E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE NETHERLANDS IN 2004

submitted to the Network by Prof. **dr. Rick LAWSON**[*]

on 3 January 2005

Reference: CFR-CDF/NL/2004

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon the 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.

[*] Kirchheiner Chair, *Europa Instituut*, University of Leiden, the Netherlands.

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Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), 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 (Lithuanie), 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), M. Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyse (Luxembourg), 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), Pavel Sturma (Rép. tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par O. De Schutter, assisté par V. Verbruggen.
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PRELIMINARY REMARKS

The present report was completed in the last days of December 2004, at a time when large parts of Asia were hit by 'the' tsunami. Against the background of the widespread human suffering caused by this natural disaster, it feels almost surreal to give a detailed account of the situation of human rights in the Netherlands. A similar feeling is hard to suppress if one thinks of the genocide in Sudan, the on-going war in the Congo, the chaos in Iraq or the terrorist attack on a school in Beslan. The contrast with our part of the world – affluent, stable, democratic and committed to human rights – could not be bigger.

This is not to say that 2004 was an altogether tranquil year for the Netherlands. Few observers will have missed the assassination of writer and film director Theo VAN GOGH, on 2 November 2004, and the turmoil that followed. It is important to describe these events here, not only for the obvious reason that they made an enormous impact on Dutch public life and on the enjoyment of certain fundamental rights, but also because the events did not yet result in new legislation, administrative practices or jurisprudence that can be properly 'filed' in the present report under specific articles of the EU Charter of Fundamental Rights. What we try to do here is to give an impression of the mood of the day in the Netherlands – a background against which to weigh specific measures and decisions.

The assassination of Theo VAN GOGH – Mr VAN GOGH (47) was known for his vitriolic style, his provocations and his readiness to criticise the political establishment and various groups in society. In 1991 he was convicted by the *Hoge Raad* [Supreme Court] for insulting Jews and making fun of the holocaust. In recent years he wrote very critically about Muslims – first aiming at fundamentalists and then also targeting Muslims residing in the Netherlands who, in his eyes, were insufficiently integrated into Dutch society. In August 2004 Dutch television aired his short film, *Submission part I,* which was meant to show the plight of Muslim women who suffered from domestic violence. The film showed verses of the Koran that were displayed on thinly veiled naked bodies of ill-treated women. Some elements in the Dutch Muslim community considered this film to be blasphemy. After the broadcasting of *Submission I* VAN GOGH was threatened, as had happened before, but he declined offers to have personal protection.

Theo VAN GOGH was assassinated on 2 November 2004. His assailant shot and stabbed him several times and then fled into a nearby park. After a gunfight with the police, which left a police officer wounded, Mohammed B., a 26-year old man of Moroccan-Dutch nationality, was shot in his leg and arrested. The murderer used a knife to attach a letter to VAN GOGH's body, the contents of which strongly suggests that the killing was inspired by a radical Islamic conviction.

The letter contained a death threat directed to Ms Ayaan HIRSI ALI, a member of Parliament (VVD, liberal-conservatives) who had co-operated with VAN GOGH in making *Submission 1* – actually on 28 August the newspaper *NRC Handelsblad* had announced the film as "New provocation [by] Hirsi Ali". The letter pinned to VAN GOGH's body accuses HIRSI ALI, an ex-Muslim herself, of joining the crusade against Islam. A facsimile copy of the six-page letter was, exceptionally, submitted by the Minister of Justice to Parliament (*Kamerstukken II* 2004-2005, 29 854, No. 2).

Ms HIRSI ALI too had received many threats before and was already under protection. Following the assassination, she felt compelled to go into hiding and was therefore prevented from exercising her rights as elected representative. Another member of Parliament, Mr Geert WILDERS, had been under permanent protection since October 2004 too; he decided early December to go into hiding for a number of weeks. WILDERS is in the process of establishing a new political party following a dispute with his previous political party VVD over his tough stance on issues such as immigration control. Polls in November 2004 suggested that he might gain some 25 seats in Parliament (on a total of 150) if elections were held then. Yet Mr WILDERS claimed that his attempts to set up a new party are frustrated by the security measures to which he is subjected.

Ms Hirsi Ali and Mr Wilders were not the only ones to receive threats (for a review of court proceedings brought in 2004 concerning threats against politicians, see Article 49 *infra)*. Several academics who had published critical analyses on the position of Islam in Western society, like prof. Paul CLITEUR, were threatened well before 2 November 2004. Some decided to abandon the topic, to avoid all publicity or cancelled public appearances.

Against this background it is understandable that the assassination of Theo VAN GOGH, which followed on a series of threats, was perceived primarily as an attack on the freedom of expression – not a classic State intervention, of course, but rather an attempt by radical Muslims to intimidate their opponents. In a series of demonstrations immediately following the assassination, public figures and members of the public expressed their determination to uphold the freedom of expression despite all threats.

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Public responses **–** In the days immediately following VAN GOGH's death, a large number of islamophobic incidents occurred. Slogans (such as 'white power') were written on the walls of a mosque in Veghel on 3 November 2004. In the weekend of 5-7 November arsonists tried to set mosques in Utrecht, IJsselstein, Rotterdam, Breda, Groningen and Huizen on fire. Muslims in different cities felt compelled to guard their mosques during the night. On 8 November a bomb exploded near an Islamic primary school[1] in Eindhoven. On 9 November another Islamic primary school in Uden burned down completely. Neighbouring schools readily offered to admit the 113 pupils, but many of them felt intimidated. Newspapers reported that children asked their parents not to send them to an Islamic school anymore because they feared that they might die if another attack occurred. On 10 November a mosque in Heerenveen was set on fire. Meanwhile there were attempts of arson of a number of churches – in Utrecht, Amersfoort, Boxmeer and Rotterdam.

This is only the tip of the iceberg. In its 'Rapid Response' report *"Current developments in the Netherlands regarding the murder of Van Gogh and attacks on religious buildings"* the Dutch Monitoring Centre on Racism and Xenophobia (DUMC) reported that 174 violent incidents took place in the period from 2 through 30 November 2004. In 106 cases (61%) there was evidence of anti-Muslim violence.

The DUMC report includes a section written by the *Meldpunt Discriminatie Internet (MDI)* [Dutch Complaints Bureau for Discrimination on the Internet]. MDI reports that "a wave of Muslim hatred rolled over the Dutch part of the Internet" after the assassination. Thousands of anti-Muslim and Anti-Moroccan expressions were found on normal Dutch web forums and even on condolence sites especially made for Theo VAN GOGH. In the first days after the murder, the owner of the site www.condoleance.nl had to remove more than 5000 of such expressions. MDI estimated that 50.000 or more hate-mails were posted on the Internet since November 2. A significant part of the expressions (up to 25%) contained calls for violence. MDI noted that only a small part of the web forum owners took their responsibility and worked actively to block or remove calls for violence and hatred. Most of them could either not find the capacity to do this or just did not care.

Opinion polls, held in the first days after the murder, showed that only one in five believed that the murder was merely an incident. Over eighty percent was of the opinion that extra measures are necessary to combat Islamic extremism, by giving police more powers (65%), imposing longer penalties (62%), deporting militant imams, (60%) holding parents accountable for behaviour of their underage children (59%), introducing better surveillance of what is practised and preached in mosques (52%), abolishing multiple nationalities (48%) and establishing institutes for re-education (33%). Almost half of the interviewees were of the opinion that the murder proved that the integration of the Moroccan community has failed. Later that week a poll was published quoting that over one third of the interviewees holds the Moroccan community accountable for the murder. According to a poll published on 20

[1] On Islamic schools in the Netherlands, see Article 14 *infra*.

November over 80 % was of the opinion that tensions had increased over the past weeks. One of the polls focussed on the opinion of Moroccan citizens, who were interviewed after the incidents. One third of them claimed to currently feel unsafe in the Netherlands. Almost one in four felt threatened. Almost three in four felt that the future for Moroccans in the Netherlands looks gloomy. They assumed that as much as nine in ten native Dutch are moderately to very negative in their attitude towards Muslims.

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Political responses – As tension in society grew in the days following the assassination of Theo VAN GOGH, the authorities struggled to find an adequate response. On the night of the assassination a demonstration was held at the Dam Square in Amsterdam. At the meeting, the Minister for Immigration and Integration, Ms VERDONK, said that society should not be dragged into "a spiral of alienation and polarisation, of fear and revenge".

Yet the leader of the VVD in Parliament, Mr VAN AARTSEN, stated that the murder of VAN GOGH and the threat to HIRSI ALI meant a "declaration of war" to his political party. On 5 November Mr ZALM (Deputy Prime Minister for the VVD), when asked to comment on this statement at a press conference, agreed that "we now go to war in order to fight this type of extremism and radicalism". Some believe that there was a causal connection between these statements and the islamophobic incidents described above; others deny this. At any rate the Prime Minister stated that he preferred the word "struggle" over "war". Meanwhile the leader of the CDA (christian-democrats) in Parliament, Mr VERHAGEN, called for radical measures, asserting that security is more important than privacy. Abuse of fundamental rights should not be tolerated; those who do so should be stripped of their rights, temporarily or permanently, in order to protect the rule of law .

Against the background of the islamophobic violence and newspaper publications commenting on the assassination of VAN GOGH, the Minister of Justice Mr DONNER (CDA) called for moderation. The Minister – who had already stressed in the past that the exercise of the freedom of expression carries with it responsibilities – asserted that some went too far in criticising the religious feelings of others, and he proposed to apply the prohibition of blasphemy more vigorously. The relevant provision, Article 147 of the Dutch Criminal Code, has been dormant since its introduction. Mr DONNER's proposal was immediately criticised by his colleague Ms VERDONK (VVD), who stated that one should not give in to the lower level of tolerance which, in her eyes, characterises the Muslim community in the Netherlands. Others believed that Mr DONNER's proposal effectively meant that VAN GOGH and HIRSI ALI had gone too far in criticising Islam, which in the present circumstances would be a completely wrong signal. Others attempted to seize the opportunity to abolish the prohibition of blasphemy, arguing that *any* type of defamation – be it on religious grounds, or on sexual orientation, or race, or gender – should be treated likewise, and that there is no need to single out one particular type. Again others said that the abolition of the prohibition of blasphemy would *also* send the wrong message: it might create the impression that, at a time that attacks against mosques were occurring almost on a daily basis, the authorities give less priority to the protection of religious feelings of others. In the end a motion calling for abolition was not adopted in Parliament.

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Evaluating Dutch integration policy – Although the assassination of Mr VAN GOGH was an extreme act that shocked Dutch public order, it would seem that the fierce (and partly Islamophobic) reactions can also be explained by a sentiment that was already visible well before 2 November 2004. Many observers have opined that attitudes have changed in Dutch society, which was once widely regarded as permissive, tolerant and liberal. The startling political career of Pim FORTUYN in 2002 was to a large extent due to the fact that he openly

criticised the Dutch immigration and integration policies of the past decades. It may be true that a Parliamentary Inquiry Commission, after evaluating integration policies in the past decades, concluded that the integration of foreigners into Dutch society was actually a partial success (see Article 21 *infra*). But the prevailing mood is that immigration and integration policies should be much tougher. Hence the introduction of an *inburgeringstest* [integration exam], compulsory both for potential immigrants and for some 450,000 existing residents of the Netherlands; hence the decision to expel over 26,000 aliens whose request for asylum had been rejected – measures that was widely criticised by human rights organisations such as Human Rights Watch and Amnesty International, but still received support in Parliament (see Articles 7 and 19 *infra*).

Shortly after the assassination of Mr VAN GOGH, the Ministers of Justice and Home Affairs announced a policy of broadening the possibilities to remove foreigners for reasons of public policy. They would also table proposals to restrict the possibility of acquiring double nationality and to deprive persons of their double nationality when they damage the essential interests of the national state (*Kamerstukken II*, 2004-2005, 29 854, No. 3, p. 14). On a population of 16 million, some 900,000 persons have a second nationality, most of them Turkish or Moroccan.

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The assassination as a terrorist act – There is also a 'post 9/11 dimension' to the assassination of Mr VAN GOGH. On the day of the killing the authorities stated that the suspect, who was raised and educated in the Netherlands, participated in a network of Muslim extremists that was already under investigation of the intelligence service AIVD (*Kamerstukken II*, 2004-2005, 29 854, No. 3, p. 14; see also below). During the investigation of murder, the police arrested and detained six suspects which were said to form part of a terrorist network of radical Muslims that planned attacks on Ms HIRSI ALI and Mr WILDERS, as well as Mr Job COHEN (the Mayor of Amsterdam) and Mr ABOUTALEB (one of the aldermen of Amsterdam). During a large scale operation in The Hague, on 10 November, three policemen who attempted to arrest members of this network were injured when a hand grenade was thrown at them and exploded. Shortly after the assassination of VAN GOGH, it appeared that the Dutch Intelligence Service (AIVD) had been observing this so-called *"Hofstadgroep"*. Mohammed B. himself had been followed for a while; the AIVD and the Minister for Home Affairs (which is politically accountable for the AIVD) were criticised for discontinuing the surveillance. When the AIVD pointed to a lack of resources, more means were made available to it.

Meanwhile the *"Hofstadgroep"* is believed to form part of a much larger terrorist network, which has its base in Spain. Already on 10 November 2004 the Ministers of Justice and Home Affairs characterised the assassination as an "aanslag met terroristisch karakter" [attack of a terrorist nature] (*Kamerstukken II*, 2004-2004, 29 854, No. 3, p. 1). The Public Prosecutor's Office has announced that Mohammed B. will be charged, *inter alia,* with "participating in a criminal organisation with terrorist objectives" and "conspiring to murder VAN GOGH, HIRSI ALI and others with terrorist intent".

The fight against terrorism has, of course, many more dimensions. In July a *terreur-alarm* [terror alarm] was announced as the authorities had reason to believe that an attack was imminent. The alarm was given after a 17-year old boy, Samir A., had been arrested. The authorities stated that he said was in possession of materials to make bombs, as well as detailed maps of the parliamentary building and the Ministry of Defence in The Hague, Schiphol Airport, the headquarters of the AIVD and a nuclear power plant. It was asserted that Samir A., possibly with the help of others, planned to attack these buildings.

Early September 2004, the Government submitted a bill in order to enhance the possibility to use information from the intelligence services in criminal proceedings. The proposals are made expressly against the background of the fight against terrorism. In that

same month the *Wet terroristische misdrijven* [Terrorist Offences Act] entered into force. The Act introduces as separate offence recruitment for the *Jihad* as well as conspiracy with the aim of committing serious terrorist offences. The Act also increases by 50% maximum sentences for a number of offences (including manslaughter, grave assault, hijacking and kidnapping) if these offences are committed with a terrorist intention.

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Positive developments – 2004 may have been an *annus horribilis* in many respects, but there are positive developments and trends to be noted too. The following pages contain many references to action plans and specific measures to improve the situation of vulnerable groups, as well as balanced court decisions. The principle of equal treatment is firmly entrenched in legislation and jurisprudence; the Netherlands is one of three EU Member States to have ratified Protocol 12 to the European Convention of Human Rights. Protocol 12, which greatly extends the substantive scope of the prohibition of discrimination, will enter into force on 1 April 2005.

New measures are contemplated to combat domestic violence. In developing these measures, inspiration was taken from the practice in Austria and Germany (see Article 4 *infra)*. By now it is common practice that explanatory memoranda to legislative proposals contain a more or less extensive passage where the proposals are reviewed under the relevant provisions of the European Convention of Human Rights. Another positive development is that a lengthy dispute between the Government and the trade unions was solved in early November. The Government intended to cut spending in the field of social security and pensions. Following a series of strikes, a compromise was reached that covers issues such as early retirement, benefits in case of unfitness for work and salary levels.

In May 2004 a government memorandum on fundamental rights in a pluralist society was submitted to Parliament by Minister DE GRAAF (*Nota Grondrechten in een pluriforme samenleving*, *Kamerstukken II* 2003/04, 29614, Nos. 1-2). The memorandum represents an attempt to wage a principled discussion concerning the basic values of the democratic state and the rule of law. The need to debate this issue stems from several recent discussions in society concerning, for instance, head scarves, honour killings, female genital mutilation and the call for prayer rooms in public (educational) institutions. The most important conclusion of the memorandum is that the Dutch Constitution does not need to be adjusted to deal with these issues, even if the relation between fundamental rights is unclear. In particular, the prohibition of discrimination on the one hand, and the freedom of religion and expression on the other hand had repeatedly proved a source of social tension (cf. the statements of imams EL MOUMNI on homosexuality, mentioned in our 2003 report). It is up to the courts, however, to strike the right balance between competing interests in each specific case. The memorandum has led to, and continues to inspire, academic debate. One may criticise the memorandum for avoiding certain sensitive issues (such as the controversial measures to counter segregation at schools and in deprived neighbourhoods) – but at the same time the government should be commended for opening the floor. In November 2004 a special website was opened (www.zestienmiljoenrechters.nl, inviting each of the sixteen million persons in the Netherlands to act as a judge in cases involving conflicting rights) so as to enhance public discussion. Following an international conference on fundamental rights in a pluralist society (The Hague, November 2003), the Netherlands also put the issue on the agenda of the Steering Committee for Human Rights (CDDH) of the Council of Europe. The Dutch Government intends to raise the issue again in CDDH in 2005. It is of course also up to Parliament to continue this debate, which after the assassination of Theo VAN GOGH is more pressing than ever.

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Institutional context **–** Unlike many of the other EU Member States, the Netherlands do not have a national human rights commission. An initiative to establish such an institution was

taken, in 1999, by the NGO 'NJCM' (*Nederlands Juristen Comité voor de Mensenrechten*, the Dutch section of the International Commission of Jurists). This idea received support from, *inter alia,* the National Ombudsman and several members of Parliament. In 2001 the Ministers of Justice and Home Affairs indicated that, while they applauded the initiative and agreed that such a commission could have an added value, further study was required (*Kamerstukken II*, 2001-2002, 28000 VI, No. 38). The Government's starting point was that human rights are already protected at a high level whereas a number of existing institutions are already involved in the promotion of human rights. If, therefore, a new human rights commission were to be established, duplication of tasks would have to be avoided. The Ministers indicated that they intended to present in the spring of 2002 a preliminary draft for the establishment of a human rights commission.

To date, however, no such draft has been published. On the contrary, the current Government has indicated in a letter to NJCM, of 10 December 2003, that it is now looking for a solution that is in line with the Government's general policy to deregulate and to simplify the system of advisory bodies. The Government is therefore unlikely to establish a national human rights commission in the near future. Against this background, a number of NGOs and institutions engaged in the protection of fundamental rights (including NJCM, the Ombudsman, the *Commissie gelijke behandeling* [Equal Treatment Tribunal] and the *College bescherming persoonsgegevens* [Personal data protection authority]) are now discussing alternative ways to co-operate more closely. Interestingly, civil servants from the Ministry of the Interior attend these meetings as observers.

This initiative should, of course, be applauded. Yet it is likely that an informal agreement between a number of actors cannot completely compensate the absence of a full-fledged national institution for the promotion and protection of human rights, established by law and meeting all requirements of the so-called Paris Principles, as laid down in UNGA resolution 48/134. In this connection it should also be noted that the UN Committee on the Rights of the Child, in its Concluding Observations of February 2004, urged the Netherlands to establish an ombudsman for children.

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International context – The year 2004 was a remarkable one for Dutch foreign policy. The Netherlands chaired the OSCE (January to December 2003), the Committee of Ministers of the Council of Europe (November 2003 to May 2004) and the Council of the European Union (July to December 2004). One of the ambitions was to enhance the cooperation between the three great European institutions. As far as the Council of Europe is concerned, one of the milestones was the adoption of Protocol 14 to the ECHR, together with a set of measures to enhance the effectiveness of the European Court of Human Rights. In addition the Dutch chairmanship organised a series of special conferences on the future of the Strasbourg Court and the position of fundamental rights in a pluralist society. The issue *Human Rights and the Rule of Law in an Information Society,* on which a recommendation is now under consideration, was also initiated during the Dutch chairmanship.

During the Dutch presidency of the EU, the Council adopted the 'Hague programme' on the further development of the Area of Freedom, Security and Justice. Unfortunately no progress was made as regards the draft Framework Decision on combating racism and xenophobia. A draft text (COM(2001) 664 def.) was adopted in November 2001, but the finalisation of the Framework Decision was halted in February 2003, the last time the item was tabled on the agenda of the JHA Council. The lack of progress is to be regretted since the phenomena of racism and xenophobia have all but disappeared in Europe. Reports issued by the EU Monitoring Centre on Racism and Xenophobia speak of a continuing appearance of racist ideas and acts in all Member States. In a number of Member States, anti-Semitic incidents have raised fear among the Jewish community. In some of the new as well as in the old Member States, members of the Roma and Sinti communities are the target of abuse and violence. In many Member States, people of Islamic background are confronted with racist and islamophobic attitudes and calls for violence and discrimination. Hate speech and racist

propaganda find an easy platform on the internet, with all its cross-border possibilities. The need for a common approach in the EU is obvious and urgent, and it is to be hoped that the Council will soon be in a position to adopt the Draft Framework Decision on racism.

International supervision – International supervision represents another aspect of the international context in which Dutch human rights policy functions. The supervision may take many shapes. For instance, the *UN Special Rapporteur on Torture*, Mr Theo VAN BOVEN, issued an 'urgent appeal' to the Dutch Government, asking for specific safeguards to secure the security of PKK member Ms Kesbir who was about to be extradited to Turkey.

In January 2004 the *UN Committee on the Rights of the Child (CRC)* adopted its Concluding Observations on the second periodic report of the Netherlands and the initial report of Aruba (CRC/C/15/Add.227). The Committee noted a number of positive aspects, but was critical in many respects. The criticism related especially to the treatment of minor asylum seekers (see on that issue also our Report on 2003 and Article 19 *infra*), budget cuts on youth policy, and the failure to adopt legislation against corporal punishment. The Committee also noted that the office of a specialised Ombudsman for children is yet to be established, despite promises. We will deal with some of the specific recommendations under the relevant Articles *infra*.

