; ICESCR 1966.
7 ESC 1961, Appendix.
would follow the example set by Amsterdam.\textsuperscript{10} This order was in force until two months after the Committee of Ministers of the Council of Europe issued their resolution, so until 15 June 2015. Due to this interim order, the State Secretary of Security and Justice agreed in January 2015 to provide municipalities with financial aid to enable them to arrange night shelter, sanitation and food for irregular migrants.\textsuperscript{11} As can be seen from the above-mentioned, this topic is currently developing. Recent developments up until the date of submission of this thesis (28 July 2015) will be discussed in Chapter 2.

The above-mentioned demonstrates a possible conflict between human rights obligations and migration law and policy. This tension has been widely acknowledged as a tension between state sovereignty and human rights, as immigration control is seen as a fundamental part of state sovereignty.\textsuperscript{12} The question arises whether the State has any obligations towards irregular migrants, as the scope of the ESC technically does not include irregular migrants. However, there may be other human rights instruments that obligate State Parties to respect the human rights of irregular migrants. A second question is, if it appears that the State indeed has obligations, is Dutch policy then violating the rights of irregular migrants?

1.2 Definitions

Before turning to this thesis’ research question, it is useful to clarify what the definition of irregular migrants entails exactly. The terminology adopted by the International Organization Migration (IOM) will be used for this thesis, as it is the leading intergovernmental organization in the area of migration. It is important to distinguish between a migrant and an asylum seeker, as they have a different legal status and may therefore enjoy different rights, as well as the different types of migrants. There is, however, no universal definition for migrant. The IOM defines a migrant as a person who has lived in a foreign country for over a year regardless of the causes (voluntary or involuntary) and the means used to migrate (regular or irregular).\textsuperscript{13} Asylum seekers are “persons seeking to be admitted into a country as refugees and awaiting decision on their application for refugee status under relevant international and national instruments. In case of a

\textsuperscript{11} Smal, \textit{NRC} 20 January 2015.
\textsuperscript{13} Perruchoud 2004.
negative decision, they must leave the country and may be expelled, as may any alien in an irregular situation, unless permission to stay is provided on humanitarian or other related grounds.”

For this thesis, it is furthermore relevant to draw the distinction between a documented migrant and an irregular migrant. A documented migrant is “a migrant who entered a country lawfully and remains in the country in accordance with his or her admission criteria”, whereas an irregular migrant is “someone who, owing to illegal entry or the expiry of his or her visa, lacks legal status in a transit or host country. The term applies to migrants who infringe a country’s admission rules and any other person not authorized to remain in the host country”. Irregular migrants can be asylum seekers who have been denied the request for asylum based on refugee status. The terms irregular migrant and undocumented migrant can be used interchangeably.

1.3 Research question and methodology

The problem described in section 1.1 demonstrates a possible conflict between national migration policy and international human rights obligations. This possible conflict leads to the following research question:

Is Dutch policy regarding irregular migrants residing in the Netherlands in violation of international human rights obligations and how can irregular migrants enforce their rights?

This question can be divided into three parts:

(1) What is the current Dutch policy regarding (the rights of) irregular migrants?
(2) To what extent is Dutch policy in line with international obligations?
(3) How can an irregular migrant enforce his/her rights?

The research question will be answered by conducting an analysis of the Dutch policy on irregular migrants and of the significant human rights provisions in European and international law. Chapter 2 will discuss Dutch policy and relevant Dutch legislation. Chapter 3 will discuss the following international instruments: the European Social Charter, the European Convention on

16 Perruchoud 2004, p. 34.
Human Rights and the International Covenant on Economic, Social and Cultural Rights. The ESC will be discussed because it is the instrument that had been violated by Dutch policy in the case of *Conference of European Churches v. the Netherlands*, the case that sparked the discussion on the rights of irregular migrants in the Netherlands in the first place. The ECHR is also relevant to discuss, as national jurisdiction has ruled that the rights of irregular migrants are violated under this instrument as well. This will be discussed in Chapters 2 and 3 more thoroughly. The ICESCR is chosen to be examined because it is, unlike the ECHR and the ESC, not a regional but an international instrument, it specifically addresses economic, social and cultural rights and it has proven to have a wide scope of persons protected. Finally, chapter 4 will give a concluding answer to the research question.
Chapter 2: Dutch legislation and policy

2.1 Introduction

The number of migrants arriving in Europe has been rapidly increasing in the past few years.\textsuperscript{17} Whereas most migrants still travel to Europe by aircraft, there has been an immense rise in migratory routes into Europe over land and sea.\textsuperscript{18} According to statistics provided by the UN Refugee Agency (UNHCR), 218,757 migrants arrived in Europe over the Mediterranean Sea in 2014. Because boats carrying these migrants over the Mediterranean Sea are often overcrowded and of very poor quality, many boats sink and do not make it to the other side of the sea. As a result, many people on these boats do not survive. In 2014, there were 3,500 estimated deaths and people missing at sea.\textsuperscript{19} This year, already around 102,000 migrants have arrived in Europe over sea, according to the International Organization for Migration.\textsuperscript{20} As can be seen from the numbers of migrants who arrive in Europe as well as the numbers of persons who do not survive crossing the Mediterranean Sea, there is an enormous migrant crisis taking place in Europe.

As for the Netherlands, in 2014, 23,935 asylum applications were lodged. The number of asylum applications in 2013 was 14,395 and in 2012 9,715.\textsuperscript{21} The number of migrants seeking asylum in the Netherlands has thus sharply increased over the past few years. Although it is difficult to determine the exact number of irregular migrants who live in the Netherlands, new research into the figures is currently being conducted. In 2009, it was estimated that there were approximately 100,000 irregular migrants in the Netherlands.\textsuperscript{22} Nevertheless, the total number of migrants in the Netherlands is unknown.

From the numbers mentioned above, it can be derived that more and more migrants are arriving in Europe and the Netherlands. The number of irregular migrants arriving and residing in the Netherlands may therefore also increase. This chapter will examine which rights irregular migrants have according to Dutch law and examine Dutch policy regarding irregular migrants. This examination will answer the question what the current Dutch policy on (the rights of) irregular

\textsuperscript{17} UNHCR 2015a.
\textsuperscript{18} Frontex 2015.
\textsuperscript{19} UNHCR 2015b, p. 1.
\textsuperscript{20} International Organization for Migration 9 June 2015, para. 1.
\textsuperscript{21} Centraal Bureau voor de Statistiek 12 June 2015.
\textsuperscript{22} van der Heijden, Cruyff & van Gils: WODC 2011.
migrants is. First, the Dutch policy and legislation on irregular migrants before the resolution adopted by the Committee of Ministers will be discussed. Second, current developments in Dutch policy regarding irregular migrants will be discussed. Finally, a conclusion will be drawn based on what is discussed in the chapter.

2.2 Dutch policy and legislation

A migrant residing in the Netherlands can become irregular when his application for a residence permit has been rejected or his residence permit has expired, or when his request for asylum has been rejected. The reasons for rejection of a request for asylum are laid down in Article 30 and 31 of the Aliens Act 2000 (Vreemdelingenwet 2000). Examples of reasons are: (1) another state being responsible for dealing with a request for asylum; (2) the asylum seeker has already applied for a residence permit under a different name; (3) or the asylum seeker is in the possession of false or forged identification documents. Asylum seekers are furthermore denied asylum when no legitimate reasons are found that a migrant fears persecution or inhuman treatment in his/her country of origin.

It has become increasingly difficult for migrants to obtain asylum in the Netherlands if they do not possess proper documentation. Multiple laws have made the obtaining of asylum more difficult, such as the Identification Act 1994 (Wet op de Identificatieplicht), the Prevention of Marriages of Convenience Act 1994 (Wet voorkoming schijnhuwelijken), and the Undocumented Aliens Act 1999 (Wet ongedocumenteerden). In the 1994 Identification Act it is laid down that policemen and other officials are allowed to ask a person to identify him- or herself. Being unable to show valid identification is an offense. The purpose of the Prevention of Marriages of Convenience Act 1994 is to prevent criminal activities such as human smuggling and human trafficking and to lower unnecessary costs for the State as persons receiving a residence permit as the result of a sham marriage can make unwarranted use of social services. The Undocumented Aliens Act 1999 was introduced to ensure that a migrant asking for asylum in the Netherlands cooperates as much as possible with the establishment of his/her identity, nationality and asylum

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24 Immigration and Naturalisation Service 2015.
26 Government of the Netherlands 2015.
story. There is a high threshold for proving a well-grounded fear of persecution without having proper documentation.

