FUNDAMENTAL RIGHTS SERIES

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
(CFR-CDF)
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE NETHERLANDS IN 2003

January 2004

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The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union. The content of this opinion does not bind the European Commission. The Commission accepts no liability whatsoever with regard to the information contained in this document.

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* submitted to the Network by Professor Dr. Rick Lawson, Kirchheiner Chair, *Europa Instituut*, University of Leiden, the Netherlands. The author is grateful for the assistance offered by a research group consisting of Mr Antoine Buyse, Ms Mireille Hagens, Mr Herke Kranenborg, Mr Gijsbert ter Kuile and Mr Felix Ronkes Agerbeek, staff members of the *Europa Instituut*, and by Ms Mieke van Ulden, student assistent.

Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice et affaires intérieures), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lituanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. Slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Dean Spielmann (Luxembourg), Pavel Sturma (Rép. Tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par Olivier De Schutter, assisté par Valérie Verbruggen.
Les documents du Réseau peuvent être consultés via :
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The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), Rick Lawson (The Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Dean Spielmann (Luxembourg), Pavel Sturma (Czech Republic), Ineta Ziemele (Latvia). The Network is coordinated by Olivier De Schutter, with the assistance of Valérie Verbruggen.
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PRELIMINARY REMARKS

For the Netherlands, political turmoil was certainly the main characteristic of 2002 – one only needs to recall the resignation of the cabinet led by Mr Kok, the spectacular rise of the political newcomers *Lijst Pim Fortuyn*, the assassination of their leader Mr Pim Fortuyn days before the general elections, and the very quick fall of the government coalition led by Mr Balkenende. When compared to 2002, 2003 was a relatively tranquil year.

Following new general elections, Mr Balkenende formed a second cabinet, consisting of christian-democrats (CDA), conservatives (VVD) and liberals (D66). This cabinet took office on 27 May 2003. The coalition partners stated their main policy objectives for the coming years in a *Strategisch akkoord* [Strategic agreement] entitled *Meedoen, meer werk, minder regels* [Participate – more jobs – less regulation] The new Government's brief puts an emphasis on issues such as economic growth, effective governance, investments in science and technology, and less bureaucracy. Facing economic stagnation, growing unemployment, an increasing government budget deficit, as well as increasing costs of the health care and pension systems, the new Government announced unprecedented cuts in the budget, totalling 23 billion euro. It is inevitable that the economic choices that were made will have consequences for the social welfare system and thus for the enjoyment of social and economic rights.

Several other elements of the new Government's brief are of special importance for the present report too. They illustrate a change of climate, a move away from the liberal permissive society towards a greater emphasis on social stability, security and individual duties and responsibilities. Thus, considerable attention is devoted to safeguarding personal security, which is characterised as the main task of Government. An intensification of the fight against crime and hooliganism is announced; more attention is to be paid to the transmission of essential norms and values. Tough measures against the production and trafficking of hard drugs are announced. Higher sentences will be introduced, in order to meet societal unrest about, in particular, repetitive criminals and crimes involving young victims. In order to increase the capacity of Dutch prisons, several measures are announced, such as placing several detainees in one cell. The position of the victim in criminal proceedings will be strengthened. It is clear that these restrictive measures are aimed to respond to apparently widespread feelings of unsafety in society. One of the results of the *"Vijfde Belevingsmonitor"* ["Fifth Experience Monitor", which is the outcome of research commissioned by the Government] is that over 60% of the population are of the opinion that the authorities should do more to secure safety in public spaces. CCTV is appreciated by 45% of the interviewees (*Staatscourant,* 11 August 2003). An obligation to prove one's identity when asked by law enforcement officials, applicable to all from the age of 14, is now being considered in Parliament.

The new Government's brief also devotes a substantial part to the issue of immigration and the integration of immigrants into Dutch society. According to the Government, mutual respect, tolerance and the combating of discrimination are indispensable for maintaining social cohesion. Immigrants who want to settle in the Netherlands must learn Dutch, share the country's basic values and abide by its norms. Newcomers will have to master a basic knowledge of Dutch in their home country prior to coming to the Netherlands. Asylum seekers will only be granted a permanent refugee status after passing an *inburgeringsexamen* [exam on integration into society]. To form a family with foreigners will become more difficult, with an age limit of 21 and a requirement that the person based in the Netherlands will at least earn 120% of the minimum wage. A larger effort will be made to remove asylum seekers whose request is rejected, to fight the illegal presence of aliens and to prosecute those who exploit illegal aliens. On the other hand the new Government's brief announced that a residence permit would be granted to those who, due to inactivity of the authorities, had been waiting for more than five years for a decision on their request for asylum.

Yet – if one looks back at 2003, a mixed image appears. Admittedly, the balance between individual freedom and public safety is shifting, to the detriment of the former, and the overall attitude towards immigrants and minorities is less than hospitable. There are various reasons for concern: the proposal to have detainees share one cell; the 'accelerated procedure' that is used to process requests for asylum; the situation of so-called unaccompanied asylum seeking minors. Apart from all new plans and legislative proposals, it is perhaps also telling that Government ministers found it appropriate to comment on individual criminal cases (see Article 49 *infra*), to applaud shopkeepers who used considerable violence when stopping a shoplifter (see Article 3 *infra*), and to criticise satirical TV programmes (see Article 13 *infra*).

In a similar mood, the head of police of The Hague called for higher sentences for offenders belonging to minorities, since, in his view, they are less sensitive to punishment than autochthonous Dutchmen. The Minister of Justice expressed support for this proposal in November. Also in November the city of Rotterdam announced that it was no longer willing to house new immigrants; the authorities felt that the city could not absorb them anymore. The head of police of Amsterdam suggested in December to strip serious criminals of their civil rights by taking away their passport and driving licence and by subjecting them to constant monitoring. In his view, criminal law measures are no longer sufficient to stop crime.

There are, however, many positive developments to be noted too: the adoption of new statutes such as the *Wet internationale misdrijven* [International Crimes Act] (see Article 4 *infra*), and an act increasing sanctions on structural forms of discrimination (see Article 21 *infra*). The Government commissioned independent scientific research into the well-being of prisoners (see Articles 4 and 6 *infra*) and the safety of women and girls at centres for asylum seekers (see Article 19 *infra*). The fact that the Public Prosecutor's Office immediately started an in-depth investigation of an incident in the south of Iraq, where a Dutch soldier was arrested after having killed an Iraqi civilian (see Article 2 *infra*), represents a faithful application of the requirements flowing from the right to life. The courts continued to give a high level of protection to individual rights such as the freedom of expression and equal treatment (see Articles 11 and 20 *infra*). In addition the courts found a pragmatic and flexible solution to compensate a person whose detention conditions had been found to violate Article 3 ECHR: his prison sentence was reduced, although the law did not provide for such an early release (see Article 4 *infra*).

Likewise it can be noted that the authorities are willing to listen to criticism. When Human Rights Watch published a very critical study on Dutch asylum policy, Parliament organised a hearing where NGO's could voice their concerns. A controversial legislative proposal, introducing an obligation to prove one's identity when asked by law enforcement officials, was submitted to a number of institutions for comments during the drafting stage. Several critical comments from the Dutch Data Protection Authority and the National Bureau against Racial Discrimination led to amendments of the draft even before it was submitted to Parliament.

Finally it can be noted that the European Committee of Social Rights, in reviewing a number of 'non-hard-core' provisions of the European Social Charter reached six conclusions of non-conformity. Leaving this aside, international human rights bodies did not find any serious violations of human rights in The Netherlands – with one exception: the cases of *Van der Ven* and *Lorsé v. the Netherlands* where the European Court of Human Rights found that certain elements of the regime applicable to detainees in a high security institution amounted to inhuman or degrading treatment (Article 3 ECHR).

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When collecting materials for the present report, I was assisted by a considerable number of my colleagues of the *Europa Instituut* of the University of Leiden. I am grateful to them all. In addition to the 'obvious' official sources (legislative proposals, parliamentary records, case law and so on), I had the benefit of submissions by a number of institutions and NGO's:

- the *Commissie gelijke behandeling* [Equal Treatment Commission]
- the *Anne Frank Huis* [Anne Frank House]
- the Dutch Monitoring Centre on Racism and Xenophobia (DUMC)
- the *Landelijk Bureau ter bestrijding van Rassendiscriminatie* [National Bureau against Racial Discrimination]
- the *Nederlandse Orde van Advocaten* [Dutch Bar Association]
- the *Nederlandse Vereniging van Journalisten* [Dutch Association of Journalists]

THE *NEDERLANDSE VERENIGING VAN STRAFRECHTADVOCATEN* [DUTCH ASSOCIATION OF CRIMINAL DEFENSE LAWYERS]
THE *NEDERLANDS JURISTEN COMITE VOOR DE MENSENRECHTEN* (NJCM) [DUTCH SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS]
VLUCHTELINGENWERK NEDERLAND [DUTCH REFUGEE COUNCIL]

I am extremely grateful for the kind cooperation of these organisations. In addition, I used publications of, *inter alia*, the *Nationale Ombudsman*, Human Rights Watch and UNHCR. In 2003 no reports on the Netherlands were published by Amnesty International and by the Centre for the Independence of Lawyers and Judges.

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Note for readers – Readers will frequently find references to "LJN numbers" when Dutch case-law is discussed. These numbers allow the reader to retrieve the full text of the judgments (in Dutch) on the excellent web site www.rechtspraak.nl.

In drafting the present report, the Network's format was followed: developments in the Netherlands from 1 December 2002 to 1 December 2003 were described and analysed from the perspective of each of the provisions of the EU Charter of Fundamental Rights. Some of these provisions overlap at least to a certain extent: Articles 7 and 8, Articles 20, 21 and 23, Articles 47 and 48. It was decided to concentrate the discussion of relevant developments under one of these provisions, and to include a mere reference under the other articles. Discrimination based on religion, which could have been described in relation to Article 10 (freedom of thought, conscience and religion), is dealt with under Article 21 (non-discrimination).

The information has been categorised along the Network's regular sub-headings (international case-law, national legislation, national practice, reasons for concern). However, where there were no significant developments to report, the sub-headings have been omitted so as to safe space and to enhance the Report's 'readability'.

The subheading 'practice of national authorities' is occasionally used to give an account of developments in society that clearly affect the enjoyment of the rights concerned, such as discrimination or private violence – even though private actors rather than 'national authorities' are responsible.

Finally, in order to facilitate quick access to the information, each item is preceded by a key word in *italics*.

It is hoped that the present Report, within the constraints of its size, provides a useful description and analysis of the most important developments in the Netherlands; hopefully those who are concerned with the protection of human rights recognise the picture that emerges from these pages. All comments are, of course, most welcome. Our ambition is to improve the quality of our reports every year – this we owe to the importance of fundamental rights.

CHAPTER I : DIGNITY

Article 1. Human dignity

National legislation, regulation and case law

"*Wrongful-life"* – On 26 March 2003 the *Gerechtshof* [Court of Appeal] of The Hague delivered its judgment in the *Kelly* case (LJN AF6263). This case concerns the birth of a baby with serious mental and physical handicaps. During pregnancy the mother requested, on two occasions, prenatal examination: she had had several miscarriages before and her family was known to have chromosomal abnormalities. The midwife, however, refused to order prenatal examination. The Court of Appeal concluded that the failure to perform the examination constituted a medical error for which the midwife and the hospital were liable. Claims for compensation of both the parents and the child were allowed.

The case – which has similarities to the French *Perruche* case, decided by the *Cour de cassation* in 2000 – was widely publicised. In reaction to parliamentary questions the Minister of Justice indicated that, in his view, the judgment in *Kelly* did not contravene the right to life as protected by Article 2 ECHR. The essence of *Kelly* is that liability resulted from the midwife's professional error not to order prenatal research despite serious indications. As a consequence the mother was deprived of the possibility to choose for abortion (*Handelingen II*, 2002-2003, *Aanhangsel* 1203 - 1205).

Subsequently the Minister of Justice and the State Secretary of Health elaborated on the potential consequences of *Kelly* in relation to progressive developments in prenatal research. In a memorandum submitted to Parliament they stated their disapproval of any potential claim for compensation of a child against its parents in case the parents failed to request prenatal research or decided not to terminate a pregnancy, as a result of which the child was born with serious abnormalities. Whilst not wishing to anticipate the decision of the *Hoge Raad* [Supreme Court] in *Kelly*, they emphasised that parents are not obliged under Dutch law to have prenatal examinations performed, nor to terminate a pregnancy after prenatal research has indicated an abnormality of the baby. Even taking into account the duty of parents to care for the state of health of the unborn child, few judicial options exist to set aside the right of the parents to self-determination regarding their unborn baby forcing them to undergo a prenatal examination or to terminate the pregnancy. Since the *Wet afbreking zwangerschap* [Termination of Pregnancy Act] does not guarantee a right to abortion, the decision of the mother not to opt for an abortion cannot result in a tort claim by the child. The same is true in case the parents fail to have prenatal research performed, thereby depriving themselves of the option to terminate the pregnancy (*Kamerstukken II,* 2003-2004, 29 200 VI, no. 61).

Article 2. Right to life

International case law and concluding observation of international organs

Death penalty – Protocol 13 to the European Convention of Human Rights, abolishing the death penalty under all circumstances, entered into force on 1 July 2003. By now 20 countries have ratified the Protocol. Perhaps somewhat surprisingly, the Netherlands – which signed the text on 30 May 2002 – is not among them. A bill proposing ratification is expected to be submitted to Parliament in 2004.

National legislation, regulation and case law

Euthanasia – Euthanasia continued to be a controversial issue in the year following the entry into force of the *Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding* [Life Termination on Request and Assisted Suicide (Review) Act] (*Staatsblad* 2001, 194 and 2002, 165). The new Government's brief (see our preliminary remarks) indicates that the 2002 Act will not be repealed, but states that more attention must be paid to palliative care.

On 3 June 2003 the *Gerechtshof* [Court of Appeal] of Amsterdam convicted a general practitioner for ending a patient's life without the latter's request (LJN AF9392). The patient, who was in coma, was in the process of dying under very degrading circumstances. She did not, however, request the doctor to end her life, which means that by definition his intervention could not qualify as euthanasia within the meaning of the 2002 Act. The Court of Appeal did not exclude that there may be exceptional circumstances where it is permissible for a doctor to terminate life without the patient's request, but it added that in these cases a number of conditions must be observed in order to secure a careful analysis of the situation. In the instant case these conditions had not been satisfied.

In response to the judgment, the *Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst* [Royal Medical Association of the Netherlands] called for the speedy adoption of adequate procedures for reporting and reviewing these situations. The question is not entirely new: the situation of, for instance, new-born babies was discussed when preparing the 2002 Act. The Government announced that it will soon adopt its position on this matter (*Kamerstukken II,* 2002-2003, 28600 XVI, no. 152).

A related issue on which the Government will have to take a stance soon, is terminal sedation, i.e. offering drugs to terminally ill patients with the intention of making their last days or hours bearable and free of pain. This treatment may lead to the patient's death, especially when accompanied by the decision to withhold artificial feeding, but it is unclear whether this situation falls within the scope of the euthanasia act. The Medical Association argues that it does not, since the doctor's intention is not to terminate life but to diminish the patient's suffering. These would therefore be matters for the medical profession itself to regulate. The Minister of Justice and the State Secretary of Health agreed in substance (*Handelingen II*, 2002-2003, *Aanhangsel* 1751). On the other hand, things are different if terminal sedation is used with the aim of terminating the patient's life – then the euthanasia act *is* applicable. The Government will return to this matter (*Kamerstukken II,* 2002-2003, 28600 XVI, no. 152).

Practice of national authorities

Lethal force in Iraq – In December 2003 an incident occurred in the south of Iraq, where Dutch troops are stationed as part of the Multilateral Stabilisation Forces pursuant to UN Security Council Resolution 1483 (2003). In the incident, where Dutch troops intervened when a group of Iraqi civilians were pillaging a container, an Iraqi was shot by a Dutch soldier and died. An investigation was carried out immediately; the soldier concerned was arrested and brought back to the Netherlands. The *Openbaar Ministerie* [Public Prosecutor's Office], which is in charge of the investigations, announced early January 2004 that the soldier may be charged of murder or manslaughter. It appears that he shot the Iraqi from long distance, hitting him in the back, at a moment that there was no immediate danger to any Dutch soldier. At the time of writing this report, the investigations are still in process.

The reaction of the Dutch authorities is interesting, also taking into account that similar incidents involving troops from other countries do not seem to have triggered such an in-depth investigation. Dutch forces in Iraq appear to react with frustration, since they feel uncertain as to their possibilities to apply force in difficult circumstances. On the other hand, it is submitted that the investigation is perfectly in line with the obligations flowing from

Article 2 ECHR (see for instance the *Kelly v. the UK* judgment of 4 May 2001, application no. 30054/96, paras. 91-98). It is clear from the Strasbourg case-law that these obligations also apply to Dutch forces in the present circumstances, where they effectively control the relevant territory and its inhabitants and "exercise all or some of the public powers normally to be exercised by the Government" (Eur. Ct. H.R., 19 December 2001, *Bankovic a.o. – Belgium and 16 other Contracting* Parties (adm. dec.), application no. 52207/99, para. 71; see also the case of *Behrami v. France*, application no. 71412/01, now pending).

Article 3. Right to the integrity of the person

National legislation, regulation and case law

Embryos –The new Government's brief (see our preliminary remarks) expressly states that the existing prohibition on especially creating and using embryos for scientific research and for other purposes than bringing about pregnancy will be maintained.