The *Committee on the Elimination of Racial Discrimination (CERD)* did not consider any individual complaints against the Netherlands. CERD did issue, however, its Concluding Observations on the fifteenth and sixteenth periodic reports of the Netherlands (CERD/C/64/CO/7). It welcomed the extensive and detailed report that was submitted and noted with satisfaction that the Netherlands have adopted a National Action Plan against Racism in December 2003. It also welcomed the adoption of further amendments to the Criminal Code increasing the maximum penalties for structural forms of systematic racial discrimination, as well as the adoption of the bill of 10 February 2004 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and establishing a general framework for equal treatment in employment and occupation. Not surprisingly CERD expressed concern about the occurrence of racist and xenophobic incidents, particularly of an anti-Semitic and "Islamophobic" nature, and of manifestations of discriminatory attitudes towards ethnic minorities. We will deal with specific recommendations under Articles 10, 19 and 21 *infra.*

The Netherlands submitted its second periodic report on the implementation of the *European Charter for Regional or Minority Languages* on 26 May 2003 to the supervising *Committee of Experts*. On 17 June 2004 the Committee adopted a report on the Netherlands, which will be dealt with under Article 22 *infra.*

Still in a European context, the *RAXEN Network* issued extensive analytical reports on Dutch legislation and education.

The *UN Committee against Torture (CAT)* decided one case that involved the Netherlands. It rejected the claim of Mr S.G. that he would be at risk of being tortured if he were returned to Turkey, and that his forced removal would constitute a violation of Article 3 of the Convention. We will deal with case under Article 19 *infra.*

The *UN Human Rights Committee (HRC)* published its views in 4 cases that involved the Netherlands. The case of *Benali*, which involved the removal of the applicant to Morocco, was declared inadmissible for failure to exhaust domestic remedies, since Ms Benali, after lodging her complaint with the HRC, submitted a renewed request for a residence permit to the immigration authorities. In the case of *Van Hulst* (which will be dealt with in more detail under Article 48 *infra*) the HRC rejected the claim that the admission as evidence of certain tapped telephone conversations between the author and his lawyer, and their use during criminal proceedings, violated his right to a fair trial. The case of *Brandsma* related to an alleged violation of Article 26 ICCPR because of the different treatment in taxation of holiday payments between the applicant and those employees who receive their payments through vouchers. The Committee did not find the complaint substantiated and declared it inadmissible; we will deal with the case in more detail under Article 20 *infra*.

Conflict with the UN Human Rights Committee – The fourth case decided by the HRC, *Derksen and Bakker*, involved a differentiation between married and unmarried couples in the field of social security. The differentiation came to an end when in July 1996 new legislation was adopted. The new rules did not have retroactive effect, however. This meant that a surviving spouse was entitled to a benefit on behalf of his or her child born out of wedlock if the partner had died after July 1996 – but not if the partner had died before that date. The Committee found a violation of Article 26 ICCPR.

The case will be dealt with in greater detail below (see Article 20 *infra*), but it merits a more extensive discussion here as well since the Dutch Government officially stated that it rejected the views of the Committee (*Staatscourant* of 30 August 2004). The Government did confirm the importance of the right of individual petition and of uniform interpretation of human rights treaties. It also accepted that applicants should be able to have confidence that their governments will pay close attention to the views of supervisory bodies and will only in ignore these views in exceptional cases. However, in the instant case the Dutch Government strongly disagreed with the Committee's finding of a violation. It argued that its position was supported both by the dissenting members of the Committee and by the case-law of the European Court of Human Rights which had rejected comparable complaints.

There is a good deal to be said in favour of the substantive arguments advanced by the Dutch Government. At the same time, these arguments have been raised before the Human Rights Committee, which rejected them. To ignore the Committee's views is not only less than fair towards the individual applicant who thought that she had won the case; it is also a potentially damaging step that can easily undermine the authority of the Human Rights Committee. The argument that the Committee's views are not binding anyway is not very convincing: the ICCPR *is* binding, the Committee *is* the body established to monitor compliance with it and its members *are* elected by the States parties; the Netherlands *did* accept the right of individual petition; it *did* participate in the present complaints procedure which was quasi-judicial and adversarial. Despite the reassuring words on the importance of the right of individual petition, the Dutch response is particularly regrettable at a time when the respect for the international rule of law and human rights is seriously challenged in Guantánamo Bay, Abu Ghraib etcetera.

The Netherlands and the ECtHR: interim measures considered to be binding – A much more positive development is that the Dutch Government accepts that interim measures indicated by the European Court of Human Rights under Rule 39 of the Rules of Court are binding. The ECHR is silent on this issue, but a Chamber of the Strasbourg Court ruled in the *Mamatkulov* case (2003) that its interim measures are binding – at least if the case involves a potential violation of Article 3 ECHR and if the failure to comply with the interim measure would deprive the applicant of the possibility to present his case effectively. On 20 January 2004 Minister VERDONK of Alien Affairs and Integration declared that "Rule 39 measures are binding" (*Tweede Kamer* 2003-2004, *Aanhangsel* 659).

Minister VERDONK made this remark in connection to the proposed removal of a large number of Somalian asylum seekers. In January 2004 UNHCR had stated that Somalis should not be returned to Southern Somalia. The Dutch Government, however, maintained that Somalis from the South could be safely returned to Northern Somalia and settle there. A troubling aspect was that the Somalis, who generally did not possess a passport, were to be sent back with a non-official document ("EU State") instead. A number of rejected asylum seekers lodged a complaint with the European Court, which, acting under Rule 39, requested the Dutch Government to postpone deportation pending the examination of the case in Strasbourg. The Dutch Government complied, but intended to proceed with the removal of those who had not lodged a complaint in Strasbourg (*Tweede Kamer* 2003-2004, *Aanhangsel* 890). This raised the question whether interim measures only apply to the case in which they have been indicated, or whether they have some sort of *Drittwirkung*. A material question was, of course, whether the interim measures were given because of the specific circumstances of the individual applicant, or because of the general situation in Somalia. The

fact that interim measures are not always motivated and not readily accessible for the public, is not particularly helpful. Hence different Dutch courts came to different conclusions.

A solution was finally reached after the Strasbourg Court, on 3 May 2004, indicated in yet another interim measure (the tenth on this issue!) that "the current situation in northern Somalia and in particular the absence of an effective public authority capable of providing protection to the applicant" had prompted its interim measures. The *Afdeling bestuursrechtspraak* of the *Raad van State* [Administrative Litigation Division of the Council of State, the highest court in this category of cases] ruled on 28 May 2004 that the latest interim measure meant that individuals could no longer be removed to this region pending the outcome of the procedures in Strasbourg. The Dutch Government complied and in June 2004 it announced a moratorium for a year.

The issue attracted even more media coverage when a Somali, who had applied for asylum in the Netherlands but was returned in October 2003, was murdered in Mogadishu eight months later. The lapse of time of 8 months makes it difficult to make any firm statements on a connection between the Dutch removal policy and the death of this person, as the Minister for Immigration and Integration emphasised (*Tweede Kamer* 2003-2004, *Aanhangsel* No. 2012).

The Netherlands and the ECtHR: judgments – In 2004 the European Court of Human Rights delivered judgment in 10 cases that involved the Netherlands. We will present them here very briefly so as to give the reader a general overview. A more detailed discussion is included in our discussion, below, of the corresponding Article of the EU Charter.

In one case (*Hutten)*, concerning undue delays, the Court merely noted that a friendly settlement had been reached. In two asylum cases (*Venkadajalasarma* and *Thampibillai*) the Court rejected the applicants' claim that their expulsion to Sri Lanka would violate Article 3 ECHR (see Article 19 *infra*). On the other hand a violation was found in the case of *Doerga,* where telephone calls of a detainee had been tapped and recorded without proper legal basis (see Article 7 *infra*). Two cases (*Haas* and *Lebbink*) concerned the scope of the right to respect for family life. *Haas* was an unusual case in that someone claimed an inheritance with the argument that he was the natural son of the deceased, but could not substantiate his claim. The European Court did not find a violation. In *Lebbink* the Court found, unlike the Dutch courts, that a very loose relationship between a father and his daughter born out of wedlock did qualify as "family life" within the meaning of Article 8 ECHR (see Article 7 *infra*).

The case of *Del Latte* closely resembles the case of *Baars* that was discussed in our Report over 2003: the applicant had been acquitted, but his request for compensation of legal costs and the days spent in pre-trial detention was rejected, essentially on the ground that the court believed that the applicant was lucky to get away without conviction. The Strasbourg Court found a violation of the presumption of innocence (see Article 48 *infra*). The case of *Marpa* is an unusual one: Marpa had been convicted at first instance. When they appealed, the Advocate General proposed a settlement whereby Marpa would withdraw the appeal and the AG would advise positively on a request for remission of the sentence. Marpa did withdraw the appeal, but then the request for remission was rejected. It turned out that the AG had given a negative advise. The Strasbourg Court found a violation of Article 6 ECHR (access to court; see Article 47 *infra*).

The most important judgments, as far as the Netherlands are concerned, were delivered in two similar cases, *Brand* en *Morsink*, relating to a structural lack of capacity in custodial clinics. The applicants had been convicted of serious offences and had been given prison sentences. However, since the courts found that their mental faculties were so poorly developed that they could only be held responsible for their offences to a limited degree, the sentence was combined with a so-called *TBS order,* i.e. a non-punitive measure comprising confinement in a custodial clinic. When the applicants had served their prison sentences, no place was available in the custodial clinics for which they had been selected. As a consequence they were held in pre-placement detention in an ordinary remand centre for lengthy periods before a place became available in a custodial clinic. The Strasbourg Court found a violation of Article 5 in the instant cases, but the problem is much wider than these

two cases. We will get back to this issue under Article 6 below; it ties in with more widespread capacity problems in the Dutch penitentiary system, both for adults and for juveniles.

Co-ordination of international supervision – Our last substantive remarks relate to the co-existence of various international supervisory bodies. To what extent should each of these bodies take into account the views of the other bodies? The question is not new, but it emerged again in 2004.

Thus in the case of *Brandsma,* before the Human Rights Committee, the Dutch Government referred to a comparable case submitted by Mr Brandsma's counsel on behalf of another client to the European Court of Human Rights. That complaint had been declared inadmissible by the European Court in 2000. According to the Dutch Government, the claims of discrimination of that case were the same as in the present case. The Government recalled that it had not entered a reservation to article 5, paragraph 2(a), of the Optional Protocol vis-à-vis matters that have already been decided by the European Court because it was believed that wide-spread similar reservations could undermine the universal system for the protection of individual human rights. The Dutch Government requested the Committee however to avoid opposing rulings by international supervisory bodies and thus to share the conclusion of the European Court that there has been no violation of the principle of non-discrimination. Mr Brandsma rebutted that decisions of the European Court interpreting the European Convention cannot be decisive when interpreting the Covenant, since they are two different treaties with different States parties and different supervisory mechanisms.

Conversely, in the HRC case of *Van der Hulst* the applicant relied on case-law of the European Court of Human Rights. In view of the similarities between Article 6 ECHR and article 14 ICCPR, he argued that the Strasbourg jurisprudence should also apply to Article 14 of the Covenant.

On both occasions the issue was not addressed by the Human Rights Committee. But one may expect the argument to be raised in future cases as well – by the applicant or by the State, depending on who is likely to derive support from precedents. Since this issue is of obvious importance for the relationship between the EU and existing international supervisory bodies, and most notably the European Court of Human Rights, it might be worthwhile to pursue the elaboration of 'principles of good neighbourliness' of international supervisory bodies.

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Methodology of this report – 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: Mr Antoine BUYSE, Ms Mireille HAGENS, Mr Herke KRANENBORG, Ms Lisa LOUWERSE, Ms Françoise SCHILD, and Ms Mieke VAN ULDEN (student assistant). Mr Wim MULLER (Department of Public International Law, Leiden) and Ms Marthe Lot VERMEULEN (executive secretary of NJCM) assisted as well. I am most grateful to them all. Of course the overall responsibility for the report rests with me.

We used a number of sources: in the first place, obviously, the official sources (legislative proposals, parliamentary records, case law and so on) as well as some excellent chronicles (especially in the *NJCM-Bulletin – Nederlands Tijdschrift voor de Mensenrechten*) and the weekly news section of the *Nederlands Juristenblad.* In the second place, like last year, I had the benefit of submissions by a number of institutions and NGO's:

- Amnesty International
- the *Anne Frank Huis* [Anne Frank House, Amsterdam]
- the *Commissie gelijke behandeling* [Equal Treatment Commission]
- the Dutch Monitoring Centre on Racism and Xenophobia (DUMC)

- the *Landelijk Bureau ter bestrijding van Rassendiscriminatie (LBR)* [National Agency for Combating Racism]
- the *Nederlands Juristen Comité voor de Mensenrechten* (NJCM) [Dutch section of the International Commission of Jurists]
- *Vluchtelingenwerk Nederland* [Dutch Refugee Council].

In addition, I used existing publications of, *inter alia*, Amnesty International, the Centre for the Independence of Lawyers and Judges, Human Rights Watch and UNHCR.

In the third place, and this represents an innovation in our methodology, I approached all Dutch ministries as well as the *Nationale Ombudsman* and asked them if they were aware of any developments – positive or negative – that they believed ought to be mentioned in our report. Whilst maintaining, of course, sole responsibility for the contents of this report, as my position as independent expert requires, I believed that we could certainly benefit from the specific expertise of the ministries and the *Ombudsman*. The latter submitted an extensive and very useful report. The response of the ministries varied – some were very co-operative, others more cautious. I have been happy to make use of a great deal of the materials that were thus submitted. Since these submissions referred to materials that were in the public domain anyway (although sometimes difficult to find for the non-specialist) I did not specify which information was provided by which ministry.

Let me underline that I am extremely grateful to all individuals and organisations, non-governmental and governmental, that were so kind as to co-operate with me.

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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 2003 to 1 December 2004 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 format (addressing international case-law, national legislation and practice, positive developments, good practices and reasons for concern). However, where there were no significant developments to report, the sub-headings have been omitted so as to save space and to enhance the Report's 'readability'. We have exercised some restraint in using the categories 'positive developments', 'good practices' and 'reasons for concern', partly because these evaluations would follow immediately on the substantive descriptions of the relevant developments, and we wanted to avoid mere repetitions.

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 domestic 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 few key words in ***bold italics***.

It is hoped that the present Report, within the inevitable constraints of its size, provides a useful description and analysis of the most important developments in the Netherlands; hopefully those who are involved in the protection and promotion 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

Legislative initiatives, national case law and practices of national authorities

"*Wrongful life*" – In our previous report attention was paid to the so-called *Baby Kelly*-case, which concerns the birth of a baby with serious mental and physical handicaps. Prior to the birth the midwife had refused to order prenatal examination, despite requests of the mother and despite the fact that the medical history of the mother and her family seemed to indicate that an examination might be warranted. Both the parents and the child are claiming financial compensation from the midwife. Especially the question whether the child itself can claim compensation is controversial. At the time of completing the present report, the case is still pending before the *Hoge Raad* [Supreme Court]. However, the Advocate General in this case, Mr Hartkamp, adopted his *Conclusie* [Opinion] in November 2004. The text of the Opinion has already been published, as an exceptional step indicating the great importance of the case. The AG advises the Supreme Court to allow the claims for compensation of both the parents and the child, although he proposes to limit the compensation for the child to damage resulting from her handicaps. This conclusion is based on the midwife's professional error not to order prenatal research despite serious indications, as a consequence of which the mother was deprived of the possibility to choose for abortion. The violation against Kelly results from the violation against her mother, because if the prenatal research was carried out, she would not have been born.

Article 2. Right to life

Euthanasia

Legislative initiatives, national case law and practices of national authorities

Case law on euthanasia – In our 2003 Report, attention was paid to the case of a general practitioner, Mr Van Oijen, who had ended a patient's life without the latter's request. The patient, aged 84, was in coma and was in the process of dying under very degrading circumstances. She had not, however, expressly requested the doctor to end her life, which meant that by definition his intervention could not qualify as euthanasia within the meaning of the *Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding* [Life Termination on Request and Assisted Suicide (Review) Act]. As we reported in 2003, the Court of Appeal convicted the general practitioner for murder but imposed a very moderate conditional sentence of one week imprisonment. On 9 November 2004 the *Hoge Raad* [Supreme Court] confirmed this judgment. The *Hoge Raad* observed that there may be very exceptional circumstances where extremely compelling developments in the situation of the patient force the doctor to strike a balance between conflicting obligations and interests. In the instant case, the *Hoge Raad* found, these circumstances did not prevail (LJN AP1493 – on LJN numbers see the preliminary remarks).

Medical decision making at the end of life – In July 2004 the State Secretary of Health published her views on the report *"Medische besluitvorming aan het einde van het leven"* ["Medical decision making at the end of life"] (*Kamerstukken II* 2003-2004, 29 200 XVI, No. 268). She indicated, *inter alia*, that in her view dementia in itself cannot be a ground for euthanasia. The fact that the applicable Act is silent on this issue has given rise to extensive discussions. Furthermore, in line with the case-law mentioned above, the State Secretary of Health confirmed that a request is necessary precondition for euthanasia. Any doctor who ends a patient's life without the latter's request, should report this to the Public Prosecutor. In

very exceptional circumstances a doctor may find himself in a state of emergency where he is forced to strike a balance between conflicting obligations and interests. In these circumstances the doctor will not be criminally liable, but the Public Prosecutor must be informed in order to be able to review the case.

The State Secretary of Health also dealt with the issue of 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 KNMG [Royal Dutch Society for the Advancement of Medical Science] has argued that it does not, since the doctor's intention is not to terminate life but to diminish the patient's suffering. The State Secretary of Health agrees in substance, but she points out things are different if terminal sedation is used with the aim of terminating the patient's life – then the euthanasia act *is* applicable.

In August 2004 the State Secretary of Health announced a separate memorandum on termination of life of new born babies with serious handicaps (*Tweede Kamer* 2004-2005, *Aanhangsel* 50).

Rules regarding the engagement of security forces

Legislative initiatives, national case law and practices of national authorities

Lethal force in Iraq – Our 2003 Report mentioned the case of a Dutch sergeant-major serving in Iraq, Eric O., who was arrested and brought back to the Netherlands on suspicion of having killed an Iraqi under questionable circumstances. The case received a lot of media attention, one of the popular sentiments being that soldiers should be allowed ample leeway when operating abroad under difficult circumstances. In a judgment of 18 October 2004 the Military Chamber of the *Rechtbank* [Regional Court] in Arnhem acquitted Eric O. As a starting point it took the view that the version of facts of a soldier should be believed, unless there are clear indications to the contrary. The Regional Court found that the situation in which the fatal shot was fired did not warrant the use of lethal force, but it accepted that Eric O. had decided to fire warning shots – hitting a person only by coincidence – in order to disperse an aggressive crowd. That decision was found to be compatible with the rules of engagements and the requirements of proportionality and subsidiarity (LJN AR4029). On a different aspect of this case (the alleged breach of the presumption of innocence, see Article 48 *infra*).

The Public Prosecutor's Office has lodged an appeal on the ground that the situation in which Eric O. found himself was not so threatening that warning shots were indispensable. In addition the Public Prosecutor's Office considered the test as applied by the Regional Court to be too subjective. It noted that the Regional Court, in stating that the soldier should in principle be believed unless proven otherwise, had relied on old precedents of a court martial at the time the Netherlands fought a colonial war in Indonesia – which was considered inappropriate today. The Minister of Defence, on the other hand, said he was unhappy with the appeal as it made life for the army "more complicated".

Military ethics – Military ethics receive a lot of attention within the Ministry of Defence and the Dutch army. In 2004 a 600-page *Praktijkboek Militaire Ethiek*, commissioned by the Ministry, was published with a view to its use in military training and education. It contains 20 chapters, most of which are written by military, addressing ethical questions and dealing with dilemmas that occur in practice.

The Mercatorplein incident – On 6 August 2003 an incident occurred in Amsterdam when Driss Arbib, a youngster of Moroccan background, was killed by the police during a riot in a restaurant at the Mercatorplein. The incident fuelled massive protests, especially from the local Moroccan community. Following an investigation of the incident, the Public Prosecutor concluded that the fatal shot had been fired in self-defence; it was decided not to bring

criminal charges against the police officer concerned. Family members of Mr Arbib disagreed and challenged that decision, in accordance with the procedure of Article 12 *Wetboek van Strafvordering* [Code on Criminal Procedure]. In its decision of 23 June 2004 the *Gerechtshof* [Court of Appeal] of Amsterdam acknowledged that the police officers had been confronted with a difficult situation. Yet the Court of Appeal was not satisfied by the quality of the investigation into the incident. It ordered further investigations under the authority of a *rechter-commissaris* [investigating judge]. A reconstruction should be part of these investigations, in order to get a better insight into the question whether the police officer had any alternatives to the use of his firearm. The decision led to parliamentary questions concerning the way in which investigations like these are conducted (*Tweede Kamer* 2003-2004, *Aanhangsel* 1964)

The fight against the trafficking in human beings

Legislative initiatives, national case law and practices of national authorities

Human trafficking – In our Report on 2003 it was noted that the *Tweede Kamer* [House of Representatives] was considering a bill with a view to expanding the scope of the prohibition on human trafficking and raising the applicable sentences. In the meantime the bill has been approved. It is now under consideration of the *Eerste Kamer* [Senate], where a discussion was scheduled for December 2004 (*Kamerstukken I*, 29291).

