

ACCESS TO JUSTICE FOR CHILDREN: NETHERLANDS

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I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

The Kingdom of the Netherlands¹ signed the CRC on 26 January 1990 and ratified it on 6 February 1995. Since the Netherlands has a monist system, the CRC took immediate domestic effect in the Netherlands after ratification. No further domestic implementation was required to incorporate it into national law.² This domestic effect does not mean that all provisions of the CRC and other ratified international instruments can be directly invoked by individuals before a Dutch court. This is dependent on the *direct effect* of a provision.³ See part I.D below.

B. Does the CRC take precedence over national law?

Provisions of the CRC which are by nature of their content binding on all persons take precedence over national law. Under the Constitution, national law provisions will not be applied if this application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.⁴

C. Has the CRC been incorporated into national law?

The CRC has for a large part been incorporated into the national law of the Netherlands.

However, the Netherlands maintains the following reservations, which the Committee on the Rights of the Child has requested be withdrawn:

- with respect to Article 26, a child shall not be granted an independent entitlement to social security and social insurance;
- with respect to Article 37, adult penal law may be applied to child over 16 years of age in certain circumstances; and
- with respect to Article 40, a child may not necessarily receive legal assistance in a trial for minor offences, nor may there be a review of the facts or of any decision made in all circumstances.⁵

¹ Comments on this report provided by Defence for Children, Netherlands, August 2015, and Prof. Dr Ton Liefwaard, Professor of Children's Rights, Leiden University, Law School, Netherlands and Ms Suzy Duivenvoorde, October 2015.

² M. Limbeek & M. Bruning, 'The Netherlands: Two Decades of the CRC in Dutch Case Law', in: T. Liefwaard & J. Doek (eds.), *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, Dordrecht: Springer 2015, p. 90.

³ Ibid.

⁴ Constitution of the Netherlands, Articles 93-4, available at: <http://www.worldlii.org/cgi-bin/sinodisp/nl/legis/const/1989/1.html>. See also CRIN, 'Netherlands: national laws', <http://www.crin.org/resources/infodetail.asp?ID=28722> (accessed 10 February 2014).

⁵ UN Committee on the Rights of the Child, *Concluding observations on the third periodic report of the*

D. Can the CRC be directly enforced in the courts?

According to the Dutch Constitution all provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.⁶ As such, only CRC provisions that are deemed to set a clear standard without requiring further elaboration in national law can be directly enforced. What this means in practice is that when a Dutch judge rules that a specific provision of the CRC has direct effect, a citizen of the Netherlands can invoke the provision in their case and the provision will then prevail over conflicting Dutch law.⁷

It should be noted that Dutch courts decide very differently on whether CRC provisions have direct effect or not and, as such, for most articles there is no clear answer as to whether individuals can directly rely on these provisions in court or not.⁸ However, in Dutch litigation the CRC is frequently used as a tool for interpreting both national law and international law (e.g. article 8 of the European Convention on Human Rights). As such, provisions of the CRC have often been granted *indirect effect* in Dutch case law.⁹

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

There are numerous cases in which the CRC has been invoked in front of the courts and in which it has been applied.¹⁰ The Dutch courts have applied provisions of the CRC and other relevant international instruments in the following recent cases:

- The District Court in Amsterdam ruled that Article 3(1) of the CRC stipulates that, in all actions concerning children including those taken by a court of law, the best interest of the child shall take priority over all other interests. Furthermore, under Article 40(2)(b)(iii) of the CRC, all children accused of having infringed Dutch penal law are guaranteed to have their cases heard and considered without any delay by an independent and unbiased authority or court of law.¹¹
- The District Court in Groningen ruled that in this particular case the resettlement of

Netherlands, CRC/C/NLD/CO/3, 27 March 2009, paras 12-13. Available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fNLD%2fCO%2f3&Lang=en.

⁶ Article 93 of the Dutch Constitution.

⁷ Brölmann & Vierdag, essay in *The Integration of International and European Community Law into the National Legal Order: A Study of the Practice in Europe*, ed. Eisemann, The Hague: Kluwer Law International, 1996, pp. 433-459; see O. Jansen, 'Researching Dutch law', <http://www.nyulawglobal.org/globalex/Netherlands1.htm>, 2012, (accessed 10 February 2014); see also CRIN.

⁸ J. De Graaf et al., *De toepassing van het Internationaal Verdrag inzake de Rechten van het Kind in de Nederlandse rechtspraak. Deel II*, Amsterdam: Centre for Children's Rights 2015.

⁹ Ibid. See also M. Limbeek & M. Bruning, 'The Netherlands: Two Decades of the CRC in Dutch Case Law', in: T. Liefwaard & J. Doek (eds.), *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, Dordrecht: Springer 2015, p. 103.