Artificial insemination – When a woman becomes pregnant by artificial insemination, Dutch law does not regard the donor as the father (Article 1:199 of the *Burgerlijk Wetboek* [Civil Code]). Article 1:204 of the Civil Code provides that a man can recognise a child who is not yet sixteen years old as his, if the mother gives prior written permission. If the mother's permission is lacking, it may be replaced by the permission of the Regional Court (Article 1:204 § 3). However, the man who seeks such permission must be the child's biological father; in addition, recognition must not be detrimental to the mother's relationship with the child or to the child's own interests.

In January 2003 the *Hoge Raad* [Supreme Court] dealt with a case where the donor wanted to recognise the child, but the mother refused to give him permission since she wanted her female life companion to adopt the child. After the *Rechtbank* [Regional Court] of Utrecht had granted joint parental authority to the mother and her life companion, the donor started court proceedings to obtain judicial permission to recognise the child, as provided for by Article 204 § 3 Civil Code. The *Gerechtshof* [Court of Appeal] of Amsterdam rejected his request, considering that the procedure of Article 204 § 3 was intended for biological fathers but not for 'mere' donors.

The Supreme Court agreed with this interpretation of Article 204 § 3. At the same time it accepted that the tie between the donor and the child may well amount to "family life" within the meaning of Article 8 ECHR, irrespective of the way in which the pregnancy was brought about. But even if Article 8 ECHR applied, that was not decisive. The Supreme Court found that in this case the mother had not abused her power to refuse permission since she herself had an interest that should be respected by law: the fact that she intended to form a family unit with her life companion, who was in the process of adopting the child (*Hoge Raad*, 24 January 2003, LJN AF0205).

Practice of national authorities

In 2003 public opinion was shocked again on a number of occasions by a phenomenon that became known as *zinloos geweld* [to be translated as 'violence without a purpose' or 'random violence'], i.e. situations where individuals were attacked – and sometimes even killed – by others without an obvious reason. Clearly it is extremely difficult for the authorities to prevent these incidents. There is a clear increase in the use of video surveillance (see also Article 8 *infra*) and of *preventief fouilleren* [whereby all persons and cars present in a designated area are searched for the possession of arms and drugs, irrespective of the existence of concrete suspicions] – but there are limits to these methods, both in terms of police resources and in terms of privacy and the presumption of innocence.

In January 2003 an incident occurred where two youngsters working in a supermarket pursued and caught a shoplifter. The police arrested the shoplifter, but also the two staff members who were believed to have used disproportionate violence while stopping the shoplifter and who continued to kick him after he was arrested by the police. When the public prosecutor decided to prosecute the two men (in addition to the shoplifter), protests were voiced: it was argued that shopkeepers should be able to defend their property if the police are unable to do so. This criticism did not seem to take into account the counter-argument that *disproportionate* violence should never be accepted. The case took a remarkable turn when the Minister of the Interior, Mr Remkes, publicly stated that he could understand if a shopkeeper gave a *rotschop* [a serious kick] to a shoplifter – and when he was even joined by Prince Bernhard (the father of Queen Beatrix) who offered to personally pay any fine that was to be imposed on the two supermarket staff members.

Indeed, after a penalty of 600 euros was imposed by the *Rechtbank* [Regional Court] of Amsterdam, Prince Bernhard paid this sum to the convict. This gesture was criticised – rightly so, it is submitted – since it might be taken as official tolerance or even encouragement of 'private justice', and at the same time as undermining public confidence in the police, the public prosecutor's office and the judiciary. The unacceptable consequences of a trend whereby private individuals seek to take justice in their own hands were made clear on 6 October 2003, when a customer was kicked and beaten to death by a group of youngsters working in a shop. They believed – wrongly, as it turned out – that the customer had stolen items from the shop. Arguably their conduct was influenced by the fact that the customer was a well-known addict to hard-drugs living in the neighbourhood, but that is of course not a justification at all.

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

International case law and concluding observation of international organs

Detention conditions – The cases of *Van der Ven* and *Lorsé v. the Netherlands* concerned the position of detainees in high security institutions. The two applicants, who were detained in the *Extra Beveiligde Inrichting (EBI)* in Vught, the Netherlands, complained, in particular, about the lack of human contact. Visits were generally only authorised with a glass partition in place. "Open visits" of spouses, parents and children were allowed only once a month; the only physical contact permitted was a handshake at the beginning and end of the visit. In addition inmates were strip-searched prior to open visits. Strip-searches also took place prior to visits to the clinic, hairdresser or dentist. On top of that detainees were subjected to strip search once a week, including an anal inspection, even where they had had no contact with the outside world in the previous week. The applicants alleged that this regime had a negative effect on their psychological stability.

The Court accepted the need to have high security institutions. In the instant case it could not find that the applicants were subjected either to sensory isolation or to total social isolation. However, considering that the applicants were already subjected to a great number of control measures, and in the absence of convincing security needs, the Court found that the practice of weekly strip-searches that was applied for a period of approximately three-and-a-half years in the case of Mr Van der Ven and more than six years in the case of Mr Lorsé diminished their human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing them. Accordingly, the Court concluded that the combination of routine strip-searching with the other stringent security measures in the EBI amounted to inhuman or degrading treatment, in violation of Article 3 ECHR. On the other hand, no violation of Articles 8 (right to respect for family life) and 13 (right to an effective remedy) was found (Eur. Ct. H.R., *Van der Ven* and *Lorsé v. the Netherlands*, judgments of 4 February 2003, application nos. 50901/99 and 52750/99).

It is interesting to note how the Dutch authorities responded to these judgments – the first occasion for the Netherlands to be held in breach of Article 3 ECHR. The Minister of Justice, replying to parliamentary questions, stated the number of strip-searches had already been lowered in 1999, after Van der Ven and Lorsé had lodged their complaints. Following the Court's judgment, the Minister announced that the practice of weekly strip-searches during prolonged periods would be ended (*Handelingen II*, 2002/03, *Aanhangsel* 853). However, a number of EBI inmates brought judicial proceedings against the new rules, which they believed to be still incompatible with Article 3 ECHR. The *Rechtbank* [Regional Court] of The Hague, in a decision of 7 July 2003, showed understanding for their concerns. It observed that under the 'new system' random strip-searches may also be applied to those who had already been subjected to the 'old' system for a prolonged period of time. The new system was therefore unlawful to the extent that it did not take into account specific circumstances (such as the length of their stay in the EBI, the impact of the visitations on the detainee, the reasons for subjecting a specific detainee to a random search and so on) (LJN AH9275).

Still on the conditions prevailing in the EBI, the *Wetenschappelijk Onderzoeks- en Documentatiecentrum* [Research and Documentation Centre of the Dutch Ministry of Justice] published a study on the psychological consequences of the EBI regime. The study, in which 79% of the inmates participated, was carried out by researchers from the Free University of Amsterdam. The researchers observed a lower level of cognitive functioning, more depressions, sleep disturbances and a high level of distrust between inmates and guards. The latter element was exacerbated by the visitations and strip-searches, which were perceived by the inmates as humiliating and intimidating. On the other hand, EBI inmates had a better day/night rhythm than inmates of the reference group, possibly because of more extensive sports facilities. Although many inmates complained of stress, objective proof (such as higher cortisol levels) was not established. The study recommended adjustments in the regime that would improve the interaction between inmates and guards and that would enable inmates to exercise control, at least to some extent, over their stay in the EBI. (Report "De psychische conditie van gedetineerden in de Extra Beveiligde Inrichting en de afdeling voor Beperkt Gemeenschapsgeschikte Gedetineerden in PI Nieuw Vosseveld in Vught", of 9 October 2003; www.wodc.nl).

Meanwhile Mr Lorsé himself, having won his case in Strasbourg, successfully applied for an early release. Despite the absence of a formal legal basis, the *Rechtbank* [Regional Court] of The Hague decided that the seriousness of the violation of Article 3 justified a reduction of 10% of the prison sentence. The *Hoge Raad* [Supreme Court] agreed with this pragmatic and flexible solution in its judgment of 31 October 2003 (LJN AI0351). The *Hoge Raad* observed that Mr Lorsé was entitled to compensation after the European Court of Human Rights had found a violation of Article 3 in his case. Compensation may take the form of a pecuniary amount, but it may also take other forms, such as early release. This conclusion was not altered by the fact that the judgment imposing a prison sentence on Mr Lorsé was final and that the State authorities were obliged to comply with that judgment as well.

Note: on detention issues, see also Article 6 *infra.*

National legislation, regulation and case law

Fight against impunity – On 1 October 2003 the *Wet internationale misdrijven* [International Crimes Act] entered into force (*Staatsblad* 2003, 270; *Kamerstukken* 28 337). The Act is obviously related to the establishment of the International Criminal Court in The Hague. It applies, *inter alia*, to genocide, crimes against humanity and war crimes. The maximum sentence that can be imposed under the Act is life imprisonment. The Act extends to acts committed outside the Netherlands, irrespective of the nationality of the suspect. Where the suspect does not have Dutch nationality, criminal proceedings can only be brought if he is present in the Netherlands. The Act will not affect immunities traditionally existing under public international law, i.e. for heads of State or Government and diplomats.

Pre-trial detention conditions – The criminal proceedings against Mr Volkert van der G., suspected of the assassination of political leader Pim Fortuyn in May 2002, attracted a lot of publicity. One of the remarkable issues in this case (see Article 49 *infra* for some other elements) was the extraordinary strict regime that was applied to the suspect before and during the trial. In order to minimise the risk of an assault by other detainees or of a suicide attempt, Mr Van der G. was subjected to permanent camera surveillance and isolation. In its judgment – in which it confirmed the prison sentence of 18 years – the *Gerechtshof* [Court of Appeal] of Amsterdam admitted that these conditions were severe, but found that they did not infringe Articles 3 and 8 ECHR (LJN AI0123).

Note: on detention issues, see also Article 6 *infra.*

Practice of national authorities

Use of force by the police - In his report on 2002, published in March 2003, the *Nationale Ombudsman* stated that he had received 19 complaints on the use of force by the police (*Kamerstukken II,* 2002-2003, 28825, no. 2, p. 244). In four of these cases he agreed that the complaint was well-founded. In five other cases the Ombudsman found that detention facilities in police stations were not acceptable.

Article 5. Prohibition of slavery and forced labor

National legislation, regulation and case law

Human trafficking – Parliament is currently considering a bill with a view to expanding the scope of the prohibition on human trafficking and raising the applicable sentences (*Kamerstukken II*, 2003-2004, 29291).

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

International case law and concluding observation of international organs

For the cases of *Van der Ven* and *Lorsé v. the Netherlands*, concerning detention conditions in a high-security prison, see Article 4, *supra*.

National legislation, regulation and case law

Detention: sharing cells – The Government has announced that the capacity of Dutch prisons will be increased with another 6000 places in the coming 5 years. One of the ways to achieve this is by placing several detainees in one cell. To that end a bill was submitted to Parliament in June 2003 (*Kamerstukken II,* 2002-2003, 28 979). The Government argue that international human rights law is not opposed to sharing cells. Admittedly Article 14 of the European Prison Rules provides that detainees "shall normally be lodged during the night in individual cells except where it is considered that there are advantages in sharing accommodation with other prisoners" – but the Government underlines that the Rules are not legally binding. The Government assured that the Netherlands will "uiteraard" [of course] not be confronted with situations such as those examined by the European Court of Human Rights in the case of *Kalashnikov v. Russian Federation* (2002).
The proposed measure is controversial – not only because placing more than one convict in a cell was for a long time inconceivable in the Dutch context, but also because of the risks for

the atmosphere in prisons and for the safety of personnel and inmates. In May 2003, prison directors advised against this proposal (*Staatscourant* 16 May 2003)

Anticipating the proposed changes in the law, a trial project was scheduled to start in Autumn. Prison personnel tried to prevent this by bringing judicial proceedings. On the one hand they argued that the consultation of the personnel had not been sufficient; on the other hand they felt that the insufficient measures were taken to compensate the consequences for personnel of the use of shared cells. After the *Gerechthof* [Court of Appeal] of Amsterdam had rejected their complaints (judgment of 3 July 2003, LJN AH9170), the trial project started in October. Detainees were asked to share cells on a voluntary basis. More than 60 detainees participated in the prison of Tilburg; by the end of the year 450 detainees are expected to share a cell.

Detention: general conditions – A new system concerning the day programmes and activities of detainees was introduced on 15 September 2003 (*Staatsblad* 2003, 349). According to the *progressieve regimesopbouw* [progressive regime structure], every detention situation will start in a basic institution with a rather restrictive regime. This will apply in principle to those serving a short-term prison sentence. Those serving for a longer term may move on to an institution with a more elaborate regime. In addition, an attempt will be made to accommodate to the individual characteristics of each detainee. Tailor made regimes might help to diminish the number of habitual offenders.

Meanwhile the first "detainees survey", entitled "Gedetineerd in Nederland 2003" ["Detained in the Netherlands - 2003"], was published on 19 November 2003. This survey involved some 10,000 detainees, from among the entire prison population, who were asked questions concerning their well-being. The aim is to identify differences between institutions and – following new surveys in the future – to map out trends. Some 60% responded. Generally speaking detainees feel safe; neither theft nor threats and sexual intimidation by fellow inmates seem to occur, or only very infrequently. The relationship between detainees and their guards is fairly good; guards are said to treat detainees in a friendly and humane fashion. On average those detainees taking part in the survey were 33 years old. About half of them (57%) was born in the Netherlands; 9% is from Surinam, 8% from the Netherlands Antilles, 6% from Morocco and 5% from Turkey. A bit less than half was detained for the first time.

Detention: confining drugs runners – In our 2002 Report attention was paid to the serious problems posed by the very high number of drug traffickers arrested at Schiphol international airport. In 2002 2165 persons were arrested, carrying over 6200 kilo of cocaine. In response to these developments an act was adopted so as to allow the detention of drugs traffickers in fairly basic accommodations: the *Tijdelijke Wet Noodcapaciteit Drugskoeriers* [Temporary Act on Emergency Capacity Drug Traffickers].

In March 2003 the applicability of the Temporary Act was prolonged with another two years, i.e. until 8 March 2005 (*Staatsblad* 2003, 95; *Kamerstukken* 28627). In some respects the detention regime was somewhat relaxed. The Minister of Justice announced an investigation into the experiences of drugs traffickers who had to share cells. In the *Kamp Zeist* emergency prison, the number of inmates who had to share a cell was to be brought back from 6 to 4.

Detention: confining aliens facing deportation – see Article 19 *infra*.

Pre-trial detention – see Article 47 *infra* for discussion of bill extending the length of pre-trial detention whilst limiting the number of hearings of the suspect.

Reasons for concern

The policy decision to place several detainees in one cell is a reason for concern. It is true that international human rights law is not opposed to sharing cells; several countries that are party to the European Convention of Human Rights have operated this system for a long time. It is equally true, however, that the Strasbourg Court is increasingly critical when it comes to detention conditions (overcrowding, hygiene), the treatment of prisoners and the protection of prisoners against inter-inmate violence. Cases such as *Dougoz* (2001), *Peers* (2001), *Price* (2001), *Keenan* (2001), *Mouisel* (2002), *Edwards* (2002), *Kalashnikov* (2002), *McGlinchey* (2003), Pantea (2003), *Kuznetsov* (2003), *Yankov* (2003) – and let's not forget the Dutch cases *Van der Ven* and *Lorsé* (2003) – may serve as an illustration.

It will be of utmost importance that the prison authorities carefully select the detainees who are to share accommodation and keep a close eye on the situation in the cells. A 'system failure' may easily lead to accidents with severe – and sometimes even fatal – consequences. It is to be hoped that the prison authorities, which are facing substantial reductions in their budgets too, will be in a position to discharge their obligations under the European Convention.

Article 7. Respect for private and family life

International case law and concluding observation of international organs

Recording telephone conversations – Two cases before the European Court of Human Rights are worth mentioning: *M.M.* (judgment) and *Doerga* (admissibility decision).

In *M.M.* the Netherlands was found to have infringed Article 8 ECHR when police officers induced a woman to tape telephone conversations with an *advocaat* [attorney, *avocat*], Mr M.M., who she claimed had assaulted her. The woman was the wife of M.M.'s client, who was imprisoned. Afraid that no-one would believe her, the woman turned to the police for help. The police gave her a tape recorder, instructed her on how to use it, came to her house to change the tapes, and made transcriptions. Although the subsequent telephone conversations between M.M. and the woman were between two private individuals, the Court noted that the police had made a crucial contribution to the execution of the scheme. The police officers acted in their official function and thus the Netherlands was responsible for their conduct. Since the normal procedure for obtaining permission to tap telephone conversations had not been followed, it was clear that there was no legal basis for recording the conversations in the instant case. Thus Article 8 was violated (Eur. Ct. H.R., *M.M. v. The Netherlands* judgment of 8 April 2003, application no. 39339/98).

The case of *Doerga* concerns telephone conversations of a prisoner, Mr Doerga, which were taped and not immediately erased. These tapes were later used in criminal proceedings against Mr Doerga regarding a car bomb aimed at his ex-girlfriend. Mr Doerga claimed that not erasing the tapes infringed the Prison Protocol and that the evidence was thus illegally obtained, which prevented its use in criminal proceedings. The *Hoge Raad* [Supreme Court] rejected the argument. The European Court of Human Rights on the one hand did not find an infringement of Article 6 ECHR, considering *inter alia* that Mr Doerga had had all opportunity to contest the legality and reliability of tapes and that there was other evidence. On the other hand, Mr Doerga's complaint concerning Article 8 ECHR was declared admissible (Eur. Ct. H.R., *Doerga v. The Netherlands* (dec.), application no. 50210/99, 23 September 2003).