Trafficking in human beings, in particular for sexual exploitation purposes – see Article 5 *infra.*

Domestic violence

Legislative initiatives, national case law and practices of national authorities

Prevention of domestic violence – Rough estimates suggest that there may be as many as 800,000 to 900,000 situations of domestic violence per year in the Netherlands. Only 12% of these situations is reported to the police. In 2002 as many as 4,422 women and 4,734 children stayed in reception centres for battered women. On 14 July 2004 the Minister of Justice announced new measures to combat domestic violence. A bill, to be submitted to Parliament in 2005, will introduce a *huisverbod*, i.e. a temporary prohibition to enter one's home. Research has shown that existing remedies, under both criminal law and civil law, are often insufficient to prevent the escalation of domestic crisis situations. For instance, summary proceedings before the civil courts may result in a temporary prohibition to enter one's home, but they may take too much time. An emergency measure is therefore needed. Criminal law will continue to be used once domestic violence has occurred; the *huisverbod* is meant to apply to situations where no criminal offences have been committed yet, but where there is a real and acute threat of domestic violence. The same measure will also be available if children run the risk of abuse. It is envisaged that the *huisverbod* may be ordered by the *hulpofficier van justitie* [Deputy Public Prosecutor] with the consent of the burgomaster. The order may last for a maximum of ten days, but will be reviewed in court within a few days. The court may confirm or annul the order, or extend it to a period of four weeks. To ignore a *huisverbod* will be a criminal offence, and trespassers may be arrested and taken into custody. It is expected that the new measure – which should become available by 2007 – will be applied in 1000 to 2000 cases a year (*Kamerstukken II* 2003-2004, 28 345, No. 25).

Amnesty International, in a letter to the Minister of Immigration and Integration of 15 October 2004, applauded the Dutch policies to denounce domestic violence. However, Amnesty argued, Dutch refugee policy fails to pay sufficient attention to victims of domestic violence. Domestic violence is not expressly mentioned in the *Vreemdelingencirculaire* as a separate ground for asylum, and although the Minister had left open the possibility of granting asylum to victims of domestic violence, Amnesty invited her to take a more explicit position

on the issue and to lay it down in unequivocal rules. Likewise, Amnesty submitted, the *ambts-berichten* [official reports] of the Ministry of Foreign Affairs should not limit themselves to indications of the prevalence of domestic violence in a particular country, but should also analyse the appropriate legal framework.

Good practices

Prevention of domestic violence – The introduction of a *huisverbod*, i.e. a temporary prohibition to enter one's home, may very well turn out to be an effective instrument in the fight against domestic violence. Interestingly, the Dutch authorities took inspiration from the practices in Austria and Germany, where similar instruments were introduced in 1997 (*Bundesgesetz zum Schutz vor Gewalt in der Familie)* and 2002. This illustrates that exchanges of good practices already do occur, albeit perhaps not yet in a systematic fashion (involving all EU Member States and all rights and freedoms of the Charter).

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Abolition of the death penalty – A bill proposing ratification of Protocol no. 13 to the ECHR, which abolishes the death penalty in all circumstances, was submitted to Parliament on 29 June 2004 (*Kamerstukken II*, 2003–2004, 29 671 (R 1765), No. 1-5).

Failure to protect life? (1): 'Öneryildiz type claim' – Victims of the explosion of a firework factory in the city of Enschede brought proceedings against the State, claiming that the authorities had been negligent and therefore at least partly responsible for the damage that they had suffered. According to the applicants, both the rules relating to the production of fireworks and the actual supervision of the factory in Enschede did not offer an adequate level of protection to those living in the vicinity. They based their claim in part on the *Öneryildiz* judgment of the European Court of Human Rights of 18 June 2002. In its judgment of 24 December 2003, the *Rechtbank* [Regional Court] of The Hague rejected the claim. The Regional Court applied the test developed by the Strasbourg Court in *Öneryildiz,* but found that negligence had not been established (LJN AO0997).

***Failure to protect life? (2): 'Mastromatteo type claim'* –** In May 2004 an incident occurred whereby a 'TBS patient' who was on weekend leave but failed to return, kidnapped and abused a 13-year old girl from the town of Eibergen. The man, taking the girl with him, fled to Germany. In the end he was arrested by the police.

A 'TBS patient' is a person who has been convicted of serious offences, such as assault. If the trial court finds that his mental faculties are so poorly developed that the individual can only be held responsible for his offences to a limited degree, a so-called *TBS order* will be imposed*,* i.e. a non-punitive measure comprising confinement in a custodial clinic. On various aspects of the position of these patients see Article 6 *infra.*

The 'Eibergen incident' led to massive publicity and to a popular call, also supported by some Members of Parliament, to abandon the system of leaves for TBS patients altogether. Specialists countered that one cannot do so without jeopardising the treatment and rehabilitation programmes which form the very basis of the TBS measures. They pointed out that the number of leaves by TBS patients amounts to 50,000 per year, and that in only 90 of these cases TBS patients were late in reporting back to the clinic; usually the delay was short and no incidents happened.

The Minister of Justice responded by ordering all custodial clinics to carry out a meticulous review an risk assessment of all individual cases (concerning some 1,000 TBS patients) where leave arrangements existed. In addition a new system to record all decisions surrounding leaves on standard forms was introduced, and the Public Prosecutor's Office was ordered to prioritise all cases where a TBS patient did not report back in time (*Kamerstukken*

II 2003-2004, 29452, No. 6). The Minister also announced the use of electronic tracking systems together with the introduction of other measures that should enable the police to find TBS patients when necessary (*Kamerstukken II* 2003-2004, 29452, No. 10).

In August 2004 workers' representatives of custodial clinics, in a letter to the Minister of Justice, complained about the enormous amount of extra paper work which this operation entails, whereas, in their view, the extra risk assessment would only give a false sense of security since it is impossible to exclude all risks.

Article 3. Right to the integrity of the person

Rights of the patients

Legislative initiatives, national case law and practices of national authorities

Psychiatric patients – There are several developments surrounding the application of the *Wet bijzondere opnemingen in psychiatrische ziekenhuizen* (BOPZ) [Psychiatric Institutions (Extraordinary Admissions) Act]. Under this Act a psychiatric patient may only be admitted against his will if he poses a threat to himself or to others. On 10 May 2004 the *Gezondheidsraad* [Health Council], an advisory body, suggested to abolish this requirement. In practice the interpretation of the criterion of "dangerousness" differs widely. This results in admissions where this is actually not allowed by law and in refusals where it would have been. The *Gezondheidsraad* estimates that there are every year some 24,000 people with serious psychiatric problems who avoid all contacts with the care institutions.

Another shortcoming of the law is the separation of admission and treatment. Often, admission is not followed by treatment. The *Gezondheidsraad* advocates the introduction of the possibility to treat patients even against their will. Respect for the right to self-determination, which is at the basis of the BOPZ, does not suffice for this group, the *Gezondheidsraad* asserts. The text of the report can be found at www.gr.nl.

Meanwhile the Government, in its periodic evaluation of the Act, noted a number of other practical problems in the application of the Act. One of the controversial issues is whether the possibilities to treat patients against their will should be extended or not. The Government did not take a position yet but announced that it would seek advise from the medical profession first (*Kamerstukken II* 25 763/28 950, No. 4).

Protection of persons in medical research.

Legislative initiatives, national case law and practices of national authorities

Biomedicine Convention – The Netherlands is still not a party to the 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine). Initiatives to accede to this convention have been stayed, pending the evaluation of both the *Embryowet* [Embryo Act] and the Convention itself (*Kamerstukken II* 2003/04, 29 700 XVI, No. 195).

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

Conditions of detention and external supervision of the places of detention

Penal institutions

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Court of Human Rights: permanent camera surveillance in cell – On 1 June 2004 the European Court of Human Rights decided a sensitive Dutch case. Mr VAN DER GRAAF – who was convicted in 2004 for murdering the politician Pim FORTUYN in 2002 – claimed that his rights under Articles 3 and 8 ECHR had been infringed by his prolonged exposure to permanent camera surveillance during pre-trial detention.

As was noted in our 2003 Report, Mr VAN DER GRAAF was placed under permanent camera surveillance upon his arrest in May 2002. This measure was considered necessary given the reaction of society to the assassination of Mr FORTUYN, as well as to prevent any risk of suicide or other harm to the applicant. Mr VAN DER GRAAF appealed against the successive orders to prolong his permanent camera surveillance. Initially the Dutch courts found in his favour, considering that there was no legal basis for imposing such a measure. In July 2002 the relevant prison regulations were amended, introducing the possibility to place detainees who, like Mr VAN DER GRAAF, were under an individual detention regime under permanent camera surveillance. On that same day, the governor issued a new order for the applicant's camera surveillance. Mr VAN DER GRAAF's appeal was this time rejected as the measure had a sufficient legal basis in the amended rules. Moreover, a balance had been struck between the interference in his private sphere and the social unrest that could arise if he escaped or his health was harmed.

The Strasbourg Court considered that permanent observation by a camera for a period of about four and a half months may have caused feelings of distress for lack of any form of privacy. Yet it had not been sufficiently established that such a measure had in fact subjected the applicant to mental suffering of a level of severity such as to constitute inhuman or degrading treatment (Article 3 ECHR). Although permanent camera surveillance constituted a serious interference with the applicant's right to respect for his private life, the measure had a basis in domestic law and pursued the legitimate aim of preventing the applicant's escape or harm to his health. Given the great public unrest caused by the applicant's offence and the importance of bringing him to trial, the Strasbourg Court found that the interference complained of could be regarded as necessary in a democratic society in the interests of public safety and the prevention of disorder and crime (Article 8 ECHR). (Eur.Ct.H.R. (dec.), 1 June 2004, *Van der Graaf v. the Netherlands*, appl. no. 8704/03)

Structural lack of capacity in custodial clinics – For a discussion of the judgment of the European Court of Human Rights in the cases of *Morsink* and *Brand v. the Netherlands*, in which the Court found a violation of Article 5 ECHR on account of delayed admission to custodial clinics, see Article 6 *infra.*

Legislative initiatives, national case law and practices of national authorities

Detention: sharing cells and less facilities – As was mentioned in our 2003 Report, the Dutch Government wishes to increase the capacity of prisons as the number of prison sentences imposed by the courts is rising rapidly. At the same time the available budget is diminishing. One of the ways out, if that is an appropriate expression, is to place several detainees in one cell. To this end a bill was submitted to Parliament in June 2003 (*Kamerstukken II,* 2002-2003, 28 979). This bill has been adopted and entered into force on 13 September 2004 (*Staatsblad* 2004, 445). At that time 450 multi-person cells were available; by January 2005 the number should have increased to 1500. Whereas during a trial

phase detainees were only put together if they agreed to share a cell, this is no longer the case. All detainees are eligible for multi-person cells, unless an individual's condition necessitates the use of a single cell.

Despite initial protests among the prison directors and personnel, the *Groepsonder-nemingsraad van het Gevangeniswezen* [overall works council] advised positively on 3 September 2004. A first evaluation, carried out by the *Wetenschappelijk Onderzoeks- en Documentatiecentrum* [WODC, the Research and Documentation Centre of the Dutch Ministry of Justice], did not signal major problems.

This development will not end here. Soon a penitentiary institution in Zwolle will be opened, featuring cells suitable for *three* persons (*Kamerstukken II* 2003-2004, 24587, No. 104). The Minister of Justice welcomed the possibility to experiment with more than two persons on a cell. Meanwhile plans are being prepared for the Lelystad prison to build an addition wing in which *six* detainees could be placed in one cell. The cells, measuring 50 m^2, would host detainees who are convicted to 30 days' imprisonment or less. The safety in this prison would be enhanced by the use of modern technology. The trade union Abvakabo FNV, however, objected. In their view it is too early after the introduction of shared cells to start an experiment with six detainees in one cell. The trade union indicated that it had received many complaints on the present situation (such as detainees being forced to share a cell with mentally disturbed or aggressive inmates).

Meanwhile, in a separate development, the detention regime has been toned down. Since October 2004 there is less time available for activities, such as work, sports and family visits. Detainees claim that they now spend some 15 hours extra per week in their cells. Several advisory bodies had warned the Minister that this may lead to a higher level of recidivism. Prison officers report a deterioration of the relationship with the detainees, as a consequence of the decreasing contacts they have. The number of incidents (verbal and physical violence against prison officers) rose from 1,736 (2001) to 2,360 (2003). Inter-inmate violence seems to have risen in a comparable way. Two prison directors who openly criticised the new policies, were removed from their positions by the Minister of Justice (which led to parliamentary questions about the freedom of expression of civil servants; see Article 11 *infra*). As a consequences, journalists noted in October, their remaining colleagues did not want to discuss the matter with the press.

The introduction of the new regime has led to a number of riots. Following the deployment of the *Mobiele Eenheid* [riot police] in the De Marwei prison, on 17 September 2004, parliamentary questions were put to the Minister of Justice. He explained that 58 detainees had protested against the reduction of the day programme. Similar protests were held in Krimpen aan den IJssel, Westlinge, Amerswiel, Groningen, Dordrecht, Veenhuizen, De Schie (Rotterdam), Tilburg, Arnhem en Zuyderbos (*Tweede Kamer* 2004-2005, *Aanhangsel* 217).

Less favourable detention conditions and Article 7 ECHR – On 16 October 2004 the *Rechtbank* [Regional court] of The Hague determined that economizing the detention regime resulting in a decrease in hours of daily activities for detainees was not in breach of Article 7 ECHR. In this case, the defendants claimed that such a cut-down leads to an increase in their sentence, unforeseeable at the time when they committed the acts for which they were convicted or even during their trial. The Court, however, considered that the impugned measure merely affected the execution of the detention regime, whereas Article 7 ECHR only applies to the imposition of sentences, not on the execution of sentences (LJN AR5713).

Ombudsman criticises detention of mentally disturbed offenders – For a discussion of the Ombudsman's report of 17 August 2004, concerning the situation of so-called 'Article 37 patients' who are forced to spend more than two months in a remand centre before they are transferred to a psychiatric institution, see Article 6 *infra*.

Reasons for concern

Detention: sharing cells – Like in our 2003 Report, we wish to put on record a widespread concern as regards the new practice to place several detainees in one cell. In making multi-person cells the rule, and single cells the exception, the Dutch Government has departed from Article 14 of the European Prison Rules which 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". It is true that the European Prison Rules are not binding, that international human rights law is not opposed to sharing cells and that 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, the treatment of prisoners and the protection of prisoners against inter-inmate violence.

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. In this connection it is worrying to note that minors are also made to share cells (see below); that TBS patients and 'Article 37 patients' have to stay in regular prisons and remand centres because of a lack of capacity elsewhere (see Article 6 *infra)*; and that the Ministry of Justice apparently does not, or did not, keep track of all 'Article 37 patients' (see also Article 6 *infra)*.

Luckily, there appear not to have been major incidents in the Dutch remand centres and prisons. But 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 continue to discharge their obligations under the European Convention.

Institutions for the detention of persons with a mental disability

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Structural lack of capacity in custodial clinics – In May 2004 the judgment of the European Court of Human Rights delivered judgments in the cases of *Morsink* and *Brand v. the Netherlands.* The applicants had been convicted of serious offences, such as assault, and had been given prison sentences. However, since the courts found that their mental faculties were so poorly developed that they could only be held responsible for their offences to a limited degree, the sentence was combined with a so-called *TBS order,* i.e. a non-punitive measure comprising confinement in a custodial clinic. Due to a structural lack of capacity in custodial clinics, however, the applicants had to stay in a regular prison after they had served their prison sentence. The Court found a violation of Article 5 ECHR on account of this delays. For a more extensive discussion, see Article 6 *infra.*

Ombudsman criticises detention of mentally disturbed offenders – The *Nationale Ombudsman*, in a report of 17 August 2004, criticised the situation of so-called 'Article 37 patients'. These are psychiatric patients who have committed criminal offences but who are in a state of diminished responsibility. A trial court may order their detention, for a maximum duration of a year, in a psychiatric institution. In practice, however, a lack of capacity may occur, as a consequence of which the patients will have to spend part of the year – or the entire year – in a *Huis van Bewaring* [remand centre]. For a more extensive discussion, see Article 6 *infra.*

Centres for the detention of juvenile offenders

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Committee on the Rights of the Child – In January 2004 the UN Committee on the Rights of the Child adopted its Concluding Observations on the Netherlands (CRC/C/15/Add.227). The Committee expressed concern that an increasing proportion of children in conflict with the law are being sentenced to detention, and also that juvenile offenders are sometimes detained with children institutionalized for behavioural problems. We will get back to the latter issue under Article 6 *infra*.

Legislative initiatives, national case law and practices of national authorities

Investigation into alleged abuses – In 2003 and 2004 the media reported several incidents in the *Rijksjeugdinrichting Den Engh* in Den Dolder, a corrective institution housing, *inter alia,* mentally retarded juveniles with criminal records. Following these reports, according to which cases of rape had not been reported under pressure of the institution's board, parliamentary questions were asked. The Minister of Justice reacted in May 2004 by ordering an external investigation, not so much because he found that the allegations had been substantiated, but rather to end all rumours (*Kamerstukken II* 2003-2004, 29 200 VI, No. 161). The investigation will cover the atmosphere in the institution, the quality of the staff, the response to violent offences, the way in which information is provided to the relevant inspection authorities. The outcome is expected early 2005.

Ombudsman criticises placement of juveniles with behavioural problems – On the Ombudsman's report of 30 November 2004, concerning the practice to place children with behavioural problems together with juveniles who have been convicted for criminal offences, see Article 6 *supra*.

Detained juveniles: sharing cells – The budget for the accommodation of juvenile offenders (totalling 270 million euro) is cut with 16%. In September 2004 the Minister of Justice proposed a number of measures, one of which is to introduce shared cells for detained juveniles. The individual circumstances will be taken into account, the Minister assured, when putting juveniles together. Sexual offenders, for instance, would not be eligible. Since the Minister was not aware of any research that presented an obstacle to the use of shared cells, he announced three pilot projects with shared cells (*Kamerstukken II* 2004–2005, 24 587 and 28 741, No. 112).

The NGO *Defence for Children* protested against the new plans, arguing that they were incompatible with international minimum standards, such as the Rues for the Protection of Juveniles deprived of their liberty (UNGA res. AS/45/113). The *Raad voor Strafrechtoepassing en Jeugdbescherming* [Advisory Council on the Application of Criminal Law and Juvenile Protection] also objected against the proposals. The Council pointed to the risks inherent in the use of shared cells, especially for such a vulnerable category. In addition the Council considered the fact that it had not been informed of the pilot projects as a grave omission. Since it was unclear how the use of shared cells would affect the persons concerned, the Council concluded that the juveniles that were involved in the pilot project were used for an experiment with uncertain outcome (*Staatscourant* 6 October 2004). Opposition was also voiced by several members of Parliament. They pointed to the experience of other countries, that shared cells may stage intimidation, ill-treatment, rape and even suicide. Other MPs though that the experiments deserve a chance (*Kamerstukken II* 2004-2005, 29 800 VI, No. 50).

Centres for the detention of foreigners

Legislative initiatives, national case law and practices of national authorities

Unaccompanied asylum seeking minors – As was noted in our Report on 2003, the situation of unaccompanied asylum seeking minors gave rise to concern in several respects. Two accommodations, specifically set up for this group, criticised on account of their strict disciplinary system and poor recreational activities. In November 2003, one of the two institutions was closed down; in 2004 the closure of the other institution, based in Vught, was announced. An evaluation showed a failure: of the 436 minors that were placed in Vught, only 6 actually returned to their country of origin. Meanwhile the number of unaccompanied minors seeking asylum in the Netherlands decreased dramatically from 6705 (in 2000) to 3232 (in 2002) to 1216 (in 2003). In the period of January to October 2004, only 421 unaccompanied minors applied for asylum. In the future unaccompanied minors from 15 to 18 years will be housed in separate units in the removal centres. They will receive full-time supervision and educational programmes, aimed to enhance their motivation to return to the country of origin (*Kamerstukken II*, 2004–2005, 27 062, No. 29). See also Article 19 *infra.*

Fight against the impunity of persons guilty of acts of torture

Legislative initiatives, national case law and practices of national authorities

Universal jurisdiction – The former head of the Afghan Military Intelligence Service, Mr Hesamuddin H., who applied for asylum in the Netherlands in 1992, was arrested on 27 November 2004. Having been in charge of the Service under the communist regime, H. is said to be responsible for a widespread practice of torture. Witnesses, both in the Netherlands and in Afghanistan, are said to have testified that H. was involved in the administration of torture.

Protection of the child against ill-treatment

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Committee on the Rights of the Child – In its Concluding Observations of 26 February 2004 (UN doc. CRC/C/15/Add.227), the UN Committee on the Rights of the Child criticised the failure to adopt legislation against corporal punishment. For the follow-up, see below.

Legislative initiatives, national case law and practices of national authorities

Violence against children – Shortly after the UN Committee had published its Concluding observations, the Minister of Justice clarified that violence against children is never permissible and should not be considered an aspect of parental authority. The Minister announced an amendment of the *Burgerlijk Wetboek* [Civil Code] along these lines. He did not consider it necessary to also change the Criminal Code (*Kamerstukken II* 2003/04, 28 345, No. 8).

Meanwhile the *Advies- en Meldpunten kindermishandeling* [Centres for advice on and reporting of ill-treatment of children) reported that they had received 28,569 notifications of ill-treatment in the year 2003, which represented an increase of 13% when compared to the previous year. It was unclear, the Centres stated, whether the increase corresponded to more incidents or that they were due to the fact that more children know that they can report violence. The Centres estimate that each year 50,000 to 80,000 children are the victim of domestic violence (ill-treatment, neglect and abuse). Commenting on these figures the State Secretary of Health announced additional research into the nature and prevalence of child abuse (*Tweede Kamer* 2004–2005, *Aanhangsel* 132)

Female circumcision – The issue of female circumcision emerged in a memorandum, submitted by the Minister of Justice in March 2004, on national and international developments concerning the requirement of double criminality. This requirement implies that a person may only be prosecuted in the Netherlands for a crime committed abroad, when the act is considered a criminal offence both in that particular country and in the Netherlands. As to female circumcision the Minister observed that is prohibited in the Netherlands, but not in a number of countries (including Somalia and Sudan). Considering that female circumcision is an unacceptable interference with physical integrity, the Minister of Justice stated that the mere fact that it is not a crime in some other countries, should not prevent criminal proceedings in the Netherlands against parents who have had their daughters circumcised abroad. Dutch citizens, or individuals residing in the Netherlands, will therefore be prosecuted if they have female circumcision performed abroad (*Kamerstukken II* 2003-2004, 29 451, Nos. 1-2).