¹⁰ Research was conducted by the University of Amsterdam in 2012 and 2015 on the use of the CRC in Dutch Courts. The research results can be downloaded in Dutch at:

<http://arils.uva.nl/nl/onderzoek/overige-onderzoeksverbanden/content/centre-for-children-s-rights-amsterdam/onderzoek/onderzoek.html>.

¹¹ Case number 13/654155-10, dated 2 April 2013.

a foster child with another family, without the permission of their foster parents, was contrary to Article 8 of the European Convention on Human Rights (right to family life) and contrary to Article 3 of the CRC.¹²

- The District Court in Utrecht found the defendant guilty of human trafficking under Article 273(f) of the Dutch penal code, for using his granddaughter to commit an act of theft. The court ruled that Article 273(f) of the Dutch penal code had to be applied in the context of international treaties on which the wording of Article 273(f) is based. As such, the court considered European Directive 2011/36/EU, Articles 3 and 19 of the CRC, and the Charter of Fundamental Rights of the European Union (in particular, Article 24 thereof). The court stated that the purpose of Article 273(f) of the Dutch penal code is to criminalise human trafficking with the aim of combating human exploitation.¹³

II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

See part III.A below.

A child may separately make a complaint about an official decision to the Children's Ombudsman who may investigate the complaint, make recommendations to the Government and monitor how those recommendations are implemented.¹⁴ The scope of a complaint to the Children's Ombudsman is wider than a claim in the administrative court, which is restricted to challenging particular administrative orders within the meaning of the General Administrative Law Act.¹⁵ The Children's Ombudsman may investigate a range of complaints from the content of legislation to instances of bullying.¹⁶

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

In the Netherlands, the question of whether a child can represent his or her own legal interests independently before a court depends on the field of law.¹⁷

¹² Case number 135121/JE RK 12-529, dated 13 April 2013.

¹³ Case number 16/661343-13 (P), dated 9 July 2013.

¹⁴ 'The Ombudsman for Children, the Netherlands', http://crin.org/docs/FileManager/enoc/2011_Annual_Update_The_Netherlands.pdf, (accessed 10 February 2014).

¹⁵ 'Order' means a written decision of an administrative authority constituting a public law act: General Administrative Law Act, Article 1:3; T. Barkhuysen, W. Ouden & Y.E. Schuurmans, *The Law on Administrative Procedures in the Netherlands*, Netherlands Administrative Law Library, June 2012, available at: <http://www.nall.nl/tijdschrift/nall/2012/06/NALL-D-12-00004>.

¹⁶ 'The Ombudsman for Children, the Netherlands'.

¹⁷ M. Limbeek & M. Bruning, 'The Netherlands: Two Decades of the CRC in Dutch Case Law', in: T. Liefwaard & J. Doek (eds.), *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, Dordrecht: Springer 2015, p. 92.

In civil cases, the general rule is that children are legally incompetent unless an exception is regulated by law. A child needs to be represented by his or her legal guardian (usually the parents) when bringing a matter before the court.¹⁸

In cases of administrative law, the child has a stronger legal position. In administrative law, children only need to be represented by their legal representative if the child cannot be deemed to sufficiently appreciate his or her own best interest.¹⁹ When there is a conflict of interests between the child and his or her legal guardian, a guardian ad litem can be appointed.²⁰

As mentioned above, children are as a general rule considered to be “*procesonbekwaam*” (not competent to bring a matter before the court) in civil law matters.²¹ However, there are some exceptions to this rule, which enable a minor to bring a case to court without having to be represented by their legal guardian. A minor can bring an action to court directly regarding:

- a request for emancipation;²²
- a request for permission to enter into a marriage;²³
- issues related to a labour or medical agreement;²⁴
- closed youth care;²⁵
- a request to cancel the child protection measure ‘*ondertoezichtstelling*’ (a family supervision order);²⁶
- a request to annul a ‘written instruction’ in case of a child protection measure;²⁷
- a request to alter an existing care/contact-arrangement (*verdeling van de zorgen opvoedingstaken/omgangsregeling*);²⁸
- a request to withdraw or shorten the duration of an out-of-home placement order;²⁹
- a request to substitute the organisation performing a child protection measure;³⁰
- a request for a guardian ad litem (*bijzondere curator*).³¹

In these cases a minimum age may apply, usually 12 or 16 years. The abovementioned exceptions all concern specific legal exceptions, rendering the child formally capable of addressing the courts. A request by a minor will, as a general rule, also be considered admissible in summary proceedings (*kort geding*).³²

¹⁸ Civil Code, Article 1:245 para. 4.

¹⁹ General Administrative Law Act, Article 8:21.

²⁰ Civil Code, Article 1:250.

²¹ Civil Code, Article 1:245, para. 4; see also Civil Code, Article 1:253i.

²² Article 1:253ha BW.

²³ Article 1:36 BW.