Family life – In the case of *Venema* a number of incidents occurred with a young child. Doctors suspected that the mother might be suffering from the Münchhausen by Proxy

syndrome. Since it was believed that the child's life was at risk and that urgent action was required, the *kinderrechter* [juvenile judge] made a provisional supervision order, without hearing the parents, and ordered the child to be placed away from her family. Later the juvenile judge issued a further order, again without hearing the parents, for the child to be taken to a foster home. The measures were rescinded after some six months, following advice from psychiatrists. The case led to questions in Parliament. The *Staatssecretaris van Justitie* [Deputy Minister of Justice] ordered an official enquiry, which led to the conclusion that although the authorities had no doubt sought in good faith to protect the child's interests, they might "have displayed more creativity in seeking a solution that did more justice to the parents' interests". The European Court accepted that, when action had to be taken to protect a child in an emergency, it might not always be possible, or even desirable, to associate in the decision-making process those having custody of the child. However, it was not clear why in this case no arrangements could have been made to discuss the concerns with the parents and to give them an opportunity to dispel those concerns. For the Court, it was crucial for the parents to be able to put forward their own point of view at some stage before the making of the provisional order. Finding that the competent authorities had presented the parents with *faits accomplis* without sufficient justification, the Court held that there had been a violation of Article 8 (Eur. Ct. H.R., *Venema v. the Netherlands* judgment of 17 December 2002, application no. 35731/97).

National legislation, regulation and case law

Identification – One of the most controversial topics concerning privacy in 2003 is the introduction of an obligation to prove one's identity when asked by law enforcement officials. On 23 September 2003 a bill on this matter was submitted to Parliament (*Kamerstukken II,* 2003-2004, 29 218). The aim of the proposal is to improve law enforcement by the police and other supervisory institutions. The bill does not create extra competencies in the field of immigration control. Only where the police have a reasonable suspicion, to be determined by objective standards, of illegal residence are they allowed to check one's identity. No new identification document will be introduced; a passport, identity card or driver's licence will suffice. It is a criminal offence not to be able to identify oneself; a maximum fine of 2250 euro is anticipated.

Before the bill was submitted to Parliament, a draft was submitted to a number of institutions. In its advise of 12 February 2003, the *College bescherming persoonsgegevens (CBP)* [Dutch Data Protection Authority] stated that the infringement of the right to privacy was not sufficiently justified. In addition the CBP was of the opinion that the applicability of the law should be raised from the age of 12 – which was originally foreseen by the draft – to at least 16 (z2002-1486, www.cbpweb.nl). By way of compromise the age of 14 was then introduced in the bill as submitted to Parliament.

Critical remarks were also made by the *Landelijk Bureau ter bestrijding van Rassen-discriminatie (LBR)* [National Bureau against Racial Discrimination]. LBR feared that the new powers might be exercised in a discriminatory fashion. It stressed that a selection on the basis of colour, language or ethnic characteristics was to be avoided. The Government was sensitive to these concerns and added a passage in the *Memorie van Toelichting* [Explanatory Memorandum] emphasising that the new act must not lead to situations where individuals are asked to identify themselves arbitrarily or without proper reasons. In case an individual cannot identify himself and a fine is imposed, the police officer must indicate in his *proces-verbaal* [official record] why he checked this person's identity and why this was necessary for a proper performance of his duties. This should enable the courts to review whether the officer was justified in asking for identity papers. If, on the other hand, the individual can identify himself so that no fine is imposed, and consequently no *proces-verbaal* will be drawn up, a special procedure it will be available to lodge a complaint about the discriminatory use of police powers. In addition one can lodge a complaint with the *Nationale Ombudsman*.

Finally, the Government announced an evaluation of the new act after three years. LBR reacted positively to the amendments, but announced at the same time that it would closely monitor the application of the new act, once it enters into force.

On 9 December 2003, the *Tweede Kamer* [House of Representatives] agreed to the proposal, which was then submitted to the *Eerste Kamer* [Senate] for consideration.

Searches – In May the *Hoge Raad* [Supreme Court] ruled on a case where the police had searched a house without the warrant that is normally required by Dutch law (Article 2 of the *Algemene wet op het binnentreden*). The *Hoge Raad* confirmed that a warrant would have been necessary. However, in this particular case the search was executed after an international request which was based on an treaty on international judicial cooperation. In these circumstances, complying with the request could only be refused when the search had violated fundamental principles of Dutch criminal procedural law. This was not the case, according to the Hoge Raad, also because a *rechter-commissaris* [examining magistrate] had been present during the search (*Hoge Raad*, 13 May 2003; LJN AF4255).

The *Rechtbank* [Regional Court] of Rotterdam decided, in a judgment of 18 June 2003, on the search of offices of notary lawyers who were suspected of price fixing by the Dutch competition authority. Although the searches were carried without search warrant, the Court did not find a violation of Article 8 ECHR (LJN AH9702).

Recording conversations – In a case that has some resemblance with the case of *M.M.* described above, taped conversations of a suspect of manslaughter were used in evidence. The conversations had been secretly taped by his neighbours using their "baby phone". The suspect, who had been convicted on the basis of the tapes, argued that this evidence was illegally obtained and thus should not be admitted. However, the *Hoge Raad* [Supreme Court] observed that there was no indication that police had induced the neighbours to tape these conversations. Rather, they had taped the conversations and presented it to police out of their own motion. In this respect the case can of course be distinguished from *M.M.*. The taping by the neighbours may have been illegal vis-à-vis the man, the Supreme Court reasoned, but the fact that police used recordings of these conversations, did not constitute an infringement of proper proceedings. Neither were the rights of defence violated, since the suspect was allowed to dispute the contents of the tapes (*Hoge Raad*, 14 January 2003; LJN AE9038).

On telephone taps, see also Article 48 *infra.*

Camera at the work place – A man was convicted of steeling cans of paint from his employer, after the theft had been recorded by the employer's CCTV. Reviewing the case, the *Hoge Raad* [Supreme Court] reiterated its case-law: it may be illegal for members of the public to tape or record others, but that in itself does not deprive the *Openbaar Ministerie* [Public Prosecutor's Office] from its right to bring charges on the basis of these recordings. Yet, evidence may be rejected when the principles of proper proceedings or the rights of the defence are infringed. The Supreme Court noted in this connection that the suspect had been allowed to dispute the contents of the recordings. A special feature of the instant case was that a private investigation bureau with a police officer on its payroll had installed the CCTV system. That aspect of the case was not a reason to reject the evidence, however, since the police officer had not been involved in this case in his official capacity; neither the police nor the Public Prosecutor's Office had been aware of his involvement (*Hoge Raad*, 18 March 2003, LJN AF4321).

Judicial review of child care measures – The *Hoge Raad* [Supreme Court], referring to case-law of the European Court of Human Rights (the *Scozzari & Giunta v. Italy* judgment of 13 July 2000, § 212), confirmed that the *kinderrechter* [Juvenile Judge] must closely review any decision of the child care authorities concerning the return of a child to his parents. The

Supreme Court rejected the view that the court's review should be marginal (*Hoge Raad*, 26 September 2003, LJN AF9715)

Eviction from one's house – The *Rechtbank* [Regional Court] of Groningen decided in summary proceedings that the burgomaster of Pekela was allowed to close two homes of people that caused nuisance, disturbed the public order, threatened and assaulted their neighbours. The Court found that Article 174a *Gemeentewet* [Municipality Act] – which was introduced to allow the authorities to maintain public order by closing houses where drugs are sold – could also serve as a basis for eviction in the present case (*Rechtbank* Groningen, 4 March 2003, LJN AF5325).

Practice of national authorities

Family reunification – Criticism was voiced by *VluchtelingenWerk Nederland* [the Dutch Refugee Council] about the *leges* [fees] for residence permits. In less than a year, the fee for a fixed term residence permit was increased from 56 euro to 430 euro, whereas the fee for a permit of indefinite duration rose from 226 euro to 890 euro. A number of migrant organisations started judicial proceedings in order to challenge these increases, the main argument being that the fees are so high that they are incompatible with the right to respect for family life (Article 8 ECHR). A decision is expected in 2004.

Abortion – The number of abortions performed in the Netherlands declined somewhat, from approximately 29,500 in 2002 to some 28,500 in 2003. This estimation was published by an organisation of abortion clinics, which noted that this was the first decline since the early 1990s. The reason for this drop appears to be a change of policy in Belgium, where the government started to reimburse the costs of an abortion in 2003. This caused less Belgian women to travel to the Netherlands in order to obtain an abortion.

Approximately 60% of all abortions are performed on women belonging to Surinamese, Antillean and African minorities residing in the Netherlands. 20% of all patients was younger than 20 years old. The clinics observed that the number of abortions is now comparable to Belgium and Germany, and at a much lower level than France and the UK.

Taping confidential telecommunication with lawyers and *infiltration* – see Article 48 *infra.*

Article 8. Protection of personal data

National legislation, regulation and case law

Collection of personal data – The Council of Ministers has agreed to introduce a bill that should expand police powers to request personal data from institutions and companies. The purpose is to make police investigations easier. Once adopted, the act should enable the police to request sensitive information, such as religion, race, political conviction, health and sexual life. The Government believes that the new powers are compatible with Article 8 ECHR; the police are enthusiastic with the proposal; some societal organisations are not (see *Staatscourant* 20 October 2003). No proposals have been submitted to Parliament yet.

DNA research in criminal investigations – The scope of possibilities for the use of DNA research in criminal investigations has been widened by a new act, that entered into force on 1 September 2003 *(Staatsblad* 2003, no. 201; *Kamerstukken* 28 072). Under the new rules, an *Officier van Justitie* [Public Prosecutor] can order a DNA test in cases where a serious crime has been committed and where the identity of the suspect is unknown. The DNA test can be used to determine certain 'external' physical characteristics of the person concerned – for the time being only sex and race. In the future, with the development of technology, other

features may be established through the DNA test as well - which would enable the prosecuting authorities to obtain an even more detailed image of the suspect. The act provides, however, that only 'external' physical characteristics may be determined, i.e. characteristics that one has from the moment of birth and that are cognisable by everyone. Hence, the new DNA test may not be directed towards congenital diseases.

In a press release, the Ministry of Justice asserted that the Netherlands and England are now taking the lead in the use of DNA tests in criminal investigations.

Practice of national authorities

Camera surveillance – On the occasion of the presentation of its Annual Report over 2002, the *College bescherming persoonsgegevens (CBP)* [Dutch Data Protection Authority] announced that camera surveillance of public places would be one of its priorities over 2003. In November 2003 the CBP presented a report on this topic ('Cameratoezicht in de openbare ruimte', www.cbpweb.nl). An examination showed that camera surveillance of public places has been introduced in 20% of all Dutch municipalities; another 6% consider introduction. In more than 50% of these municipalities the effectiveness of this measure had not been examined. Although citizens expect that camera images are being watched constantly, so that the authorities can intervene immediately if there is an incident, it turned out that this is the case in only one out of five municipalities with camera surveillance.

Personal data and secret phone numbers – In August 2003 the CBP and the *Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA)* [Independent Post and Telecommunication Authority] presented the outcome of an investigation concerning the use by KPN (a privatised telecom company) of personal data of people with a secret phone number (z2001-0746, www.cbpweb.nl). Without informing the users of a secret number, KPN sold names and addresses to the direct marketing branch. The CBP and the OPTA conclude that this constitutes an breach of Article 9 of the *Wet Bescherming Persoonsgegevens* [Personal Data Protection Act], which provides that personal data shall not be further processed in a way incompatible with the purposes for which they have been obtained.

Article 9. Right to marry and right to found a family

National legislation, regulation and case law

Registered partnerships – In May 2003 a bill was submitted to Parliament, to regulate private international law on registered partnerships for international situations (*Kamerstukken II,* 2002-2003, 28 924). The present statute on partnerships does not indicate whether partnerships – or their dissolution – are valid in international situations. Furthermore, it is unclear what legal regime applies. The present proposal deals with partnerships that have *"Standesfolge"*, i.e. legal relations which are registered and exclusive, and lead to rights and obligations similar to matrimonial ones. The bill opts for the *lex loci celebrationis* (other than with marriages) in order to prevent a legal vacuum, since only a few countries have registered partnerships.

Article 10. Freedom of thought, conscience and religion

National legislation, regulation and case law

Conscientious objections to same-sex marriage – Short as it is, the new Government's brief (see our preliminary remarks) expressly refers to the position of municipal officials who have conscientious objections against conducting a marriage ceremony involving two persons of

the same sex. The starting point is that their objections must be respected and that one of their colleagues should conduct the marriage in their place – as long as a same-sex marriage continues to be possible in practice in each municipality.

Homosexuality – In our report over 2002, mention was made of the case of Mr El Moumni, an imam living in Rotterdam who stated in an interview that homosexuality is "an illness that must be treated" and "a danger to Dutch society". Mr El Moumni was charged with publicly insulting others because of their sexual orientation (Article 137c Criminal Code) and inciting to hatred, discrimination or violence against others because of their sexual orientation (Article 137d CC). However, both the *Rechtbank* [Regional Court] of Rotterdam and the *Gerechtshof* [Court of Appeal] of The Hague acquitted him.

In 2003 a more or less similar case concerned a protestant minister who described paedophilia, homosexuality and polygamy as dirty and filthy sins which God forbids in the Bible. The *Hoge Raad* confirmed on 14 January 2003 the judgment of the *Gerechtshof* [Court of Appeal] of Arnhem that these remarks were not insulting since they were an expression of religion and the minister meant to warn humanity, thereby wishing to contribute to public debate (LJN AE7632).

Head scarves – On the debate concerning head scarves, see Article 21 *infra*. Likewise, the struggle against discriminatory acts based on religion (such as anti-Semitic or Islamophobic acts) is dealt with in Article 21 *infra*.

Practice of national authorities

Monitoring mosques – In a letter to Parliament of 20 November 2003, the Minister of Home Affairs announced closer monitoring of mosques. The Minister stated that the *Algemene Inlichtingen en Veiligheidsdienst (AIVD)* [General Intelligence and Security Service] is investigating several mosques that follow a radical Islamic conviction. The investigation will concern unacceptable statements, such as inciting hatred and discrimination, recruiting for violent *jihad*, and possible support to terrorist activities (*Kamerstukken II,* 2003-2004, 27925, no. 104).

Article 11. Freedom of expression and of information

International case law and concluding observation of international organs

Free speech for lawyers – The *Steur* case features an interesting application of the freedom of expression. Mr Steur, an *advocaat* [lawyer, *avocat*] acted for a client who was accused of obtaining social security benefits by fraud. Civil and criminal proceedings were instituted against his client after he had made statements to Mr W., a *sociaal rechercheur* [social-security investigating officer], at an interview conducted without the presence of an interpreter or lawyer. In the civil proceedings, Mr Steur alleged that Mr W. must have obtained the statements by subjecting his client to unacceptable pressure. Mr W. considered that those statements tarnished his professional honour and reputation and filed a complaint. The *Raad van Discipline* [Disciplinary Council] found that indeed Mr Steur's allegations were uncorroborated and that he had transgressed the limits of acceptable behaviour and failed to observe the standards expected from a lawyer. Mr Steur lodged an appeal, but the *Hof van Discipline* [Disciplinary Appeals Tribunal], noting that he did not have any evidence in support of his allegations at the time they were made (having only received confirmation from his client subsequently), held that a lawyer was not permitted to make such allegations without any factual basis.

When Mr Steur complained about a violation of Article 10 ECHR, the Strasbourg Court noted that while no penalty had been imposed on him, he had nonetheless been found guilty of violating the applicable professional standards. That could have had a discouraging effect on him, in the sense that he might have felt restricted in his choice of arguments when defending clients in future cases. It was therefore reasonable to consider that the applicant's freedom of expression had been impeded by a "formality" or "restriction". It was common ground that the interference was prescribed by law and pursued a legitimate aim, namely the protection of the reputation or rights of others. The Court noted that the applicant's comments were liable to discredit Mr W. In that connection, it reiterated that the limits of acceptable criticism might in some circumstances be wider with regard to civil servants exercising their official duties than in relation to private individuals. However, civil servants were not deprived of all protection. In the case before the Court, the applicant's criticism was limited to Mr W. in his capacity as an investigating officer in a specific case. It had been confined to the courtroom and did not amount to a personal insult. It was based on the fact that the applicant's client had not fully understood his incriminating statement, given the absence of an interpreter at the interview.

The Court noted that the disciplinary authorities had not attempted to establish whether the applicant's allegations were true or had been made in good faith. While it was true that no penalty had been imposed on the applicant, the threat of an *ex post facto* review of his criticism with respect to the manner in which evidence had been taken from his client was difficult to reconcile with his duty as an advocate to protect the interests of his clients and might adversely affect the way he performed his professional duties. In the circumstances, the Court unanimously found that the restrictions on the applicant's freedom of expression did not meet a pressing social need. Eur. Ct. H.R., *Steur v. the Netherlands* judgment of 28 October 2003 (application no. 39657/98).

Free speech for civil servants – In the case of *Strik*, the UN Human Rights Committee examined a complaint brought by an employee of the municipality of Eindhoven. In 1990 he sent a critical memorandum about his employer to the Municipal Council of Eindhoven. The municipality of Eindhoven regarded the report as evidence of his neglect of duty and as defamation. Disciplinary measures were imposed but later annulled by the competent courts. Mr Strik still felt that his freedom of expression had been violated. The HRC noted that disciplinary or other sanctions against a municipal official for writing a critical report to his employer, when the latter considers the language as defamatory, could raise issues under article 19 of the Covenant. However, as all disciplinary sanctions imposed as a consequence of Mr Strik writing the report in question were later quashed, the Committee considered that he had no remaining claim under article 19 ICCPR (Human Rights Committee, *Strik v. the Netherlands*, Comm. No 1001/2001, 2 December 2002).