Male circumcision – In parliamentary questions it was argued that it was discriminatory to continue to allow the circumcision of boys for non-medical reasons, since female circumcision was banned. The Minister of Justice disagreed: the circumcision of boys may have religious, hygienic or medical reasons; it is not meant to cause bodily harm, and it is not perceived as problematic in the Netherlands. On the contrary, female circumcision is a form of ill-treatment with very serious consequences of a physical and psychological nature, especially at a later age (*Tweede Kamer* 2004–2005, *Aanhangsel* 363).

Behaviour of security forces

Legislative initiatives, national case law and practices of national authorities

Promoting the integrity of the defence organisation – The Secretary of State for Defence, Mr. VAN DER KNAAP, when asked by the present author if it wished to draw the Network's attention to any pertinent developments, indicated that special attention is being paid to the prevention of intimidation, extremism and other forms of undesirable conduct. To this end a policy was defined and a special complaints procedure was established in 2001. A network of counsellors was set up, as well as a system to register reports of undesirable conduct. An external consultancy firm, KPMG, carried out two investigations into the manners that prevail in the defence organisation, one in 2001 (when the new policy was launched) and the second in late 2003. Both investigations involved 10% of the defence personnel. Less than 3% of the respondents reported that they had witnessed incidents involving violent extremism or extremist expressions. On the other hand no less than 73 % (in 2001) and 56% (in 2003) reported that racist jokes and remarks are made frequently or even often. Yet the manners within the organisation are evaluated positively by the personnel, also when compared to the evaluation in other sectors of the labour market. The Ministry indicated that the existing policies will be continued and intensified. An officer has been assigned to co-ordinate the policies on integrity, to revise the present code of conduct and to supervise a new plan of action.

Ombudsman and use of force by the police – Every year the *Nationale Ombudsman* receives complaints on the use of force by the police (see www.nationaleombudsman.nl). In five cases that were dealt with in 2003 and 2004 (case Nos. 2003/351 to 354 and 2004/049) he found that there was no legal basis for the use of hand-cuffs and blindfolds, since the person concerned was not a suspect (but for instance a family member of the suspect). In that situation the *Ambtsinstructie* for the police does not provide for the use of these means. Interestingly the Ombudsman relied expressly on Article 8 ECHR in order to substantiate his finding that the police had not operated in an appropriate fashion. The Ombudsman welcomed the fact that the Minister of the Interior, in response to these findings, had announced legislative proposals on this issue, to be tabled in 2005.

Allegations of disproportionate police force (1) – As was noted in the 'preliminary remarks', a *terreuralarm* [terror alarm] was announced in July after the arrest of a 17-year old boy, Samir A., who was in possession of materials to make bombs and maps of key locations. In the weeks that followed, several individuals were arrested on suspicion of involvement in terrorist offences. A firm reaction against terrorism is obviously legitimate and even indispensable in order to protect our democratic society. Yet it would appear that some overreactions occurred. On Sunday evening 26 September 2004 an arrest team, using considerable force, entered the house of a Moroccan family in Utrecht and arrested the father, mother and son. Apparently the *Landelijk Parket* [National Organised Crime Prosecution Service] had reason to believe that there were explosives present that might be used for a terrorist attack. Yet this was not the case and the family was released after two days. The neighbourhood in which the family lived, reacted furiously. The mayor of Utrecht criticised the operation too, observing that the Moroccan community felt stigmatised. She also complained about a lack of communication on the part of the Prosecution Service.

Allegations of disproportionate police force (2) – The allegedly violent arrest of a 20-year old Moroccan juvenile in Zaanstad led to media attention and parliamentary questions – which in itself illustrates that police brutality is a rare phenomenon in The Netherlands. The man was arrested after insulting a number of persons, including several police officers. Part of the incident was recorded by a CCTV. After he had been arrested one of the police officers, apparently of his own motion and before a complaint was lodged, informed his superiors that he had beaten the juvenile. In compliance with the applicable rules the *korpsleiding* [local police authorities] conducted an investigation and discussed the outcome with the Public Prosecutor's Office. The Public Prosecutor then ordered a further investigation by the *Bureau Interne Onderzoeken* [Internal Investigations Unit]. Such an investigation could also be conducted by the *Rijksrecherche* [the national criminal investigation department], which is independent of the local police (*Tweede Kamer* 2003-2003, *Aanhangsel* 1027).

Article 5. Prohibition of slavery and forced labour

Fight against the prostitution of others

Legislative initiatives, national case law and practices of national authorities

New plan of action – In June 2004 the *Plan van aanpak Ordening en Bescherming Prostitutiesector* was submitted to Parliament (*Kamerstukken II* 2004-2005, 25 437, No.46). The Minister of Justice noted a number of positive developments following the legalisation of prostitution: a better view of, and more grip on the regulated parts of the profession; less abuses; the formation of organisations for the promotion of common interests (which joined employers' organisations and trade unions), as a consequences of which negotiations on working conditions took place; support for prostitutes who wish to change their career. But there are still many problems, the Minister acknowledged; especially in those sectors of prostitution that were not tied to a specific location, there are many difficulties to enforce rules and prosecute offences. An overall evaluation of this policy area will take place in 2005.

Trafficking in human beings (in particular for sexual exploitation purposes)

Legislative initiatives, national case law and practices of national authorities

National measures against trafficking in human beings – In July 2004 the *Nationaal Rapporteur Mensenhandel* [National Rapporteur on trafficking in human beings] published her third annual report. In his reaction the Minister of Justice announced a new *Actieplan aanpak mensenhandel* [Action plan against trafficking in human beings] (*Kamerstukken II*, 2004-2005, 28638, No. 10). The Minister also ordered an investigation into slavery-like situations of exploitation, to be carried out by the *Wetenschappelijk Onderzoeks- en Docu-*

mentatiecentrum [WODC, the Research and Documentation Centre of the Dutch Ministry of Justice] (*Tweede Kamer* 2004-2005, *Aanhangsel* 242).

In the Netherlands the fight against the trafficking in human beings has mainly focused on sexual exploitation purposes. However, a bill that is now pending before Parliament aims to extend the notion to exploitation in other branches as well. The difficulty is how to define the notion *'mensenhandel'* [trafficking in human beings] in order to meet the requirement of legality. The new provision of the Criminal Code, Article 273a, should be limited to serious abuses that amount to a violation of fundamental human rights. In addition it is proposed to grant more facilities to victims, including temporary residence permits so as to allow them to act as witnesses in criminal proceedings.

Protection of the child (fight against child labour – especially with purposes of sexual exploitation or child pornography - and fight against the sexual tourism involving children)

Legislative initiatives, national case law and practices of national authorities

National measures against child trafficking – In September 2004 the Dutch branch of UNICEF expressed concerns relating to the existence of child trafficking in the Netherlands (see the report *"Ongezien en ongehoord"*, at www.unicef.nl). At the conference where the report was presented to him, the Minister of Justice indicated that he did not have a complete overview of the situation – but he agreed that each case was obviously one too many. He indicated that the investigation and prosecution of trafficking in human beings is a matter of priority, especially if minors are involved. Specific measures would be announced in the new *Actieplan aanpak mensenhandel* [Plan of action plan against trafficking in human beings] that was due before the end of 2004 (*Tweede Kamer* 2004-2005, *Aanhangsel* 242; see also above under the heading 'National measures against trafficking in human beings'; see also Article 24 *infra*). Meanwhile UNICEF announced two further reports, to be published later.

In response to another parliamentary question the Ministers of Justice and Foreign Affairs gave an indication of the Dutch financial support for the fight against the trafficking in children. Thus, the Ministry of Foreign Affairs provides, on a voluntary basis, annual support to UNICEF of 28.5 million euro to help implementing the Medium Term Strategic Plan. Another 7 million euro was offered for the period 2003-2004 to the "child protection" programme. In the period 2001-2004 the Ministry spent some 8 million euro, through the ILO, the combat child labour; in the period 2004-2005 12.5 million euro will be spend in the relationship between child labour and education. In addition a number of NGOs that are active in this area are financially supported (*Tweede Kamer* 2004-2005, *Aanhangsel* 246).

Alleged involvement in child pornography in Brazil – In September 2004 a number of parliamentary questions were asked concerning the Dutch consulate-general in Rio de Janeiro. The consulate-general was allegedly involved in the flight of two Dutch nationals who had been convicted in Brazil for trade in child pornography. The two men had been convicted and sentenced to 8 and 11 years' imprisonment by a court of first instance. When they lodged an appeal, they were allowed to remain in liberty, provided they would report regularly to the local police. In February 2004 the Consulate-General in Rio provided the two men, at their request, with emergency travel documents, following clearance from the Ministry of Foreign Affairs. The clearance was based on a strict interpretation of the *Paspoortwet* [Passport Act] which provides that any Dutch citizen is entitled to travel documents; a refusal can only be based on an exhaustive list of exceptions.

Looking back at the case, the Ministers of Foreign Affairs and Justice indicated that the emergency travel documents could and should have been refused on the basis of the law. A circular has now been sent to all Dutch embassies and consulates, stressing that travel documents should be refused if there is a real risk that the individual concerned will avoid criminal investigations. A practical problem is that the consular authorities will not always be aware of this. In the instant case the Dutch government has apologised to Brazil. Brazil did not seek the extradition of the two men. One of them was already involved in criminal

proceedings in the Netherlands, in relation to the same set of facts for which he was convicted in Brazil (*Tweede Kamer* 2004-2005, *Aanhangsel* 236).

Sex tourism to Gambia – Also in September 2004 two NGOs, *Terre des Hommes* and the *Child Protection Alliance*, claimed that Dutch 'tourists' in Gambia often engage in child sex. Also Gambian children were said to be invited for a 'holiday' to the Netherlands, whereas in reality they were to be sexually exploited. In response to parliamentary questions, the Minister of Justice indicated that he was unaware of the number of Gambian children that might be exploited in the sex industry. No Dutch nationals had been prosecuted in Gambia for child abuse, but this might not reflect the reality. He also noted that only a very small amount of visa had been given to Gambian minors (only 13 in the first ten months of 2004). Without excluding that children might be invited to come to the Netherlands with the aim to exploit them, the Minister stated that there were no concrete indications that this actually happened in practice. He emphasised that Dutch nationals who engage in sexual abuse of children abroad may be prosecuted in the Netherlands upon their return. In order to facilitate prosecution, the requirement of double criminality (see above, under the heading 'female circumcision') had been dropped, as well as the requirement that a formal complaint be lodged (*Tweede Kamer* 2004-2005, *Aanhangsel* 408).

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

Pre-trial detention

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Permanent camera surveillance – For a discussion of the *Van der Graaf* case, decided by the European Court of Human Rights, concerning a detainee's prolonged exposure to permanent camera surveillance during pre-trial detention, see Article 4 *supra*.

Legislative initiatives, national case law and practices of national authorities

Custody at police station: too long but not in violation of Article 5 ECHR – The *Gerechtshof* [Court of Appeal] of Arnhem decided on 2 June 2004 that a situation of custody at a police station was not unlawful in the sense of Article 5 ECHR, despite the fact that it had lasted one day longer than allowed by law. Although the suspect should have been transferred to a *Huis van Bewaring* [remand centre], the Court observed that a custody order is not rendered incompatible with Article 5 ECHR merely because its execution was defective or illegal *("gebrekkig of onrechtmatig")*. The Court considered that in this case a balance must be found between all relevant interests. Since the suspect had been held at the wrong place for only one day, the Court found that there was no "illegal" deprivation of liberty in the sense of Article 5 ECHR and rejected a request to end the detention on remand (LJN AP3619).

Delay in judgment on appeal against remand order violates Article 5 § 4 ECHR – *O*n 28 May 2004 the *Rechtbank* [Regional Court] of Den Bosch issued an order to keep a suspect on remand (*bevel tot gevangenhouding*). The next day the suspect appealed. The Public Prosecutor, however, decided not to forward the appeal to the *Gerechtshof* [Court of Appeal] of Den Bosch, since he preferred to await the outcome of a different procedure against the same suspect, whereby a custody order was asked. As a result, the appeal was only received by the Court of Appeal on 21 May. On 3 June 2004 the Court of Appeal found that the appeal had not been dealt with "speedily" as required by Article 5 § 4 ECHR. Considering that the Public Prosecutor had disregarded the rights of the defence, the Court of Appeal ordered the immediate release of the suspect (LJN AP4609).

Detention following a criminal conviction (including the alternatives to the deprivation of liberty and the conditions for the access to release on parole)

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Structural lack of capacity in custodial clinics – On 11 May 2004 the European Court of Human Rights found a violation of Article 5 ECHR in two Dutch cases. Both cases concerned a delayed admission to a custodial clinic, due to structural lack of capacity.

The applicants had been convicted of serious offences, such as assault, and had been given prison sentences. However, since the courts found that their mental faculties were so poorly developed that they could only be held responsible for their offences to a limited degree, the sentence was combined with a so-called *TBS order,* i.e. a non-punitive measure comprising confinement in a custodial clinic. When the applicants had served their prison sentences, no place was available in the custodial clinics for which they had been selected. They were therefore held in pre-placement detention in an ordinary *Huis van bewaring*

[remand centre]. On the basis of domestic legislation they could be kept there for six months, and thereafter, for successive periods of three months on decision of the Minister of Justice.

The Strasbourg Court accepted that it would be unrealistic to expect the authorities to ensure that a place is immediately available in the selected custodial clinic. It also accepted that, for reasons linked to the efficient management of public funds, a certain friction between available and needed capacity in custodial clinics is inevitable and must be regarded as acceptable. A balance had to be struck between the competing interests, giving particular weight to the applicant's right to liberty. However, a significant delay in admission to a custodial clinic would obviously affect the prospects of a treatment's success. In the circumstances, a reasonable balance had not been struck. Whilst there was a problem of a structural lack of capacity in custodial clinics, as the authorities were not faced with an exceptional or unforeseen situation, a delay of fourteen and fifteen months in admission to a custodial clinic was not acceptable (Eur.Ct.H.R., 11 May 2004, *Morsink v. the Netherlands*, appl. no. 48865/99; and *Brand v. the Netherlands*, appl. no. 49902/99).

The cases were relied upon by the *Raad voor de Strafrechttoepassing* [Council for the Application of Criminal Law] in January 2005, when ruling on complaints from convicts who were waiting for placement in custodial. The applicants were held in pre-placement detention in ordinary remand centres for more than six months. The lawyer acting on behalf of the applicants, basing himself on figures of the Ministry of Justice, stated that some 180 persons are in a similar; the average length of pre-placement detention amounts to 243 days. the receive a compensation of 75 euro per day, but still argue that their continued detention is illegal. The Ministry of Justice did not dispute these facts but cited lack of capacity as a reason. The number of TBS orders is increasing, the Ministry said, and it is difficult to find personnel for the institutions. Yet the *Raad* found that the Minister was responsible for the shortage of TBS places. It annulled the decisions extending the applicants' pre-placement detention.

Legislative initiatives, national case law and practices of national authorities

Structural lack of 'long term' capacity in custodial clinics – In addition to the problems noted above, in connection to the cases of *Brand* and *Morsink,* research carried out by the *Wetenschappelijk Onderzoeks- en Documentatiecentrum* [WODC, the Research and Documentation Centre of the Dutch Ministry of Justice], pointed to another problem. WODC noted, in a report published on 26 November 2004, that there is a great shortage of 'long stay' places in custodial clinics. These places are necessary for persons on whom a 'TBS order' has been imposed, and who are considered to pose a high risk of committing serious and violent crimes if they were released within six years.

According to WODC there are now 204 patients who should be placed in a 'long stay' section, but there are only 60 places available. Many of these patients are now taking up places where they are under intensive (and expensive) treatment, whereas they could also be confined in high security institutions with less intensive psychiatric treatment. The patients could also carry out work in these institutions, which would diminish the need for expensive day programmes. WODC determined that out of a total of 1,648 TBS patients that were held on 1 January 2003, 658 were considered to be 'permanently dangerous', Of this group, 204 should be confined in a fully closed environment (see www.wodc.nl).

Detention: sharing cells and less facilities – For a discussion of the new policy to place several detainees in one cell, see Article 4 *supra*.

Ombudsman criticises detention of mentally disturbed offenders – The *Nationale Ombudsman*, in a report of 17 August 2004, criticised the situation of so-called 'Article 37 patients'. These are psychiatric patients who have committed criminal offences but who are in a state of diminished responsibility. A trial court may order their detention, for a maximum duration of a year, in a psychiatric institution. In practice, however, a lack of capacity may occur, as a consequence of which the patients will have to spend part of the year – or the entire year – in

a *Huis van Bewaring* [remand centre]. Following the complaint of a man who received an 'Article 37 order' in March 2000 and remained in a remand centre until July 2001, the *Nationale Ombudsman* carried out an in-depth investigation. Citing the cases of *Brand* and *Morsink,* discussed above, the Ombudsman argued that 'Article 37' patients should not be forced to spend more than two months in a remand centre before they are transferred to a psychiatric institution. A worrying aspect of the situation is that the Ministry of Justice did not seem to be aware of the total number of persons involved. It appeared that, in the year 2003, an 'Article 37 order' had been imposed in 106 cases; but it was unclear in how many cases the order was executed, in whole or in part, in a *Huis van Bewaring.*

Social security rights for detainees – The *Wet sociale zekerheidsrechten gedetineerden* (WSG) [Social security rights (detainees) Act], which entered into force in 2000, provides that detainees lose their entitlement to social security benefits for the duration of their detention. The Act has been challenged before the *Centrale Raad van Beroep* [Central Appeals Tribunal] on several occasions. In decisions of 18 June and 15 July 2004 the Tribunal rejected the argument that the differentiation between detainees and others amounted to discrimination. It also decided that the WSG led to a deprivation of property rights which, in general, is legitimate. However, the Tribunal held that certain aspects of the transitional arrangement of the Act are not compatible with Article 1 of the First Protocol to the ECHR. The Act also applied to those who were already detained at the date of entry into force of the Act. These detainees would lose their entitlements after one month. The Tribunal found that this short period did not meet the requirements of proportionality and subsidiarity. According to the Tribunal a transitional period of six months would have been acceptable (LJN AQ5064).

Alternatives to the deprivation of liberty: controversy concerning 'task penalties' – In August 2004 controversy arose concerning the execution of *taakstraffen* [task penalties], i.e. penalties imposed by way of criminal conviction whereby the convict is ordered to work for a specified number of hours, for instance by removing graffiti or cleaning in a hospital. It was alleged that several persons undergoing 'task penalties' in Utrecht, were involved in drugs offences and fraud. In the discussion that followed, various general problems were noted: the number of 'task penalties' imposed doubled since 2000 (to some 29,000 cases per year) and 'task penalties' are increasingly imposed for serious offences. In addition the method for calculation of the length of the 'task penalties' is very favourable: one day of work equals four days in prison, meaning that six months' imprisonment is equalled to 240 hours of work. According to researchers this standard is the 'softest' in Europe. Finally it is noted that the original aim of the 'task penalties', rehabilitation, is under pressure because of budget cuts.

Reasons for concern

Structural lack of capacity in custodial clinics – Clearly the lack of capacity in custodial clinics, both for 'regular' and for 'long stay' patients is worrying. The European Court of Human Rights and the *Raad voor de Strafrechttoepassing* rightfully held the State responsible for the shortage of 'TBS places'. The cuts in the budget are a reality that cannot be ignored – but they do not constitute a ground for the Netherlands to detain 'TBS patients' in a way that is incompatible with its international obligations. When depriving a person of his liberty, the authorities assume a special responsibility for his well-being. Moreover, the European Convention on Human Rights and other international instruments place a duty on each of the Contracting States to organise their legal and penal systems so as to guarantee that each person deprived of his liberty is placed in an appropriate institution and treated in a way that takes into account his particular circumstances.

Meanwhile the 'TBS system' is also under pressure following the 'Eibergen incident', whereby a 'TBS patient' on temporary leave kidnapped a young girl (see Article 2 *supra)*. Given all problems, there may be a risk that courts will impose less 'TBS orders', even in

cases where this would be warranted. Such a develop would undermine one of the 'civilised' cornerstones of the Dutch penal system.

Deprivation of liberty for juvenile offenders

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Committee on the Rights of the Child – On the Concluding Observations of the UN Committee on the Rights of the Child, concerning the detention of children in conflict with the law and concerning the fact that juvenile offenders are sometimes detained with children institutionalised for behavioural problems, see Article 4 *supra*.

Legislative initiatives, national case law and practices of national authorities

Ombudsman criticises placement of juveniles with behavioural problems – The *Nationale Ombudsman*, in a report of 30 November 2004, strongly criticised the practice to place children with behavioural problems together with juveniles who have been convicted for criminal offences. The Ombudsman accepts that children with behavioural problems may have to be placed in juvenile remand centres as a temporary measure, before they are transferred to an institution where they can be treated, but this should be strictly limited in time.

The background to the problem is once again: lack of capacity. There are two types of judicial institutions for juveniles of 12 to 18 years old. In the first place there are *"opvanginrichtingen",* in fact remand centres for juveniles who are awaiting trial or who have been criminally convicted. Each year approximately 5000 juveniles are sentenced to undergo deprivation of liberty in one the 15 institutions of this type, which have a total of some 2400 places. Secondly there are *"behandelinrichtingen"*, i.e. institutions where juveniles can be treated. There is a serious lack of capacity in both types of institutions, but the especially in the latter one. As a result children with behavioural problems, on whom a so-called *ondertoezichtstelling (ots)* [placement under supervision order] has been imposed by a civil court judge specialising in family matters, in order to have them treated in a *"behandelinrichting"*, are placed in *"opvanginrichtingen"*. In 2004 about 150 juveniles were in this situation; their temporary stay in *"opvanginrichtingen"* lasted 132 days. As a matter of fact the Ombudsman's report was triggered by a complaint from a 12 year old girl with serious behavioural problems who was placed in an *"opvanginrichting"* for almost ten months before she could be placed in a *"behandelinrichting"*. In practice even children below 12 are sometimes admitted to an *"opvanginrichting"* on account of their behavioural problems.