²⁴ Article 7:612 lid 1 BW en Article 7:447 lid 1 en 3 BW.

²⁵ Article 6.1.1 lid 2 Jeugdwet.

²⁶ Article 1:261 lid 2 BW.

²⁷ Article 1:264 lid 1 BW.

²⁸ Article 1:265g lid 2 BW.

²⁹ Article 1:265d lid 4 BW.

³⁰ Article 1:259 BW.

³¹ Article 1:250 BW.

³² Zie daarover C.A.R.M van Leuven & M.J. de Klerk, ‘Formele en informele rechtsingang(en) minderjarige’, *EB* 2013-32.

The Dutch Civil Code also provides that a minor can, via an informal route (without a lawyer), contact a district judge and present him or her with a specific issue that the child wants the judge to take a decision on. A child can request:

- the judge to give only one of his or her parents legal guardianship (*gezag*) pending divorce proceedings;³³
- the judge to determine an arrangement regarding the exercise of the legal guardianship of his or her parents;³⁴
- the judge to determine an arrangement regarding the care/contact (including an arrangement regarding the issuance of information on the child);³⁵ and
- a guardian ad litem.³⁶

The judge is free to decide whether or not he or she will act on the request of the child.

Furthermore, the Dutch Civil Code provides the child with the right to express his or her views in civil law matters.³⁷ The court is obliged to invite children who are 12 years or older to be heard in relation to matters affecting them, unless it decides it is a matter of minor importance or an urgent situation.³⁸ The Court has a discretionary power to hear children below the age of 12 years.

C. In the case of infants and young children, how would cases typically be brought?

See part II.B above.

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Under the European Convention on Human Rights and the Constitution of the Netherlands, each citizen of the Netherlands has the right to access courts, to be legally represented in legal and administrative proceedings and, if means do not suffice, to receive state-funded legal aid.³⁹

The legal aid system is a two-fold model consisting of public first-line and private second-line help. The first step to receiving legal aid is at a Legal Services Counter, which provides free legal advice in simple legal matters, including in the areas of civil, administrative, criminal, family, and immigration law. The Legal Services Counter may then refer the individual to a private lawyer or mediator, who acts as the secondary line of legal aid in more complicated or time-consuming matters. Individuals can also apply

³³ Article 1:251a lid 4 BW. The Supreme Court of The Netherlands has ruled that this provision should not be applied too strictly, meaning that requests that have been made after the divorce proceedings have been finalised are to be considered admissible insofar as a decision on the matter has not yet been taken: Dutch Supreme Court ruling dated 4 April 2008, ECLI:NL:HR:2008:BC2241.

³⁴ Article 1:253a lid 4 jo. 1:377g BW.

³⁵ Article 1:377g BW.

³⁶ Dutch Supreme Court 4 February 2005, ECLI:NL:HR:2005:AR4850.

³⁷ Code of Civil Procedure, Article 809.

³⁸ M. Limbeek & M. Bruning, 'The Netherlands: Two Decades of the CRC in Dutch Case Law', in: T. Liefwaard & J. Doek (eds.), *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, Dordrecht: Springer 2015, p. 93.

³⁹ Constitution, Articles 17 and 18.

for help from a subsidised lawyer directly.⁴⁰

Eligibility for legal aid is means-based, and the exact amount of the subsidy will depend on the claimant's circumstances. In all cases there is a small personal fee payable by the claimant. If the legal problem is expected to take more than three hours, clients are entitled to legal aid only if they have been granted a legal aid certificate. In order to obtain this, a lawyer needs to submit an application to the Legal Aid Board on behalf of their client. The Board assesses each application both in terms of the client's means (their annual income and assets), merits and significance of the legal problem in question. If legal aid is granted, a certificate is issued which allows the lawyer in question to deal with the case.⁴¹

In criminal matters, a child is entitled to be assisted by a lawyer under the legal aid scheme.⁴² A lawyer is assigned automatically where the case is tried by a district court. Where the case is heard by a sub-district court, a lawyer will not be assigned in all cases. The Netherlands has made a reservation to Article 40 of the CRC in connection with this (see part I.C. above).⁴³

- E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

There are no other such conditions or limits.

III. How can children's rights violations be challenged before national courts?

- A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

Where there is a potential violation of a right, a civil law claim can be brought under tort law. Under Dutch tort law, an unlawful act is committed when: (1) an act or omission violates a statutory duty;⁴⁴ (2) a right is violated; or (3) an act or omission violates a rule of unwritten duty of care.⁴⁵

As noted in part I.D above, the provisions of the CRC that are deemed to set a clear

⁴⁰ Legal Aid Board, 'Legal aid in the Netherlands', <http://www.rvr.org/binaries/about-rvr/legal-aid-in-the-netherlands-2011-05-23-ilag.pdf>, 2011, (accessed 10 February 2014).