National legislation, regulation and case law

Whistleblowers – In July 2003 a bill aiming to enhance protection of "whistleblowers" in the private sector was submitted to Parliament (*Kamerstukken II,* 2002-2003, 28 990). The bill acknowledges the importance of exposing abuses in the private sector and seeks to protect employees' freedom of expression. Furthermore, "whistleblowing" is seen as a necessary complement of the individual responsibility that every citizen has. Currently, civil servants who disclose wrongdoing in the Government services are protected on the basis of Article 7 *Grondwet* [Constitution] and Article 125a *Ambtenarenwet* [Civil Servants Act]. Private employees, however, are not and they may be instantly dismissed for "whistleblowing". The bill outlines the substantive and formal criteria to assess when one is sworn to secrecy and when one merits protection for "whistleblowing".

Press and privacy – When HRH The Prince of Orange and his wife were about to move to their new house in the town of Wassenaar, the municipal council imposed a ban on taking

pictures of the premises. The ban was challenged by journalists and subsequently lifted in summary proceedings. In his judgment of 6 August 2003, the President of the *Rechtbank* [Regional Court] of The Hague observed that even though the Prince's privacy had to be respected, this did not justify the infringement on the freedom of expression, which includes the right to gather information and which is of eminent importance in a democracy. No appeal was lodged (LJN AI0834).

Press and ethics (1) – A TV journalist, known for his aggressive way of assisting private individuals in their problems with public institutions and companies, filmed the director of an institution while confronting him in an intimidating way with unverified facts. The director brought court proceedings in order to prevent broadcasting of the programme. In summary proceedings, he obtained the ban. Before the *Hoge Raad* [Supreme Court] the journalist complained of censorship and an unjustified infringement of his freedom of expression. The Supreme Court, however, found in favour of the director. As to the required legal basis for the ban, the Supreme Court observed that the civil-law prohibition of engaging in an *"onrechtmatige daad"* [wrongful act], i.e. behaving in a way that according to unwritten rules is improper in society (Article 6:162 *Burgerlijk Wetboek* [Civil Code]), is a sufficient and foreseeable legal basis for such an interference. Furthermore, the director was allowed to resist broadcasting since it infringed his right to his own portrait (*Hoge Raad*, 2 May 2003, LJN AF3416).

Press and ethics (2) – A radio journalist interviewed people that had protested against housing a Somalian family in their street. The interviews would be broadcasted the following day. One inhabitant, when asked if she had the banners ready, and if so, what she would write on it, said: "Hitler has forgotten a few". She immediately added that that was an awful thing to say and she had not meant it that way and requested the excerpt of the interview not be aired. The journalist refused and the statement was aired the following day. The woman was prosecuted for her statements, and a conditional sentence of six weeks' imprisonment was imposed. Before the *Hoge Raad* [Supreme Court] she argued that for a conviction, it had to be established that she had intended the insult to be made public. The Court of Appeal had held that the act of "making public" her statement took place during the interview, while the woman claimed this had only happened the next day when the interview was broadcasted. The Supreme Court agreed with the woman. At the time of broadcasting she had no longer the intention to make the insult public, since she had retracted it (*Hoge Raad,* 30 September 2003, LJN AG3813).

Protection of sources of journalists – The police seized a 'zipdisc' from a newspaper, containing information on the identity of a source who the journalist had promised confidentiality. Invoking Article 10 ECHR, the journalist claimed his 'zipdisc' back. After the *Rechtbank* [Regional Court] of Rotterdam granted this request, the *officier van justitie* [public prosecutor] appealed to the *Hoge Raad* [Supreme Court]. The Supreme Court underlined the importance of the right to freedom of expression, which includes respect for the confidentiality of sources. Any interference must satisfy the requirements of Article 10 para. 2 ECHR. This implies, according to the Supreme Court, that the burden of proof is on the public prosecutor: he must show that the confiscation was necessary for the prevention of crime and that no other means were available to achieve that aim. The Supreme Court rejected the public prosecutor's argument that one presume that the seizure is necessary, leaving the burden of proof with the journalist (*Hoge Raad,* 8 April 2003, LJN AE8771).

"Right wing clothing" – In summary proceedings the *Rechtbank* [Regional Court] of Haarlem held that a school can remove pupils who wear jumpers of the brand *Lonsdale* in combination with a jacket, thereby showing the letters NSDA, a reminder of nazi-party NSDAP. In its judgment of 21 March 2003, the court found that the decision to remove the pupils if they insist on wearing these clothes does not violate the right to freedom of expression (LJN AF6131).

Practice of national authorities

Access of foreign journalists to the ICTY – In August 2003, the International Federation of Journalists (IFJ) asked the Dutch Government to facilitate access of foreign journalists to the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. The Federation stated that the current visa requirements hinder this access, especially for journalists from Bosnia and Herzegovina and from Serbia and Montenegro. The Federation recalled that reconciliation in former Yugoslavia can only be achieved if the public in the former Yugoslavia has timely and accurate information about the cases before the Tribunal. The task to provide this information falls upon representatives of the media from the former Yugoslavia who rely upon the co-operation of the Dutch Government to gain access to the Tribunal. Yet the conditions are so difficult that many journalists are of the view that, even though these policies are rooted in local law and international agreements, the inflexibility with which they are applied results in an unacceptable form of censorship. The Federation noted that the ICTY authorities had already taken this matter up with the Dutch Government and asked for the host country's assistance in facilitating access for journalists. However, the Federation felt that there had been no improvement.

The Dutch authorities were invited to follow the lead of other European Union countries, such as Belgium, France and Germany, in which people who apply for temporary residence permits are required to stay in the country to whose authorities they submitted the request, and not in their country of origin. A similar arrangement would make it possible for the ICTY correspondents to continue reporting while they apply for temporary residence. The Federation also noted that in each of the above mentioned countries, journalists are granted special status that relieves them of the obligation to undergo the same bureaucratic procedures undergone by other foreign citizens requesting the residence permit. Given the small numbers involved and the special role and responsibility of journalists in these matters, the Federation believed there is a strong case for a similar arrangement for journalists coming to The Netherlands.

Private threats against journalists – When asked about their views on the rights of Dutch journalists, the *Nederlandse Vereniging van Journalisten* [Dutch Association of Journalists] stated that there are no direct threats from the authorities, although the practice of tapping telephones (see Article 7 *supra* and 48 *infra*) is a source of concern. However, journalists do encounter more and more threats, arguably from criminal quarters that do not like publicity and want to deter investigative journalism. In November 2003 unknown individuals fired a number of shots at the editorial offices of the monthly journal *Quote,* in an apparent attempt to intimidate the editors. It should be stressed that no-one would suggest that the national authorities are in any way connected to these events – but if this trend continues, life will obviously become more difficult for journalists.

Article 12. Freedom of assembly and of association

National legislation, regulation and case law

Political parties and equal treatment – An interesting case is now pending: a woman wishing to join the *Staatkundig Gereformeerde Partij (SGP)*, an orthodox protestant political party, is challenging the SGP's refusal to admit women as full members. She is supported by a number of NGO's, which believe that the prohibition of discrimination outweighs the freedom of association. The SGP, established in 1918, now holds two of the 150 seats in the *Tweede Kamer* [House of Representatives]. With 25,500 members it is the sixth political party in terms of membership.

In 2001 the UN Committee on the Elimination of All Forms of Discrimination against Women expressed its concern about the fact that the SGP, as a political party excluding women, was represented in Parliament. The Committee found that this was incompatible with Article 7 (c) of the UN Convention (see CEDAW, Concluding Comments, paras. 34-35, UN doc. CEDAW/C/2001/II/add.7). The Dutch Government felt, however, that it was not its task to take action against the SGP, since the Dutch criminal code offers sufficient protection against discrimination on the ground of sex.

Also in 2001 the *Commissie gelijke behandeling* [Equal Treatment Commission] rejected a complaint against the SGP since the applicable legislation did not apply to political parties such as the SGP (*oordeel* 2001-150). One has to wait and see what the courts are going to rule in the new set of proceedings.

Practice of national authorities

Political parties and fundamentalism – Meanwhile a very new political party, the *Arabisch-Europese Liga (AEL)* [Arab European League], was the subject of controversy too. The party, modelled after a fairly political party in Belgium, tried to establish itself in the spring of 2003. Critics argued that it was anti-democratic, opposed to the equal treatment of men and women, aiming to introduce *sharia*, and opposed to the integration of minorities in Dutch society. A member of Parliament asked whether one should derive from the European Court's judgment in the case of *Refah Partisi v. Turkey* (judgment of 13 February 2003, application no. 41340/98) that the AEL had to be banned. The Minister of Justice replied that the *Refah* judgment does not impose an obligation to ban a party; it only allows for the dissolution of a party under certain circumstances. The Minister noted that Dutch law does not offer a basis for the dissolution of a party that calls for the introduction of *sharia*; it would be different if a party incited, for instance, to discrimination (*Kamerstukken II* 2002-2003, *Aanhangsel* 1300). Other parliamentary questions concerned the allegedly radical views of the candidate chairman of the AEL. No concrete steps against the AEL were taken, though.

Article 13. Freedom of the arts and sciences

Practice of national authorities

In a remarkable move, the Prime Minister, speaking at his weekly press conference in November 2003, criticised satirical television programmes aimed at the royal family. Mr Balkenende, who suggested that he was speaking on behalf of the entire cabinet, observed that the television programmes were a sign of bad taste. Whilst not proposing any concrete measures, he noted that the continuous stream of satire could threaten the position of the royal family, which was not in a position to defend itself.

The next day it turned out that two of the coalition partners (the conservatives (VVD) and the liberals (D66)) actually *did not* support the PM's views. They emphasised the importance of freedom of expression and made clear that they wished to avoid any suggestion about censorship by the public authorities. The general tendency in press comments was the same. Mr Balkenende was, however, supported by the Minister of Justice, Mr Donner who advanced the view that such TV programmes may in the long run contribute to *verloedering* [deterioration of morals].
Parliament debated the matter on 11 November 2003. The Prime Minister and the Minister of Justice confirmed the importance of the freedom of expression and they expressed their support for what is known in Dutch constitutional law as the "Thorbecke principle": "the Government shall not judge upon science and arts". At the same time they emphasised the responsibilities of those making satirical television programmes and stated that the freedom of expression does not include a right to engage in insults (*Handelingen II,* 2003-2004, no. 22).

Article 14. Right to education

International case law and concluding observation of international organs

ESC – In 2003 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 10 of the European Social Charter in respect of the Netherlands (Kingdom in Europe). The Committee concluded that the situation in the Netherlands is not in conformity with Article 10 § 4 of the Charter because equal treatment for nationals of non-EU Contracting Parties to the 1961 European Social Charter and of non-EU Parties to the Revised European Social Charter lawfully resident or regularly working in the Netherlands with respect to financial assistance for training is not guaranteed.

The Committee also concluded in respect of the Netherlands Antilles that the situation is not in conformity with Article 1 § 4 of the Charter because the Netherlands failed, since the first supervision cycle, to provide evidence of compliance with this provision.

National legislation, regulation and case law

Head scarves – On the debate concerning head scarves at schools, see Article 21 *infra*.

Article 15. Freedom to choose an occupation and right to engage in work

Practice of national authorities

EUMC – The European Monitoring Centre on Racism and Xenophobia (EUMC) noted in its Annual Report on 2002 that the unemployment rate of ethnic minorities declined in the Netherlands (www.eumc.eu.int, page 37). Research form the *Sociaal en Cultureel Planbureau (SCP)* [Social and Cultural Planning Office of The Netherlands] showed that the current rise in unemployment among ethnic minorities was no higher than among the autochthonous population (see www.scp.nl for the report with a summary in English).

According to statistics of the Ministry of Social Affairs, 664,000 individuals were registered as unemployed in November 2003. Of these, 476,000 were Dutch and 178,000 belonged to minorities (including 38,000 Turkish; 31,000 Morroccan; 21,000 Surinamese, and 11,000 Antillean).

Article 16. Freedom to conduct a business

Practice of national authorities

Arms exports – In September 2003 the Ministries of Economic Affairs and Foreign Affairs published their annual review of the Netherlands arms exports in 2002 (*Kamerstukken II*, 2003-2004, 22054, no. 74; English version available at www.minez.nl). The export licences granted in 2002 corresponded to a value of 450 million euro, or 0.22% of Dutch exports. These figures include disposals of 'old' equipment of the Dutch army to third countries. The largest part the export (corresponding to a value of 350 million euro) was to NATO countries; exports to the USA, Germany and Greece accounted for a value of 250 million euro. Still according to the Annual Report, some 150 to 200 Dutch companies, employing approximately 10,000 workers, produce military goods. Most of these companies also perform civil activities, military production accounting for an average share of 10% of their total turnover.

The Annual Report states that, in line with the European Councils of Luxembourg (1991) and Lisbon (1992), respect for human rights in the country of final destination is one of the eight

criteria used to decide on applications for licences for the export of military equipment. EU co-operation on arms exports is co-ordinated within COARM, the Working Group on Conventional Arms Exports. On behalf of the Netherlands, representatives of the Ministry of Foreign Affairs and the Ministry of Economic Affairs have a seat in COARM. In COARM, within the framework of the Common Foreign and Security Policy (CFSP) the EU member states exchange information on their arms export policy and endeavour to improve the mutual co-ordination of these policies and the relevant procedures. The EU Code of Conduct for arms exports (1998) forms the basis for this. In 2002 the Netherlands made 7 'denial notifications' under the Code of Conduct. The destination countries were Angola, Bulgaria, India, Israel, Pakistan and South-Africa.

On the initiative of the Netherlands, in 2002 agreement was reached in COARM on a procedure for exchanging information with the future EU partners concerning licence denials issued by the member states. Information of this nature will provide those countries with improved insight into the operation of the Code, in particular as to the application of the assessment criteria it sets out. In addition, the member states considered a number of other subjects relating to arms export and reached understandings on them, such as controls on arms brokering, standardisation of end-user declarations, periodical updates of the EU list of military goods, and the application of the criteria of the Code of Conduct to transit transactions subject to mandatory licensing.

The Netherlands are traditionally active in seeking to increase transparency and control in the area of arms exports. In the UN it has become custom that the Netherlands take the initiative in proposing the annual resolution concerning transparency in armament. On the multilateral level, developments surrounding arms exports are discussed in the framework of the *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies*. Altogether 33 countries, including the United States, Russia and the EU member states, are party to this forum, which owes its name to the Dutch town where, under the presidency of the Netherlands, the negotiations were conducted on the founding of the arrangement. These countries together account for over 90% of total exports of military goods.

As to small arms and light weapons, the Annual Report asserts that The Netherlands has complied with all obligations arising from the UN Action programme. The Minister for Development Co-operation makes an annual appropriation of approx. 2.3 million euro to the *Fonds Kleine Wapens* [Small Arms Fund] which provides finance to projects intended to assist nations in implementing the UN Action Programme. In 2002 the Netherlands also supported, *inter alia*, arms destruction projects in the Great Lakes Region, Cambodia and the Balkan.

Article 17. Right to property

No significant developments to be reported.

Article 18. Right to asylum

International case law and concluding observation of international organs

Expulsion of seriously ill persons – In its admissibility decision of 24 June 2003 in the case of *Arcila Henao v. the Netherlands* (application no. 13669/03) the European Court of Human Rights found that the expulsion to Colombia of the applicant, who was HIV-positive and claimed that he would face practical difficulties in Colombia in obtaining the required medical treatment, would not be violation of his rights under Article 3 of the Convention.

The Court considered that, unlike the situation in the case of *D. v. the UK* (judgment of 2 May 1997, application no. 30240/96; Reports 1997, 777), it did not appear that the applicant's illness had attained an advanced or terminal stage, or that he has no prospect of medical care or family support in his country of origin. The fact that the applicant's circumstances in Colombia would be less favourable than those he enjoys in the Netherlands could not be regarded as decisive from the point of view of Article 3 of the Convention, the Court observed.

Committee against Torture – In the case of *A.R. v. the Netherlands* (No. 203/2002) the complainant claimed that he feared being subjected to torture if he were returned to Iran by the Dutch authorities. The UN Committee against Torture (CAT), in its decision of 23 November 2003, noted that A.R. claimed to have been tortured and imprisoned previously by the Iranian authorities, because of his involvement with the Fedayeen Khalg-Iran. This was not contested by the Dutch authorities. However, the alleged acts of torture occurred in 1983, some 20 years ago. The Committee noted that, in accordance with its General Comment on article 3, information which is considered pertinent to risk of torture includes whether the complainant has been tortured in the past, and if so, whether this was in the recent past. This could not be said to be the case in the author's complaint. The Committee further noted that A.R.'s arguments, and his evidence to support them, had all been considered by the Dutch courts. Since the Committee is not an appellate, quasi-judicial or administrative body, it must give considerable weight to findings of fact made by the organs of the State party. In this case, the Committee could not determine that the Dutch review of the complainant's case was deficient in this respect. On the basis of the above, the Committee considered that A.R. had not substantiated that he would face a foreseeable, real and personal risk of being subjected to torture upon his return to Iran.

National legislation, regulation and case law

General - Over the past several years, the Netherlands has left behind its traditional hospitality toward refugees to take up a restrictive approach. Politics are largely preoccupied with enhancing efficiency in processing cases and preventing any abuse of asylum procedures. The number of asylum seekers has dropped considerably, perhaps as a consequence of the tougher policies: from 43,895 (in 2000) to 32579 (in 2001) to 18667 (in 2002). In the first six months of 2003, 7,466 new applications were registered; more recent statistics are not available.