Dutch law does not contain any rules regarding the maximum length of a temporary placement in *"opvanginrichtingen"*. In his report the Ombudsman argues that a maximum period of six weeks is acceptable. Part of the problem is that the *"opvanginrichtingen"* offer no treatment of behavioural problems, as well as less extensive and diverse types of education. The Ombudsman is also afraid that the placement may have a negative impact on the juveniles, since they may be influenced by juveniles with a criminal record, or be afraid of them. Research by the Verwey-Jonker Instituut, commission by the Minister of Justice and published in July 2004, confirms this fear. In addition the children themselves regard placement in an *"opvanginrichting"* as unfair since they perceive the institution as a prison whereas they have no criminal record.

The Ombudsman's report ties in with the concerns expressed by the UN Committee on the Rights of the Child (see above) and by the *Werkgroep Kinderrechters*, a working group of juvenile judges of the Dutch Society of Judges NVVR. The judges noted that many of the children with behavioural problems are mentally somewhat retarded of come from a deprived family background. The best solution would often be to provide intensive help programme to

these children in their own environment, but in practice this does not happen. Instead, the children are 'locked away' with juveniles who are criminally convicted.

In his reaction to these findings the Minister of Justice acknowledged the problem. However he intends to continue the present policy, until solutions are found, rather than leave children with behavioural problems to their own devices. He therefore believes that one cannot avoid temporary placements of twelve weeks in *"opvanginrichtingen"*. The issue has been picked up by the Parliament; numerous questions have been asked (e.g. *Tweede Kamer* 2003-2004, *Aanhangsel* 913; *Kamerstukken II* 2004-2005, 28606 nr. 22). In the meantime the children with behavioural problems may be separated from the criminally convicted juveniles within the institutions themselves. More lasting solutions may be found as part of an overall evaluation of the applicable legislation which is now pending.

Detained juveniles: sharing cells – On the proposal to introduce shared cells for detained juveniles, see Article 4 *supra*.

Reasons for concern

Placement of juveniles with behavioural problems – It is difficult to disagree with the criticism of the *Nationale Ombudsman* on the practice to place children with behavioural problems together with juveniles who have been convicted for criminal offences. For simplicity sake we refer to our discussion of this issue above.

Deprivation of liberty for persons with a mental disability

Legislative initiatives, national case law and practices of national authorities

Psychiatric patients – On the developments surrounding the application of the *Wet bijzondere opnemingen in psychiatrische ziekenhuizen* (Bopz) [Psychiatric Institutions (Extraordinary Admissions) Act], see Article 4 *supra.*

Ombudsman criticises detention of mentally disturbed offenders – For a discussion of the report of the *Nationale Ombudsman* of 17 August 2004, on the situation of so-called 'Article 37 patients', see above (under the heading "Detention following a criminal conviction").

Imposition of 'TBS order' on aliens – In our discussion of the *Brand* en *Morsink* cases (see Article 6 *supra*), mention was made of the so-called *TBS order:* a non-punitive measure comprising confinement in a custodial clinic. This order may be imposed in the context of criminal proceedings if the courts find that the offender's mental faculties are so poorly developed that he can only be held responsible for his offences to a limited degree. In the case of foreigners Article 67a of the *Vreemdelingenwet 2000* [Aliens Act] allows the Minister to declare the alien a *persona non grata* if a TBS order is imposed.

In practice the treatment in the custodial clinic is frustrated in the case of foreigners who have lost their right to reside in the Netherlands: this presents an obvious obstacle to resocialisation. The Minister of Justice has now proposed various solutions: the Public Prosecutor might henceforth abandon the policy to demand a 'TBS order'; the law might be changed so as to allow the Minister of Justice to end confinement in a custodial clinic at an earlier stage; separate, more basic, facilities might be introduced for this category of detainees. Apparently the option *not* to strip these persons of their right to reside in the Netherlands is not considered (*Kamerstukken II* 2003-2004, 29452 Nos. 6 and 13).

Deprivation of liberty for foreigners

Legislative initiatives, national case law and practices of national authorities

Alien detention capacity – The capacity to detain aliens will be increased with another 430 places in the coming years, totalling over 2000 in the year 2007. The extra capacity is needed to enforce the government's intentions in the field of removal policy, the Minister of Aliens Affairs and Integration wrote in September 2004 (*Kamerstukken II* 2004-2005, No. 29800 VI).

Article 7. Respect for private and family life

Private life

Criminal investigations and the use of special or particular methods of inquiry or research

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Court of Human Rights: telephone tapping – The telephone conversations of a prisoner, Mr Doerga, were tapped and recorded; the recordings were 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 *Gevangenismaatregel* [Prison Rules] 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 rejected as manifestly ill-founded a complaint under 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, the Court found that Article 8 ECHR had been violated since the rules at issue were lacking both in clarity and detail: they did not give any precise indication as to the circumstances in which prisoner's telephone conversations may be monitored, recorded and retained by penitentiary authorities pr the procedures to be observed. The Court accepted that it may be necessary to monitor detainees' contacts with the outside world, but the rules at issue did not offer appropriate protection against arbitrary interference by the authorities with Mr Doerga's right to respect for his private life and correspondence (Eur. Ct. H.R., *Doerga v. The Netherlands*, application no. 50210/99, 27 April 2004).

European Court of Human Rights and UN Human Rights Committee: telephone tapping – On the international case-law concerning tapping of telephone conversations between suspects and lawyers, see Article 48 *infra.*

Legislative initiatives, national case law and practices of national authorities

Identification – Our 2003 report paid attention to one of the most controversial topics concerning privacy in the Netherlands: 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 was to improve law enforcement by the police and other supervisory institutions. Critical remarks of, among others, the *College bescherming persoonsgegevens (CBP)* [Personal Data Protection Authority] and the *Landelijk Bureau ter bestrijding van Rassendiscriminatie (LBR)* [National Agency for Combating Racism] led to certain amendments of the original proposals.

In December 2003 the *Tweede Kamer* [House of Representatives] passed the bill. In March 2004, prior to the examination of the bill by the *Eerste Kamer* [Senate], the NJCM (*Nederlands Juristen Comité voor de Mensenrechten*; Dutch section of the International

Commission of Jurists) wrote another critical comment, arguing that the proposals were still incompatible with Article 8 ECHR. NJCM also pointed out that there were insufficient safeguards against discriminatory application of the new powers. Yet the *Eerste Kamer* approved the bill in June (Act of 24 June 2004, *Staatsblad* 2004, 300). The Act entered into force on 1 January 2005 (see *Staatsblad* 2004, 583). The obligation to prove one's identity applies to all from the age of 14. Under the new Article 447e of the Criminal Code it is an *overtreding* [offence] not to be able to identify oneself. According to the law a maximum fine of 2250 euro may be imposed. In practice a penalty of 50 euro (25 euro in case of children under 16) will be imposed.

The new powers were immediately exercised and did not fail to give rise to controversy. A 14-year old girl, who was on her way home and happened to pass a street were the police was confronting a group of youth, was arrested and detained for more than six hours because she could not prove her identity.

Preventive body search – On 2 March 2004 the *Rechtbank* [Regional Court] of Breda imposed a fine on a woman who had been found in possession of teargas spray. The police had discovered the tear gas when carrying out an operation of *preventief fouilleren* [preventive body search] in the city centre of Tilburg at night. The suspect was asked to empty her pockets and then showed the teargas spray. The Regional Court accepted that the body search, including the request to empty one's pockets, amounts to an interference with the privacy as protected by Article 8 ECHR. Following a detailed analysis of the legal basis, purpose and necessity of the instrument and this particular application, the Court found that all requirements of Article 8 para. 2 ECHR had been met (LJN AO4770).

DNA (1): data base with DNA profiles from convicts – In September 2004 a bill was passed that provides for the taking of DNA from all persons who are convicted for criminal offences of a certain gravity carrying a punishment of imprisonment of four years or more (Article 67 of the Criminal Code). According the new *Wet DNA-onderzoek bij veroordeelden* (*Staatsblad* 2004, 465; *Kamerstukken* 28 685), the profiles will be stored in a database. The purpose is twofold: on the one hand it is hoped that the mere existence of the database will deter convicts from committing new offences once they are released. On the other hand the database might be useful in solving crimes of the past where the perpetrators could not be found so far.

At the time the bill was passed, a database already existed, containing 5737 DNA profiles that were obtained in the past in the course of criminal investigations. It anticipated that several tens of thousands of profiles will be added. In order to boost the database, Article 8 of the new Act also provides for the taking of DNA samples from all persons already sentenced to imprisonment at the moment that the Act entered into force, unless they had already served their time in prison. This 'immediate effect' of the Act clearly enhances its effectiveness, but it may at the same time be questioned from the perspective of the legality principle. Individuals who were convicted before the entry into force of the new Act are confronted with an interference with their privacy which did was not foreseen by law at the time they committed their offence nor when they were tried. Since the DNA samples may also be used to investigate crimes of the past, a 'double retroactive effect' occurs which may be difficult to reconcile with the foreseeability requirement as developed by the European Court of Human Rights under Article 8 ECHR.

DNA (2): use of DNA research in criminal investigations – The new Act complements an Act on the use of DNA research in criminal investigations that entered into force in September 2003 *(Staatsblad* 2003, no. 201; *Kamerstukken* 28 072). Under the latter Act the 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 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.

DNA (3): DNA exculpating convict – The DNA technology can also work in the advantage of suspects and convicts. In December a man was released who had been convicted for murder in 2002. The man had initially confessed that he had killed a 10-year old girl and assaulted her boy friend in a park. In addition it emerged that he had been in the park at the time of incident, he was known to have a sexual preference for children, and did not have an alibi. He later withdrew the confession, but he was nevertheless convicted and sentenced to 18 years' imprisonment. In 2004 fresh investigations of the DNA that was found on the girl's body led to another man. Having spent four years in prison for a crime he did not commit, the man announced that he would claim compensation. He would also bring charges against the police officers who, according to him, had put him under pressure to confess.

Publication of picture suspected murder of **Theo VAN GOGH** – In November the authorities decided to show the picture of Mohammed B., the 26-year old man who is suspected of killing Mr VAN GOGH, on Dutch television. They asked the public for additional information, for instance on the route that B. had followed on 2 November 2004. To show his picture was an exceptional move (which was specifically approved of by the Minister of Justice): under Dutch practice both the name and the face of suspects are never made public. The defence tried to prevent the broadcasting of the picture, invoking Article 8 ECHR on the one hand (as B's privacy was interfered with unnecessarily, as he had already been arrested), and Articles 2 and 3 ECHR on the other hand (since his life might be at risk after his identity became known to the public). However, the request for an injunction was refused by the *Rechtbank* [Regional Court] of Amsterdam on 29 November 2004. With a sense of understatement the Court considered it unlikely that Mr B. was at risk of being recognised in public as a consequence of the broadcasting. The Court agreed that Mr B. himself had already been arrested, but the police was still looking for other persons who might be involved. Given the gravity of the case, the Court accepted that publication of picture complied with the requirements of proportionality and subsidiarity and was therefore acceptable (LJN AR6898). The case of Mohammed B. being a very exceptional one given the gravity of the offence and its repercussions on Dutch society, it is difficult to draw any general conclusions from this particular judgment. Still it is interesting to reflect on this issue, also against the background of the judgment of the European Court of Human Rights in the case of *Sciacca v. Italy* (Appl. 50774/99, judgment of 11 January 2005).

Publication of pictures of habitual offenders v. privacy – Shop owners have been looking for ways to deter habitual offenders – who became known in the discussion as *draaideurcriminelen* or 'revolving door criminals'. One proposal was to display pictures of repetitive shoplifters in shops. Mr Vogelenzang, head of the Utrecht police, said in January that he supported such as an approach as an attempt to take habitual offenders out of anonymity and thereby make them more accountable. He also proposed to circulate pictures on internet and in neighbourhoods.

In a reaction the *College Bescherming Persoonsgegevens* (*CBP*) [Data Protection Authority] commented that the proposed measures would be disproportionate and might lead to a witch hunt. The police may of course co-operate with shop-owners in preventing and investigating crime. In that framework it is conceivable that the police passes information on habitual offenders, including their pictures, in specific cases and for specific purposes. A generalised exchange of pictures would not meet the requirements of proportionality and subsidiarity, the CBP asserted. In a reaction the Minister of Justice agreed and said that pictures, when handed over to shop-owners, should be reserved for the use by personnel.

Publication of pictures of habitual offenders v. copyright laws – A different approach was followed by the *Rechtbank* [Regional Court] of Amsterdam. The Court ruled on 26 August

2004 that the publication of the picture of a shoplifter infringed upon copyright and data protection laws. In this case a 79-year old woman had been caught by the shop owner when he saw that she tried to leave the shop with three tabloid magazines without paying. He handed her over to the police and displayed her picture (a still taken from recordings made by his own CCTV), adding the text "This woman has shoplifted here". Relatives of the woman brought summary injunction proceedings, arguing that the woman, who was suffering from dementia, had realised that she had left her wallet in a bag attached to her bicycle and left the shop merely to get it; she never intended to steal the magazines. More importantly they argued that the woman had never given permission to display her picture. The fact that a shop has a sign at the entrance that there is camera surveillance, does not imply that somebody entering that shop agrees with the publication of his picture.

The Regional Court agreed. It admitted that shoplifting is a serious problem and agreed that shop owners are entitled to protect their property. They should, however, only use legal means to do so. It is not up the shop-owner to determine whether somebody has stolen an item; only the criminal courts can do so. In addition, the shop-owner had not convinced the court that all other remedies against shoplifting had proven useless. He could have checked with the police whether the woman was prosecuted (which was actually the case) – and if she were not, he could have protested against that decision under Article 12 of the Code on Criminal Procedure. To display a picture infringes upon copyright laws and also upon data protection laws. The shop owner was convicted to post a rectification in his shop (LJN AQ 7877).

Intelligence and security services

Legislative initiatives, national case law and practices of national authorities

More scope for the use of intelligence information in criminal proceedings – See Articles 8 and 48 *infra.*

Right to the protection of family life and right of the public to have access to information

Legislative initiatives, national case law and practices of national authorities

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 injunction 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).

Voluntary termination of pregnancy

Legislative initiatives, national case law and practices of national authorities

Abortion: stricter time limits – After the British PM had said that the legal time-limits for abortions should be re-examined because of new medical research, questions were raised in the *Tweede Kamer* [House of Representatives] as to the practice in the Netherlands. In August 2004 the Secretary of State for Health replied that Dutch abortion clinics will not procure an abortion if the pregnancy has lasted for more than 21 weeks and few days. The *Wet afbreking zwangerschap* [Termination of pregnancy Act] does not permit abortion once the foetus is viable. Medical research has recently demonstrated that a foetus may be viable after 22 weeks. This has led the clinics, which used to apply a term of 24 weeks, to change their

practice, the Secretary of State for Health asserted (*Tweede Kamer* 2003-2004, *Aanhangsel* 2016).

The Secretary of State was contradicted, however, by doctors who stated that in practice some abortions do take place in the 22nd week of pregnancy – 30 to 40 times per year in the case of Dutch women, and "much more often" in the case of immigrants, they said.

Abortion: 'Women on Waves' – The Dutch pro-choice foundation 'Women on Waves' has as its purpose to raise public awareness of reproductive rights, counsel pregnant women and carry out abortions. The foundation has developed a mobile unit for gynaecological treatment, which can be placed on a truck or on a ship. In 2001 the foundation asked for a license under the *Wet afbreking zwangerschap* (WAZ) [Termination of pregnancy Act] in order to run a clinic on board of a ship so as to be able to operate outside the Dutch jurisdiction. The Dutch Secretary of State for Health rejected the application in 2002, *inter alia* because she considered it undesirable that the foundation could operate anywhere in the world, irrespective of local regulations. The foundation appealed to the *Rechtbank* [Regional Court] of Amsterdam which, in June 2004, found in favour of the foundation and ordered the Secretary of State to take a fresh decision (LJN AP1251).

In July 2004 the Secretary of State did take a new decision and granted a license, but imposed the condition that the foundation would operate within 25 kilometres from a hospital in Amsterdam. The Secretary of State based this condition on a provision of the WAZ which requires local abortion facilities to co-operate with a hospital *"in de omgeving"* [in the neighbourhood] in order to ensure the availability of specialist expertise in case of complications. Since the foundation had planned to send its ship to Portugal, it appealed against the decision. In summary injunction proceedings the Regional Court of Amsterdam rejected the appeal. The Court said it did not attach decisive importance to the investments which the foundation had already made, nor to the disappointment of the women in Portugal who would have wished to have their pregnancy terminated. The Court also observed that the foundation could send its ship anyway, even without license, in order to raise public awareness of reproductive rights and counsel pregnant women – as long as it did not carry out abortions (LJN AQ7017).

In September the ship actually went to Portugal, but was refused admission to the Portuguese ports. The foundation announced that the ship would return in 2006, on the occasion of the national elections in Portugal.

Personal identity

Legislative initiatives, national case law and practices of national authorities

Artificial insemination – On 1 January 2004 the *Wet donorgegevens kunstmatige bevruchting* [Artificial insemination (donor data) Act] entered into force (see *Kamerstukken* 23207; *Staatsblad* 2002, 240; *Staatsblad* 2004, 32 and 50). The previously existing possibility of donors to remain anonymous has been largely taken away; the right of the child to know its origins is considered to outweigh the donor's interest to remain anonymous.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Court of Human Rights: permanent camera surveillance in cell – On the decision of the European Court of Human Rights in the case of *Van der Graaf,* which concerned prolonged exposure to permanent camera surveillance during pre-trial detention, see Article 4 *supra*.

Legislative initiatives, national case law and practices of national authorities

Human Rights and the Rule of Law in an Information Society – The *Ministerraad* [Council of Ministers] decided in November 2004 to prepare fresh legislative proposals to amend the Constitution as regards he right to respect for private life, the freedom of expression and the right to respect for communication. A set of legislative proposals had been prepared in 2001, but the Council of Ministers decided not to pursue these as they were considered not to reflect contemporary developments. As an off-shoot of these discussions, the Dutch chairmanship of the Council of Europe initiated a discussion on the issue *Human Rights and the Rule of Law in an Information Society.* A recommendation on this topic is now under consideration. The outcome will feed into the preparation of the new legislative proposals to amend the Dutch Constitution.

More scope for the use of intelligence information in criminal proceedings – On the judgment of Court of Appeal of The Hague concerning the use of evidence gathered by the intelligence service, despite the questionable legal basis of the interferences of rights protected under Article 8 ECHR, see Article 48 *infra.*

'Hatton' and 'Moreno Gómez' cases before Dutch courts – In a number of cases before the *Afdeling Bestuursrechtspraak van de Raad van State* [Administrative Litigation Division of the Council of State] the plaintiffs complaint of violations of their privacy on account of noise. They relied on the judgments of the European Court in the well-known case of *Hatton,* to which the case of *Moreno Gómes v. Spain* was recently added. In none of these cases a violation of Article 8 was found (see *ABRvS* 12 November 2003 (200301877/1): Harderwijk; *ABRvS* 24 March 2004 (200305490/1, -91/1 en –92/1 en 200306212/1): Harderwijk a.o.; *ABRvS* 28 April 2004 (200306379/1): Lochem, see also *Rechtbank 's-Gravenhage* 24 December 2003 (01-2529): Enschede).

Family life

Protection of family life

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Court of Human Rights: wide concept of "family life" – The case of *Lebbink* is of general importance for the concept of "family life" in the meaning of Article 8 ECHR. The Strasbourg Court found, unlike the Dutch courts, that a very loose relationship between a father and his daughter born out of wedlock did qualify as "family life" within the meaning of Article 8 ECHR. Since the case may have a fairly wide impact, we deal with it in more detail.

The applicant, Mr Lebbink, had a relationship with Ms B. from mid 1993. In April 1995 a daughter, Amber, was born to Ms B. and the applicant. The applicant and Ms B. did not formally cohabit, but the applicant would visit her and Amber on a regular basis. He also baby-sat and cared for Amber a few times. Ms B. sometimes consulted the applicant about Amber's hearing problems. The applicant did not formally recognise (*erkenning*) Amber, as Ms B. refused to give her permission for this and her family also opposed such recognition. Although the applicant could have sought judicial consent for recognising Amber, he did not avail himself of this possibility, considering that it would stand little chance of success. Moreover, the applicant preferred to respect the position adopted by Ms B. and her relatives, and to maintain the factual family ties he had with his daughter rather than establish formal legal ties with her.

In August 1996, the applicant's relationship with Ms B. broke down. In January 1997 the applicant requested a formal access arrangement (*omgangsregeling*). In the judicial proceedings that followed Ms B. argued primarily that the applicant's request should be declared inadmissible in that there had never been any family life within the meaning of

Article 8 of the Convention between the applicant and Amber and, in so far as family life had existed, that this had ceased to exist after the end of her relationship with the applicant. The Dutch Courts agreed with her position. The Supreme Court considered that the mere biological link between the applicant and Amber was not sufficient to attract the protection of Article 8 of the Convention. It held that "family life" for the purposes of Article 8 implied the existence of further personal ties in addition to biological paternity, which in the instant case did not exist.

The European Court of Human Rights recalled that the notion of "family life" under Article 8 of the Convention is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso iure* part of that "family" unit from the moment and by the very fact of its birth. Thus there exists between the child and the parents a relationship amounting to family life. Although, as a rule, cohabitation may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* "family ties". The existence or non-existence of "family life" for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties. Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth.