During the process of seeking asylum, a migrant is provided with basic facilities, including, *inter alia*, day shelter, a weekly financial allowance for food, clothing and other personal expenses, and recreational and educational activities. The rights of an asylum seeker can be found in Article 9 Asylum Seekers and Other Categories of Aliens (Provisions) Regulations (*Regeling verstrekkingen asielzoekers*). The Central Agency for the Reception of Asylum Seekers (*Centraal orgaan opvang asielzoekers*, COA) is responsible for providing shelter and guidance to asylum seekers in the Netherlands as well as discharge from a shelter. COA falls under the political responsibility of the State Secretary of Security and Justice and COA answers to this ministry. After a request for asylum has been denied, a migrant is provided with shelter by COA for a period of 28 days. After these 28 days have passed, a migrant is discharged from the shelter and is responsible for providing for his basic needs, with the intention that he or she will return to the country of origin.

As for irregular migrants, the 1998 Linkage Act (*Koppelingswet*) asserts that they and other persons who are illegally residing in the Netherlands do not have a right to benefit from government services and facilities, such as social assistance, child allowance, public housing services and health insurance or health care benefits. The right to these benefits is linked to residence status. The purpose of the Linkage Act is to discourage illegal residence in the Netherlands. There are three exceptions to this exclusion of services: emergency medical care, education for persons under the age of 18, and legal assistance. Irregular migrants’ rights in the Netherlands thus only entail these three exceptions to the Linkage Act. It is furthermore important to note the following. Because the definition of emergency health care is a much debated one but not the focus of this thesis, the right to health in international human rights standards will not be discussed in the light of the degree of health care (emergency compared to preventive, for example)

28 Amnesty International 2008, p. 11.
30 COA 2015.
31 Art. 62(c) Aliens Act 2000.
32 Picum 2003, para. 2.
an irregular migrant should be entitled to. This regards a question too broad and divergent from the main research question to be answered in this thesis.

At the moment, residing in the Netherlands illegally is not an offense. However, a person without a residence permit does not have the right to shelter and social security, can be put into alien detention at any moment for the purpose of expulsion, and can receive a return decision (terugkeerbesluit) and an entry ban. A return decision gives irregular migrants and other persons residing in the Netherlands illegally a time period of 28 days provided by COA in which they have the opportunity to leave the country voluntarily. When this time period has expired, a person may receive an entry ban. Residing in the Netherlands with an entry ban is a criminal offense.

2.3 Current developments

As mentioned in Chapter 1, on 18 November 2014 the European Committee of Social Rights determined that the Dutch government violated the rights of irregular migrants under the European Social Charter. The ECSR ruled that Article 13(4) (the right to social and medical assistance) and Article 31(2) (the right to housing) were breached, as irregular migrants were not provided with food, clothing and shelter.

On 15 April 2015, the Committee of Ministers of the Council of Europe adopted a resolution as a follow-up to the decision adopted by the ECSR on the complaint of the Conference of European Churches. The resolution of the Committee of Ministers included the following concluding paragraph:

“The Committee of Ministers: (…)  
takes note of the report of the ECSR and in particular the concerns communicated by the Dutch Government (see appendix to the Resolution);  
recalls that the powers entrusted to the ECSR are firmly rooted in the Charter itself and recognises that the decision of the ECSR raises complex issues in this regard and in relation to the obligation of States parties to respect the Charter;

In 2013, a bill was proposed to criminalize illegal residence. The proposal was rejected in 2014. See Vossers, Elsevier 1 April 2014; Kamerstukken II 2013/14, 33512, 13.

Stichting LOS 2015.

ECSR 10 November 2014, 90/2013 (Conference of European Churches v. the Netherlands).
recalls the limitation of the scope of the European Social Charter (revised), laid down in paragraph 1 of the appendix to the Charter;
looks forward to the Netherlands reporting on any possible developments in the issue.”

This conclusion entails a certain contradiction. On the one hand, the Committee of Ministers notes the firmly rooted powers entrusted to the ECSR, thus acknowledging its authority. On the other hand, the Committee of Ministers undermines this authority by recognising the limited scope of the ESC in terms of persons protected. The Committee of Ministers making this point about the ESC’s scope could be interpreted as a disagreement in opinion with the ECSR. However, the Committee’s resolution must be in line with the ECSR’s decision. It may therefore be the case that the Committee of Ministers formulated a recommendation that is quite weak and vague in nature, as all the Netherlands is now legally obligated to do based on this resolution is report on “any possible developments” in the provision of food, clothing and shelter to irregular migrants.

As mentioned before, the Dutch Administrative High Court ruled in December 2014 that municipalities have to provide irregular migrants with food, clothing and shelter until two months after the resolution of the Committee of Ministers, so 15 June. The Administrative High Court ruled in this case that Articles 13 and 31 ESC are not legally binding provisions in accordance with Article 94 of the Dutch Constitution. This provision is as follows: “Within the Kingdom, applicable statutory provisions do not apply if such application is incompatible with binding provisions of treaties and resolutions of international organizations.” In other words, domestic provisions are only applicable when they are compatible with international legal obligations. According to the Administrative High Court, Articles 13 and 31 ESC are not such international legal obligations that require domestic provisions to be compatible with them. Despite this consideration, the Administrative High Court rules that this does not necessarily mean that they are without significance for the assessment of claims for shelter. In this regard, the Administrative High Court refers to an earlier ruling of 21 July 2006. In this ruling, the Administrative High Court assessed the position of the Human Rights Committee, the monitoring body of the UN International Covenant on Civil and Political Rights. The Administrative High Court ruled that the

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38 Besselsen and Slingenberg, Verblijfblog 16 April 2015.
Human Rights Committee’s recommendations are not legally binding, but in general should be regarded as authoritative judgments that are significant in proceedings before national courts. Based on this referral, it can be concluded that the Administrative High Court views the ECSR’s decisions as authoritative judgments significant in national proceedings as well. Furthermore, the Administrative High Court did not rule out that the decisions by the ESC could influence the Dutch law on shelter. In light of this uncertainty, the Administrative High Court issued an interim order on the provision of food, clothing and shelter.

On 8 May 2015, the Regional Court of Amsterdam also issued a judgment on this topic. This Court ruled that undocumented migrants have an unconditional right to shelter (including food and clothing), referring to the judgment of the ECSR. Denying migrants the right to shelter is in breach of the respect for human dignity in a way that impedes the right to private life laid down in Article 8 ECHR. The Regional Court did note that food, clothing and shelter for undocumented migrants is a temporary measure of last resort and only applies when no claim can be made for the use of other facilities.\(^{41}\) Whereas the Administrative High Court refers to provisions of the ESC regarding the right to shelter, the Regional Court of Amsterdam refers to provisions of a different treaty, namely the ECHR. The right to shelter can thus apparently be found in both legal instruments, according to these national courts. This will be thoroughly examined in Chapter 3.

After the resolution of the Committee of Ministers, the Dutch government discussed and negotiated the issue for over a week. Eventually, they decided that the five largest municipalities (Amsterdam, Rotterdam, The Hague, Utrecht and Eindhoven) would provide irregular migrants with food, clothing and shelter. This would be financed by the government. It was furthermore decided that shelter would only be provided for a limited period of time. It is still unknown how long this period is, but if, after this period, a migrant is not willing to return, he or she will be released from the shelter and will thus be back on the streets.\(^{42}\) After the decision was made public, multiple municipalities other than the five largest ones declared that they would not stop providing food, clothing and shelter.