⁴¹ Ibid.

⁴² Criminal Code, Article 489; see also *Initial report of the Netherlands to the UN Committee on the Rights of the Child*, para. 334.

⁴³ *Initial report of the Netherlands to the UN Committee on the Rights of the Child*, para. 334.

⁴⁴ A breach of a statutory duty includes any breach of an act of parliament or of a norm provided in secondary legislation (either of a public or private nature), whether of Dutch or foreign origin: N. Jägers &

M. van der Heijden, 'Corporate human rights violations: the feasibility of civil recourse in the Netherlands', *Brook J. Int'l Law*, Vol. 33, No. 3, p. 857, available at: <http://arno.uvt.nl/show.cgi?fid=81270>.

⁴⁵ Ibid., p. 855; Civil Code, Article 6:162.

standard without requiring further elaboration in national law can be directly enforced,⁴⁶ and a judge must rule that specific provisions of the CRC are capable of being invoked before rights under the CRC can be enforced.⁴⁷ The judge would make that decision in the context of a petition brought by the child or their representative at the relevant court.

If the potential violation arises out of an order⁴⁸ (or the refusal or failure to make an order) by an administrative authority, a petitioner is generally required to follow a preliminary administrative procedure (usually an objection procedure) before they can take their case against an order to court.⁴⁹ This involves submitting an objection to the administrative authority that made the order, followed by a hearing.⁵⁰ This procedure allows the petitioner to explain why they disagree with the order, after which the administrative authority considers its order once again.⁵¹ If the administrative authority does not revise its order to address the potential violation, the petitioner can appeal the case to an administrative court.⁵²

In the criminal setting, victims of rights violations are dependent on governmental authorities to initiate the proceedings.⁵³

Once all domestic remedies have been exhausted, children's rights violations can be brought before the European Court of Human Rights.⁵⁴ The European Court of Human Rights decides cases concerning alleged violations of any of the rights contained in the European Convention on Human Rights.⁵⁵ Any individual, group of individuals or an NGO who is a victim of a violation of one of these rights may submit a complaint to the Court.⁵⁶ Anonymous complaints are not permitted.⁵⁷ The procedural rules for the Court do not make any child-specific provisions. Persons may initially present an application themselves or through a representative, however, all applicants must be represented at hearings thereafter.⁵⁸ After examining the case, the Court renders a judgment which is binding on the State⁵⁹ and also has powers to award monetary compensation to the victims of human rights abuses.⁶⁰ It is also worth noting that the Court has an established practice of referring to other international human rights instruments, including the CRC, as guides to interpretation of the European Convention.

⁴⁶ Constitution, Article 94.

⁴⁷ Brölmann & Vierdag; see O. Jansen.

⁴⁸ 'Order' means a written decision of an administrative authority constituting a public law act: General Administrative Law Act, Article 1:3, available at:

<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LangbroeksLaw.pdf>

⁴⁹ T. Barkhuysen, W. Ouden & Y.E. Schuurmans.

⁵⁰ General Administrative Law Act, Divisions 6.1, 6.2, 7.1, 7.2,.

⁵¹ T. Barkhuysen, W. Ouden & Y.E. Schuurmans.

⁵² See, generally, General Administrative Law Act.

⁵³ N. Jägers & M. van der Heijden, p. 867.

⁵⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), 1950, Article 35, available at:

<https://www.crin.org/en/library/legal-database/european-convention-protection-human-rights-and-fundamental-freedoms>.

⁵⁵ Ibid., Articles 19 and 32.

⁵⁶ Ibid., Article 34.

⁵⁷ Ibid.

⁵⁸ Rules of Court, July 2014, Rule 36, available at:

http://www.echr.coe.int/documents/rules_court_eng.pdf.

⁵⁹ European Convention on Human Rights, Article 46.

⁶⁰ Ibid., Article 41.

B. What powers would courts have to review these violations, and what remedies could they offer?

Under the Civil Code, courts have a wide range of remedies available, including specific performance to do or not to do something, an injunction to prohibit specific tortious behaviour, a declaration against the responsible party, and compensation.

In its review of the lawfulness of an administrative order, the court will respect the administrative authority's right to exercise discretionary powers. This means that the court conducts a judicial review limited to whether administrative powers have been exercised reasonably.⁶¹ If the administrative court rules that an order is unlawful, it can annul the order and instruct the administrative authority to make a new order, or to perform another act in accordance with its judgment. It may also determine that its judgment shall take the place of the annulled order. It can make an interim decision, after ruling that an order is unlawful, requiring the administrative authority to issue a new order or to provide better reasons for its old order. It can issue specific directions to the administrative authority for the structure of the new order to be issued.⁶² It can also order compensation for damage suffered.⁶³ Note that an objection can only lead to annulment of the administrative order if that ground aims to protect the specific interest of the petitioner.⁶⁴

The Supreme Court can in principle rule that provisions of Dutch law are invalid because they contravene any part of the CRC that sets a clear standard without requiring further elaboration in national law (see part I.D above).