In the present case, the Court noted that the applicant had not sought to recognise Amber and had never formed a "family unit" with Amber and her mother as they have never cohabited. Consequently, the question arose whether there were other factors demonstrating that the applicant's relationship with Amber had sufficient constancy and substance to create *de facto* "family ties". The Court did not agree with the applicant that a mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship, should be regarded as sufficient to attract the protection of Article 8. However, the Court was prepared to accept the ties which existed between the applicant and Amber were sufficient to attract the protection of Article 8. Consequently, the decision of the domestic courts not to examine the merits of the applicant's request for access to Amber but to declare it inadmissible on the basis of a finding that there was no family life between them, was in breach of the applicant's rights under Article 8 ECHR.

European Court of Human Rights: "family life" not substantiated – The case of *Haas* will have much less precedential value than *Lebbink*. Mr Haas stated that he was born from a relationship between his mother and a certain Mr P., a civil law notary (*notaris*). Although his mother had wanted to marry, Mr P. had not; neither had the two ever lived together. Mr P. had not recognised (*erkenning*) Mr Haas. Nevertheless, Mr P. made regular payments towards his care and upbringing, gave him presents for his birthday, visited him and, together with his mother, went on day trips with him.

Mr P. died in 1992 without leaving a will. His body was cremated. A nephew, Mr K., was identified as his sole heir. Mr Haas then brought civil proceedings against Mr K., seeking an order that Mr K. hand over Mr P.'s estate. He argued that he had had "family life" within the meaning of Article 8 ECHR with Mr P. and that the Netherlands legal provisions relating to the position of the "illegitimate" and unrecognised child infringed Article 14. The Dutch courts, however, rejected his complaint.

When Mr Haas complained in Strasbourg that as an unrecognised "illegitimate" child, he was not able to inherit from his father, the Court observed that in reality the courts were faced with a question of evidence going to the issue of whether family-law ties between the applicant and the deceased should be recognised. The case did not concern Article 8 ECHR, whether seen in terms of "family life" or "private life". The applicant had never lived with Mr P. and any sporadic contact between them could not be construed as "family life." Neither had the applicant intended to have his claim to be Mr P.'s son accepted in order to provide him with the emotional security of knowing that he was part of a family or to enable him to create

ties with Mr P.'s surviving family circle or to resolve any doubts he might have had about his own personal identity - he was convinced in his own mind that he was the unrecognised illegitimate son of Mr P. The Court also noted that the applicant had the option of applying for a judicial declaration of paternity under Article 1:207 of the Civil Code. The Court held unanimously that Articles 8, 14 and 13 were not applicable.

Legislative initiatives, national case law and practices of national authorities

No adoption by grandparents allowed – Under Article 1:228 para. 1 (b) of the Civil Code, grandparents cannot adopt their grandchildren. In the 1970s, when the time the rules on adoption were reconsidered, several MPs proposed to abandon this prohibition. But in 1979 it was decided to retain the prohibition so as to prevent identity problems and 'usurpation by grandparents'.

In September 2004 the *Hoge Raad* [Supreme Court] held that this prohibition is not in breach of Article 8 ECHR: admittedly this provision does protect existing family life, but, as the Strasbourg Court had confirmed in its *Fretté v France* judgment of 26 February 2002, neither Article 8 nor Article 12 ECHR protect the right to adopt. That conclusion was not altered by the facts of the instant case: the child had been conceived by rape; the rapist was unaware of the fact that he was the biological father of the child; the grandmother had taken care of the child from the moment of birth; the grandmother, the mother and the child had lived together; the child was mentally retarded and was unaware of the fact that her grandmother was not her mother (LJN AP1439).

Removal of a child from the family

Legislative initiatives, national case law and practices of national authorities

Procedural guarantees surrounding removal of child – In March 2004 the *Hoge Raad* [Supreme Court] rejected a claim that Articles 6 and 8 ECHR had been violated on account of procedural flaws. The case concerned a child born in 1992, which, by order of the *Kinderrechter* [juvenile judge] of May 2000, was placed under the supervision of a Child Welfare Board (*ondertoezichtstelling*). In February 2003 the Board, fearing that the child was ill-treated, applied to the juvenile judge for an emergency order for the child to be placed away from her family (*uithuisplaatsing*). The parents were not informed of the application out of fear that they would harm the child if they knew about it. After hearing the lawyer representing the parents, but without hearing them in person, the juvenile judge gave the order. The parents appealed to the *Gerechtshof* [Court of Appeal] which, after a hearing where the parents were present, confirmed the emergency order in April. The parents appealed to the Supreme Court against this decision. In the meantime the juvenile judge had heard the parents in person with a view to a prolongation of the initial order. The parents agreed that there were problems, but maintained that these could be solved while the child remained at home.

On 26 March 2004 the Supreme Court rejected the appeal. It accepted that the juvenile judge had acted incorrectly, since the parents should have been invited for a hearing within two weeks after the order had been given. Instead, the juvenile judge waited for the parents to take the initiative. Citing the *Venema* judgment of the European Court of Human Rights (17 December 2002), the Supreme Court found that at that stage the parents had been unable to participate effectively in the decision-making process or put forward in a fair or adequate manner those matters militating in favour of their ability to provide the child with proper care and protection. Yet the Supreme Court considered that the procedure as a whole – that is, including the appeal proceedings before the Court of Appeal, where the parents had been heard in person – met the requirements of Articles 6 and 8 (LJN AO1991).

The right to family reunification

Legislative initiatives, national case law and practices of national authorities

'Pre-emptive integration' and other limitations to the right to family reunification and the right to establish a family – As was mentioned in our 2003 report, the Government attaches great weight to the need of *inburgering* [integration into society] of foreigners. With a view to the speedy integration of *nieuwkomers* [newcomers] into Dutch society, it is considered necessary to secure a basic level of knowledge of Dutch and of Dutch society among potential immigrants. In 2002 86,619 immigrants took up residence in the Netherlands; in 2003 the number was 73,566. 40% of this group consisted of *gezinsvormers* [individuals establishing a family] and *gezinsherenigers* [individuals joining an existing family]. The number of children joining their parents is rapidly declining; the number of *importhuwelijken* ['import marriages'] is on the rise.

Against that background a bill was submitted to Parliament in August 2004 (*Wetsvoorstel inburgering in het buitenland, Kamerstukken II* 2003/04, 29 700, Nos. 1-3), according to which a residence permit will only be given if the applicant has successfully completed a Dutch language course and an introductory programme in his or her country of origin. It is estimated that some 17,000 potential immigrants per year will take the *inburgeringsexamen* [integration exam], of which 15 to 20% is expected to fail. To take the exam will cost the immigrant 350 euro.

There will also be other requirements, in addition to the *inburgeringsexamen,* that must be fulfilled before family life can be established in the Netherlands. Also with a view to the implementation of Directive 2003/68/EC of 22 September 2003 (OJ 2003, L 251) a number of amendments to the *Vreemdelingenbesluit 2000* [Aliens Decree 2000] were introduced in September 2004 (*Staatsblad 2004*, 496). New requirements are put to *gezinsvorming* [establishment of family life]: a foreign spouse living abroad can only join her husband (or his wife) in the Netherlands if the latter is at least 21 years old (this used to be 18) and earns an income of at least 120% of the statutory minimum wage (this used to be 70%). A controversial aspect of the new rules is that they do not apply to all foreigners; EU citizens and, for instance, Americans are exempted. Local authorities announced in 2004 that the number of 'import marriages' was rapidly rising, especially in Rotterdam and The Hague; apparently spouses do not want to wait until the entry into force of the new, tougher rules.

Criticism – The new measures have met considerable criticism. The *Raad van State* [Council of State], in its capacity as advisor to the Government on legislative proposals, has warned that the new obligation to complete a Dutch language course and an introductory programme may conflict with the right to respect for family life. In general the new scheme will be compatible with Article 8 ECHR. But whether this will also be true in specific cases, the Council of State observed, will depend on the particular circumstances of the applicant as well as on the way in which the requirements are implemented in practice.

Vluchtelingenwerk Nederland [Dutch Refugee Council], in its comments of 19 November 2004, questioned the proposals, which also apply to refugees, in light of Article 8 ECHR. If there exists no other possibility to enjoy family life, *Vluchtelingenwerk* maintained, it should not be permitted to impose additional requirements which could in fact preclude the refugee in question from enjoying his or her right to family life (www.vluchtelingenwerk.nl). According to the NGO the Minister for Immigration and Integration had promised not to break up families when removing aliens whose asylum requests have been denied (*Kamerstukken II*, 2003-2004, 29344, 19). Furthermore the new legislation requires people applying for reunion or creation of a family to prove that they possess adequate means for the first three months. (*Kamerstukken II*, 2004-2005, 19 637, 863).

An analysis of the proposals was also made by *Equality*, an agency specialising in gender and ethnicity issues. *Equality* noted that in 2003 more women then men immigrated into the Netherlands (37,870 v. 35,696 individuals). Whereas most men tend to be admitted as refugee (i.e. they have an independent reason to be admitted to the Netherlands), women tend

to come as *volgmigrant* (i.e. to migrate in the context of family reunification, or as spouse of a man already established in the Netherlands). *Equality* showed that the requirements for family reunification and establishment of family life are more difficult to meet for women than for man. For instance it is a statistical fact that most immigrant women have a lower income then immigrant men, so it will be more difficult for them to meet the requirement to earn an income of at least 120% of the statutory minimum wage. Likewise the *inburgeringsexamen* [integration exam] will be more difficult for women to pass, taking into account that women in the countries of origin tend to have received lower levels of education; of all illiterates in the world, 64% is female.

Prior to the introduction of the proposals, the Minister of Immigration and Integration established an ad hoc commission that should advise her on the possibilities for an exam. Interestingly the *Commission Franssen* advised the Minister *not* to introduce an exam – not out of considerations based on Article 8 ECHR or indirect discrimination, but rather because the exams would cost a lot and are unlikely to be very effective. Yet the Minister, and a majority in Parliament, want to push the idea of an integration exam.

Reasons for concern

Limitations to the right to family reunification and the right to establish a family – It remains to be seen what the combined effect will be of a compulsory but relatively expensive *inburgeringsexamen* and the new requirements that are put to *gezinsvorming* (a higher minimum age for foreign spouses and a higher income on the part of the residing spouse). In individual cases this may lead to a situation that is incompatible with the effective enjoyment of the right to respect for family life. A controversial aspect of the new rules is that they do not apply to all foreigners, and that they may have a more detrimental effect on women.

Private and family life in the context of the expulsion of foreigners

Legislative initiatives, national case law and practices of national authorities

Removal of 26,000 rejected asylum seekers – For a discussion of the announced removal of 26,000 rejected asylum seekers, and the concerns expressed by Human Rights Watch (HRW) and the UN Committee on the Elimination of Racial Discrimination, see Article 19 *infra*.

Article 8. Protection of personal data

Independent control authority

Legislative initiatives, national case law and practices of national authorities

Legislative framework – The *College Bescherming Persoonsgegevens* (*CBP*) [Personal Data Protection Authority] is a body set up in implementation of Article 28 of the European Union Privacy Directive 95/46/EC. It supervises compliance with and the application of the legal rules governing the use of personal data as contained in, *inter alia*, the *Wet Bescherming Persoonsgegevens* [Personal Data Protection Act (Article 51 § 1)], the *Wet op de politie-registers* [Police Files Act (Article 26 § 1)] and the *Wet Gemeentelijke Basisadministratie Persoonsgegevens* [Municipal Database (Personal Files) Act (Article 120 § 1)]. Furthermore, pursuant to Articles 151a § 6 and 195a § 4 of the Code on Criminal Procedure, the CBP must be heard in the determination of the rules, to be set out in an *Algemene Maatregel van Bestuur* [Order in Council], on the processing, storing and destruction of DNA profiles.

In the exercise of its various functions, the CBP advises the Government on legislation, assesses codes of conduct, studies technological developments, gives information, mediates and handles complaints, evaluates the processing of personal data and, if necessary and subject to the provisions of the *Algemene Wet Bestuursrecht* [General Administrative

Law Act] may issue decisions and take enforcement action in respect of non-compliance with the legal rules on processing personal data.

Under Article 60 § 1 of the Personal Data Protection Act, the CBP has a discretionary power to initiate, either acting *ex officio* or at the request of an interested party, an enquiry into the manner in which the provisions under or based on this Act are applied as regards data processing.

Protection of the private life of the worker and the prospective worker

Legislative initiatives, national case law and practices of national authorities

Monitoring the use of internet by job seekers – In December 2003 the Minister of Social Affairs and Employment admitted that the *Centrum voor werk en inkomen (CWI)* [Agencies for work and income] monitor the use of internet and e-mail by individuals who are looking for jobs. The monitoring was limited to the use of computers in the CWI premises that were put at the disposal of job seekers, but there was no notification that the use of internet would be screened. In the meantime the situation has been remedied. Another controversy arose when it appeared that CWI allowed employers access to private data of job seekers.

Protection of the private life in the processing of medical data

Legislative initiatives, national case law and practices of national authorities

No legislative framework for the processing of medical data – The *College Bescherming Persoonsgegevens* (*CBP*) [Personal Data Protection Authority] expressed its concern that a legal basis is missing for the processing of data concerning medical diagnoses and treatment by the so-called *Trusted Third Party*. The TTP will receive data, including personal data, from both hospitals and insurance companies. In 2004 the CBP sent two letters to the Minister of Health on this issue (see www.cbpweb.nl).

Intelligence and security services

Legislative initiatives, national case law and practices of national authorities

Data-mining – In July 2004 the Minister for Home Affairs announced legislative proposals to amend the *Wet Inlichtingen- en veiligheidsdiensten* (WIV 2002) [Intelligence and Security Services Act 2002]. The *Algemene Inlichtingen- en Veiligheidsdienst (AIVD)* [General Intelligence and Security Service] will be given new powers to use *data-mining* in order to be able to identify persons who are preparing terrorist offences – that is, to search large files of personal data of persons who are not suspected of any particular offence (*Kamerstukken II* 2003-2004, 29 200 VII, No. 61).

The *College bescherming persoonsgegevens (CBP)* [Personal Data Protection Authority] was very critical of the proposals. The CBP stated that the Government had failed to demonstrate the necessity of the measures, many of which interfere with the private life of citizens against whom there was no suspicion. In addition – and contrary to what is required by international treaties, European rules and he constitution – the proposals did not provide for adequate supervision of the flow of information among the police and the security services. The CBP agreed, of course, that that effective measures against terrorism must be taken. At the same time, however, the citizen must be able to remain confident that the authorities exercise their powers act in a legitimate fashion. The CBP added that the new plans came too early. New anti-terrorist legislation had only entered into force on 1 September 2004 (*Wet terroristische misdrijven* [Terrorist Offences Act], see under Article 49 *infra*). The CPB felt it was preferable to wait and see if the new powers were sufficient in practice, before contemplating yet further extensions (letter to the Minister of Justice of 22 September, z2004-1222).

Video surveillance in public fora

Legislative initiatives, national case law and practices of national authorities

Camera surveillance: guidelines and draft legislation – On 1 December 2003 the *College bescherming persoonsgegevens (CBP)* [Dutch Data Protection Authority] published *vuistregels* [guidelines] for the use of camera surveillance of public places for the protection of public order. The CBP emphasised that importance to ensure that the State authorities remain responsible for supervising the public domain. To take into account the relevant privacy standards will add to the acceptance, effectiveness and legality of camera surveillance, the CBP added (see www.cbpweb.nl).

In March 2004 the bill *Cameratoezicht op openbare plaatsen* [camera surveillance of public places] was submitted to Parliament. The bill seeks to give an explicit legal basis for the use of camera surveillance by local authorities. In the recent past some 50 to 80 municipalities have experimented with camera surveillance. Although its precise impact is difficult to measure, the general impression is that both the public and police officers feel more safe. The explanatory memorandum to the bill further asserts that there is wide public support for camera surveillance; the initial fear that citizens would perceive camera surveillance as an interference with their privacy did not materialise. According to the proposals, the *gemeenteraad* [city council] can empower the *burgemeester* [burgomaster] to introduce camera surveillance in a particular area if he believes that this is necessary for the maintenance of public order. Clear signs should alert the citizen that he enters an area that is under surveillance; surveillance may take place only in public places. Images may be recorded and stored, and they can later be used for criminal investigations. According to the explanatory memorandum to the bill, the proposals meet the requirements of proportionality and subsidiarity and they are fully compatible with Article 8 ECHR (*Kamerstukken II,* 2003-2004, 29440, Nos. 1-3).

Camera surveillance: case-law – A man was convicted for leaving graffiti on a wall in Rotterdam after his act had been recorded by a CCTV. The man argued that the use of camera surveillance was incompatible with Article 8 ECHR since the interference with his private life did not meet the requirements of foreseeability and accessibility. The *Gerechtshof* [Court of Appeal] of The Hague rejected the argument, considering that the interference with his private life had been so minimal that there was in reality no interference, also taking into account the purpose of the camera surveillance (the maintenance of public order) and the way in which it was executed. And even if there had been an interference, the Court of Appeal added, it would meet all requirements of Article 8 ECHR. In its judgment of 20 April 2004, the *Hoge Raad* [Supreme Court] agreed, noting that the suspect had been filmed during a short period whilst he was in the public space. This was not a situation in which he had a legitimate expectation of privacy. The Supreme Court added that the suggestion that the legal basis of the camera surveillance was insufficient, as the suspect had argued, did not imply that there had been an interference with his privacy (LJN AL 8449).

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Late implementation of Directive 2002/58/EC – The European Commission has announced that it will start an infringement procedure under Article 226 ECT against the Netherlands for late implementation of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). The Directive should have been implemented by 31 October 2003.

New police powers to demand data – In February 2004 the bill *Bevoegdheid vorderen gegevens* [Power to demand data] was submitted to Parliament *(Kamerstukken II*, 2003-2004, 29441, Nos. 1-3). In November 2004 it was adopted by the *Tweede Kamer* [House of Representatives]; it is now pending before the *Eerste Kamer* [Senate]. The bill distinguishes between (1) data that may lead to the identification of individuals (data concerning name and address, but also administrative data such bank account numbers and membership numbers of a sports club), (2) 'other data' (for instance the books or videos that have been rented from a public library or video shop, or items bought in a supermarket), and (3) sensitive data (such as religion, sexual life, political conviction or trade union membership). Generally speaking: the more serious the crime that is under investigation, the more sensitive the data than can be demanded (and the higher the authority that should make the demand) – but in all these cases the demand is not necessarily related to a person who is suspected himself; what matters is that the data are considered useful for the criminal investigation.

This bill follows up on two bills that were previously tabled and which in the meantime have been adopted in Parliament: the *Wetsvoorstel vorderen gegevens telecommunicatie (Kamerstukken* 28 059, *Staatsblad* 2004, No. 394) and the *Wetsvoorstel vorderen gegevens financiële sector (Kamerstukken* 28 353, *Staatsblad* 2004, No. 109). The two acts empower the investigative authorities to demand so-called *NAW-gegevens* [data concerning name, address and *woonplaats*, i.e. place of residence) of subscribers to telephone and internet providers (the first act) and clients of bank (the second Act). Again it is not required that these persons are not suspected of any particular crime.

The three bills were preceded by the report of an advisory committee (the 'Commissie Mevis 2001'), *Gegevensvergaring in strafvordering.* At the time this report was criticised by some observers who felt that insufficient account was taken of privacy (the Commission was awarded the 'Big Brother award by its critics in 2002 who dubbed it 'the worst proposal for privacy of the year'). In drafting its three bills, however, the Government goes further than the 'Commissie Mevis 2001' had proposed.

Proposal: more police powers to process personal data – On 31 March 2004 the Minister of Justice announced a proposal to amend the *Wet op de politieregisters* [Police Files Act]. According to the proposals the police will acquire more powers to process personal data, including data concerning persons who are not suspected of a particular offence, and to use the data that were obtained in other investigations. The proposals have been submitted to the judiciary, the public prosecutors service and the police for consultation.

On 3 August the *College Bescherming Persoonsgegevens* (*CBP*) [Personal Data Protection Authority] gave its advice, in which it agreed with the general structure of the proposals. The CBP argued, however, that the *fee flow of information* within the police should be accompanied by adequate safeguards, relating to, *inter alia*, the quality of the data, the scale on which the data of 'non-suspects' are processed and the period during which the data are stored. In addition the CBP advises to regulate access to the data kept by the police, to have periodic audits and to up-grade to the position of the privacy officers within the police (z2004-0467; see also *Kamerstukken II*, 2003-2004, 29200 VI, No. 144 for a proposal to amend the *Besluit politieregisters*).

Reasons for concern

The struggle against terrorism and respect for privacy – The Netherlands are, of course, not the only country that seeks to find the right balance between the demands of the struggle against terrorism and the requirements of effective respect for privacy. No-one will disagree with the starting point that effective measures against terrorism must be taken. Yet anti-terrorist measures *are* adopted at a breathtaking pace; see also Article 48 *infra*. One can share the CBP's feeling that it would be preferable to wait and see if the new powers, for instance those under the Terrorist Offences Act, are sufficient in practice, before contemplating yet further extensions of investigative powers – especially because the accumulation of new techniques such as data-mining and new powers to demand data will lead to large-scale

processing of potentially very sensitive data of individual citizens, also if there is no particular suspicion against them. In these circumstances, the introduction of strict safeguards against abuse is of great importance.

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

Marriage

Legislative initiatives, national case law and practices of national authorities

Refusal to carry out marriage violates Article 12 ECHR – On 17 December 2003 the *Rechtbank* [Regional Court] of Leeuwarden ordered a civil servant to conclude a marriage, even though sufficient evidence with regard to birth and capacity to marry of the bride was lacking. The lack of evidence was considered to be of less weight than the right to marry as guaranteed by Article 12 ECHR (LJN AO 1396).