The ruling of the Administrative High Court was applicable until 15 June 2015.\(^{43}\) On 9 June 2015, a meeting was held between the State Secretary of Security and Justice and the Association

\(^{42}\) Klompenhouwer and van den Dool, NRC 2015.
of Dutch Municipalities (Vereniging van Nederlandse Gemeenten). Based on this meeting, it was decided that the provision of food, clothing and shelter will be continued until the Council of State or the Administrative High Court passes a judgment on the matter or when a government agreement is signed.\textsuperscript{44} The State Secretary aims to have a definite arrangement by 1 November 2015.\textsuperscript{45} The State is currently awaiting a judgment of the Administrative High Court in a relevant case. The judgment will likely determine what obligations the State has regarding the provision of food, clothing and shelter to irregular migrants.

### 2.4 Conclusion

As mentioned, the main problem with the Committee of Ministers’ resolution is that the wording of the recommendation is quite weak and vague. The Dutch government has not received a concrete obligation regarding its policy toward irregular migrants.\textsuperscript{46} This problem plays a role in the importance of investigating what obligations the Netherlands then has according to international human rights instruments with regard to irregular migrants. Even if the Netherlands appears to not have violated the provisions of the ESC, it may perhaps have done so in relation to provisions of the ECHR or the ICESCR. In case of a violation of international human rights standards by the Netherlands, Dutch policy has to be adjusted to be compatible with international obligations.

At the moment, irregular migrants do receive shelter. Whether they will still be entitled to this right in the future depends on national jurisprudence soon to be pronounced.

\textsuperscript{44} Association of Dutch Municipalities 15 June 2015, para. 1-2.
\textsuperscript{45} Binnenlands bestuur 9 June 2015, para. 4.
Chapter 3: International legal standards

Dutch policy as discussed in Chapter 2 before the current developments has been claimed to violate the European Social Charter. Dutch policy may very well be in breach of other international human rights standards as well. In this thesis, the examination of international human rights law will be conducted at the UN and European level, limited to the following legally binding instruments: on a European level, the European Social Charter and the Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights (hereinafter: the ECHR), and, on a UN level, the International Covenant on Economic, Social and Cultural Rights (hereinafter: the ICESCR).

3.1 The European Social Charter

The European Social Charter (ESC) is a treaty created by the Council of Europe guaranteeing social and economic human rights. It was adopted in 1961, entered into force in 1965 and it was revised in 1996. The Revised ESC entered into force in 1999 and is meant to ultimately replace the original ESC. The ESC was ratified by the Netherlands in 2006. Conformity and compliance by State Parties with the ESC is monitored by the European Committee of Social Rights (ECSR). The ECSR also monitors the 1988 Additional Protocol and the Revised European Social Charter. The ECSR further explains the ESC and consists of 15 independent, impartial experts who are chosen by the Committee of Ministers of the Council of Europe.

Irregular migrants may be able to enforce their rights by filing a complaint before the ECSR. Therefore, in this section, first, the complaint procedure in cases of a violation of the ESC will be considered. Second, the scope of persons protected will be discussed to see whether irregular migrants fall under it. Third, the provisions that may be violated by Dutch policy will be examined.

3.1.1 Complaint procedure

47 ESC (Revised), explanatory report, para. 8.
48 Council of Europe (a).
The complaint procedure for the European Social Charter is laid down in the 1995 Additional Protocol to the European Social Charter. Besides States, international organizations and international and national NGOs can submit complaints to the Committee, but only if State Parties have enabled them to do so in a specific declaration. The Netherlands ratified the Additional Protocol on 3 May 2006. Unfortunately, the Netherlands has not yet submitted a declaration enabling national NGOs to submit collective complaints. Therefore, only States, international organizations and international NGOs can file a complaint. States almost never file complaints about other States for reasons of international relations, so in practice only international organizations and NGOs file complaints. There is no individual complaint procedure before the ECSR on violations of the ESC: “Individual disputes cannot be the subject of a collective complaint.” Irregular migrants who have fallen victim to violations of the ESC by the Dutch government thus depend on international organizations and international NGOs. In the past, three cases following from collective complaints against the Netherlands have been examined: Defence for Children International (DCI) v. the Netherlands, No. 47/2008; European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands, No. 86/2012; and Conference of European Churches (CEC) v. the Netherlands, No. 90/2013, the case which led to the current debate on the rights of irregular migrants in the Netherlands.

3.1.2 Scope of persons protected

As mentioned in the previous chapter, the ECSR decided in the case of the Confederation of European Churches v. the Netherlands that the Netherlands had violated Articles 13(4) and 31(2) of the ESC. This led to the question whether the ESC is even applicable to irregular migrants. In the appendix to the European Social Charter, the scope of the persons protected is discussed:

“1. Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the

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49 Council of Europe (b).
50 Council of Europe (c), p. 1.
51 Akkilioglu 2009, p. 61.
52 Akkilioglu 2009, p. 7.
Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19. This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties.

2. Each Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 and in the Protocol of 31 January 1967, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said convention and under any other existing international instruments applicable to those refugees."

Accordingly, the appendix to the ESC states that the provisions of the ESC only apply to nationals of States Parties to the ESC, who are lawfully residing on the territory of a State Party. This definition undoubtedly excludes irregular migrants, as they are neither lawful residents nor nationals of a State Party to the ESC.

The ECSR decided that the Netherlands violated two articles of the ESC, of which one is article 13(4). However, as can be seen in the cited paragraphs above, the scope of the ESC is applied “without prejudice to Article 12, paragraph 4 and Article 13, paragraph 4”. Article 13(4) reads as follows:

“[the Parties undertake] to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.”

This provision thus only applies to a State Party’s nationals or nationals of other Parties lawfully within a State Party’s territory. In addition to the appendix to the ESC mentioning the limited scope of the instrument, article 13(4) once again states the exclusion of persons unlawfully residing on a State Party’s territory. Despite this explicit statement, the ECSR applies this provision to irregular migrants unlawfully residing in the Netherlands.

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53 ESC 1961, Appendix.
54 Slingenberg 2012, p. 271.
It is clear from the above-mentioned that the ECSR takes another approach to the scope of the ESC than is laid down in the ESC itself.55 In the ECSR’s conclusions of 2004, the ECSR states the following:

“The Committee notes that the Parties to the Charter (in its 1961 and revised 1996 versions) have guaranteed to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights treaties – in particular the European Convention of Human Rights – or by adopting domestic rules whether constitutional, legislative or otherwise without distinguishing between persons referred to explicitly in the Appendix and other non-nationals. In so doing, the Parties have undertaken these obligations.

Whereas these obligations do not in principle fall within the ambit of its supervisory functions, the Committee does not exclude that the implementation of certain provisions of the Charter could in certain specific situations require complete equality of treatment between nationals and foreigners, whether or not they are nationals of member States, Party to the Charter.”56

The scope of certain rights can thus be expanded in certain specific circumstances to all categories of foreigners, regardless of their legal status, according to the ECSR.57 An example of such a right can be found in the case of the *International Federation of Human Rights Leagues (FIDH) v. France*, in which the ECSR concludes that “legislation or practice which denies entitlement to medical assistance [article 13 ESC] to foreign nationals, within the territory of a State party, even if they are there illegally, is contrary to the Charter.”58 The reasoning of the ECSR was that the ESC was intended to complement the European Convention on Human Rights and that all human rights are “universal, indivisible and interdependent and interrelated”.59 Health care is connected to human dignity, which is “the fundamental value and indeed the core of positive

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56 ECSR 2004, p. 10.
European human rights law – whether under the European Social Charter or under the European Convention of Human Rights”.\(^{60}\) The ECSR goes on to say that the ESC is a living instrument that must “be interpreted so as to give life and meaning to fundamental social rights, as a result of which restrictions on rights are to be read restrictively.”\(^{61}\) In this case, the ECSR argues that with respect to matters relating to fundamental rights as the right to life and rights that affect human dignity, such as the right to health care, there is an overlap between the provisions of the ECHR and the ESC. In such cases, the scope of the ESC is to be interpreted in accordance with the scope of the ECHR, which is universal.\(^{62}\)

In the case of *Conference of European Churches v. the Netherlands*, the ECSR furthermore stated that “when human dignity is at stake, the restriction of the personal scope should not be read in such way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter”.\(^{63}\) The ECSR has explained several times that when basic human rights are concerned, the ESC is applicable to all human beings in need, including human beings without a legal status.