The applicable rules are set out in the *Vreemdelingenwet 2000* [Aliens Act 2000] which entered into force on 1 April 2001 *(Kamerstukken II*, 2002-2003, 28 749). One of its most controversial elements is the *versnelde procedure in het aanmeldcentrum* or *'AC procedure'* [accelerated procedure in reception centres]. The procedure was designed to pick out manifestly ill-founded cases; asylum seekers will obtain a negative decision within four to five days after they lodged a request. More and more cases are dealt with in accordance with this procedure: in 2000 16% of al applications for asylum was rejected within 5 days, in 2001 the figure was 22%, in 2002 it was 45% and by the end of 2002 even as many as 60%.

Criticism on the 'accelerated procedure' – Serious criticism on the Dutch asylum policy in general, and the 'AC procedure' more in particular, was levelled from various quarters in 2003. Research by the University of Nijmegen, commissioned by the Immigration and Naturalisation Service, showed that the procedures leave a lot to be desired: a lack of time for the newly arrived asylum seeker to get accustomed to his new environment and to understand the procedure that he is going through; defective communication between the asylum seeker and the official; growing distrust between them as a consequence of the way in which the interviews are organised; very limited legal assistance and so on (see a review article in *Nederlands Juristenblad* [Netherlands Law Review] 19 December 2003, p. 2340-2346.

In April 2003 the NGO Human Rights Watch (HRW) published a very critical study: *"Fleeting Refuge – the triumph of efficiency over protection in Dutch asylum policy"*. HRW reported that the 'AC procedure' is being used to process cases for which it is inappropriate: it was originally designed to screen out clearly unfounded cases, but Government officials now aim to process 80 percent of asylum claims through this accelerated review. The HRW report also charged that certain aspects of Dutch immigration policy fail to serve the best interests of migrant children as required under the Convention on the Rights of the Child. Specifically, HRW expressed concern that more than 30 percent of child asylum seekers have their claims reviewed in the cursory AC procedure. HRW found that interviews of children are often conducted in a manner inappropriate for their age and maturity and without the benefit of consistent assistance from a lawyer or guardian. In a third area of concern, HRW criticized Dutch policy to deny basic material support, including food and housing, to asylum seekers still in various stages of the asylum process. HRW said this policy leaves asylum seekers, including families with children, homeless and dependent on charity for basic survival while awaiting a final determination on appeal from the AC procedure. In one case reported by HRW, a family from Rwanda was evicted from the asylum reception centre after the immigration authorities rejected their asylum claim. When a court later overturned that decision, the family could not be found.

In view of its findings, HRW made a number of pertinent recommendations:

- individuals from a much wider range of countries than those currently listed as categorically "unsafe" require access to the full determination procedure in order to establish whether they are in need of international protection.
- the same applies to cases involving serious physical or psychological problems at the time of the applicant's asylum interview, cases involving possible victims of torture or sexual violence, and other persons exhibiting symptoms of trauma, as well as complex cases requiring additional investigation must be directed to the full asylum determination procedure.
- asylum seekers' access to lawyers, preferably a single lawyer throughout the process given the speed of accelerated procedures, should be improved so as to allow adequate time for the claim and any appeal to be prepared. Asylum officers in the AC procedure, when evaluating credibility, should take into account the limited opportunity available to the asylum seeker to present documentary proof and other relevant information.

URGENT STEPS MUST BE TAKEN TO ENSURE THAT EVERY ASYLUM SEEKER IS PROVIDED AN ADEQUATE OPPORTUNITY TO PRESENT THEIR CLAIM FOR ASYLUM, AND THAT JUDICIAL REVIEW ENSURES THAT THE MERITS OF THE CASE HAVE BEEN FAIRLY EXAMINED.

Following the publication of HRW's report, on 25 September 2003, the *Tweede Kamer* [House of Representatives] of Parliament organised a hearing where a number of NGO's voiced their concerns. The matter is still on the Parliament's agenda.

The *Nederlands Juristen Comité voor de Mensenrechten* (NJCM) [Dutch section of the International Commission of Jurists] joined in the criticism by publishing a report *"De AC-procedure, de Achilleshiel van het asielbeleid"* [The AC procedure – The Achilles Heel of Asylum Policy], on 25 November 2003.

Judicial remedies and marginal review - Under the Aliens Act 2000, the final instance in asylum cases is the *Raad van State* [Council of State]. Its case-law has been criticised as being very restrictive in a number of respects. Firstly, the Council of State leaves a wide margin of appreciation to the immigration authorities, assuming that they have a full insight in the personal background of the asylum seeker and the situation in his country of origin. Given the cursory nature of the 'AC procedure', as mentioned above, this assumption may be overly

optimistic. Secondly, it does occur in practice that an asylum seeker does not mention in his first set of interviews that he was tortured - or traumatised in any other way - but only at a later stage asserts that this was actually the case. As a general rule the Council of State, when reviewing the rejection of a request for asylum, is not willing to take into account these new elements, since they are not regarded as 'new facts' within the meaning of Article 4:6 *Algemene wet bestuursrecht (Awb)* [General Act on Administrative Law]. After all, the facts were known, but the asylum seeker failed to raise them in good time. The question has been raised, understandably, whether this rigid approach is compatible with Articles 3 and 13 ECHR. To date, however, the European Court of Human Rights has not found a violation of the Convention in this respect.

An improvement with respect to the latter issue may be a policy decision of the responsible Minister of August 2003 to make an exception from the rule of Article 4:6 in special circumstances, if the fresh statements indicate that the asylum seeker is a refugee within the meaning of the Geneva Convention or that his removal to his country of origin might violate Article 3 ECHR (*Staatscourant* 11 August 2003, p. 10).

Judicial remedies and lack of suspensive effect – A separate but related issue is the lack of suspensive effect in AC procedures. Whereas the institution of judicial remedies normally has suspensive effect (meaning that the asylum seeker can stay in the Netherlands pending the procedure), this is different for asylum seekers rejected in the accelerated procedure (Article 82 Aliens Act 2000). In July 2003, UNHCR published its report *Implementation of the Aliens Act 2000: UNHCR's Observations and Recommendations* in which it criticised the latter element. UNHCR noted that, because of the case-law of the *Raad van State* [Council of State] it is "extremely difficult" to argue for the grant of suspensive effect. This is further complicated, UNHCR observed, by the fact that material support is terminated immediately following a negative first instance decision in accelerated procedures, thereby in effect undermining the ability of the asylum-seeker to submit an appeal and to request suspensive effect. "Given the potential serious consequences of an erroneous first instance decision, it is UNHCR's view that withholding expulsion until at least one proper review of the decision has been taken is a fundamental protection guarantee. Suspensive effect should therefore in principle be granted in asylum cases", UNHCR maintained. Exceptionally, in cases that can be considered manifestly unfounded or clearly abusive as outlined above, automatic suspensive effect could be lifted. However, in such cases, there should be an effective means to request suspensive effect, based on a review of the facts of the asylum case. Further, UNHCR argued that material support should not be terminated until the deadline for requesting review of the case has passed, or until a decision on suspensive effect has been taken. Where it is granted, material assistance should continue to be provided until a final decision has been taken.

Reasons for concern

The 'accelerated procedure' has attracted criticism for several years now. The concerns address various aspects of the procedure and cannot be dismissed as ill-founded. It seems that the sharp decline of asylum seekers – which may well have been caused by the stricter policies and the increasing proportion of rejections – did not lead to an increase in the time invested in those cases were asylum is actually asked. A thorough overall review of this procedure is warranted.

Article 19. Protection in the event of removal, expulsion or extradition

National legislation, regulation and case law

Detention: confining aliens facing deportation – Parliament is now considering a bill by which the Government intend to change the system of judicial control of detention pursuant to the Aliens Act 2000 *(Kamerstukken II*, 2002-2003, 28 749). When this Act (see also Article 18 *supra*) entered into force, three elements were introduced which turned out to have a heavy impact on the workload of the authorities, more in particular the judiciary: (a) the authorities had to notify the courts of each case of alien detention within three days; (b) the authorities had to notify the courts periodically of the continuation of this detention, and (c) the courts had to review the legality of the detention within 7 days of receiving either a notification from the authorities or a complaint of the individual concerned. The new system led to a considerable backlog with the judiciary: 22500 cases per year (which equals 40% of the court capacity in this area) concern aliens detention.

According to the proposal, the judicial authorities shall have a longer period for their initial notification (28 days instead of 3); the periodic notification will no longer be given; and the courts will have 14 instead of 7 days to hear cases. The Government argue that the proposed changes will mostly restore the situation that existed before the entry into force of the *Vreemdelingenwet 2000.* Moreover, the alien will continue to have access to court because he can challenge the legality of his detention at any time and have a hearing within 14 days. The Government expects that the changes will result in a decrease of the number of cases (from 22500 to some 9000 cases per year) that are brought before the courts.

The proposal is controversial. Criticism was voiced, *inter alia*, by the *Nederlandse Orde van Advocaten* [Dutch Bar Association] and *VluchtelingenWerk Nederland* [Dutch Refugee Council]. Citing the judgment of the European Court of Human Rights in the case of *Kadem v. Malta* (9 January 2003, application no. 55263/00) they argue that the new system will not allow the courts to give a "speedy" decision concerning the legality of detention, as required by Article 5 para. 4 ECHR. The Government, on the other hand, maintain that the proposed system is fully compatible with Article 5 ECHR, citing the Strasbourg Court's admissibility decision in *Tekdemir v. the Netherlands* (application no. 46960/99, 1 October 2002) in its support.

Removal centres – Two *uitzetcentra* [removal centres] were opened in 2003: one at Rotterdam airport, the other at Schiphol international airport. Their capacity is expected to grow from 300 to 600 individuals. Aliens facing deportation may be kept in these centres for up to four weeks (Article 59 *Vreemdelingenwet 2000* [Aliens Act 2000]), without a need for the authorities to demonstrate any threat to public order or any risk for absconding. NGO's such as *VluchtelingenWerk Nederland* [Dutch Refugee Council] argue that the living conditions are below standard and that detainees have only limited access to legal assistance. Parliament debated this matter in November (*Handelingen II*, 2003-2004, TK 25-1703).

On pending proposals to change the system of judicial review of detention pursuant to the Aliens Act 2000, see Article 6 *supra*.

Removal policy – The new Government has firmly expressed its intention to remove aliens whose request for asylum has been rejected and illegal aliens. In practice, however, the actual implementation continues to give rise to controversy. The Government expect municipal authorities to evict asylum seekers whose request has been rejected and who ought to leave the Netherlands. The municipalities refuse since the asylum seekers often do *not* leave, and, having no alternative accommodation, would end up living on the streets. Parliament has regularly debated the issue (*Kamerstukken II*, 2003-2004, 29344). Shortly before Christmas

2003 the responsible Minister had to give guarantees that families facing removal would not be evicted from their houses so long as there was no decent alternative accommodation.

Extradition to USA – In a series of cases concerning requests by the United States for the extradition of Dutch nationals suspected of trading XTC, the *Gerechtshof* [Court of Appeal] of The Hague decided that it was not established that the suspects would not receive a fair trial in the United States. It dismissed the arguments relating to the phenomenon of plea bargaining – negotiating a mitigated sentence in return for a confession (a conviction usually follows without the evidence having been reviewed by a court). The Court of Appeal recalled that the US are bound by the ICCPR, Article 14 of which guarantees a fair trial, and emphasized the principle of mutual good faith in the legal systems of the Netherlands and the US (judgment of 5 June 2003, LJN AF9613; judgment of 25 September 2003, LJN AL1732).

Extradition and unlawfully obtained evidence – A person whose extradition was requested by Italy, argued that the evidence against him (including recordings of telephone conversations) had been obtained in violation of applicable rules. He claimed that his extradition would violate Articles 6 and 8 ECHR. The *Rechtbank* [Regional Court] of The Hague rejected these arguments. On the one hand, the Court observed that Italy is a party to the European Convention, and one must start from the expectation that it will comply with its obligations under the Convention. This would only be different if there are serious reasons to assume that the receiving State will grossly violate the Convention – which in this case had not been established. On the other hand, to the extent that the alleged violations of the Convention had occurred in the Netherlands, the Court considered that its task was restricted to reviewing the legality of the extradition to Italy, and not to review the conduct of the Dutch police. The *Hoge Raad* [Supreme Court] accepted this line of reasoning (*Hoge Raad*, 27 May 2003; LJN AF7313).

Practice of national authorities

Safety of women at centres for asylum seekers – A study, commissioned by the State Secretary for Justice, into the safety of women and girls at centres for asylum seekers showed that almost 20% of the locations reported monthly incidents of bullying and sexual intimidation and 33% reported monthly incidents of verbal aggression against women and girls in the past six months. Serious forms of sexual violence such as rape, indecent assault and enforced prostitution are reported significantly less often, but certainly do occur. In total, 18% of the locations reported incidents of sexual assault. In most cases, this involved a single incident observed in the past six months. Rape (single incidents) was reported at six locations (5%). The researchers stressed the vulnerable position of women and girls, especially when they are on their own. The centres for asylum seekers are places where people with very different ethnic and social backgrounds as well as sexual codes are forced to live together in basic facilities that often do not offer extensive privacy. The importance of staff surveillance, especially at night, was underlined. (Report *"Het lange wachten op een veilige toekomst. Onderzoek naar veiligheid van vrouwen en meisjes in Asielzoekersopvang"*, 2003).

Note: on *Unaccompanied asylum seeking minors*, see Article 24 *infra.*

CHAPTER III : EQUALITY

Article 20. Equality before the law

International case law and concluding observation of international organs

Protocol 12 – On 23 September 2003 the *Tweede Kamer* [House of Representatives] unanimously approved Dutch accession to Protocol 12 to the European Convention on Human

Rights (*Kamerstukken* 28100 (R1705)). The proposal is now pending before the *Eerste Kamer* [Senate].

National legislation, regulation and case law

General – In the Netherlands, Article 1 of the *Grondwet* [Constitution] prohibits discrimination. The 1994 *Algemene Wet Gelijke Behandeling (AWGB)* [Equal Treatment Act] elaborates on this norm. The AWGB prohibits discrimination in specific fields (employment, education and the provision of goods and services) on a limited number of grounds (religion, belief, political orientation, race, sex, nationality, sexual preference, marital status, working hours or temporary contract). The *Commissie gelijke behandeling* [Equal Treatment Commission] was set up to promote and monitor compliance with this Act, together with other specific non-discrimination and equal treatment legislation in the Netherlands. A number of CGB decisions will be summarised below.

Currently the AWGB is in a process of evaluation. It is argued that the Act no longer reflects the needs of present-day society, which has changed considerably since the Act entered into force. A bill proposing certain changes was submitted to Parliament in November 2003 (*Kamerstukken II,* 2003-2004, 29311).

Apart from this more general debate, a bill was submitted to Parliament with the aim of implementing Directives 2000/43 and 2000/78 (*Kamerstukken II,* 2002-2003, 28770). Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*OJ* 2000 L 180) was due to be implemented as of 19 July 2003; Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (*OJ* 2000 L 303) should have been implemented per 2 December 2003. The bill was accepted, with some amendments, by the *Tweede Kamer* [House of Representatives] in October 2003 and forwarded to the *Eerste Kamer* [Senate]. It is to be expected that the Act will enter into force in the first half of 2004.

Speaking of late implementation: the so-called E-commerce Directive (2000/31/EC), which should provide protection against the circulation of material with discriminatory content in services on the Internet, has not yet been transposed into domestic law either. The implementation time limit expired on 17 January 2002.

In its CERD report (see Article 21 *infra*), the Dutch government noted that a four-part project has been set up to promote equal treatment of a number of target groups (including ethnic minorities) in the workplace. The project is intended to implement national equal treatment legislation and legislative amendments in accordance with Article 13 EC Treaty. More in particular its aims are: (1) to encourage works councils to address the issue of equal treatment, (2) to promote equal treatment in small and medium-sized enterprises, (3) to promote equal treatment in large companies, and (4) to organise a conference on equal treatment. The project is scheduled to run from 2002 to the end of 2004.

Equal treatment: age – see Article 25 *infra*.
Equal treatment: fixed-term and indefinite contracts – On 22 November 2002 the *Wet verbod van onderscheid tussen arbeidsovereenkomsten van onbepaalde en bepaalde tijd (WOBOT)* [Act on the prohibition of discrimination between fixed-term work and indefinite duration contracts] entered into force (*Staatsblad* 2002, 560). The Act aims to implement Directive 1999/70 EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (*OJ* 1999 L 175/43). The Directive was due to be implemented as of 10 July 2001.

A bill aiming to expand the scope of WOBOT was submitted to Parliament on 16 July 2003. The bill proposed to change the *Ambtenarenwet* [Civil Servants Act] to the extent that

discrimination between fixed-term work and indefinite duration contracts will be prohibited in the civil service too (*Kamerstukken II,* 2002-2003, 28 992).

Equality between man and women – see Article 23.

Article 21. Non-discrimination

International case law and concluding observation of international organs

CERD – The Netherlands ratified the UN Convention on the Elimination of Racial Discrimination (CERD) in 1966. In August 2003, the Netherlands submitted its 15th and 16th periodic report to the supervising committee. It is expected that the report will be discussed during the Committee's 64th session, in February-March 2004. In the following pages several references to the 'CERD report' will be made.

Commenting on the report, the *Nederlands Juristen Comité voor de Mensenrechten* (NJCM) [Dutch section of the International Commission of Jurists] asserted that the position of women belonging to ethnic minorities leaves a lot to be desired, especially on the labour market and in the educational system. NJCM also deplored the termination of several instruments that were intended to diminish unemployment among ethnic minorities, at a time where unemployment is on the rise again (NJCM report of 18 December 2003, English version on www.njcm.nl).