Restrictions on the right to establish family life – For a discussion of changes in Dutch legislation concerning the right to family reunification and the right to establish family life, see Article 7 *supra.*

Legal recognition of same-sex partnerships

Legislative initiatives, national case law and practices of national authorities

Recognition of same-sex partnerships – There are no specific initiatives or new trends to be reported here. The Dutch rules concerning registered partnerships (*geregistreerd partnerschap*, Article 1-80a of the Civil Code) expressly state that a person can enter into a partnership with a person of the same or opposite sex.

Recognition of foreign same-sex marriages – There are no specific initiatives or new trends to be reported here either. The Dutch rules concerning the recognition of foreign marriages make no distinction between same-sex marriages and marriages involving individuals of opposite sex. Article 5 para. 1 *Wet conflictenrecht huwelijk* [Conflicts of Laws (Marriages) Act 1989, as amended in 2001] provides for the recognition of any marriage that has been concluded in accordance with the laws of the state where the ceremony took place. Article 6 of the same Act provides for an exception on the grounds of *ordre public*, but this is unlikely to be applied in the case of same-sex marriages since this is recognised under Dutch law.

Article 10. Freedom of thought, conscience and religion

Reasonable accommodation provided in order to ensure the freedom of religion.

Legislative initiatives, national case law and practices of national authorities

Government memorandum on fundamental rights in a pluralist society – As was mentioned in the 'Preliminary remarks', a government memorandum on fundamental rights in a pluralist society was submitted to Parliament in May 2004 (*Nota Grondrechten in een pluriforme samenleving*, *Kamerstukken* II 2003/04, 29 614). On the specific issue of head scarves, the Government accepts as a matter or principle that civil servants may wear head scarves. Only certain functions that public servants performed could necessitate prescriptions with regard to clothing, e.g. with regard to security, functionality or impartiality. Teachers in public schools might also be subjected to clothing regulations as long as an objective justification exists.

No headscarves in restaurant – In order to keep youngsters wearing football colours etc. out, an exclusive restaurant in The Hague operated a policy to deny access to all customers wearing headgear. Consequently several Muslim women wearing a headscarve were denied entry. The owner accepted that they did fit in the sort of audience he wished to see in his restaurant, but he had introduced a blanket prohibition of all types of headgear for the reason of simplicity. On 8 September 2004, the *Commissie Gelijke Behandeling* [Equal Treatment Commission] observed that the measure amounted to indirect discrimination on the basis of religion. The Commission found that the restaurant had not acted in accordance with the demands of necessity and proportionality. According to the CGB, it was legitimate to operate a dress code, but the restaurant could also achieve its purpose by defining in more detail which types of clothing were not acceptable. In that way the restaurant could allow access of headscarf-wearing women who dressed correctly, and keep out individuals wearing sports clothes even if they did not wear headgear (*oordeel* 2004-112, at www.cgb.nl).

Protection against harassment especially of religious minorities

Legislative initiatives, national case law and practices of national authorities

Discriminatory acts on the ground of religion – For a general overview, see our preliminary remarks. For statistics on discrimination, see Article 21 *infra.*

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Refusal to use 'EU' license plate – In a somewhat unusual case the *Gerechtshof* [Court of Appeal] Leeuwarden ruled on 23 December 2003 that a fine which had been imposed did not violate the freedom of religion as protected by Article 9 ECHR. The defendant had refused to attach the legally required number plate to his car because of the European Union sign which was printed on the number plate. According to him the twelve star symbol derives from the Bible and constitutes a sign honouring the Holy Virgin Mother Mary (LJN AO1667).

Cannabis for religious reasons – On 9 April 2004, the *politierechter* [police judge] in Almelo ruled that a defendant could not rely the freedom of religion as protected by Article 9 ECHR in order to justify growing of cannabis. The judge, who was not convinced that the defendant really grew cannabis for religious reasons, did apply Article 9 § 2 ECHR in conjunction with the relevant Dutch law (*Opiumwet*) and generally considered that the government's legitimate aim in protecting public health warranted restrictions on the expression of the defendant's alleged religion (LJN AO7379).

Norms and values – On 5 March 2004, the Government published its response to the report '*Waarden, normen en de last van het gedrag'* by the *Wetenschappelijke Raad voor het Regeringsbeleid (WRR)* (Scientific Council for Government Policy). The Government underlined that pluralism is an essential and deeply rooted element of Dutch society, democracy and the rule of law. It also emphasised that the freedom of the individual needs to be restricted when its exercise affects the freedom of choice or the wellbeing of others. Conflicts in values should be dealt with peacefully. The WRR and the Government were in agreement that some values are common to all sections of Dutch society: values such as were the freedom of religion, freedom of expression, and the freedom of association. As to the question how to reconcile pluralism of values on the one hand and shared values on the other hand could be guaranteed, the Government suggested several measures: clear enforcement of legal rules, protection of the integrity of public administration and active expression of the common values of democratic society (*Kamerstukken II* 2003/04, 29454, No. 2).

Proposal: easier prohibition of religious entities – Under Dutch law, *kerkgenootschappen* [religious denominations or entities] have a privileged position to the extent that they cannot be prohibited following the normal civil procedure of Article 2:20 Civil Code. Believing that this makes it attractive for extremists to use the legal status of *kerkgenootschap*, two Members of Parliament have taken the initiative to introduce on a bill (*Voorstel van wet van de leden Wilders en Eerdmans tot wijziging van het Burgerlijk Wetboek in verband met aanpassing van de uitzonderingspositie van kerkgenootschappen; Kamerstukken II* 2003/04, 29 757, Nos. 1-3). The explanatory memorandum does not deal with the freedom of religion, apart from a paragraph entitled *Grondwet/EVRM* [Constitution/ECHR] consisting of the remark: 'Germany: assimilation to position of political parties, so still a restrictive approach".

Article 11. Freedom of expression and of information

Freedom of expression and information

Legislative initiatives, national case law and practices of national authorities

Threats against politicians and academics: risk of self-censorship – As was noted in the 'preliminary remarks', both the assassination of Theo VAN GOGH and the preceding threats against him and several others have had a 'chilling effect' on the public debate. If opinion leaders are afraid, for instance, to publish critical analyses on the position of Islam in Western society or feel compelled to cancel public appearances, then that is of course an extremely serious matter.

Threats against politicians: legitimate responses and overreactions – In 2004 a number of suspects have been tried for threatening politicians; for a review of these cases see Article 49 *infra.* A firm reaction against these threats is legitimate and even indispensable in a democratic society in order to ensure that public figures can carry out their functions without fear and intimidation. Yet it would appear that some overreactions occurred, especially in the weeks after the assassination of Theo VAN GOGH.

One example is offered by a TV interview and its aftermath. An imam, Mr Abdul-Jabber VAN DE VEN (a Dutchman who converted to Islam) was interviewed on 23 November, i.e. three weeks after the assassination. He told that he disapproved of violence; when he learned that Muslim boys were sending threatening e-mails to Mr Geert WILDERS he had urged them to stop. The reporter then asked whether he would mind if Mr WILDERS were to die. The imam replied that, like everybody, Mr WILDERS has to die eventually. The reporter then asked if Mr WILDERS should die within two years. The imam said that he would disapprove murder but that he would actually be happy, deep within, if this were to occur. He added that he hoped that no Muslim would kill Mr WILDERS. The reporter then suggested that he preferred Mr WILDERS to die from cancer, which the imam affirmed.

That very same evening, Ms VERDONK, the Minister of Immigration and Integration stated in a radio interview that she wanted a thorough investigation to see if the imam could be prosecuted. The next day the Minister of the Interior and *all* leaders of political parties represented of Parliament followed. Later that day the Minister of Justice announced that such an investigation would indeed take place. The media reported widely on the interview, showing pictures of 'the imam who had threatened Mr WILDERS'. Mr VAN DE VEN issued a press release in which he apologised if he had given offence, and in which he re-iterated that he rejected the use of violence. He explained that his statements by suggesting that there might be many people in the West who would not mind hearing that Osama bin-Laden was found dead, although they might disapprove of the use of violence against him. After receiving death threats himself, the imam went into hiding.

One can perhaps understand the strong reaction to the interview, in the tense atmosphere in the weeks after the assassination of Theo VAN GOGH. From a legal perspective, however, this joint response is surprising for several reasons. In the first place, the imam

actually did not make a threat. One does not have to sympathise with his statements to acknowledge that the imam actually spoke out against a murder. Even if his words were ambiguous, it is hard to interpret them as incitement to violence. Secondly, the statements were made during a live interview after suggestive questioning by the reporter, whereas the discussion formed part of a public debate on matters of general interest. Strasbourg case-law has made it clear that in these circumstances a conviction will be hard to reconcile with Article 10 ECHR (see, e.g., Eur. Crt. H.R., 29 Feb. 2000, *Fuentes Bobo v. Spain* (Appl. No.39293)). Thirdly it is not easy to describe the position of the authorities as consistent. Theo VAN GOGH wished that a "cheering brain tumour" would develop with politician Paul ROSENMÜLLER and said he would "piss on his grave"; he expressed the hope that inmates would hang Volkert VAN DER GRAAF et cetera – yet when VAN GOGH was killed the common response was that the freedom of expression should be maintained at all costs. At a demonstration in Amsterdam on 2 November, Ms VERDONK stated that VAN GOGH had always very far in his formulations, "but in this country that is allowed".

The way in which the interview was conducted, as described above, also suggest that not all reporters appear to realise that the freedom of expression "carries with it duties and responsibilities", as Article 10 para. 2 ECHR puts it. The same goes for the way in which some newspapers picked up the interview the next day. The Minister of Justice was therefore right to call for a certain moderation on the part of the press.

Insulting believers: blasphemy in penal law – As was noted in our 'Preliminary remarks', the islamophobic violence and newspaper publications commenting on the assassination of VAN GOGH led the Minister of Justice to propose to a more vigorous application of the prohibition of blasphemy (Article 147 of the Dutch criminal code). The proposal was immediately criticised, however, and in the end a motion calling for abolition of Article 147 CC was not adopted in Parliament. See the 'Preliminary remarks' for a more extensive review of the discussions.

Spamming not protected by freedom of expression – Back to business. On 12 March 2004, the *Hoge Raad* [Supreme Court] ruled that the freedom of expression as guaranteed by Article 10 ECHR does not protect the mass sending of unsolicited e-mail ("spamming") through the network of an internet provider. Specifically, the Court ruled that the freedom of expression does not warrant violating someone else's exclusive property rights (LJN AN8483).

In a reaction the civil rights organisation *Bits of Freedom* pointed out that the Court went further than its Advocate-General, who proposed that this issue should be dealt with on a case-by-case basis. BoF suggested that according to the Court's judgment, internet providers might be able to ban all kinds of material, even if it was not illegal (see www.bof.nl).

Freedom of expression of civil servants – As was noted under Article 4 *supra*, two prison directors were dismissed after criticising the detention policy of the Minister of Justice. Following the controversy surrounding the dismissal on April 26, the Minister of the Interior replied to parliamentary questions about the freedom of expression of civil servants. One of the questions was whether a civil servant could publicly comment on stated policy as long as he would execute it faithfully. The Minister replied that the freedom of expression of a civil servant is not absolute, and that, in accordance with the relevant laws, this freedom has to be restricted where it might reasonably be considered to be an obstacle for his proper functioning or the functioning of the civil service. Relevant factors when judging whether this was the case are: the distance between the civil servant and the relevant unit where the impugned policy is developed, the nature of the matter at hand and the circle where the civil servant would choose to express his opinion. The further away a civil servant is from the relevant policy area, the less reason there would be to limit his freedom of expression because he happens to be a civil servant himself. But if a civil servant is very closely involved in the making of a specific policy, he should show reticence in commenting on the matters involved. The Minister also stated that when policy has been determined by the Minister and

Parliament, civil servants should not criticise the political choices that have been made and be loyal, especially if they hold senior positions. (*Tweede Kamer* 2003/04, *Aanhangsel* 1435).

Greenpeace blockade and freedom of expression – On 9 June 2004 the *Rechtbank* (Regional Court) of Middelburg ruled on a blockade by Greenpeace of a ship that allegedly carried tropical wood. The Court recognised that the freedom to use such a method of action was within the scope of the freedom of expression as protected by Article 10 ECHR. Yet the Court found the blockade disproportional; a prohibition could be justified under Article 10 para. 2 ECHR. (LJN AP1969).

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Discrimination on the internet – The *Meldpunt Discriminatie Internet* MDI was itself accused of an anti-Islamic bias. After it had expressed the opinion that certain inflammatory statements against Muslims were not discriminatory, a representative of the Islamic web site maghrebonline.nl posted exactly the same statements on his site, in which the word "Muslim" had been replaced with "Jew". The MDI immediately responded to complaints and denounced the statement as anti-Semitic. Maghrebonline.nl complained to the *Landelijk Bureau ter bestrijding van Rassendiscriminatie* (LBR) [National Agency for Combating Racism] which agreed expressed that the MDI had indeed been applying different standards.

Freedom of expression and internet providers – Another experiment, this time by digital civil rights organisation *Bits of Freedom (BoF)*, lead to the conclusion that Dutch Internet Service Providers (IPS) are quick to remove content if it merely is alleged to violate intellectual property rights. BoF posted a text written by the famous 19th century Dutch writer Multatuli (E.D. Dekker) on 10 web sites. It hen sent takedown notices to all providers from an unverified Hotmail e-mail account which supposedly belonged to an organisation founded to safeguard the rights of Dekker's estate. Seven providers immediately took down the site without prior notice and without conducting any research, even though this would have yielded that Dekker's intellectual property rights already have expired in 1957 in accordance with Dutch law. According to BoF, this experiments points to serious shortcomings with regard to the guarantee of the freedom of expression on the Internet.

Article 12. Freedom of assembly and of association

Freedom of peaceful assembly

Legislative initiatives, national case law and practices of national authorities

Heroine users invoke freedom of peaceful assembly – Heroine users in Amsterdam intend to invoke the freedom of peaceful assembly in a remarkable attempt to stop the *opjaagbeleid* ['chase away policy'] of the police. Municipal regulations allow the police to act against junks in designated emergency zones. Accordingly the police will send junks away when grouping together, or impose fines if they are hanging around. Recently heroine users established an association, *Meeting Point*, that intends to challenge this policy. *Meeting Point* cited a number of allegedly disproportionate actions by the police, such as the fine that was imposed on a man who was standing in front of a shop, whilst according to the police officer he did not have money to buy anything anyway. *Meeting Point* hopes that the police may be stopped if junks start wearing badges with the text « do not disturb – in a meeting ». In a reaction the police announced that they will pursue their policy, and they were confident that court proceedings would prove that their actions are legitimate.

Article 13. Freedom of the arts and sciences

No significant developments to be reported.

Article 14. Right to education

Access to education

Legislative initiatives, national case law and practices of national authorities

Islamic schools under attack – As was noted in our 'preliminary remarks' a bomb exploded on 8 November, in the wake of the assassination of Theo van Gogh, near an Islamic primary school in Eindhoven. The building was seriously damaged. On 9 November another Islamic primary school, in Uden, burned down completely.

There are 42 Islamic schools in the Netherlands, with some 8000 pupils. They are funded by the government, like for instance Jewish, Protestant, Catholic and other *bijzondere* ['particular'] schools, provided that they are officially recognised. Under Article 23 of the Constitution, anyone can establish a school in accordance with his belief or conviction, provided that the curriculum meets the regular criteria for quality. The first Islamic school in the Netherlands was established in Rotterdam in the late 1980s. The Islamic schools came under criticism in 2003, on the one hand because their existence would effectively lead to segregation in the Dutch educational system, and on the other hand because they would spread anti-Western ideas. The latter allegations have not been substantiated and were actually denied by the *Onderwijsinspectie* [Inspection service for education] in 2003. In 2004 8 applications for recognition of new Islamic schools were made; 7 were rejected.

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

No significant developments to be reported.

Article 16. Freedom to conduct a business

No significant developments to be reported.

Article 17. Right to property

The right to property and the restrictions to this right

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Court of Human Rights **–** Below, under Article 20, mention is made of two cases before the Human Rights Committee, in which the applicants complained of allegedly discriminatory practices in the field of social security benefits (*Derksen)* and taxation (*Brandsma*). In both cases the applicants could rely on Article 26 ICCP which protects equal treatment in general. To bring similar complaints before the European Court of Human Rights requires the applicant to demonstrate in the first place that the matter complained of falls within the scope of application of one of the substantive provisions of the ECHR – only then the prohibition of discrimination contained in Article 14 ECHR can be invoked. This will change once Protocol 12 enters into force (the Netherlands being among the first ten countries to ratify this instrument), since Article 1 of this Protocol requires the Contracting Parties to secure the enjoyment of any right *set forth by law* without discrimination on any ground. But in the period under review again a number of attempts were made to argue that allegedly

discriminatory practices in the field of social security benefits amounted to a breach of Article 14 ECHR in conjunction with Article 1 of the First Protocol to the ECHR. These attempts failed, however, and the cases were declared inadmissible.

Thus in the case of *Meyne-Moskalczuk a.o.* (9 December 2003, Appl. No. 53002/99), the applicants alleged discrimination because of the way in which the *Wet verevening pensioenrechten bij scheiding* [Pensions Equalisation (Divorce) Act] was applied. Each of the applicants had been married and was then divorced before the entry into force of the 1995 act. During the marriage their husbands were employed and accumulated pension entitlements. Each of the applicants took care of the couple's children, did not work outside the home and did not accumulate any pension entitlements in their own name. Under the 1995 Act they would be entitled to fifty percent of their former husbands' pension entitlements, but the Act did not have retro-active effect. Before the European Court of Human Rights they argued that they were discriminated as compared to their ex-husbands, whose marital status was identical to theirs, and as compared to women divorced after 1 May 1995, who were entitled to 50% of their former husbands' pension entitlements as a matter of course. They also allege indirect discrimination on the ground of their gender since the group of divorcees without pension entitlements of their own consists, almost exclusively, of women. The Court, however, found that at the time when the applicants were divorced, i.e. before the entry into force of the 1995 Act, they did not have either a "possession" or a "legitimate expectation" to be entitled to any part of their former husbands' pensions. The applicants also asked the Court to hold that a "legitimate expectation" had come into being through the operation of the 1995 Act even though it did not exist before. However, the Court found that such a position was not tenable in the light of the relevant domestic law. It followed that the case fell outside the ambit of Article 1 of Protocol No. 1.

Legislative initiatives, national case law and practices of national authorities

Domestic case-law concerning the right to property – In recent years Dutch legal practice has 'rediscovered' Article 1 of the First Protocol to the ECHR. Also in 2004 a relatively large number of procedures before Dutch courts turned around restrictions on the use of property. Many cases concerned prohibitions on the permanent use of houses which, under local planning regulations, were reserved for recreational purposes. In none of these cases a violation of Article 1 of the First Protocol to the ECHR was found (see, for instance, the rulings of the *Afdeling Bestuursrechtspraak van de Raad van State* [Administrative Litigation Division of the Council of State] of 12 November 2003 (in case No. 200301877/1), of 24 March 2004 (200305490/1, –91/1 and –92/1 as well as 200306212/1), 28 April 2004 (200306379/1, JB 2004/239) and 27 October 2004 (200402406/01). Likewise the *Rechtbank* [Regional Court] of The Hague ruled that no interference with property rights had occurred in a case involving the municipality of Enschede (24 December 2003, No. 01-2529).

In parliamentary discussion the right to property did not feature very prominently in the period under review.

Article 18. Right to asylum

Asylum proceedings

Legislative initiatives, national case law and practices of national authorities

Decrease of number of asylum seekers – The number of asylum seekers has been rapidly decreasing over the last couple of years. In 2004 only 9,872 requests were filed, as opposed to 13,402 in 2003 and 32,579 in 2001, the Ministry of Justice reported on 6 January 2005. Most asylum seekers came from Iraq (1,041), Somalia (793) and Afghanistan (688) (source: *NRC Handelsblad,* 6 January 2005). Earlier the Government had announced that it anticipated a stabilisation of the number of asylum seekers at the level of 14,000 per year (*Kamerstukken II*, 29800 VI).

Continued criticism on the 'accelerated procedure' – As was noted in last year's report, strong criticism was voiced by Human Rights Watch, NJCM and other NGOs regarding the so-called 'accelerated procedure', in which the status of asylum seekers is determined in only 48 working hours, and which has been described as the Achilles Heel of Dutch asylum policy. Originally meant for clearly unfounded asylum requests, the procedure was used in 2004 for approximately 40 % of asylum requests.

In June 2004, the Minister of Immigration and Integration responded to reports by the *Adviescommissie voor vreemdelingenzaken (ACVZ)* (Advisory Committee for Aliens Affairs), the University of Leiden, NJCM (*Nederlands Juristen Comité voor de Mensenrechten*; Dutch section of the International Commission of Jurists) and UNHCR on this issue (*Kamerstukken II*, 2003-2004, 19 637, No. 826). She was of the opinion that the accelerated procedure did not pose serious risks as to the meticulousness of the procedure. It is true that decisions taken in the AC-procedure are only marginally reviewed by the *Raad van State* [Council of State], but in her eyes this is balanced by the responsibility of the *Immigratie en Naturalisatie Dienst* (IND) [Immigration and Naturalisation Service] for a careful review of the facts. The Minister promised to try to make the accelerated procedure more flexible, e.g. by providing the asylum seeker with the opportunity to have documents sent from his or her country of origin. Most of the other recommendations however, for instance those pertaining to prolonging the 48 hours term, were not followed.

On medical issues relating to the asylum procedure, see Article 19 *infra*.

Delays in processing requests for asylum **–** For those whose asylum requests are *not* processed in the 'accelerated procedure', the opposite problem may arise: extreme delays in decision-making. The functioning of the Immigration and Naturalisation Service was the subject of several debates in the *Tweede Kamer* [House of Representatives] in October and November 2004. According to *Vluchtelingenwerk Nederland* (the Dutch Refugee Council; press release of 11 October 2004, www.vluchtelingenwerk.nl) administrative chaos at the IND lead to uncertainty for refugees regarding their status, delays in the provision of legal documents regarding their status and prolonged procedures. The expectation that under the *Vreemdelingenwet 2000* [Aliens Act 2000], asylum proceedings would have a duration of only one year, was not fulfilled. More than half of the asylum seekers who have entered the Netherlands under the 2000 Act, have been in asylum centers for two years or longer.