The ECSR is not alone in its position on the application of fundamental social rights. The Committee of Ministers stated in 2000 that in situations of extreme hardship, the right to basic necessities of life (such as food, clothing, shelter, and medical care) must be universal and enforceable and applicable to all human beings, regardless of their position or status.\(^{64}\)

Besides article 13, the ECSR has held the same reasoning on the right to housing laid down in article 31 ESC in a case on unlawfully residing children in the Netherlands.\(^{65}\) It is relevant to note that the ECSR draws a distinction between paragraph 1 of article 31, which addresses access to housing of an adequate standard, and paragraph 2, which addresses the prevention and reduction of homelessness. The ECSR holds that article 31(1) does not apply to children unlawfully on the Netherlands’ territory, as this counters migration policy objectives.\(^{66}\) Based on this reasoning, it

\(^{60}\) ECSR 8 September 2004, 14/2003 (*International Federation of Human Rights Leagues (FIDH) v. France*), para. 31.


\(^{63}\) ECSR 10 November 2014, 90/2013 (*Conference of European Churches (CEC) v. the Netherlands*), para. 66.

\(^{64}\) Amnesty International 2014, p. 2.

\(^{65}\) ECSR 20 October 2009, 47/2008 (*Defence for Children International (DCI) v. the Netherlands*).

can be argued that article 31(1) will not apply to unlawfully residing adults either, considering that children are a more vulnerable group than adults.

The question arising from the ECSR’s standpoints in the above-mentioned two cases is whether the interpretation of the ESC by the ECSR is convincing. The ESC’s arguments have been questioned by assistant professor Slingenberg, whose reasoning has been laid down in this paragraph: Although the ECSR argues that the scope of the ESC can be interpreted based on other international conventions, inter alia the ECHR, in accordance with article 31(3)(c) of the Vienna Convention on the Law of Treaties, it is the question whether article 31(3)(c) applies where treaty articles are inconsistent. It has been generally accepted that this article does not allow for one treaty to modify the scope of another treaty. Furthermore, the ECSR seems to reason that, with regards to fundamental rights that involve human dignity, there is an overlap between the provisions of the ESC and those of the ECHR. In such cases, the scope of the ESC must be interpreted in line with the scope of the ECHR, which is universal. Slingenberg asserts that the downside of this reasoning is that it can also be applied vice versa. The European Court of Human Rights (ECtHR) could argue that, when interpreting obligations regarding social and economic rights, the limited scope of the ESC could be taken into account. This would be in line with the interdependence and the interrelatedness of the ESC and the ECHR. Interpretation of the scope of the ECHR in line with the scope of the ESC would not give irregular migrants the right to food, clothing and shelter. Jurisprudence of the ECtHR shows that the scope of the ECHR is not always universal when it comes to social and economic rights, as the ECtHR appears to value the legal status of the individual concerned. As the application of the ECHR’s scope to the ESC can work the other way as well, the ECSR’s argument is not very convincing and furthermore not in line with article 31(3)(c) of the Vienna Convention on the Law of the Treaties.

Based on the reasoning by Slingenberg laid down above, irregular migrants cannot seem to convincingly fall under the scope of the ESC. It can therefore, under this legal instrument, be

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67 C.H. Slingenberg, assistant professor migration law at VU University Amsterdam, has thoroughly discussed the scope of the ESC according to the ECSR in her dissertation ‘Between sovereignty and equality: The reception of asylum seekers under international law’.

68 Slingenberg 2012, p. 276.


70 See for example ECtHR 16 September 1996, 17371/90 (Gaygusuz v. Austria); ECtHR 30 September 2003, 40892/98 (Koua Poirrez v. France), both cited in Slingenberg 2010.

71 Slingenberg 2012, p. 278.
questioned whether irregular migrants are entitled to the rights that have been claimed to apply to them in the case of CEC v. the Netherlands.

3.1.3 Relevant provisions

Besides the right to housing and the right to social and medical assistance addressed by the ECSR, there are no other rights established in the ESC that have been asserted by the ECSR to be such basic rights that they should be accorded as well to irregular adult migrants. This is in line with the fact that the basic necessities of life mentioned by the Committee of Ministers, namely food, clothing, shelter, and medical care, all fall under these two Articles.
3.2 The European Convention on Human Rights

The European Convention on Human Rights (ECHR), officially entitled the Convention for the Protection of Human Rights and Fundamental Freedoms, was drafted by the Council of Europe in 1950. It entered into force in 1953. All Member States of the Council of Europe are party to the Convention. The Convention created the European Court of Human Rights (ECtHR), which rules over alleged violations of the Convention by State Parties. The Committee of Ministers of the Council of Europe monitors the execution of judgments of the ECtHR.72 The ECHR was ratified by the Netherlands in 1954.73

Irregular migrants can enforce their rights by filing a complaint before the ECtHR. Therefore, in this section, first, the complaint procedure in case of a violation of the ECHR will be considered. Second, the scope of persons protected under the ECHR will be discussed to see whether irregular migrants fall under it. Third, the provisions that may be violated by Dutch policy will be examined.

3.2.1 Complaint procedure

Article 34 ECHR addresses the right to individually apply before the ECtHR:

“The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”74

There are some criteria, however, for the individual application. Applicants must be actual victims of a breach of the ECHR, they must have exhausted all domestic remedies and they must apply within a time limit of six months. These criteria can be found in Articles 32, 34 and 35 ECHR.75 The time limit of six months is installed to prevent uncertainty for long periods of time

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72 Council of Europe (d).
73 Council of Europe 2015.
74 ECHR 1950.
75 Ktistakis 2013.
and to promote security of law.\textsuperscript{76} In its case law, the ECtHR has accepted victims to be both direct and indirect ones. Indirect victims are persons who have a specific and/or personal connection to the direct victim, such as a victim’s spouse or parent.\textsuperscript{77} This makes the scope of who can apply individually before the Court somewhat broader. Potential victims can also apply before the Court, which can be especially relevant for (irregular) migrants, who will face risks of becoming victims (of, for example, persecution) in their country of origin if they get expelled.\textsuperscript{78}

With regards to NGOs and other types of organizations, they can only file a complaint before the Court if they themselves have become a victim of a violation of the ECHR.\textsuperscript{79} They can thus not file a complaint on behalf of a victim or a group of victims and irregular migrants can thus not rely on organizations to enforce their rights for them.

### 3.2.2 Scope of persons protected

Article 1 of the ECHR states the following: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”\textsuperscript{80} The words “everyone within their jurisdiction” also include irregular migrants residing on the territory of a State Party, as they fall under a State Party’s territorial jurisdiction.\textsuperscript{81} Therefore, the rights laid down in the ECHR seem to apply to irregular migrants.

Like the ESC, the ECHR has been called a living instrument. The ECtHR called the ECHR a living instrument for the first time in a judgment delivered in 1978 about corporal punishment:

“The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.”\textsuperscript{82}

\begin{thebibliography}{99}
\bibitem{76} Ktistakis 2013, p. 112.
\bibitem{77} Ktistakis 2013, p. 108.
\bibitem{78} Ktistakis 2013, p. 110.
\bibitem{79} ECtHR 2014.
\bibitem{80} ECHR 1950.
\bibitem{81} ECtHR 12 December 2001, 52207/99 (\textit{Bankovic and others v. Belgium and others}), para. 68.
\bibitem{82} ECtHR 25 April 1978, 5856/72 (\textit{Tyrer v. the United Kingdom}), para. 31 cited in Letsas 2013, p. 3.
\end{thebibliography}
Professor Letsas\textsuperscript{83} pleads for the moral reading of the ECHR by the ECtHR, which would entitle irregular migrants with the rights of the ECHR. This raises the question whether such a moral reading would undermine or exceed the ECtHR’s legitimacy, as the ECtHR’s effect is “ultimately dependent on state consent”\textsuperscript{84} and States may not agree with a certain interpretation of the ECHR. In other words, there may be a tension between reading the ECHR as a living instrument and, by doing so, the undermining of the ECtHR’s legitimacy. This reasoning is in line with the critique resulting from the decision by the ECSR in the case of Conference of European Churches (CEC) \textit{v. the Netherlands} that interpreting the scope of the instrument different from how it was originally intended, undermines the effectiveness of the instrument as well as the authority of the monitoring body. This critique can be applied to the interpretation of the ECHR as a living instrument as well. Interpreting the scope of the ECHR in the light of present-day conditions demonstrates, once again, a tension between a State’s policy and international human rights law.