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

In collective actions, the petition must state the name and address of the petitioners.⁶⁵

In administrative law matters, the general rule is that any interested party may challenge the order of an administrative body. An interested party is deemed to be a person whose interest is directly affected by an order.⁶⁶ The notice of objection which initiates proceedings must state the name of the person submitting it.⁶⁷

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

Under the Civil Code, associations and foundations with full legal capacity can bring a

⁶¹ T. Barkhuysen, W. Ouden & Y.E. Schuurmans.

⁶² General Administrative Law Act, Article 8:72; see also Ibid.

⁶³ Ibid., Article 8:73; see also E. Minderhoud, S. Nuijten, N. de Munnik & J. Lautenbach, 'Damage Compensation Act and Procedural Administrative Law Amendment Act', <http://www.lexology.com/library/detail.aspx?g=e38bb545-d994-4b1b-8404-cb9e961e27a4>, 2013, (accessed 10 February 2014).

⁶⁴ E. Minderhoud, S. Nuijten, N. de Munnik & J. Lautenbach.

⁶⁵ Code of Civil Procedure, Article 1013, available at: <http://dutchcivillaw.com/civilprocedureleg.htm>

⁶⁶ General Administrative Law Act, Article 1:2.

⁶⁷ Ibid., Articles 6:5(1)(a).

collective action on behalf of other persons, provided they can represent the interests of such persons according to their articles of association. Such actions can be used to obtain a declaratory judgment against a responsible party, but cannot be filed in order to obtain compensatory damages.⁶⁸

Alternatively, the Dutch Act on Collective Settlement of Mass Damage Claims provides a mechanism for collective redress in mass damages on the basis of a settlement agreement concluded between, on the one hand, one or more foundations or associations representing the interests of a group of injured parties who suffered damages and, on the other hand, the party or parties allegedly causing the damages. The collective settlement usually includes monetary compensation of damages. Once all parties involved have reached a settlement agreement, they may submit a joint application to the Amsterdam Court of Appeal requesting the Court to declare the collective settlement binding on all injured parties falling within the scope of the agreement. If the Court declares the agreement binding on all injured parties, the agreement will bind all injured parties falling within the scope of the agreement, whether residing in the Netherlands or abroad. Those injured parties who do not want to be bound by the agreement can choose to opt out within a limited period of time,⁶⁹ at which point they will no longer be bound by the collective settlement and will maintain⁷⁰ their right to initiate individual legal proceedings.

In administrative law, petitioners have the right to apply to have their cases joined to another pending case. The court has the power to consolidate cases dealing with the same or related administrative order, and the court may publicise the details of the case if it suspects that there may be other petitioners equally affected by the order.⁷¹

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

As discussed in part III.D above, associations and foundations with full legal capacity can bring a collective action on behalf of other persons, provided they can represent the interests of such persons according to their articles of association.

In administrative cases, non-governmental organisations (NGOs) have standing to file challenges to potential children's rights violations or to intervene in cases. Dutch administrative law makes clear that an objection or an appeal may be brought by an NGO where the "collective interests which they particularly represent" are affected by an administrative order.⁷²

The Netherlands has ratified the Additional Protocol to the European Social Charter

⁶⁸ Civil Code, Article 3:305a; see also N. Jägers & M. van der Heijden, p. 861; K. Jelsma & M. Cordewener, 'The Settlement of Mass Claims: A Hot Topic in The Netherlands', *International Law Quarterly*, p. 13, available at: http://www.hoganlovells.com/files/Publication/035a19d4-5aa9-4e43-b651-363f3031a0b9/Presentation/PublicationAttachment/28345212-16e0-43be-9bcd-4199ccea23/The_Settlement_of_Mass_Claims_A_Hot_Topic_in_The_Netherlands.pdf.

⁶⁹ This period of time is set by the court but should be at least three months following the day of the judgment in which the collective settlement is declared binding. See K. Jelsma & M. Cordewener.

⁷⁰ *Ibid.*; Civil Code, Article 7:907.

⁷¹ General Administrative Law Act, Articles 8:14 and 8:26.

⁷² *Ibid.*, Article 1:2.