Cybercrime – The Netherlands have signed the first additional Protocol to the Convention on cybercrime of the Council of Europe on 28 January 2003. A proposal for ratification has not yet been submitted to Parliament.

EUMC – The European Monitoring Centre on Racism and Xenophobia (EUMC) noted in its Annual Report on 2002 (part 2 – trends, developments and good practices in 2002) a "positive development" in the educational sphere in that "the Dutch Government is starting to think about measures to counteract the trend of ethnic segregation" (www.eumc.eu.int, page 9). A discussion is now focussing on Article 23 of the Dutch *Grondwet* [Constitution] which protects the freedom of education, including the right to found a school on a particular religion or set of pedagogical principles. This provision is deeply rooted in Dutch constitutional tradition. Traditionally it used to protect the independence of Protestant and Catholic schools, but the past years have seen a significant increase in the number of Islamic schools. It is argued that these schools do not contribute to the integration of minorities in Dutch society. In addition it is argued that the freedom of education is used by some schools to refuse admission to pupils from minority backgrounds with different religious beliefs – thereby in fact allowing for 'white schools' to develop (EUMC Annual Report 2002, p. 30).

In this connection it is interesting to note that the new Government's brief (see our preliminary remarks) asserts that the freedom of education will not be affected ("aan de vrijheid van onderwijs wordt niet getornd"), but is seems that the discussion has been opened. The *Commissie Gelijke Behandeling* [Equal Treatment Commission] dealt with the case of a Protestant school that operated a maximum per class on the number of pupils for whom Dutch is the second language. The Commission considered that this amounted to indirect discrimination on the basis of race which was not justified, *inter alia* because the maximum of 15% was arbitrary (CGB, 29 July 2003, *oordeel* 2003-105).

National legislation, regulation and case law

Structural discrimination – Discrimination and incitement to hatred or discrimination are offences under Articles 137c-137g and 429 quater of the Criminal Code. On 20 November

2003 an Act came into force that increases sanctions on structural forms of discrimination on the grounds of race, religion, belief and sexual orientation. New provisions have been added to Articles 137c (deliberately insulting a group of people), 137d (incitement to discrimination), 137e (dissemination of discriminatory utterances) and 137g (deliberate discrimination in the exercise of an office, profession or business), prescribing a higher maximum penalty for anyone making a profession or habit of the offences defined in the said articles or committing the offences defined in these articles in association with at least one other person. The new maximum penalty for insulting groups of people and incitement to discrimination will be two years' imprisonment or a fine of 11,250 euro, while the new maximum penalty for dissemination of discriminatory utterances and deliberate discrimination in the exercise of an office, profession or business will be one year's imprisonment or a fine of 11,250 euro (*Staatsblad* 2003, 480; *Kamerstukken* 27792). The new rules will enter into force on 1 March 2004.

In its 'CERD report', the Dutch Government explained that it had decided not to add grounds for increasing the penalty for assisting discriminatory activities (Article 137f of the Criminal Code) or discrimination in the exercise of an office, profession or business (Article 429 quater of the Criminal Code). This is because doubling the maximum penalties for these offences when committed repeatedly (three and two months' imprisonment respectively) would produce very little additional benefit in terms of the normative effect of the anti-discrimination provisions of the Criminal Code.

Guidelines on the prosecution of discrimination – For several decades Dutch criminal law contains provisions intended to prevent and combat discrimination. Yet criminal legislation has been shown to be far from effective: in practice it may still be difficult to report incidents of discrimination to the police, and these cases are not always given sufficient priority. On 27 March 2003, the *College van Procureurs-Generaal* (the governing body of the *Openbaar Ministerie,* the Public Prosecution Service) adopted revised Guidelines on Discrimination (*Staatscourant* 2003, 61). The new Guidelines seek to reflect the outcome of an evaluation of practice since 1999 (when the previous guidelines were adopted) and follow on consultation with the non-governmental *Landelijke Vereniging van Anti-discriminatiebureaus en -meld-punten* [National Federation of Anti-Discrimination Agencies] and the *Landelijk Bureau ter bestrijding van Rassendiscriminatie (LBR)* [National Bureau against Racial Discrimination]. The new Guidelines state that the police must register each and every discrimination case, whereas the Public Prosecution Service must, in principle, give priority to prosecuting the suspect. The Public Prosecutors are instructed to ask the courts for an increase of the sentence with 25% in cases of common crimes with a discriminatory background.

In a further attempt to improve things, the Dutch police established a *Landelijk Bureau Discriminatiezaken* [National Bureau Discrimination Issues] in 2002. This specialist bureau is to play an important role in retrieving all relevant data on racism and discrimination from the police files, particularly on racial violence. The staff of this bureau are experts in the field of discrimination and police work. This staff has access to specialists within the police force who will be able to retrieve data from all police districts in the country. It will play a central role in the collection of data of racist/discriminatory incidents and thereby improve the reliability of data considerably.

Headscarves and veils – In 2003, the rights of students and teachers to wear headscarves and veils at school caused a number of controversies throughout the country. The *Commissie Gelijke Behandeling* [Equal Treatment Commission] issued an advice about the possibilities to prohibit these garments under the law on equal treatment. It states that exceptions on the prohibition of direct discrimination can only be sanctioned by law; exceptions on the prohibition of indirect discrimination are only allowed when an objective justification can be given. Examples of the latter are impediments to communication in the classroom and conflict

with the religious identity of a school (*Advies inzake "gezichtssluiers en hoofddoeken op scholen",* 16 April 2003, *advies* 2003/01, www.cgb.nl).

Building on this advice, the Ministry of Education has issued guidelines on this issue. In these, the objective justification is further explained as consisting of three requirements: (a) a legitimate aim; (b) suitable means must be used; and (c) the means used must be necessary to achieve that aim (*Leidraad kleding op scholen,* May 2003, www.ocw.nl).
In a dispute on the same question, the Equal Treatment Commission issued a decision on 6 August 2003 concerning the right to wear headscarves at school. A catholic secondary school had prohibited its students to wear headscarves or any other clothing that reflected a non-catholic religious conviction. Although the Commission considered this to be unequal treatment, it was of the opinion that this treatment came within the scope of one of the exceptions on the general prohibition of discrimination: religious schools can apply admission requirements that are necessary to uphold their religious identity (CGB, 5 August 2003, *oordeel* 2003-122).

In yet another case the CGB found that educational institutions may prohibit the wearing of a *niquaab*, i.e. a veil that covers the entire face. The CGB accepted that the decision to wear a *niquaab* may well be an expression of religious beliefs, but it found that the prohibition was justified: *niquaabs* render communication between staff and students (and between the students themselves) more difficult. In addition identification of those visiting the school premises is impossible if *niquaabs* are allowed (CGB, 20 March 2003, *oordeel* 2003-40).

Practice of national authorities

Racist incident - A serious incident occurred in the city of Eindhoven, where on 15 June 2003 a group of five skinheads threw a molotov cocktail in an islamic school. The damage was limited thanks to a quick intervention of the fire brigade. The five were arrested and charged. It turned out that they had initially planned to attack a mosque. They had changed plans because the mosque had been very crowded - not that they were afraid to cause casualties, but they feared that there would be too many eye-witnesses who might recognise them. During the trial, racist supporters sent adhesion messages to extremist right-wing web sites on internet. On 16 October 2003 three of the five skinheads were convicted to prison sentences ranging from 10 to 12 months. Two minor suspects were to be tried separately.

Statistics on discrimination – Statistics over 2003 are not yet available. The statistics cited below may not be entirely reliable. Apart from the obvious problem of underreporting by the victims, the methods and definitions vary considerably. According to the Dutch Monitoring Centre on Racism and Xenophobia (DUMC), these figures could be considered as the "tip of the iceberg". An EUMC study supports the estimate of 16,000 cases (EUMC Annual Report 2002, part 2, p. 72).

The *Landelijk Expertisecentrum Discriminatiezaken (LCED)* [National Expert Centre Discrimination Cases], which forms part of the *Openbaar Ministerie* [Public Prosecutor's Office] since 1998, reported that 242 cases relating to discrimination were dealt with in 2002. 191 of these cases concerned insults. 118 cases were brought before criminal courts; in 80% the suspects were convicted.

In October 2003 the *Sociaal en Cultureel Planbureau (SCP)* [Social and Cultural Planning Office of The Netherlands] published the results of a study into personal discrimination as perceived by Turks, Moroccans, Surinamese and Antilleans. They were asked to what extent they had been confronted with discrimination. 4,5% to 7,9% indicated that they were "often" or "very often" confronted with discrimination; 29,7% to 34,5% were "occasionally", whereas 61,2% to 65,2% indicated that they were "never" or "almost never" exposed to discrimination (*Rapportage minderheden 2003;* see www.scp.nl for the report with a summary in English).

The *Landelijke Vereniging van Anti-discriminatiebureaus en -meldpunten* [National Federation of Anti-Discrimination Agencies] received 3902 complaints in 2002. This represents a marginal decrease compared to the previous year (3913 complaints). 63% of the complaints involved discrimination on the basis of race or colour. Discrimination on the basis of religion is on the rise: from 3% (in 2000) to 6% (in 2001) to 7% (in 2002). In 2002, the number of complaints about discrimination in the local neighbourhood (18%) for the first time exceeded those about the labour market (15%). The Federation notes that in the larger cities a comparatively bigger decrease has occurred. This may have to do with the heated political climate in 2001 (murder of Pim Fortuyn, elections, general hardening of the public debate on issues of integration) which may have made victims of discrimination reluctant to complain for fear of repercussions. (Annual Report over 2002, *Klachten en meldingen over ongelijke behandeling 2002*, available in English at www.lvadb.nl).

A separate research project – *Monitoring racism and the extreme right* – is carried out an annual basis by the *Anne Frank House* (Amsterdam) and the University of Leiden. In their 2003 report the researchers note that after a sharp increase in racial violence and violence incited by the extreme right at the end of the nineties and in 2000 (from 300 to 400 incidents per year), there was a striking decline in 2001 and another drop in 2002: from 317 cases in 2001 to 264 incidents in 2002. During 2001, the investigated violent incidents were dominated by the after-effects of September 11th: a series of violent incidents aimed at Muslims and objects associated with Muslims, especially mosques, which began almost immediately after September 11th and continued until some time around December. All these incidents together amounted to about 60% of the total number in 2001. In 2002 this percentage dropped to about 26% of the total (absolute number: 68). Approximately 17% of the investigated incidents of 2002 had to do with *anti-Semitic violence* (46 incidents). This is a striking increase in comparison with the anti-Semitic violence in 2001, which was 6% (18 cases). Nineteen of the 46 cases of anti-Semitic violence in 2002 can be labelled 'new anti-Semitism': either the perpetrator was believed to belong to an ethnic minority or there was a clear connection with the violence between the Israelis and the Palestinians.

The Amsterdam-based NGO C*entre Information and Documentation Israel (CIDI)* reported 337 incidents of anti-Semitic violence, an increase of 140% when compared to 2001. There were less incidents in the first five months of 2003. CIDI noted a significant increase in e-mails inciting to hatred or violence (Annual report on 2002, published 13 June 2003, www.cidi.nl).

Finally some thousand reports were made to the *Meldpunt Discriminatie Internet (MDI)* [Dutch Complaints Bureau for Discrimination on the Internet]. In 2002 the MDI received 1,008 reports as opposed to 691 in 2001: a 30% increase. The MDI evaluated 1,798 discriminatory statements in 2002 (there are usually several statements for each report). Of those 1,789 statements, the MDI found that in 1,238 cases there was evidence of punishable material. As a result, 881 requests to remove the objectionable material were made. In 557 cases this request resulted in removal, and in 324 cases it did not. Reports will be issued concerning 143 of these 324 statements (26 dossiers), and 169 will be submitted to the Public Prosecution Service for further examination. Considering the large number of complaints, the activities of the Public Prosecution Service to combat discrimination on the Internet are very limited. In 2001 only five cases were brought to court.

Article 22. Cultural, religious and linguistic diversity

International case law and concluding observation of international organs

Framework Convention – During the period under scrutiny, no progress has been made on the issue of ratification of the Framework Convention on National Minorities. Thus the Netherlands remain one of the few EU member states not having ratified this treaty. In the

context of the Dutch presidency of the Council of Europe, the Government has – after questions in the Dutch Senate – promised to reconsider the issue on the short term with the goal of swift ratification (*Kamerstukken I,* 2003-2004, 28810, no. 1).

Article 23. Equality between man and women

International case law and concluding observation of international organs

CEDAW – The Netherlands ratified the UN Convention on the Elimination of Discrimination against Women (CEDAW) in 1991. Its 4th periodic report will be submitted in 2004. As a preliminary step, a 'national periodic report' was submitted to Parliament on 22 December 2003. We will get back to this in our report on 2004.

ESC: remuneration gap – In 2003 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 4 of the European Social Charter in respect of the Netherlands (Kingdom in Europe). The Committee noted statistics according to which the remuneration gap between women and men, all sectors combined, was 23 % in 1998, compared with 26 % in 1993. As in the past, much of this difference in remuneration is explained, in decreasing order, by differences in the posts held, fulltime/part-time work, age, experience, etc. Once these factors have been eliminated, the difference in pay was about 7 % in 1998 (compared to 9 % in 1993). The discrepancy was much smaller (4 %) in the public sector. While aware that statistical comparisons in this field are not very reliable, the Committee notes that the remuneration gap in the Netherlands is clearly larger than in most other European Union member states.

In its conclusion on Article 1 of the Additional Protocol to the Charter (Conclusions XV-2, p. 378), the Committee noted that one of the reasons for this difference in pay was that women worked part-time more often than men. In the Netherlands, about 15 % of collective labour agreements still do not apply to employees working "short part-time" (less than twelve hours a week). The Committee considers that the principle that there should be no discrimination between the sexes implies that the rule of equal pay for full-time and part-time workers should be observed, since most of the latter are women and this can gives rise to indirect discrimination. Accordingly, the Committee raised a number of additional questions to the Netherlands.

ESC and ECHR: pensions – On a different note the Committee European Committee of Social Rights concluded that the situation in the Netherlands is not in conformity with Article 4 § 3 of the Charter as benefits or rights linked to a pension scheme are excluded from the notion of pay and therefore from the application of the principle of equal treatment.

On the other hand, the European Court of Human Rights declared inadmissible a complaint concerning the unequal division of pension entitlements between former spouses. The Court found, on the basis of the development of Dutch law, that it cannot be said that at the time when the applicants were divorced, i.e. before the entry into force of the *Wet verevening pensioenrechten bij scheiding* [Pensions Equalisation (Divorce) Act] of 1995, the applicants had either a "possession" or a "legitimate expectation" to be entitled to any part of their former husbands' pensions. Since the case fell outside the ambit of Article 1 of Protocol No. 1, the Court was not in position to review the compatibility of the situation with Article 14 ECHR (Eur. Ct. H.R., *Meyne-Moskalczuk a.o. v. the Netherlands* admissibility decision. of 9 December 2003, application no. 53002/99).

National legislation, regulation and case law

Equal treatment: sex – Following the ECJ's preliminary ruling in the case of *Lommers* (case C-476/99) – in which the ECJ held that Council Directive 76/207/EEC does not preclude a scheme set up by a Minister to tackle extensive under-representation of women within his Ministry under which a limited number of subsidised nursery places made available by the Ministry to its staff is reserved for female officials alone – the referring Dutch court, the *Centrale Raad van Beroep* [Central Appeals Tribunal] decided the case on the merits. In its judgment of 23 January 2003 it upheld the Minister's policy to reserve subsidised nursery places for female officials.

Article 19 *Wet Arbeidsongeschiktheid* [Incapacity to Work Act] provides that one is entitled to a benefit following a period of 52 weeks of incapacity to work. In a decision of 6 June 2003 (LJN AI1035), the Central Appeals Tribunal determined that the period of pregnancy and maternity leave must not be taken into account when calculating the 52 weeks' period. The Tribunal based its decision, *inter alia*, on the ECJ's ruling in *Brown* (case C-394/96; ECR 1998, p. I-4225).

Article 24. The rights of the child

International case law and concluding observation of international organs

UN Convention on the Rights of the Child – In 2003 the Netherlands submitted its second periodic report pursuant to the UN Convention on the Rights of the Child. It will be discussed by the UN Committee on 19 January 2004.

Child care measures – On the judgment of the European Court of Human Rights in the case of *Venema v. Netherlands*: see Article 7 *supra.*

National legislation, regulation and case law

Minimum wage for youngsters – On 11 December 2003, the *Rechtbank* [District Court] of The Hague delivered a judgment on minimum wage rules for youngsters (LJN AF1787). The case concerned a refusal by the State to extend these rules, which apply to persons aged 15 and older, to 13 and 14 year olds. The authorities considered this refusal necessary to protect this vulnerable group and to prevent them from entering the labour market. The District Court, however, considered the age limit of 15 to be arbitrary and the distinction with younger children to be unjustified discrimination on the ground of age. The District Court observed that the refusal to define a minimum wage is not an appropriate means of restricting access to the labour market. It concluded that the refusal violated Article 26 ICCPR in conjunction with article 7 of the European Social Charter. The District Court did not determine the appropriate level of minimum wages for 13 and 14 year olds, since this would be beyond the power of the courts. It is now up to the legislator to adjust the relevant rules. On this issue, see also Article 32 *infra*.