Article 14 ECHR is furthermore relevant to discuss with regards to the scope of the ECHR. This provision addresses the prohibition of discrimination “on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”\textsuperscript{85} It should be noted that Article 14 ECHR is not an independent right and the prohibition of discrimination is linked to all rights laid down in the ECHR. Jurisprudence of the ECtHR shows that it is also sufficient that a violation falls “within the ambit” of one or more of the Articles of the ECHR.\textsuperscript{86} In short, Article 14 ECHR applies solely in relation to the enjoyment of rights laid down in the ECHR or rights which fall within the ambit of these provisions.

In its jurisprudence, the ECtHR has addressed the question whether discrimination can be on ground of legal status. In the case of \textit{Bah v. the United Kingdom}, the following paragraphs are relevant:

\begin{itemize}
  \item [\textsuperscript{83}] George Letsas is Professor of Competition Law & Policy at University College London, the United Kingdom.
  \item [\textsuperscript{84}] Letsas 2013, p. 14.
  \item [\textsuperscript{85}] Art. 14 ECHR 1950.
  \item [\textsuperscript{86}] ECtHR 27 September 2011, 56328/07 (\textit{Bah v. the United Kingdom}), para. 35.
\end{itemize}
“45. […] immigration status where it does not entail, for example, refugee status, involves an element of choice, in that it frequently applies to a person who has chosen to reside in a country of which they are not a national. […]

46. The Court finds therefore, in line with its previous conclusions, that the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to “other status” for the purposes of Article 14.

47. Given the element of choice involved in immigration status, therefore, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality. Furthermore, given that the subject matter of this case – the provision of housing to those in need – is predominantly socio-economic in nature, the margin of appreciation accorded to the Government will be relatively wide (see the Grand Chamber judgment in Stec and Others, cited above, § 52).”

As can be seen in the paragraphs cited here, legal status, in this case immigration status, falls under ‘other status’ as a ground of discrimination under article 14 ECHR. Even though the ECtHR has associated ‘other status’ with inherent characteristics of an individual, legal status can fall under ‘other status’ as well. However, if there is an element of choice related to the status, the justification does not need to be as weighty as it must be in cases of an inherent status. With regards to irregular migrants, who are not entitled to refugee status, the ECtHR will likely view their legal status as including an element of choice, as it has ruled in the case of Bah v. the United Kingdom.

All in all, based on articles 1 and 14 ECHR, it seems that irregular migrants are included in the scope of the ECHR, although in case of discrimination, the justification need not be as weighty as it must be in case of discrimination based on an inherent status.

3.2.3 Relevant provisions

87 ECtHR 27 September 2011, 56328/07 (Bah v. the United Kingdom).
3.2.3.1 Article 3 ECHR: Prohibition of torture

Article 3 of the ECHR states the following: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”⁸⁹ States must ensure that irregular migrants will not be subject to ill-treatment falling under the scope of Article 3.

In 2000, the Committee of Ministers of the Council of Europe adopted a Recommendation to Member States on the Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship. As mentioned before, in this recommendation, basic human material needs as a minimum are recognized to entail food, clothing, shelter and basic medical care. The Committee of Ministers recommends Member States to “recognise, at national level, an individual universal and enforceable right to the satisfaction of basic material needs (as a minimum: food, clothing, shelter and basic medical care) for persons in situations of extreme hardship.”⁹⁰ One of the principles of the Recommendation states the following: “The exercise of this right should be open to all citizens and foreigners, whatever the latters’ position under national rules on the status of foreigners, and in the manner determined by national authorities.”⁹¹ Irregular migrants fall under this definition, because their position under national rules on the status of foreigners should not be considered regarding their right to enjoy these basic material needs.

The ECtHR has affirmed this, by asserting that if states fail to take measures to help irregular migrants who are suffering from extremely poor living conditions, this is in breach of the prohibition of inhuman or degrading treatment. The ECHR itself does not provide any specific standards of living, but the ECtHR has decided this.⁹² Letting irregular migrants live on the streets because of a lack of provided shelter, is thus in breach of Article 3 ECHR. Regarding places like the Refugee Garage, it is the question whether this amounts to a violation of Article 3. These places need to be examined in order to investigate whether the living conditions are so poor that they would constitute inhuman or degrading treatment. However, these circumstances have been said to indeed be inhuman, by for example the Netherlands Institute for Human Rights.⁹³ Although irregular migrants in Amsterdam are no longer living in the Refugee Garage, there are still similar

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⁸⁹ ECHR 1950.
⁹² Ktistakis 2013, p. 47.
⁹³ Netherlands Institute for Human Rights 18 June 2014.
places with similar circumstances occupied by these migrants, which should make them subject for examination on whether the living conditions would amount to a violation of Article 3 ECHR.

In any case, living without food, clothing and shelter available would constitute living in poor conditions and thus amount to a violation of article 3 ECHR.

**3.2.3.2 Article 8 ECHR: The right to respect for private and family life**

Article 8 ECHR reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

As mentioned before, in a judgment on 8 May 2015, the Dutch Regional Court of Amsterdam ruled that Dutch policy on the provision of food, clothing and shelter, is violating article 8 ECHR. The Court ruled that denying irregular migrants food, clothing and shelter affects the right to human integrity in a way that precludes the right to private life under Article 8 ECHR. The notion of “private life” laid down in Article 8 ECHR encompasses “a sphere within which every individual can freely develop and fulfill his personality, both in relation to others and with the outside world”. This includes, amongst others, physical and moral integrity of a person. Denial of basic needs like food, clothing and shelter thus affects one’s physical and moral integrity.

Article 8 ECHR has also been used to protect persons from getting deported because they were not seen as justified in light of this provision. For example, in the case of *Berrehab v. the
A Moroccan man was granted a residence permit based on his marriage to a Netherlands national, with whom he had a child of the Netherlands nationality. When Mr. Berrehab and his wife got divorced, his application for renewal of his residence permit was denied because the Dutch government had allowed Mr. Berrehab a residence permit for the sole purpose of him being able to live with his Dutch wife, a condition that was no longer fulfilled. Based on his relationship with his Dutch daughter, the ECtHR ruled that an expulsion would be unjustified in light of the right to family life.

Another relevant case is Boultif v. Switzerland, in which an Algerian national, married to a woman of Swiss nationality, was ordered to be expelled based on having committed criminal offenses. The ECtHR established criteria, now commonly known as the Boultif criteria, “to assess a ‘fair balance’ between the interest of the state in maintaining public order and the right to family life of the individual concerned.”

It should be noted, however, that the fact that Mr. Boultif had been living in Switzerland since the age of five and therefore had been building up a family life there.

In the more recent case of Jeunesse v. the Netherlands, an irregular migrant in the Netherlands was granted a residence permit because she had three children who were born in the Netherlands and had the Dutch nationality, and she was married to a Dutch national. The Court took into account that Ms. Jeunesse had been living in the Netherlands for over 16 years and sending her back to Surinam, her country of origin, would mean a degree of hardship for her family. Based on the best interests of Ms. Jeunesse’s children rather than her best interests, the Court ruled that there was no fair balance between the personal interests of Ms. Jeunesse and her children in sustaining their family life and the Dutch government’s immigration policy.