Providing for a System of Collective Complaints,⁷³ meaning that complaints of violations of children's rights contained in the European Social Charter⁷⁴ can be made to the European Committee of Social Rights. Such complaints of unsatisfactory application of the Charter may only be submitted by international NGOs that have participatory status with the Council of Europe.⁷⁵ The Committee reviews the information provided by both sides and writes a report with its conclusions, which is sent to the Committee of Ministers of the Council of Europe that adopts a resolution and makes a recommendation to the State.⁷⁶ The State then must provide information about the steps taken to comply with the recommendation in its next report under the Charter.⁷⁷

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

In administrative law matters, the petitioner must first present objections to the authority which issued the order. If the order is not resolved to the petitioner's satisfaction, the case may then proceed to the applicable administrative courts. In most cases, this will be the District Court, but there is a range of legislation creating rights of review in different courts.⁷⁸

Claims for damages arising from unlawful administrative decisions concerning matters such as public service or social security, which, if appealed, would ultimately fall under the jurisdiction of the Central Appeals Tribunal or the Tax Division of the Supreme Court, are heard exclusively by the administrative division of the District Court.

Claims for damages arising out of any other unlawful administrative decision, which, if appealed, would fall under the jurisdiction of the Administrative Division of the Council of State or the Trade and Industry Appeals Tribunal, may be treated as follows:

- For claims up to EUR 25,000, the petitioner may choose between the administrative and civil divisions of the District Court.
- For claims above EUR 25,000, the petitioner must bring the case before the civil division of the District Court.
- For claims where no administrative remedy is available because no decision has been made (e.g., when the administrative authority has provided incorrect information or exercised disproportionate supervision), the civil division of the District Court will always have jurisdiction.⁷⁹

Cases brought against private individuals must first be brought either in the Sub-district

⁷³ Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/158.htm>.

⁷⁴ Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/TreatiesIndex_en.asp.

⁷⁵ Additional Protocol for a System of Collective Complaints, Article 1. See also:

http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/OrgEntitled_en.asp.

⁷⁶ Additional Protocol for a System of Collective Complaints, Articles 8-9.

⁷⁷ Additional Protocol for a System of Collective Complaints, Article 10.

⁷⁸ T. Barkhuysen, W. Ouden & Y.E. Schuurmans.

⁷⁹ E. Minderhoud, S. Nuijten, N. de Munnik & J. Lautenbach.

Court (including employment claims and all claims less than €5000) or the District Court (most other claims).⁸⁰ The filing process in the District Court must be carried out through a lawyer, but there is no such requirement for the Sub-district Court. In order to initiate proceedings, a writ of summons or a petition will need to be presented on behalf of the claimant.⁸¹

In civil law matters, a juvenile court judge will handle (almost) all cases concerning children brought to the court.⁸²

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

As noted in part II.D above, the Legal Aid Board assesses each application for legal aid in terms of the claimant's financial means, merits and significance of the legal problem in question. In some cases, such as all cases where people have been deprived of their freedom, claimants are exempted from individual fees. This applies equally to civil, criminal and administrative law matters.⁸³

In administrative law matters, the registry fee payable by the petitioner may be reimbursed if the court rules that the appeal was well-founded, and in all other cases the court has a discretion to rule that the registry fee be reimbursed in whole or in part.⁸⁴ The court has the discretion to order the administrative authority to pay the petitioner's costs, whereas the petitioner will only be liable for the administrative authority's costs in the event of a manifestly unreasonable use of court proceedings.⁸⁵ If the petitioner withdraws the case because the administrative authority has wholly or partly satisfied the petitioner's wishes, the court may instruct the administrative authority to pay the petitioner's costs.⁸⁶

In civil proceedings, the rule is that the loser pays all costs.⁸⁷ These costs must be reasonable, and in practice are awarded on the basis of reasonable costs of carrying out specific items of legal work, whether or not extra legal costs were necessary in the circumstances. This applies equally to appeals.⁸⁸ In family law cases, the rules are the same as for civil proceedings, but a lower level of court fees are usually awarded.⁸⁹ In criminal cases, there is currently no power to impose costs on the defendant, although

⁸⁰ Dutch Civil Law, 'Jurisdiction of Dutch courts', <http://www.dutchcivillaw.com/jurisdiction/nationaljuris.htm>, (accessed 10 February 2014).

⁸¹ Dutch Civil Law, 'Legal proceedings in Dutch civil law', <http://www.dutchcivillaw.com/jurisdiction/legalsystem011.htm> (accessed 10 February 2014).

⁸² Code of Civil Procedure, Article 808.

⁸³ Legal Aid Board.

⁸⁴ General Administrative Law Act, Article 8:74.

⁸⁵ Ibid., Article 8:75.

⁸⁶ Ibid., Article 8:75a.

⁸⁷ Code of Civil Procedure, Article 237 para. 1; see Prof. dr. M.B.M. Loos, 'Cost and fee allocation in civil procedure: Dutch report', http://www-personal.umich.edu/~purzel/national_reports/Netherlands.pdf, (accessed 10 February 2014).

⁸⁸ Prof. dr. M.B.M. Loos.