Practice of national authorities

Unaccompanied asylum seeking minors – As was noted in connection to Article 18 *supra*, Human Rights Watch expressed concern that more than 30 percent of child asylum seekers have their claims reviewed in the cursory AC procedure. The situation of unaccompanied asylum seeking minors gave rise to concern in other respects too. Two accommodations, so-called campuses, were set up for this group in November 2002 and February 2003. The disciplinary system, which was based on a regime for young criminals, was very strict and caused protests both from the minors themselves and from society at large. A large number of

them have already rebelled against the strict regime and a portion of them have departed to unknown destinations. On 23 April 2003 the *Voorzieningenrechter* [Interim Relief Judge] concluded in a case brought by NGOs that the unaccompanied asylum seeking minor campus provided insufficient options for free choice recreational activities, in violation of Article 31 CRC, and also concluded that an independent complaint commission must be set up within one month and that the young people must be allowed to use their spending money allowance as they see fit. Subsequent to this judgment the regime in the two centres was somewhat relaxed (see *Second Report of the Dutch NGO Coalition for Children's Rights on the implementation of the Convention of the Rights of the Child in the Netherlands,* May 2003; and see *Commentary on the Second Periodic Report of the Kingdom of the Netherlands in accordance with Art. 44, paragraph 1(a) of the Convention on the Rights of the Child,* NJCM, Dutch Section of the International Commission of Jurists (ICJ) and Johannes Wier Stichting, May 2003).

On 27 November, one of the two institutions was closed down; the Minister of Asylum Affairs has declared that the other will remain open, specifically because of the effect it has had on the number of unaccompanied minors seeking asylum in the Netherlands: it has dramatically decreased from 6705 in 2000 to 1019 in 2003.

Reasons for concern

The situation of the campus for unaccompanied asylum seeking minors is still a cause for concern, as the aim of the existence is one of general deterrence and is aimed at return, whereas for many of the inhabitants their asylum claim has not yet been decided. The best interests of these children seem to be subservient to the Government's policy aims.

Article 25. The rights of the elderly

National legislation, regulation and case law

Equal treatment in the workplace – A new act, the *Wet gelijke behandeling op grond van leeftijd bij de arbeid,* will prohibit age discrimination in the workplace and in professional education. The act seeks to implement Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and education (*OJ* 2000 L 303/16). The *Tweede Kamer* [House of Representatives] approved the bill on 23 September 2003; the E*erste Kamer* [Senate] followed on 16 December 2003 (*Kamerstukken* 2003-2004, 28 170).

It is to be recalled – as was noted in our 2002 Report – that the *Hoge Raad* [Supreme Court] in November 2002 confirmed that dismissal at the age of 65 does not amount to discrimination on the ground of age. The applicant had argued that the existing case-law should be reconsidered so as to reflect present-day standards. The Supreme Court observed, however, that only in 2001 a bill had been tabled concerning equal treatment on the ground of age as regards labour, which expressly provided for dismissal at 65. This implied that a reasonable and objective justification for compulsory retirement at that age must still be considered to exist (LJN AE7356).

The position of the *Hoge Raad* was followed in more recent cases. The *Gerechtshof* [Court of Appeal] of Amsterdam, in a judgment of 3 April 2003 (*JAR* 2003, 126), accepted compulsory retirement at the age of 62 for personnel working in a casino. A similar decision was taken on 11 June 2003 by the *Kantongerecht* [District Court] of Haarlem (*JAR* 2003, 187). The District Court of Deventer found on 28 May 2003 that the dismissal of a 68 year old cleaner did not amount to age discrimination (*JAR* 2003, 186). In general active life ends at 68, the judge observed.

Article 26. Integration of persons with disabilities

International case law and concluding observation of international organs

ESC – In 2003 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 15 § 1 (Right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement) of the European Social Charter. Following a description of the various regulations in force, the Committee concluded that the situation in the Netherlands is in conformity with Article 15 § 1 of the Charter.

National legislation, regulation and case law

Equal treatment of handicapped and chronically ill – The *Wet gelijke behandeling op grond van handicap of chronische ziekte* [Equal treatment of the handicapped and the chronically ill Act] partially entered into force on 1 December 2003. The Act, which seeks to implement, *inter alia*, Directive 78/2000/EC, gives anyone who considers himself to have been unequally treated on the grounds of handicap or chronic illness the right to complain before the Equal Treatment Commission. The scope of the law is limited to the workplace and professional education. To stimulate effective implementation of the law, the Government has announced to set up a taskforce. This taskforce will help Governmental and private organisations to take the needs of the handicapped into account in the early stages of their planning (*Staatsblad* 2003, 206)

Financial support – The *Regeling leerlinggebonden financiering* [Pupil-tied Financing Scheme] entered into force on 1 Augustus 2003 (*Staatsblad* 2002, 631). As a consequence pupils and scholars with a handicap can decide themselves to a large extent on the way in which their financial aid is spent. This should enhance their opportunities to participate in the regular forms of education.

CHAPTER IV : SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

International case law and concluding observation of international organs

ESC – In 2003 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 3 of the European Social Charter in respect of the Netherlands. Paragraph 3 provides for consultation with employers' and workers' organisations on questions of safety and health. The Committee examined the structures and procedures for consulting at national level and within the firm in the previous conclusion (Conclusions XIV-2, p. 546), and concluded that these were in conformity with Article 3 § 3 of the Charter. However, it had deferred its conclusion pending receipt of information on the practical application of consultation at national level. In this respect the new Dutch report indicated that social partners are regularly and fully informed within the Safety, Health and Welfare Committee, a tripartite body. The Committee concluded that the situation in the Netherlands is in conformity with Article 3 § 3 of the Charter.

National legislation, regulation and case law

Involvement of employees in European companies – In November 2003 the Government submitted a bill to Parliament with a view to the implementation of EC Directive 2001/86/EC, supplementing the Statute for a European company with regard to the involvement of employees (*OJ* 2001 L 294/22).

Representative bodies – Five years after the introduction of several amendments to the 1988 *Wet op de ondernemingsraden (WOR)* [Workers' Council Act] the Government has submitted an evaluation of workers' representation to Parliament. Some of the conclusions are that workers' councils have been established in about 70% of the companies that should have done so; councils make more and more use of their legal powers; members tend to be overburdened; the relation between the councils and the employees could be improved (*Kamerstukken II,* 2002-2003, 28792, no. 1)

Working hours – On 1 June 2003, the act of 14 March 2003 entered into force, giving employees more influence in the determination of their working hours (*Staatsblad* 2003, no. 141).

Article 28. Right of collective bargaining and action

International case law and concluding observation of international organs

ESC – In 2003 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 2 of the European Social Charter in respect of the Netherlands (Kingdom in Europe). The Committee reiterated that the provisions of the Working Hours Act on the so-called "flexibility regulations" do not contain sufficient guarantees for collective bargaining in order to protect workers and are thus not in conformity with Article 2 § 1 of the Charter.

National legislation, regulation and case law

Collective action – In April 2002 workers in the public transportation sector announced that tickets would not be checked on certain specified days. Effectively the public was offered a free ride. The *Gerechtshof* [Court of Appeal] of Amsterdam decided, in a judgment of 9 January 2003, that this form of collective action is protected by Article 6 par. 4 of the European Social Charter (LJN AF2826).

On the other hand the *Rechtbank* [Regional Court] of Utrecht decided, in a judgment of 16 July 2003, that Article 6 ESC does *not* cover strikes that result from disciplinary measures taken against individual workers.

In a reaction to these decisions it was suggested in Parliament that legislation regulating the right to strike should be adopted. The Minister of Social Affairs, however, expressed the opinion that the existing case-law is sufficiently clear and well-balanced (*Kamerstukken II,* 2002-2003, *Aanhangsel* 1687).

Article 29. Right of access to placement services

International case law and concluding observation of international organs

ESC – In 2003 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 15 § 2 (placement arrangements for disabled persons) of the European Social Charter. The Dutch report (which covered the period 1997-2000) stated that 32,143 reintegration instruments were used in 1999 and 58,105 in 2000. The Committee noted the increase but asked for figures on the number of beneficiaries of the measures.

As regards sheltered employment the Committee notes that new legislation on sheltered employment entered into force during the reference period (Sheltered Employment Act of 11 September 1997). In addition to providing for employment opportunities in a company under

the sheltered employment scheme the new Act provides the opportunity for people with disabilities to work in an ordinary employment setting under supervision. The employee enters into an employment contract with the employer as opposed to the local authority (as in the sheltered employment scheme) and is supervised by a professional supervisory organisation. The local authority provides a subsidy to the employer and finances the cost of supervision. Measures under the Sheltered Employment Act are largely financed by central government; the budget for 2001 was 1863.4 million euro. In 2000 there were 91,000 workers in sheltered employment. Pending receipt of additional information, the Committee deferred its conclusion as to conformity of the Dutch practice with Article 15 § 2.

Article 30. Protection in the event of unjustified dismissal

National legislation, regulation and case law

On 14 August 2003, the *Commissie Gelijke Behandeling* [Equal Treatment Commission] ruled that the dismissal of a homosexual aid worker was unjustified, since his dismissal appeared to be based on his sexual orientation. The employer failed to prove that there was another ground for dismissing the worker (CGB, *oordeel* 2003-113).

Article 31. Fair and just working conditions

International case law and concluding observation of international organs

ESC – In 2003 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 2 of the European Social Charter in respect of the Netherlands (Kingdom in Europe). The Committee concluded that the situation in the Netherlands is not in conformity with Article 2 § 4 as there is no provision for reduced working hours or additional paid holidays in dangerous and unhealthy occupations.

Article 32. Prohibition of child labor and protection of young people at work

International case law and concluding observation of international organs

ESC – In 2003 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 4 of the European Social Charter in respect of the Netherlands (Kingdom in Europe). The Committee recalled that under the Minimum Wage and Minimum Holiday Allowance Act as amended workers under the age of 23 years are entitled only to a percentage of the adult minimum wage ranging from 30 % for 15-year olds increasing to 85 % for 22-year olds. A worker aged 18 years was thus entitled to 45,5 % of the adult minimum wage which in 2000 represented a net value of about 4 904 euro annually or a mere 31,4 % of the net average wage. Notwithstanding the Government's arguments, the Committee can only reiterate that such a wage is too low to be considered fair in the meaning of Article 4 § 1 of the Charter.

On minimum wage rules for 13- and 14-year olds, see Article 24 *supra*.

Article 33. Family and professional life

No significant developments to be reported.

Article 34. Social security and social assistance

National legislation, regulation and case law

In the period under scrutiny, the Government announced an package to overhaul social security in order to keep the system affordable. Many legislative initiatives have been announced, but not many measures have entered into force yet. According to the Government, the intention must be to keep workers with health problems in the labour force as long as possible. However, some critics argue that many measures are being taken without a more fundamental discussion about the premises of the social security system.

On January 1, 2004, the *Wet werk en bijstand* [Labour and Welfare Act]) entered into force, replacing the *Bijstandswet* [Welfare Act]. The new act aims to bring disabled people back to work within a shorter time.

Article 35. Health care

International case law and concluding observation of international organs

In its 'CERD report' (see Article 21 *supra*), the Dutch Government recalled that under Dutch civil law, medical services must be paid for by the actual recipient of the services or by a third party who is responsible for his or her maintenance. If the recipient has either public or private medical insurance, this will normally cover the costs of health care. As a result of the Benefit Entitlement (Residence Status) Act, illegal immigrants are not entitled to public medical insurance. People who have no medical insurance and are unable to pay their medical expenses can apply for benefits under the Social Assistance Act. In order to do so, however, they must be legally resident in the Netherlands. Dutch law makes no social security provision for illegal immigrants.

However, the Government noted, according to Dutch ethical standards, urgent medical care must be provided even if the recipient is uninsured or unable to pay for it. Urgent medical care includes emergency treatment in life-threatening situations, prevention of loss of essential functions, care in situations that pose a threat to the health of third parties, maternity care, preventive health care for children and young people, and vaccinations. The patient's condition and the degree of urgency are assessed by the attending physician. In cases where illegal immigrants are unable to pay for the care provided, health care providers can recover their expenses from a government-subsidised fund set up for the purpose. One of the main aims of the fund is to identify and solve problems concerning health services for illegal immigrants.

Article 36. Access to services of general economic interest

No significant developments to be reported.

Article 37. Environmental protection

International case law and concluding observation of international organs

On 2 October 2003, the European Court of Justice found the Netherlands to be in violation of Directive 91/676/EEC, concerning the protection of waters against pollution caused by nitrates from agricultural sources (*Commission v. the Netherlands*, Case C-322/00).

National legislation, regulation and case law

A bill has been submitted to Parliament with a view to changing the *Electriciteitswet* [Electricity Act] in order to promote the use of durable electricity (*Kamerstukken II*, 28782, no. 15)

Article 38. Consumer protection

No significant developments to be reported.

CHAPTER V : CITIZEN'S RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

National legislation, regulation and case law

A change of the *Kieswet* [Elections Act] has been effected (*Staatsblad* 2003, 514; *Kamerstukken II*, 2002-2003, 28991). The changes were made to bring the Elections Act, in so far as elections for European Parliament are concerned, in conformity with the decisions of the EU Council of 25 June 2002 and 23 September 2002. From a Dutch perspective the only substantial (but hypothetical) change is that a member of Parliament can no longer be MEP at the same time.

Article 40. Right to vote and to stand as a candidate at municipal elections

International case law and concluding observation of international organs

Foreign nationals who have been legally resident in the Netherlands for five years are entitled to vote and to stand for election at local level. The 1998 local and national elections saw progress regarding the political representation of ethnic minorities (although this trend was more marked at national than at local level). The percentage of ethnic minority members in the *Tweede Kamer* [House of Representatives] of Parliament is higher than on local councils.

In its 'CERD report' (see Article 21 *supra*), the Dutch Government reported that a survey of political participation by ethnic minorities in the four largest cities has revealed differences between the various minorities. People of Turkish origin participate most (although often through their own ethnic organisations), followed by people of Surinamese origin. People of Moroccan origin participate less, and there are considerable divisions within that group. People of Antillean origin participate least in local politics.

The election campaign for the municipal elections on 6 March 2002 started in February that year and was aimed at encouraging voters to turn out at all the forthcoming elections (not only the municipal elections, but also the national elections in May 2002 and provincial elections in March 2003). It focused on minorities in two particular ways: (a) Associations of minorities that sit on the National Ethnic Minorities Consultative Council (LOM) were invited to submit a joint plan of activities designed to encourage their supporters to turn out and vote. The sum of 272,270 euro was set aside for this purpose. (b) The sum of 272,270 euro was likewise set aside for television advertisements specifically aimed at minorities, and broadcast on the channels they mainly watch.

A survey conducted in Rotterdam by the Centre for Research and Statistics (COS) on the turn-out of voters from the various minority groups reported significant differences between them. The Antillean community had the lowest turn-out rate (20%) and the Turkish the highest (50%). The survey report suggests that there may be some relationship between voter turn-out and the number of candidates from the relevant minority standing for election. Of all the minorities, the Turkish community had the largest number of candidates standing and also the highest level of voter participation.

Article 41. Right to good administration

This provision of the Charter will only be analyzed in the Report dealing with the law and practices of the institutions of the Union.

Article 42. Right of access to documents

This provision of the Charter will only be analyzed in the Report dealing with the law and practices of the institutions of the Union. It should be noted, however, that members of Dutch Parliament have time and again complained about incomplete and late access to documents pertaining to the Justice and Home Affairs Council. In a letter of 28 October the Minister of Justice and the Minister of Aliens Affairs and Integration promised to make more documents available at an earlier moment. Thus, the provisional agenda for Council meetings will be forwarded immediately by e-mail (*Kamerstukken II*, 2003-2004, 23490, no. 297).

Article 43. Ombudsman

This provision of the Charter will only be analyzed in the Report dealing with the law and practices of the institutions of the Union.

Article 44. Right to petition

This provision of the Charter will only be analyzed in the Report dealing with the law and practices of the institutions of the Union.

Article 45. Freedom of movement and of residence

National legislation, regulation and case law

Prohibition orders – In our 2002 Report we discussed the cases of *Landvreugd* and *Olivieira*, in which the European Court of Human Rights reviewed the *verwijderingsbevelen* [prohibition orders] which had been imposed by the *Burgemeester* [Burgomaster] of Amsterdam, after the applicants had been found in possession of hard drugs or openly using the drugs. The applicants were banned for 14 days from designated emergency areas. In each case, the Strasbourg Court held, by four votes to three, that there had been no violation of Article 2 of Protocol No. 4 of the European Convention on Human Rights (liberty of movement) (Eur. Ct. H.R., *Olivieira* and *Landvreugd v. the Netherlands* judgments of 4 June 2002, application nos. 37331/97 and 33129/96).

In a somewhat similar case the *Gerechtshof* [Court of Appeal] of 's-Hertogenbosch accepted a *verblijfsverbod* [prohibition order] which was imposed by the Burgomaster of Venlo on the basis of the *Algemene plaatselijke verordening* [local by-laws]. In its judgment of 4 February

2003, the Court of Appeal found that the order did not violate Article 12 ICCPR or Article 2 of Protocol No. 4 of the European Convention on Human Rights. The Court accepted that the by-laws were sufficient as a legal basis (LJN AF3987).

Article 46. Diplomatic and consular protection

National legislation, regulation and case law

No subjective right to diplomatic and consular protection – The case of Mr Kuijt, a Dutch national detained in Thailand since 1997 on suspicion of drugs trafficking, attracted considerable attention in the media. Having been acquitted in 2002 by the court of first instance, Mr Kuijt continued to be detained while the court of appeal examined his case.