What can be seen in the three above-mentioned cases, is that the right to respect for private and family life is granted to the children rather than the parents. In the case of Boultif the applicant did not have any children but the ECtHR ruled that it was unjustified to expel him based on the fact that he had been living in Switzerland since the age of 5, so also since he was a child. Family members of a person, often a child, lawfully residing in the Netherlands may in limited

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98 ECtHR 21 June 1988, 10730/84 (Berrehab v. the Netherlands).
99 ECtHR 2 August 2001, 54273/00, (Boultif v. Switzerland).
100 ECtHR 2 August 2001, 54273/00, (Boultif v. Switzerland) cited in European Union Agency for Fundamental Rights 2011, p. 23.
101 ECtHR 3 October 2014, 12738/10 (Jeunesse v. the Netherlands).
circumstances receive a residence permit according to Article 8 ECHR. Families may be reunited in cases where a lawfully residing migrant in a Council of Europe member state would face an undefeatable difficulty to form a family life in his country of origin.\textsuperscript{102} Based on jurisprudence of the ECtHR, Dutch policy on expulsion may thus violate article 8 ECHR in specific cases, but not in general.

\textsuperscript{102} Roagna 2012, p. 72-73.
3.3 The International Covenant on Economic, Social and Cultural Rights

The ICESCR is one of the human rights treaties created by the United Nations, more specifically, the General Assembly. The Convention was drafted in 1966 and entered into force 10 years later, in 1976. Its focus is on economic, social and cultural rights and it currently has 164 State Parties. The ICESCR is, together with the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights, part of the International Bill of Human Rights. The monitoring treaty body of the ICESCR is the United Nations Committee on Economic, Social and Cultural Rights (CESCR).\(^{103}\) The ICESCR was ratified by the Netherlands in 1978.\(^{104}\)

The complaint procedure regarding the ICESCR in cases of a violation of an irregular migrant’s rights is not that straightforward as it is with regards to the ESC and the ECHR. First, it will be considered what an irregular migrant can do to enforce his/her rights. Second, the scope of persons protected under the ICESCR will be examined. Third, the provisions laid down in the ICESCR that may be violated by Dutch policy will be examined.

3.3.1 Complaint procedure

The complaint procedure for the ICESCR is laid down in the 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).\(^{105}\) The Netherlands signed the OP-ICESCR on 24 September 2009.\(^{106}\) The Netherlands has however not ratified the Protocol. This means that individuals residing in the Netherlands cannot file a complaint before the CESCR about the Netherlands violating one or more of their rights laid down in the ICESCR. Irregular migrants in the Netherlands are reliant on other procedures on violations of the ICESCR by the Netherlands, namely domestic legal procedures. The Administrative Jurisdiction Division of the Council of State, the highest general administrative court of the Netherlands\(^ {107}\), ruled that Article 11 ICESCR (right to an adequate standard of living) and Article

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\(^{103}\) OHCHR.
\(^{104}\) United Nations.
\(^{105}\) OP-ICESCR 2008.
\(^{106}\) United Nations.
\(^{107}\) Council of State.
12 ICESCR (right to health) are standards that are not directly applicable for rulings, as the provisions are insufficiently precise to be applied in national legislation and therefore further elaboration in national legislation is needed.\textsuperscript{108} 

Furthermore, the Dutch Supreme Court decided that, in light of Article 7 ICESCR (right to enjoy just and favorable conditions of work)\textsuperscript{109}, a provision does not have a direct effect if, because of the general wording of a provision, it can hardly function in the legal system without it being further elaborated.\textsuperscript{110} The provisions laid down in the ICESCR are thus not seen as easily legally binding according to Dutch jurisprudence. This is confirmed by Professor Coomans.\textsuperscript{111} Coomans asserts that the lack of direct effect of the provisions of the ICESCR is consistently adopted in Dutch jurisprudence, not taking into consideration important legal developments on the international level, such as General Comments, concluding observations, or national and international jurisprudence. Cases addressing social, cultural or economic rights are not substantively dealt with by national judges, because cases are closed immediately due to the lack of direct effect of the ICESCR provisions.\textsuperscript{112} This lack of implementation can also be attributed to the concept of progressive realization of the ICESCR’s rights established in Article 2 ICESCR, rather than the immediate obligation of rights laid down in the same provision in the ICCPR. The CESCR associates this concept with the realization that the ICESCR’s rights will not be reached in a short period of time.\textsuperscript{113} Reliance on domestic courts regarding violations of the ICESCR by the Netherlands is unfortunately thus not very promising.

Besides the complaint procedure, the CESCR also holds sessions in which it examines reports submitted by State Parties. States must report every five years on how the rights laid down in the ICESCR are implemented in national legislation and regulation. “The Committee examines each report and addresses its concerns and recommendations to the State party in the form of “concluding observations”. “\textsuperscript{114} The last report on the implementation of the ICESCR was submitted by the Netherlands in 2009. The CESCR issued its concluding observations in 2010,

\textsuperscript{109} ICESCR 1966, Art. 7.
\textsuperscript{110} Studie- en Informatiecentrum Mensenrechten (SIM) 2012, p. 11.
\textsuperscript{111} Professor Coomans is the UNESCO Chair in Human Rights and Peace at the Department of International and European Law at Maastricht University, the Netherlands.
\textsuperscript{112} Dutch Section of the International Commission of Jurists 2013, para. 3.
\textsuperscript{113} Moeckli, Shah, Sivakumaran and Harris 2013, p. 144.
\textsuperscript{114} OHCHR, para. 2.
already raising concerns regarding the lack of shelter provided to irregular migrants and urged the Netherlands to “ensure that the minimum essential level relating to the right to housing, health and education is respected, protected and fulfilled in relation to undocumented migrants.”¹¹⁵ This year, the Netherlands has to submit a State Party report again in which the State’s compliance with the ICESCR can be challenged again, inter alia in relation to irregular migrants. Other ways in which rights can be denounced are through General Comments or inquiries.¹¹⁶ Irregular migrants may thus rely on these procedures as they cannot file a complaint themselves, although these types of documents are not legally binding and not taken into account in national jurisprudence. The lack of implementation of the ICESCR can also be denounced by lobbying NGOs or the Netherlands Institute for Human Rights. Irregular migrants can turn to these organizations for help.

3.3.2 Scope of persons protected

Article 2(2) of the ICESCR states the following: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹¹⁷

The ICESCR does not include in this article any clause on who are entitled to the rights laid down in the Covenant. In this regard, it is interesting to compare the provision on non-discrimination laid down in the ICESCR with the one laid down in the ICCPR. The difference between these Articles is that the ICCPR specifically states that State Parties have to respect and ensure the rights laid down in the Covenant to “all individuals within their territory.”¹¹⁸ The ICESCR, however, does not mention all individuals on a State Party’s territory. It is important to make this distinction between the non-discrimination clauses of the two Covenants, because this distinction may cause them to have a different scope in terms of persons protected. The term “all individuals on a territory” in Article 2(1) ICCPR thus includes irregular migrants residing in the concerning State. As for the ICESCR, there is no mention of all persons or individuals on a State’s

¹¹⁵ CESC 2010, para. 25.
¹¹⁶ Inquiries may be initiated in the case of indications of serious, race or systematic violations of a convention; Moeckli, Shah, Sivakumaran and Harris 2013, p. 380.
¹¹⁷ ICESCR 1966.
¹¹⁸ Art. 2(1) ICCPR 1966.
territory. Irregular migrants are thus, in the non-discrimination clause, not automatically included in the scope of the ICESCR, whereas they are in the ICCPR. It should be noted, however, that the Human Rights Committee, the monitoring body of the ICCPR, is more ambiguous on the matter whether irregular migrants are entitled to the rights laid down in the ICCPR. ¹¹⁹

The discrimination of migrants, regular and irregular, is further addressed by the CESCR in its General Comment No. 20 (non-discrimination in economic, social and cultural rights), which states the following: “The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”¹²⁰ This includes irregular migrants, as legal status and documentation are not considered when applying the rights of the ICESCR. This position taken by the CESCR that the ICESCR applies to everyone under a State Party’s jurisdiction has been confirmed in several other General Comments as well.¹²¹

Another indication on the inclusion of migrants in the scope of the ICESCR, is laid down in article 2(3) ICESCR, which reads:

“Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

This article implies that, as opposed to developing countries, developed countries (such as the Netherlands), should guarantee all the rights laid down in the ICESCR to both nationals and non-nationals.¹²² However, it is not specified whether irregular migrants fall under the ICESCR’s definition of non-nationals.