⁸⁹ Ibid.

there is a debate in the Netherlands about whether this should be changed.⁹⁰

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

Lawyers are permitted to offer their services on a pro bono basis. However, mainly due to the extensive legal aid regime available to indigent persons in the Netherlands, the nature of the pro bono work in the Netherlands is less focused on indigents and more on interest groups and foundations serving social needs and advocating for human rights, which are not entitled to receive government-subsidised legal aid.

That said, currently only a few (large commercial) law firms in the Netherlands provide pro bono legal services. These law firms often require that the case holds demonstrable social significance or sets a legal precedent.

The Dutch regulatory regime does not generally allow lawyers to provide their services based on a contingency fee.⁹¹

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

An objection to an order of an administrative authority must be made within six weeks of the date on which the order is notified. An appeal to the relevant court must also be made within six weeks of the date on which the order is confirmed by the administrative authority.⁹²

In cases brought against private individuals, the general rule is that a case must be brought within five years of the victim becoming aware both of the injury and the responsible defendant, although some specific claims have their own shorter periods. This is subject to a long stop date of 20 or 30 years, depending on the specific nature of the claim.⁹³

In most civil cases, the period in which a claim must be brought can be extended by writing a letter to the defendant in which the right to performance is unequivocally reserved, by issuing a writ having the same effect, or by issuing proceedings. However, in certain causes of action such as injury in certain public transport accidents, the limitation period can only be stopped by issuing proceedings.⁹⁴

⁹⁰ See P.J.P. Tak, 'Contribution of defendants to the costs of criminal proceedings: summary', https://english.wodc.nl/images/2198-summary_tcm45-456422.pdf, 2012, (accessed 10 February 2014).

⁹¹ See Pro Bono Institute, 'A survey of pro bono practices and opportunities in 71 jurisdictions', <http://www.probonoinst.org/wpps/wp-content/uploads/a-survey-of-pro-bono-practices-and-opportunities-in-71-jurisdiction-2012.pdf>, 2012, pp. 193-6, (accessed 10 February 2014).

⁹² General Administrative Law Act, Articles 6:7 and 6:8(1).

⁹³ Antoinette Collignon-Smit Sibinga, 'Dutch personal injury law', *Negligence and Damages*, Vol. 10, No. 1, August 2011, available at:

http://www.legaltree.nl/site_media/uploads/Dutch_Personal_Injury_Law.pdf.

⁹⁴ Ibid.

In criminal law, there is a time limit of three years for prosecution of misdemeanours, six years for crimes carrying a maximum penalty of three years imprisonment, twelve years for crimes carrying a maximum penalty of between three and ten years imprisonment, but no time limit for crimes carrying a life sentence. Exceeding these time limits will lead to a dismissal of the case.⁹⁵

There are certain provisions in the Dutch Civil Code that allow a claim to be brought to court even after the the claim would normally become inadmissible due to the passage of time. For example, a child who wishes to challenge paternity may do so within three years after it has become clear to the child that the man who has recognised him or her as his child is (presumably) not his or her biological father. However, if the child has discovered this fact before reaching the age of majority, he or she can challenge this paternity up to three years after having come of age.⁹⁶

In a recent decision the Court of Appeal in 's-Hertogenbosch ruled that the claimant's claim for damages was not to be deemed inadmissible for being outside of the statute of limitations. The claimant had been abused as a minor, which had caused PTSS. The court ruled that the claimant was not capable of bringing the claim for damages before the court any earlier than he did. The statute of limitations for the claim brought before the court is five years after the act for which damages were being sought was committed, however, these five years could not be considered to have commenced if the claimant was not *in fact* capable of bringing the claim before the courts.⁹⁷

- E. Evidence. What sort of evidence is admissible/ required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

The general rule in the Netherlands is that all evidence is in principle admissible, unless otherwise provided by law. This means that a wide variety of evidence is admissible, including recordings of telephone calls made without the other party's consent.⁹⁸

A witness who has not yet reached the age of 16 and a witness who is unable to adequately comprehend the meaning of an oath is not required to take an oath. They are then warned to tell the whole truth and nothing but the truth. If evidence is accepted in part on the strength of the statement by the witness, the judgment must make particular mention of the reason for this.⁹⁹

Generally, if the court is concerned that the physical or mental health of a party would be put at risk if they were forced to examine particular documents, or that the privacy of a person would be disproportionately invaded by a party being allowed to examine particular documents, such documents may be examined only by a legal representative

⁹⁵ P.J.P. Tak, *The Dutch Criminal Justice System*, Wolf Legal Publishers, 2008, available at: www.wodc.nl/images/dutch-cjs-full-text_tcm44-350501.pdf.

⁹⁶ Civil Code, Art. 1:200 lid 6.

⁹⁷ Court of Appeal 's-Hertogenbosch 12 May 2015, ECLI:NL:GHSHE:2015:1960.

⁹⁸ J.M. Jeroen, M.J. Chorus, P.I.M. Gerver, E.H. Hondius, *Introduction to Dutch Law*, Kluwer, 2010, p. 257.