Although the Dutch embassy in Thailand had supported Mr Kuijt throughout his detention, and diplomatic means were used to bring about his release, Mr Kuijt felt that the Dutch authorities had not done enough to secure his release from prison. He brought proceedings against the State of the Netherlands, asking the Minister of Foreign Affairs to offer a guarantee to his Thai counterpart that Mr Kuijt would not leave Thailand if he were released pending trial. The Ministry of Foreign Affairs argued that it was not under a legal obligation vis-à-vis Mr Kuijt to offer diplomatic protection, and that it is entitled to a wide margin of appreciation since each case should be determined on an individual basis.

In summary proceedings, the *Rechtbank* [Regional Court] of The Hague rejected Mr Kuijt's request on 18 March 2003 (LJN AF5930). The Regional Court observed that the Ministry had already made a considerable effort in supporting Mr Kuijt and in raising his case through diplomatic channels. In addition the Court noted that there was no legal obligation for the Ministry to offer the kind of guarantees that Mr Kuijt was looking for.

CHAPTER VI : JUSTICE

Article 47. Right to an effective remedy and to a fair trial

International case law and concluding observation of international organs

Independence and impartiality – The case of *Kleyn and others* had a fairly factual background but a clear constitutional dimension. The case essentially concerned the position of the Dutch *Raad van State* [Council of State, *Conseil d'Etat*] which exercises both advisory functions, by giving advisory opinions on draft legislation, and judicial functions, by determining appeals under administrative law. The case was decided by a Grand Chamber, the Governments of Italy and France making third party submissions.

The applicants were owners of homes or business premises, which were located on or near the track of a new railway, the *Betuweroute* which will run across the Netherlands from the Rotterdam harbour to the German border. When the applicants objected to the routing of the *Betuweroute,* their complaints were determined by the *Afdeling Bestuursrechtspraak* [Administrative Jurisdiction Division] of the Council of State. Their complaints were rejected.

In Strasbourg the applicants complained, under Article 6 § 1 of the Convention, that Council of State could not be regarded as an independent and impartial tribunal. Relying on the Strasbourg Court's findings in the *Procola* case (1995), in which the Court held that the Luxembourg Supreme Administrative Court's successive performance of advisory and judicial functions in respect of the same decisions was capable of casting doubt on that

institution's structural impartiality, the applicants complained that the Council of State had advised the Government on the Bill for the *Tracéwet* [Transport Infrastructure Planning Act] and that the *Tracébesluit* [Routing Decision] they had subsequently challenged before the Administrative Jurisdiction Division of the Council of State had been taken on the basis of that Act.
The European Court of Human Rights took a fairly narrow approach, asking itself whether, in the circumstances of *this* case, the Administrative Jurisdiction Division had had the requisite appearance of independence or the requisite objective impartiality. The Court found nothing in the manner and conditions of appointment of the Netherlands Council of State's members or their terms of office to substantiate the applicants' concerns regarding the independence of the Council of State. Nor was there any indication of any personal bias on the part of any member of the bench that had heard the applicants' appeals against the Routing Decision.

The Court was not as confident as the Government that the internal measures taken by the Council of State with a view to giving effect to the *Procola* judgment in the Netherlands were such as to ensure that in all appeals the Administrative Jurisdiction Division constituted an impartial tribunal under Article 6 § 1. However, it was not the Court's task to rule in the abstract on the compatibility of the Netherlands system in this respect with the Convention. The issue before the Court was whether, in respect of the applicants' appeals, it was compatible with the requirement of objective impartiality that the Council of State's institutional structure had allowed certain of its councillors to exercise both advisory and judicial functions.

The Council of State had advised on the Transport Infrastructure Planning Bill, whereas the applicants' appeals had been directed against the Routing Decision. The Court found that the advisory opinions given on the draft legislation and the subsequent proceedings on the appeals against the Routing Decision could not be regarded as involving the "same case" or the "same decision". Although the planning of the *Betuweroute* railway had been referred to in the advice given to the Government, that could not reasonably be regarded as a preliminary determination of any issues subsequently decided by the ministers responsible for the Routing Decision. The Court could not agree with the applicants that, by suggesting the name of places where the *Betuweroute* was to start and end, the Council of State had in any way prejudged the exact routing of that railway. The applicants' fears regarding the Administrative Jurisdiction Division's lack of independence and impartiality could not be regarded as objectively justified. There had accordingly been no violation of Article 6 § 1 (twelve votes to five; the Dutch Judge Thomassen being among the dissenters). Eur. Ct. H.R., *Kleyn and Others v. the Netherlands* judgment of 6 May 2003 (application nos. 39343/98 a.o.).

Reasonable time – In 2003 the European Court of Human Rights found a violation of Article 6 ECHR for failure to conduct judicial proceedings within a reasonable time. The case of *Beumer* concerned a social-security dispute. The proceedings lasted five years for three levels of jurisdiction. The Court considered that was a "striking feature" that, more than four years after Mr Beumer had filed his request for a benefit and after proceedings before two judicial instances concerning this request, the basic question which social security organ was in fact competent to deal with the case remained unresolved. The Court found no other explanation than the apparent complexity of the social security regulations, which did engage the responsibility of the Netherlands. The Court awarded the applicant a total of 2,500 euros for non-pecuniary damage (Eur. Ct. H.R., *Beumer v. the Netherlands* judgment of 29 July 2003 (application no. 48086/99)).

National legislation, regulation and case law

Efficiency and capacity of the legal system – Especially in the area of criminal law, public debate and political effort has concentrated on increasing the efficiency and capacity of the legal system. The *Wetenschappelijk Raad voor het Regeringsbeleid* [Scientific Council for

Government Policy] published an interesting report on the future of the national constitutional state (English translation available on www.wrr.nl). See for the response of the Prime Minister: *Kamerstukken II*, 2003-2004, 29 279, no. 1. See also: Algemeen kader herziening Wetboek van Strafvordering, *Kamerstukken II*, 2003–2004, 29 271.

The concern to increase the efficiency and capacity of the legal system is reflected in a number of legislative proposals, for instance on

- the wider use of administrative sanctions *(Kamerstukken II*, 2002–2003, 29 000);
- extending the length of pre-trial detention whilst limiting the number of hearings of the suspect (*Kamerstukken II*, 2003–2004, 29 253);
- extending the possibilities for the Courts of Appeal to refuse the hearing of witnesses *à décharge* in appeal proceedings (*Kamerstukken II*, 2003–2004, 29 254);
- lowering the requirements for motivation of criminal judgments against persons that have confessed to the charge (*Kamerstukken II*, 2003–2004, 29 255);
- creating the possibility for the *Openbaar Ministerie* [Public Prosecutor's Office] to impose pecuniary sanctions for certain criminal offences (*Kamerstukken II*, 2003-2004, 29 279, no. 1, p. 17, and see *Staatscourant* 17 January 2003).

These proposals, which are currently discussed by Parliament, were generally welcomed by the judiciary and the Public Prosecutor's Office. Concern was also voiced, however, by organisations such as the *Nederlandse Vereniging van Strafrechtadvocaten* [Dutch Association of Criminal Defense Lawyers]. While acknowledging the need to enhance efficiency, the NVSA feels that several proposals go too far in limiting the rights of the defense.

With respect to the proposal extending the length of pre-trial detention, for instance, the NVSA criticises the fact that judicial review of deprivation of liberty – which is after all a far-reaching measure – will become dependent to a much greater extent on the suspect's initiative. Under the current system, the court may order pre-trial detention for a duration of 30 days; this measure can be prolonged twice. This means that the need to deprive the suspect of his liberty is considered on three occasions. The courts must hear the suspect at the first occasion, and can do so on the second and third occasion (but the suspect often waives his right to attend). Under the proposed system, the court may order pre-trial detention for a duration of 90 days – which means that there will be no *ex officio* examination of the need of continued detention after 30 and 60 days. Admittedly the suspect may appeal to the court to consider his release, but the NVSA observes that in practice suspects do not always enjoy adequate legal assistance.

The NVSA voiced similar concerns with respect to the proposal on the hearing of witnesses in appeal proceedings.

Article 48. Presumption of innocence and right of defence

International case law and concluding observation of international organs

Presumption of innocence – A violation of Article 6 § 2 ECHR was found in the case of *Baars*. Mr Baars had been suspected of forgery and being an accessory to bribery of a public official, Mr B. Indeed this Mr B was convicted, but the case against Mr Baars was closed by the public prosecutor's office since the proceedings could not be ended within a "reasonable time", as required by Article 6 § 1 ECHR. Mr Baars then claimed a total of 205,000 Netherlands guilders (NLG) for reimbursement of costs and expenses he incurred during the criminal proceedings against him and for pecuniary and non-pecuniary damage for time spent

in pre-trial detention. He was only awarded NLG 114.60 for travel expenses; the remainder of his claim was rejected. His appeal to the *Gerechtshof* [Court of Appeal] of Den Bosch was rejected on the ground that he had been involved in forging a receipt which was, among other things, the basis for the conviction of Mr B for participating in forgery.

The European Court of Human Rights found that the Court of Appeal's reasoning amounted in substance to a determination of the applicant's guilt without the applicant having been "found guilty according to law". It was based on findings in proceedings against another person, in which the applicant participated only as a witness, without the protection guaranteed to the defence under Article 6 of the Convention. The Court, therefore, held unanimously that there had been a violation of Article 6 § 2. The Court further held that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant. He was awarded 2,500 euro (for costs and expenses. Eur. Ct. H.R., *Baars v. the Netherlands* judgment of 28 October 2003 (application no. 44320/98)

The problem appears to be more wide-spread: see for instance the case of *Del Latte v. The Netherlands*, now pending (admissibility decision of 9 October 2003, application no. 44760/98).

National legislation, regulation and case law

"Post Van Mechelen" – In 1997 the European Court of Human Rights found a violation of Article 6 in the case of *Van Mechelen a.o. v. the Netherlands* (judgment of 23 April 1997, *Reports* 1997, p. 691). The Court found that the conviction of the applicants on the basis of statements of witnesses who remained anonymous was incompatible with the rights of the defence. Amounts of 25,000 to 30,000 guilders (approximately 11,000 to 14,000 euro) were awarded by way of just satisfaction on the basis of Article 50 (now 41) ECHR.

Following the Strasbourg judgment, Mr Van Mechelen and the other applicants brought proceedings before the Dutch courts, claiming compensation for the days spent in prison. On 5 June 2003, the *Gerechtshof* [Court of Appeal] of The Hague found in their favour. It ruled that the fact that the Strasbourg Court had already awarded amounts by way of 'just satisfaction' did not affect their right to obtain full financial compensation of the damage they had suffered in accordance with Dutch legal principles. The Court of Appeal awarded considerable amounts: some 190,000 euro to Mr Van Mechelen and 127,000 euro to each of the other applicants.(LJN AF9801)

DNA research in criminal investigations – see Article 8 *supra.*

Efficiency and capacity of the legal system – see our discussion of various legislative proposals under Article 47 *supra.*

Practice of national authorities

TAPING CONFIDENTIAL TELECOMMUNICATION WITH LAWYERS – THE *COLLEGE BESCHERMING PERSOONSGEGEVENS* [DUTCH DATA PROTECTION AUTHORITY], IN A REPORT OF 16 JULY 2003, CONSIDERS CURRENT POLICE PRACTICE AS REGARDS TAPING AND REGISTRATION OF CONFIDENTIAL TELECOMMUNICATION WITH LAWYERS OR OTHER LEGAL ADVISORS ILLEGAL (*ONDERZOEK NAAR DE WAARBORGING VAN DE VERTROUWELIJKE COMMUNICATIE VAN ADVOCATEN BIJ DE INTERCEPTIE VAN TELECOMMUNICATIE* [INVESTIGATION INTO SECURING CONFIDENTIAL COMMUNICATION OF LAWYERS WHEN INTERCEPTING TELECOMMUNICATION], 16 JULY 2003, WWW.CBPWEB.NL). THE AUTHORITY RECOMMENDS THE USE OF AUTOMATIC NUMBER-RECOGNITION TO FILTER CONFIDENTIAL TELEPHONE CALLS WITH LAWYERS, A STRENGTHENING OF THE PRACTICE TO DESTROY RECORDS OF

THOSE PHONE CALLS AND OF MEASURES TO MAKE SURE THAT ANY KNOWLEDGE DERIVED FROM THEM CANNOT BE USED, ESPECIALLY NOT IN THE CONTEXT OF CRIMINAL PROCEDURES. THE MINISTER OF JUSTICE, HOWEVER, HAS INDICATED THAT HE DOES NOT AGREE WITH THE FINDINGS OF THE DATA PROTECTION AUTHORITY (*HANDELINGEN II,* 2002/2003 (*AANHANGSEL*), 3613).
MEANWHILE, A NUMBER OF LAWYERS SUPPORTED BY THE *NEDERLANDSE VERENIGING VAN STRAFRECHTADVOCATEN* [DUTCH ASSOCIATION OF CRIMINAL DEFENSE LAWYERS] HAVE LODGED A COMPLAINT ABOUT THIS MATTER WITH THE EUROPEAN COURT OF HUMAN RIGHTS.

More in general questions have been raised about the practice of telephone tapping. The Minister of Justice refused to indicate the amount of telephone taps, and claimed that there is sufficient judicial control (see *Staatscourant* 1 April 2003).

The *Hoge Raad* [Supreme Court] decided that the transcript into Dutch of telephone conversations held in a foreign language by an anonymous interpreter cannot be regarded as the written statement of an anonymous witness (*Hoge Raad*, 21 October 2003; LJN AH9922).

On telephone taps, see also Article 8 *supra*.

Infiltration – In March 2003 the Minister of Justice admitted that a criminal infiltrator was used, after an international request for legal help. The use of criminal infiltrators is highly controversial: following extensive debate Parliament decided in 1999 that criminal infiltrators should no be used since they may have a hidden agenda. However, the Minister argued, an exception had to be made in this case since it concerned international terrorism (*Staatscourant*, 12 March 2003).

In July 2003 the *Hoge Raad* [Supreme Court] decided a case concerning a convict who, not having appealed his conviction, found out later that a civilian infiltrator was used to assemble evidence against him. This information only became known to him due to criminal proceedings against an accomplice. The convict asked for revision of his conviction, but this request was rejected. The *Hoge Raad* agreed: only severe violation of the principles of a fair trial merit revision (*Hoge Raad*, 1 July 2003).

Still on infiltration: in October the Supreme Court ruled that in an order for infiltration of "one person and members of his entourage", the members of the "entourage" do not have to be named. As a consequence, infiltration can be aimed at persons who initially were not identified as forming part of the "entourage" (*Hoge Raad,* 7 October 2003, LJN AG2528).

Article 49. Principles of legality and proportionality of criminal offences and penalties

National legislation, regulation and case law

Higher sentences – There seems to be a general feeling of the legislator that criminal penalties are not sufficiently severe. Several legislative proposals aim to increase the level of penalties, for example for crimes related to terrorism *(Kamerstukken II,* 2003–2004, 28 463). For other examples see *Kamerstukken II*, 2002–2003, 29 025 and *Kamerstukken II*, 2002–2003, 28 484. As was noted in connection with Article 21*, supra,* an act was adopted to increase the penalty for structural forms of discrimination *(Staatsblad* 2003, 480).

Proportionality of sentences – In one particular case the proportionality of a criminal sentence became a topic of vehement public debate. This was the case of Volkert van der G., who was charged with the murder of the Dutch right-wing politician Mr. Fortuyn (see also Article 4

supra). In April 2003, the *Rechtbank* [Regional Court] of Amsterdam convicted him to 18 years' imprisonment. Several commentators voiced the opinion that this sentence was too low and that Volkert van der G. should have been sentenced to life imprisonment. Among them was Mr Remkes, the Minister of the Interior in several press interviews (see, e.g., *NRC Handelsblad* en *Algemeen Dagblad* of 16 April 2003). Mr Remkes was subsequently criticised – e.g. by the Minister of Justice and by the public prosecutor of Van der G. – for interfering with the judicial process (see, for instance, *De Volkskrant* en *Trouw* of 17 April 2003).

In July, the *Gerechtshof* [Court of Appeal] of Amsterdam, after reviewing the case in its entirety, imposed exactly the same sentence as the lower court. The Court of Appeal criticised the extensive interference by politicians who had publicly commented on the guilt of the suspect, the appropriate sentence, the fact that the suspect initially exercised his right to remain silent – and even on the composition of the *Rechtbank* hearing the case in first instance. Thus, the statements by Minister Remkes were qualified as "ongepast en riskant" [inappropriate and risky] "since they suggested ministerial ignorance of carelessness as regards the relationship between the judiciary and members of Government, as enshrined in Dutch constitutional law". The Court of Appeal went on to observe that the presumption of innocence may be infringed upon by the statements of public officials. In this case, however, the Court believed that no undue influence had been exercised. The judgment seems to have ended the debate on the appropriate punishment for Van der G. Neither the Public Prosecutor, nor Van der G. launched an appeal before the *Hoge Raad* [Supreme Court].

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

International case law and concluding observation of international organs

Ne bis in idem – In its first ruling on the interpretation of the Convention implementing the Schengen Agreement, the Court of Justice considered that the principle of ne bis in idem extends to procedures whereby the Public Prosecutor decides to discontinue criminal proceedings against an accused once the latter has complied with certain obligations imposed by the Public Prosecutor without the involvement of a court.

Mr Gözütok was prosecuted in the Netherlands for dealing in narcotics. Proceedings against him were discontinued following a pecuniary settlement with the *Openbaar Ministerie* [Public Prosecutor's Office]. However, Mr Gözütok was later arrested in Germany where he was charged with the same facts. The ECJ held 'that there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied' (ECJ, 11 February 2003, *Gözütok and Brügge*, Joined Cases C-187/01 and C-385/01, § 33).