Finally, it is relevant to discuss the 2004 concluding observations of the CESCR on Spain’s periodic report, stating the following: “The Committee urges the State party to take measures to ensure the effective protection of fundamental economic, social and cultural rights of all persons

¹¹⁹ Human Rights Committee, General Comment No. 15, 11 April 1986, paras. 1, 4-6 cited in Slingenberg 2012, p. 228.
¹²⁰ CESCR, General Comment No. 20, 2 July 2009, para. 30.
¹²¹ See for example CESCR, General Comment No. 12, 12 May 1999, para. 14; CESCR, General Comment No. 14, 11 August 2000, para. 12; CESCR, General Comment No. 18, 24 November 2005, para. 12, all cited in Slingenberg 2012, p. 234.
¹²² Slingenberg 2012, p. 234.
residing within its territory, in accordance with article 2.2 of the Covenant. It further encourages the State party to promote the legalization of undocumented immigrants so as to enable them to enjoy fully their economic, social and cultural rights.”

To conclude, despite the fact that Article 2(2) does not include all persons on a State Party’s territory, the CESCR has decided, in both its concluding observations and its General Comments, that State Parties do need to protect and ensure the fundamental economic, social and cultural rights of all persons residing on their territory, including irregular migrants and that all persons on State Parties’ territory may not be discriminated.

### 3.3.3 Relevant provisions

**3.3.3.1 Article 11 ICESCR: The right to an adequate standard of living**

The fact that irregular migrants are not entitled to food, clothing and shelter in the Netherlands is not in line with Article 11 ICESCR, which asserts that State Parties "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". The right to housing is established in Article 11(1). In 1991, the CESCR published a General Comment (No. 4) on the right to housing. In this General Comment, the following is stated: “[…] individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination.” Irregular migrants are not specifically mentioned as persons entitled to the right to housing in General Comment No. 4. However, it seems that irregular migrants are also entitled to the right to housing due to the fact that the CESCR states that enjoyment of this right has to be in accordance with Article 2(2), the fact that Article 2 prohibits discrimination of irregular migrants as described in General Comment No. 20 and the statement of the CESCR in the concluding observations on

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123 Cholewinski 2005, p. 28.
124 Art. 11(1) ICESCR 1966.
125 CESCR, General Comment No. 4, 13 December 1991, para. 12.
Spain’s periodic report that State Parties need to ensure the fundamental economic, social and cultural rights of all persons residing on their territory.

The right to an adequate standard of living includes, besides the right to housing, the right to adequate food and the right to water. These have as well been asserted to apply to irregular migrants in the same reasoning as made above regarding the right to housing, in respectively General Comment No. 12 and General Comment No. 15. Based on the above-mentioned, Dutch policy is thus violating irregular migrants’ rights to an adequate standard of living.

3.3.3.2 Article 12: The right to health

In 1985, the UN Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live stated that certain social rights, such as health protection, social security and social services, are only applicable to migrants residing lawfully in the territory of a State Party. However, the CESCR stated in General Comment No. 14 that irregular migrants are also entitled to enjoy the right to health. In this General Comment (the right to the highest attainable standard of health, Art. 12), the following is stated: “[…] States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; […]”.

Dutch policy only provides irregular migrants with emergency health care. Besides the right to health care, irregular migrants are thus also entitled to enjoy the right to health. The CESCR has defined the right to health as follows: “The right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health” and “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working

126 CESCR, General Comment No. 12, 12 May 1999, para. 8; CESCR, General Comment No. 15, 20 January 2003.
129 CESCR, General Comment No. 14, 11 August 2000, para. 34.
131 CESCR, General Comment No. 14, 11 August 2000, para. 9.
conditions, and a healthy environment.” The underlined parts in this citation show that Dutch policy denying irregular migrants food, clothing and shelter is thus in breach of Article 12 ICESCR.

132 CESCR, General Comment No. 14, 11 August 2000, para. 4.
Chapter 4: Conclusion

The research question of this thesis was as follows: Is Dutch policy regarding irregular migrants residing in the Netherlands in violation of international human rights obligations and how can irregular migrants enforce their rights? The question was furthermore divided into three parts:

1. What is the current Dutch policy regarding (the rights of) irregular migrants?
2. To what extent is Dutch policy in line with international obligations?
3. How can an irregular migrant enforce his/her rights?

These questions will be answered separately below.

4.1 What is the current Dutch policy regarding the rights of irregular migrants?

According to the Dutch policy before the recent developments, irregular migrants were self-responsible for providing for their basic needs, such as food, clothing and shelter. They are now provided with food, clothing and shelter but do not have the right to enjoy government services and facilities, except for emergency medical care, education for minors, and judicial assistance. The policy in the Netherlands is aimed to discourage irregular migrants from staying in the Netherlands.

As a result of the current developments, the Dutch policy toward irregular migrants at the moment is a developing matter. After the decision of the European Committee on Social Rights and the resolution of the Committee of Ministers, the Dutch government decided to finance the five largest municipalities in the Netherlands to provide irregular migrants with food, clothing and shelter, for a limited period of time. It was also decided that other municipalities will not receive financial aid for the reception of irregular migrants. However, until 15 June 2015 municipalities had to provide irregular migrants with food, clothing and shelter, as ruled by the Dutch Administrative High Court in December 2014. On 9 June it was decided that this provision may continue until a judgment is passed or a government agreement is signed. The Regional Court in Amsterdam already decided that denying migrants food, clothing and shelter is in violation of Article 8 ECHR, but the Council of State and the Administrative High Court will have the final
say in the matter. At the moment, irregular migrants are thus provided with food, clothing and shelter, but this is not laid down in legislation or regulation.

4.2 To what extent is Dutch policy in line with international obligations?

According to the ECSR, denying migrants the provision of their basic needs is in breach of two articles of the ESC. At the moment, according to Dutch policy, municipalities are not obliged to provide irregular migrants with food, clothing and shelter. If it is the case that there are municipalities that do not ensure this provision, this could be a violation of the ESC. To comply with the ESC, the provision of food, clothing and shelter should be established in national legislation. If the Dutch government sticks to its initial plan to allow only five municipalities to provide food, clothing and shelter, this would also entail a violation of the human rights discussed in Chapter 3 as irregular migrants in other municipalities would still be denied access to the provision of these basic needs or would have to move to one of these five municipalities.

The ECSR has no legally binding influence, but the Committee of Ministers does. Even though the Committee of Ministers cannot reverse a decision made by the ECSR, the Committee of Ministers did not obligate the Netherlands to provide irregular migrants with food, clothing and shelter. The Committee of Ministers only stated to look forward to the Netherlands reporting on any further developments concerning the issue. As a result, it is up to national courts to decide which rights irregular migrants have according to the European Social Charter. The interim order of the Administrative High Court demonstrates that Articles 13(4) and 31(2) are significant for the assessment of claims for food, clothing and shelter and that the ESC is thus applicable to irregular migrants in terms of these rights. The judgment by the Regional Court in Amsterdam demonstrates that article 8 ECHR is also applicable. These judgments are promising for Dutch legislation, especially the first one, as the Administrative High Court is the highest judicial power in the Netherlands with regards to a part of administrative disputes. Lower courts will thus have to follow the judgment of the Administrative High Court.