⁹⁹ Code of Civil Procedure, Article 203(3).

(who is a lawyer or a doctor).¹⁰⁰

F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

In administrative law matters, the court must give judgment within one week of the hearing. A copy of the judgment must be sent to the parties within two weeks of the date of judgment.¹⁰¹

In civil proceedings, the decision must be given within three weeks of the end of the trial unless the scope or complexity of the matter requires a longer period.¹⁰²

G. Appeal. What are the possibilities for appealing a decision to a higher court?

In administrative matters, a decision of the District Court may be appealed to a higher court, which is usually the Administrative Jurisdiction Division of the Council of State, but may vary (see above).¹⁰³ There are certain specialist appeal courts for social security issues (the Central Board of Appeal) and social economic administrative law (The Board of Appeal for Trade).¹⁰⁴ The timing of such an appeal will be subject to the same requirements as to objections to an administrative decision and appeals to the first-tier administrative court.¹⁰⁵

In civil proceedings, an appeal may be brought before one of four courts of appeal, which may examine all aspects of the decision.¹⁰⁶ The Supreme Court in the Hague is the final court of appeal, but can only rule on points of law and does not re-examine the facts of the case.¹⁰⁷

In criminal proceedings, an appeal may be filed by the accused usually within 14 days. The appeal will be heard by one of the appellate courts, which may examine all aspects of the decision. Further appeal is available to the Supreme Court, which only has power to examine the legal aspects of the decision.¹⁰⁸

When a case has been brought before the judge through the so-called informal route (for which no legal representation is necessary) and the child wishes to appeal the decision by the district judge, the child will need to do so through his or her legal guardians except in cases where the child sought to have a guardian ad litem appointed.¹⁰⁹

H. Impact. What are the potential short-term and long-term impacts of a negative

¹⁰⁰ General Administrative Law Act, Article 8.32.

¹⁰¹ Ibid., Articles 8.67(1) and 79.

¹⁰² Code of Civil Procedure, Section 310.

¹⁰³ T. Barkhuysen, W. Ouden & Y.E. Schuurmans; see also General Administrative Law Act, Article 8.88; E. Minderhoud, S. Nuijten, N. de Munnik & J. Lautenbach.

¹⁰⁴ Conway & Partners, 'Litigation before the Dutch Courts', <http://www.conway-partners.com/en/litigation-before-the-dutch-courts>, (accessed 10 February 2014).

¹⁰⁵ General Administrative Law Act, Article 6.24.

¹⁰⁶ Code of Civil Procedure, Section 358 jo. 261.

¹⁰⁷ Conway & Partners.

¹⁰⁸ P.J.P. Tak, *The Dutch Criminal Justice System*.

¹⁰⁹ Dutch Supreme Court 29 May 2015, ECLI:NL:HR:2015:1409.

decision? Is there a possibility for political backlash or repercussions from a positive decision?

The success of claimants in enforcing their rights under the CRC in the Netherlands means that a political backlash is extremely unlikely.

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

There are no serious concerns about enforcement of a positive decision of the Dutch courts.

- V. **Additional factors**. Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

The cases of 135121/JE RK 12-529 and 16/661343-13 (P) (see part I.E above) involved the CRC being considered alongside the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, respectively. The Dutch courts are experienced at interpreting and applying international treaties, and the Dutch Constitution gives these treaties direct legal status.¹¹⁰ Amongst others, the Netherlands has ratified the following treaties:

- The European Convention on Human Rights;
- The Charter of Fundamental Rights of the European Union;
- The International Covenant on Civil and Political Rights;
- Convention against Discrimination in Education;
- Equal Remuneration Convention;
- Convention concerning Forced or Compulsory Labour; and
- The International Convention on the Elimination of All Forms of Racial Discrimination.

Moreover, the European Social Charter and the judgments of the European Committee of Social Rights are relevant to consider when contemplating legal action to challenge a violation of children's rights in the Netherlands.¹¹¹

Note also that administrative law in the Netherlands is subject to change. For example, the General and Administrative Law was supplemented in 2013 by the Compensation of Damage from Lawful and Unlawful Administrative Decisions Act (effective 1 July 2013) and the Procedural Administrative Law Amendment Act (effective 1 January 2013). Petitioners will need to make sure that they understand their rights and the necessary procedures under any future changes in the law.¹¹²

This report is provided for educational and informational purposes only and should not

¹¹⁰ Constitution, Articles 93 and 94; See also CRIN.

¹¹¹ See e.g. judgment of the Supreme Court 21 September 2012, ECLI:NL:HR:2012:BW5328.

¹¹² General Administrative Law Act, Articles 1.3 and 8.69(a); see also E. Minderhoud, S. Nuijten, N. de Munnik & J. Lautenbach.

be construed as legal advice.