In light of the ECHR, the fact that irregular migrants are responsible themselves for providing for their basic needs seems to be in breach of Article 3 ECHR, according to the Recommendation of the Committee of Ministers. It should be noted, however, that this Recommendation is not legally binding. Fortunately, the ECtHR has also decided that a lack of taking measures to help
persons suffering from poor living conditions is a violation of Article 3. It speaks for itself that being denied basic needs, such as food, clothing and shelter, falls under the definition of poor living conditions. Furthermore, the deprivation of basic needs can even be in violation of Article 8 ECHR (right to respect for private and family life). However, it should be noted that this has been decided by a Dutch court and not by the ECtHR. These violations of Article 3 are in accordance with a violation of Article 14 ECHR, as the justification for discriminatory treatment needs to be weighty. The justification to deprive persons of their basic needs does not seem to be a weighty reason to discriminate.

Regarding the ICESCR, irregular migrants’ rights are violated by Dutch policy under the right to health laid down in Article 12 and the right to an adequate standard of living in Article 11(1). The right to health entails basic needs that are required to live healthy. The right to an adequate standard of living includes, inter alia, the right to housing, food and water. The right to an adequate standard of living and the right to health are closely related and the Netherlands seems to be violating both when denying irregular migrants these rights.

An important point in light of this thesis regards the discussion on the scope of the international human rights instruments. This will first be discussed in light of the ESC, followed by the ECHR. As discussed in Chapter 3, the ECSR has interpreted the scope of the ESC much broader than it was initially intended to be. The ECSR’s reasoning for this is as follows. First, certain provisions of the ESC could in certain specific situations apply to all categories of foreigners regardless of what the legal status of these foreigners is. Second, the ESC was created to complement the ECHR and all human rights are “universal, indivisible and interdependent and interrelated”.133 The ESC is a living instrument that must “be interpreted so as to give life and meaning to fundamental social rights, as a result of which restrictions on rights are to be read restrictively.”134 When it comes to fundamental rights, the scope of the ESC is to be interpreted in accordance with the scope of the ECHR, which is universal.

Slingenberg has provided several arguments why the ECSR’s arguments for its interpretation cannot be persuasive. She first notes that, in addition to the restrictive scope of the ESC excluding irregular migrants, article 13(4) even explicitly states the exclusion of persons unlawfully residing

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on a State Party’s territory. Second, article 31(3)(c) of the Vienna Convention on the Law of Treaties does not permit one treaty to modify the scope of another treaty, in this case the ECHR modifying the scope of the ESC.

Based on the critique following from the ECSR’s judgment in the case of Conference of European Churches (CEC) v. the Netherlands, there is no consensus on whether the ECSR was right to interpret the scope of the ESC this way. Regardless, national jurisprudence appears to agree with the ECSR and can therefore obligate the Netherlands to provide irregular migrants with food, clothing and shelter.

As for the scope of the ECHR, it does not explicitly exclude irregular migrants and seems to include them, as article 1 ECHR states that the scope applies to everyone within a State Party’s jurisdiction. However, jurisprudence may show otherwise. In the case of Bah v. the United Kingdom, the ECtHR decided that discrimination based on immigration status does not require a justification as weighty as it must be in cases of discrimination based on an inherent status because of the element of choice associated with immigration status. With the case, the ECtHR seems to be of the opinion that immigrants may not be entitled to the same (degree of) rights as nationals based on their status conferred by law.

Another point is that the ECHR has also been called a living instrument that must be interpreted in the light of present-day conditions. Calling both the ESC and the ECHR living instruments creates a tension between what was originally agreed on upon ratification of these instruments and how they are interpreted nowadays. More specifically, in this case, it creates a tension between domestic migration law and international human rights law. This tension has been widely acknowledged as a tension between state sovereignty and human rights, as immigration control is seen as a fundamental part of state sovereignty.\textsuperscript{135} The main question according to Professor Bosniak\textsuperscript{136} is: “[H]ow far does sovereignty reach before it must give way to equality”?\textsuperscript{137} This question can obviously not easily be answered and is furthermore not the main question tried to be answered in this thesis. It merely demonstrates the tension between immigration policy and human rights ideals, a tension that cannot easily be resolved.

\textsuperscript{136} L.S. Bosniak is a Professor of Law at Rutgers Law School, the United States, and is an expert on issues of immigration, citizenship, nationalism and transnationalism, and constitutional equality.
My personal opinion on the matter is not a very clear one. Although international law often precedes domestic law, this may not easily be so when it comes to irregular migrants. These migrants have gone through an immigration procedure in which the State provided them with food, clothing and shelter. When they were eventually denied a residence permit, they themselves chose to stay in the Netherlands unlawfully. The question is then to what extent the State is to blame for these migrants’ choice. These migrants have been denied asylum and should thus, according to the State, be able to return to the country of origin. The question always remains whether this is truly the case for all irregular migrants.

Despite the above-mentioned tension between national policy and international human rights obligations, national jurisprudence appears to agree with the opinion that irregular migrant are entitled the right to receive food, clothing and shelter. Two courts have ruled that the Dutch government has violated respectively the ESC and the ECHR. The scope of the ICESCR and the documents published by the CESCR, such as General Comments and concluding observations, also appear to agree with this opinion.

4.3 What can an irregular migrant do in case of a violation of his right?

If an irregular migrant wishes to enforce his/her rights under the ESC, he or she is dependent on international organizations and NGOs to file a complaint for them. National NGOs and individuals are not enabled to file a complaint. Under the ICESCR, there is no complaint procedure installed for violations of the ICESCR because the Netherlands has not ratified the OP-ICESCR. Irregular migrants can therefore only depend on domestic legal procedures, although these are not very promising due to the lack of direct effect of the provisions of the ICESCR adopted in Dutch jurisprudence as well as the view that these provisions are not easily legally binding. The fact that both article 11 and article 12 ICESCR have been ruled to be standards that are not directly applicable for rulings by the highest general administrative court of the Netherlands, makes it even more difficult to enforce these rights in national procedures. Awareness of the rights of irregular migrants may, however, be raised after the publication of the CESCR’s General Comments, inquiries or concluding observations, but these are not legally binding and the concluding observations on the Netherlands’ report will probably only be published next year at

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the earliest. A third option for irregular migrants is to apply before the ECtHR. There are, however, some criteria that individuals must meet. Organizations and NGOs cannot file a complaint before the ECtHR for an irregular migrant, only if they are victims of violations themselves.

All in all, if they have a strong case, it seems that irregular migrants can most easily enforce their rights by addressing violations of their rights before the ECtHR, because they can file an individual complaint after having exhausted all domestic remedies and because the rights laid down in the ESC and the ICESCR may be more difficult to enforce on a national level. The rights violated by Dutch policy of the ESC and the ICESCR are social rights, which can be seen as second generation rights and more difficult to implement for this reason. The status of economic, social and cultural rights are commonly contested in a way that questions their legal enforceability. Furthermore, as mentioned before, the rights of the ICESCR are to be realized progressively rather than immediately. This demonstrates another tension in the debate on the human rights of irregular migrants. States are reluctant to fully implement social, economic and cultural rights for the reasons mentioned above. However, the ICESCR seems to be the instrument that acknowledges irregular migrants the most out of the three instruments discussed, which may make a violation under this instrument more recognized than under the other two instruments. As for the ESC, the fact that irregular migrants actually do not fall within the scope of the instrument, may also make it more difficult to enforce rights under the ESC. The ECSR has reasoned that when it comes to fundamental rights, the scope of the ESC is to be interpreted in accordance with the scope of the ECHR. The scope of the ESC furthermore seems stretched because irregular migrants are also entitled to fundamental rights in the ECHR and the ICESCR, which thus confirm the ECSR’s standpoint. Even if the ECSR cannot convincingly argue that irregular migrants fall within the scope of the ESC, Dutch policy can still be a violation of the ECHR and the ICESCR. The ECHR is not an instrument specifically focused on social rights and therefore its provisions may be easier to implement and enforce on a national level.

To conclude, even if complaints are not recognized on an international level, national jurisprudence demonstrates that they might be on a national level. This is especially the case for

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provisions of the ECHR and the ESC, as they have been acknowledged to be violated by Dutch policy by two different national courts.
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