In August 2004 the *Nationale Ombudsman* also expressed his concerns about the Immigration and Naturalisation Service: slow processing of requests for a regular residence permit, delays in the handing over of documents, bad accessibility of officials by telephone, late and inadequate responses to complaints. A spokesman said the Ombudsman receives approximately 100 complaints per month about the delays in the processing of extensions of residence permits .

The Minister for Immigration and Integration announced an inquiry by the *Algemene Rekenkamer* [Netherlands Court of Audit] into the working processes at the Service (*Tweede Kamer* 2003-2004, *Aanhangsel*, 2303). Parliamentarians asked questions about possible intimidation and unfair treatment by officials of the Service as well (*Tweede Kamer* 2004-2005, *Aanhangsel*, Nos. 72, 73, 74, 135, 136 and 326).

Reasons for concern

Doubts continue to surround the accuracy of the 'accelerated procedure' and the functioning of the Immigration and Naturalisation Service. This is further compounded by the fact that there is only marginal judicial review of asylum decisions. It is hoped that the sharp decrease of asylum seekers will allow all actors involved to review of the whole procedure.

Recognition of the status of refugee

Legislative initiatives, national case law and practices of national authorities

Use of Article 1(F) of the Geneva Convention – Questions have been raised concerning the Dutch application of the exclusion clause of article 1(F) of the Geneva Convention. Critics state that the clause is used relatively often to deny the status of "refugee" to asylum seekers. In 2003, an 'Article 1(F) investigation' was started in some 500 cases; in 270 cases a request for asylum is denied on the ground of the exclusion clause. Critics also note that very slight data concerning article 1 (F), for instance information in an official country report from the Department of Foreign Affairs *("ambtsbericht")*, may suffice to deny the status of "refugee" whereas it would never be enough to secure a criminal conviction.

The Immigration and Naturalisation Service has started to review earlier decisions granting refugee status in light of article 1 (F). A considerable number of these statuses have already been revoked. A dilemma is that to impose a duty on the asylum seeker to report on certain activities in the past, may border on self-incrimination.

Unaccompanied minors seeking asylum

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Committee on the Rights of the Child – In its Concluding Observations of February 2004 the UN Committee on the Rights of the Child expressed its concern the definition of an unaccompanied minor seeking asylum does not conform to international standards and may make access to basic services more difficult for the child while in the country. Furthermore it stated that the 'accelerated procedure' (see above) is contrary to article 22 of the Convention and to other international standards. Finally the Committee condemned the practice of keeping children whose asylum requests have been denied in closed camps with limited possibilities for education and leisure activities (see below). Detention of children whose asylum request has been denied should only be used as a measure of last resort, the Committee emphasised.

Legislative initiatives, national case law and practices of national authorities

Unaccompanied asylum seeking minors – As was noted under Article 4 *supra,* criticism was expressed regarding the two accommodations that were specifically set up for unaccompanied asylum seeking minors. In November 2003, one of the two institutions was closed down; in 2004 the closure of the other institution, based in Vught, was announced. In the future unaccompanied minors from 15 to 18 years will be housed in separate units in the removal centres. They will receive full-time supervision and educational programmes, aimed to enhance their motivation to return to the country of origin (*Kamerstukken II*, 2004–2005, 27 062, No. 29).

Positive aspects

More careful review of young asylum seekers – In response to criticism on the accelerated procedure, the Minister for Immigration and Integration promised that asylum requests of children under 12 years old would no longer be reviewed under the accelerated procedure (*Kamerstukken II*, 2003-2004, 19 637, No. 826; see also above).

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

Prohibition of removals of foreigners to countries were they face a real and serious risk of being killed or being subjected to torture or to cruel, inhuman and degrading treatments.

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Court of Human Rights: removal to Sri Lanka – In two cases concerning expulsion to Sri Lanka the Strasbourg Court found no violation of Article 3 ECHR. Both applicants (whose request for asylum had been rejected) claimed that they would run a real risk of being subjected to treatment contrary to Article 3 ECHR if returned to Sri Lanka. They feared not only the Sri Lankan army, because of their earlier detention on suspicion of LTTE involvement, but also the LTTE, because of their refusal to join the ranks of the LTTE. The Court, considering that the current situation in Sri Lanka and its likely evolution were decisive, noted a considerable improvement in the development of the security situation in the country. Considering the relatively low-level support the applicants were made to provide to the LTTE, the Court considered it unlikely that the Sri Lankan authorities would still be interested in them. Therefore there were no substantial grounds for believing that the applicants, if expelled, would be exposed to a real risk of being subjected to torture or inhuman or degrading treatment within the meaning of Article 3 of the Convention. The Court was unanimous in the first case; in the second Judge Mularoni dissented. (Eur. Ct. H.R., 17 February 2004, *Venkadajalasarma – The Netherlands* (appl. no. 58510/00), and *Thampibillai – The Netherlands* (appl. no. 61350/00)).

Committee against Torture: removal to Turkey – In the case of *S.G. v. The Netherlands* the applicant claimed that his forced removal to Turkey would violate Article 3 of the Convention against Torture. S.G. claimed that he had been tortured on several occasions in 1995 and that had been engaged in political activities both inside and outside Turkey. However, the Committee considered that the alleged torture took place nine years ago, a lapse of time that cannot be described as recent. Furthermore S.G. could not establish that he was regarded by the Turkish authorities as a significant opposition figure, that the Turkish authorities were aware of his participation in political activities and meetings in The Netherlands and Denmark and that, had they been aware of them, this would have placed him at particular risk of torture upon his return to Turkey. Having found that the complainant had not established that he would face a foreseeable, real and personal risk of being tortured in the event of his return to Turkey, the Committee concluded that his removal to Turkey would not constitute a breach of Article 3 of the Convention.

Legislative initiatives, national case law and practices of national authorities

Removal of rejected asylum seekers to Somalia – In the 'preliminary remarks' to the present report, attention was paid to the removal of failed asylum seekers to Somalia. It was noted that the Dutch Government accepted that interim measures indicated by the European Court of Human Rights under Rule 39 of the Rules of Court are binding, although there was considerable controversy to what extent interim measures should also be taken into account in comparable cases.

Removal of 26,000 rejected asylum seekers – Several organisations criticised the announced removal of 26,000 rejected asylum seekers in the coming three years: Human Rights Watch, *Vluchtelingenwerk Nederland* [Dutch Refugee Council], the *Vereniging van Nederlandse Gemeenten (VNG)* [Association of Dutch Municipalities], the *Raad van Kerken* [Council of Churches] and so on. They did not persuade a majority of the *Tweede Kamer* [House of Representatives] which supported the Government plans. By way of compromise a block exception was made for 2200 asylum seekers who had lodged their application before 28 May

1998 and were still waiting for a decision on that application. In 26,000 other cases, the rejected asylum seekers had to go – even if, like in many cases, they were living in the Netherlands for some 10 years and had children that were born and bred in this country.

In February 2004, the NGO Human Rights Watch (HRW) stated that some of the people subject to the planned deportations would be at risk of return to a country or a part of a country where their lives or freedom would be threatened, especially when being sent back to Afghanistan, Sudan or Somalia. HRW expressed concern that people who had received earlier temporary protection as a group, might not be able to make an individual presentation of their case regarding the risk of ill-treatment when returned to their country of origin. HRW also stated that the Dutch government was planning to deport stateless people. Furthermore in many cases, where the asylum request of a whole family unit had been denied, the family unit had to leave the asylum centre which meant the whole family was turned to the streets (see www.hrw.org).

Also the UN Committee on the Elimination of Racial Discrimination, in its Concluding Observations of May 2004, expressed its concern about the possible risks which the Government's plans may entail, particularly with regard to respect for the affected individual's human rights and the unity of their families.

Meanwhile the Minister of Immigration and Integration announced that 220 of the proposed removals would not be carried out and that the people in question would receive a residence permit for humanitarian reasons. (*Kamerstukken II*, 2003-2004, 19 637 and 29 244, 793). The remainder of the removals will take place as planned.

Refugee status for victims of domestic violence? – As was noted under Article 4 *supra,* Amnesty International, in a letter to the Minister of Immigration and Integration of 15 October 2004, argued that Dutch refugee policy fails to pay sufficient attention to victims of domestic violence. Domestic violence is not expressly mentioned in the *Vreemdelingen-circulaire* as a separate ground for asylum, and although the Minister had left open the possibility of granting asylum to victims of domestic violence, Amnesty invited her to take a more explicit position on the issue and to lay it down in unequivocal rules. Likewise, Amnesty submitted, the *ambtsberichten* [official reports] of the Ministry of Foreign Affairs should not limit themselves to indications of the prevalence of domestic violence in a particular country, but should also analyse the appropriate legal framework.

Detention: confining aliens facing deportation – In November 2004 the system of judicial review of alien detention under the *Vreemdelingenwet 2000* [Aliens Act 2000] was amended (see *Kamerstukken* 28 749; *Staatsblad* 2004, Nos. 298 and 550). Where an alien is detained with a view to his removal, the court will have to be notified in 28 days instead of three days. The purpose of the amendment is to decrease the work load of the courts significantly (from 22500 to some 9000 cases per year). As was already noted in our report over 2003, however, the changes were criticised by the *Nederlandse Orde van Advocaten* [Dutch Bar Association] and *VluchtelingenWerk Nederland* [Dutch Refugee Council].

No extradition of PKK leader to Turkey – The *Rechtbank* [Regional Court] of The Hague decided on 8 November 2004 that PKK member Ms Nuriye KESBIR should not be extradited to Turkey. It is – for the time being – the last in a series of judgments concerning the extradition of Ms KESBIR, a prominent PKK leader who asked political asylum in the Netherlands in 2001. Turkey has requested her extradition. The Dutch Government was willing to grant the extradition, but Ms KESBIR argued that she would be subjected to torture upon her return in Turkey and receive an unfair trial.

In a judgment of 7 May 2004, the *Hoge Raad* (Supreme Court) ruled that the extradition was permissible as it would not violate Article 3 ECHR (LJN AO7185). At the same time, however, the Supreme Court recommended that the Dutch Government before permitting the extradition consult with Turkey in order to obtain the necessary guarantees concerning the treatment she would receive and concerning her rights under Article 6 ECHR. Turkey subsequently gave the assurance that it would comply with its international

obligations, following which the Dutch Minister of Justice issued an extradition decision in September 2004. Human Rights organisations such as Amnesty International and Human Rights Watch criticised this decision as the found the assurance too vague. The UN Special Rapporteur on Torture, Mr Theo VAN BOVEN issued an 'urgent appeal' to the Dutch Government, asking for specific safeguards to secure the security of Ms KESBIR.

In summary injunction proceedings the Regional Court of The Hague agreed with the criticism. In its judgment of 8 November 2004 (KG 04/1161) it observed that in principle it would only carry out a marginal review of the extradition decision. However, the absolute nature of Articles 3 and 6 ECHR precluded such a marginal review. The Court held that the Minister of Justice should not have accepted the guarantees by the Turkish Government as they were too general in nature. The request for an injunction was granted. Meanwhile the Minister of Justice has announced that he will appeal against the injunction. A hearing before the Court of Appeal was scheduled on 20 December 2004. The outcome was not known yet at the time of writing the present report.

Extradition to the USA – In our previous report mention was made of a series of cases concerning requests by the United States for the extradition of Dutch nationals suspected, for instance, of trading XTC. The extraditions are controversial, *inter alia* because of 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). In July 2004 the Minister of Justice refused extradition in the case of a man who, according to experts, was psychologically unstable and therefore not capable of coping with the hardship that is inherent in the procedure.

Reasons for concern

NGOs such as Human Rights Watch, along with the UN Committee on the Elimination of Racial Discrimination, have expressed their concern about the possible risks which the Government's plans to remove 26,000 rejected asylum seekers may entail, particularly with regard to respect for the affected individual's human rights and the unity of their families.

Foreigners under a life-saving medical treatment

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Expulsion to Kosovo – The case of *Meho and others* involved the removal of Mr Meho to Kosovo, despite his serious mental disease. The applicants claimed that, because of Mr Meho's situation, he might face disablement or death. The European Court of Human Rights considered the risk that the applicant would suffer a deterioration in his condition if he were returned to Kosovo and whether he would receive adequate support or care in Kosovo. Although the Court accepted the seriousness of his medical condition, it also underlined the high threshold set by Article 3 ECHR, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm. The Court did not find that there was a sufficiently real risk that Meho's removal in these circumstances would be contrary to the standards of Article 3 and declared the case inadmissible (Eur. Ct. H.R. (dec.), 20 January 2004, *Meho and others – The Netherlands*, appl. no. 76749/01).

Legislative initiatives, national case law and practices of national authorities

Medical aspects of Dutch immigration policy – On 18 March 2004 the *Landelijke Commissie Medische Aspecten van het Vreemdelingenbeleid (Commissie Smeets),* an advisory committee that reviewed the medical aspects of immigration policy, published its report (*Kamerstukken II,* 19637, No. 806). Space limitations permit an extensive review of the report and the 14 recommendations of the Committee. It stated *inter alia* that the individual medical situation of

each asylum seekers should always be taken into account when deciding whether to admit him. If the medical situation of an asylum seeker deteriorates during the period that he finds himself under the responsibility of the Dutch authorities, he should be offered appropriate care and not be removed. If the medical situation of an asylum seeker is ambiguous, or relevant to the determination of his request for asylum, his request should not be processed in the so-called 'accelerated procedure'.

The Minister of Immigration and Integration immediately responded that, although she found parts of he report interesting and useful, she did not go along with many of the recommendations. This led to lengthy discussions with Amnesty International and *Vluchtelingenwerk Nederland* (the Dutch Refugee Council). These organisations argued in favour of the recommendations, and also complained of the practice of the *Bureau Medische Advisering* (Bureau of Medical Advice) of the Immigration and Naturalisation Service. Amnesty submitted that the Bureau does not have an independent function and merely serves to legitimise decisions already taken.

In a letter of 22 June 2004, NJCM, (*Nederlands Juristen Comité voor de Mensenrechten*, the Dutch section of the International Commission of Jurists) mentioned many concrete examples of cases where it seemed obvious that the examination of asylum seekers by the Bureau had either been defective (for instance because the report was internally inconsistent) or at least extremely superficial (for instance because the examination had been limited to ascertaining whether the asylum seeker could respond to questions in general). NJCM cited shocking examples, for instance a case where a pregnant woman was first submitted to an X-ray to determine her age (which may be harmful for the foetus), then had miscarriage and lost the child – and was interrogated the next day as part of the 'accelerated procedure'. The problem is all the more pressing because the burden to prove that there are ground to grant asylum is on the asylum seeker; if he is declared fit to undergo an interview although in fact he is not, the consequences may be enormous.

In addition, concern about access to medical care in asylum centres was voiced by the KNMG (Royal Dutch Society for the Advancement of Medical Science) in a letter to the *Tweede Kamer* [House of Representatives]; see *Kamerstukken II*, 2004-2005, 19 637, No. 34.

Amnesty added that the Bureau fails to ascertain in individual situations whether an alien returning to his or country of will have actual access to medical treatment. The Minister of Immigration and Integration stated that whenever there exists the possibility of treatment in the home country, it will be assumed that access exists. Only in cases where it is impossible to ascertain whether treatment exists, will it be assumed that there is no treatment available (*Kamerstukken II*, 2004-2005, 293 44, 34).

Reasons for concern

Medical aspects of Dutch immigration policy – The *Commissie Smeets* made a number of sensible recommendations which received support from NGOs such as Amnesty International, NJCM and *Vluchtelingenwerk Nederland*. As was noted above, however, the Minister of Immigration and Integration rejected some of the most pressing of these recommendations. As a result, serious doubts remain whether the 'medical dimension' of the treatment of asylum seekers is compatible with the requirements of Article 3 ECHR and other international standards.

Legal remedies and procedural guarantees regarding the removal of foreigners

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Withdrawal of basic facilities to asylum seekers – The decision to deport Mr Taheri Kandomabadi to Iran gave rise to a complaint before the European Court of Human. The Court initially requested the Dutch authorities, by way of interim measure (Rule 39 of the Rules of Court), to stay the expulsion pending the procedure in Strasbourg. In the end,

however, the Court rejected the applicant's principal claim that he might be subjected to ill-treatment in Iran. A second complaint, which we will deal with in more detail, related to the fact that the Dutch authorities did not provide the applicant with basic facilities such as food and accommodation pending the proceedings before the Strasbourg Court. From August 2000 to 2004 Mr Taheri Kandomabadi was dependent from financial contributions from charitable organisations and private donors. According to him this situation endangered his life and constituted inhuman and degrading treatment.

Under Dutch law, an alien is entitled to reception and other facilities provided by the State during the initial phases of the asylum procedure. However, this entitlement ends if the application has been refused in the so-called 'accelerated procedure'. This procedure, which was introduced in 2000, is 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. Currently 40% of all requests for asylum are dealt with in accordance with this procedure. Article 10 of the *Vreemdelingenwet 2000* [Aliens Act 2000], according to which an alien who is unlawfully present in the Netherlands is not entitled to reception facilities, extends to asylum seekers whose applications have been unsuccessful. Also, a second or further application for asylum does not confer a new entitlement to reception facilities. An exception to that basic principle can nevertheless be made if, *inter alia*, the asylum seeker finds him in extremely compelling humanitarian circumstances (*zeer schrijnende humanitaire omstandigheden*, Chapter C5/20.4 of the Aliens Circular 2000). The question whether such circumstances exist is always considered after it has been ascertained that the second or further application for asylum will not be processed in the 'accelerated procedure'. It may also be considered if a person, who has submitted a second or further application, requests reception facilities due to extremely compelling humanitarian circumstances. The *Centraal Orgaan Opvang Asielzoekers* [COA, the Central Agency for the Reception of Asylum Seekers] decides whether or not reception facilities will be provided. Appeal lies against a decision to refuse reception, but also against a failure to decide (or to decide within a reasonable time) on a request for reception facilities. The lodging of an appeal does not suspend the denial of reception facilities, but a provisional measure may be requested to the effect that such facilities are made available pending the appeal proceedings. In injunction proceedings not related to the present case, the Regional Court of The Hague noted that the legislator had omitted to regulate whether or not an entitlement to reception facilities existed during the period for which an interim measure pursuant to Rule 39 of the Rules of Court was in place. The judge considered that, as a result of the application of Rule 39, the petitioner could not be said to be under an obligation to leave the country and his stay in the Netherlands was, therefore, lawful. In addition, the denial of reception facilities – which was aimed at encouraging a departure from the Netherlands – might detract from the effectiveness of the interim measure. In these circumstances, the judge granted a provisional measure to the effect that the COA should provide the petitioner with reception facilities (case No. AWB 04/4053 COA, of 28 April 2004). In different proceedings, the *Afdeling Bestuursrechtspraak van de Raad van State* [Administrative Litigation Division of the Council of State] held on 25 May 2004 that, as long as an interim measure pursuant to Rule 39 of the Rules of Court is in place, the stay in the Netherlands of the person concerned is lawful (No. 200400863/1).

Against this background the Strasbourg Court noted that it appeared from recent case-law that the stay in the Netherlands of a person, in respect of whom an interim measure pursuant to Rule 39 has been issued, has been held to be lawful. That person is, therefore, considered eligible for reception facilities. Indeed, it appeared that the applicant had recently instituted such proceedings. Although it is the applicant's submission that his request for facilities is bound to fail, the Court found that it could on the face of it be said that the proceedings, which were still pending, are ineffective. Therefore, the Court rejected this complaint for non-exhaustion of domestic remedies (Eur. Ct. H.R., 29 June 2004, *Taheri Kandomabadi – The Netherlands*, appl. nos. 6276/03 and 6122/04).

The case illustrates, on the one hand, the very difficult situation in which asylum seekers generally may find themselves if their request for asylum has been rejected. On the

other hand, a positive aspect of the case is that at least in the cases where the Strasbourg Court has issued interim measures, reception facilities are offered.

Legislative initiatives, national case law and practices of national authorities

Departure centres – In February 2004 Human Rights Watch also expressed its concern over the departure centres and closed expulsion centres. The Dutch Government claims that these centres are open and are only meant to facilitate a voluntary return. In some cases, however, people who fail to return voluntarily, are moved to closed expulsion centres. HRW is concerned that rejected asylum seekers are subject to undue influence or coercion in the process of deciding whether or not to depart the Netherlands voluntarily.

Reasons for concern

No suspensive effect of appeal in expulsion cases – In March 2004 the NGO 'NJCM' (*Nederlands Juristen Comité voor de Mensenrechten*, the Dutch section of the International Commission of Jurists) asked attention for the lack of suspensive effect of appeals in expulsion cases. An asylum seeker has the possibility to file a request for interim measures with the *Raad van State* (Council of State). The request will, however, only be admissible however if the date of expulsion is known. The problem is that in practice asylum seekers are sometimes expelled during the appeal proceedings, without his lawyer being notified.

CHAPTER III : EQUALITY

Article 20. Equality before the law

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

HRC and differentiation between married and unmarried couples – The case of *Derksen and Bakker*, involved a differentiation between married and unmarried couples in the field of social security. The differentiation came to an end when in July 1996 new legislation was adopted. The new rules did not have retroactive effect, however. This meant that a surviving spouse was entitled to a benefit on behalf of his or her child born out of wedlock if the partner had died after July 1996 – but not if the partner had died before that date. The Committee found a violation of Article 26 ICCPR. As was noted in the 'Preliminary remarks' to the present report, the Dutch Government has indicated that it will not comply with the Committee's views. Against that background it is considered useful to describe the case in more detail.

The author, Ms Derksen, shared a household with her partner Marcel Bakker from 1991 to 1995. It is stated that Mr. Bakker was the breadwinner, whereas Ms. Derksen took care of the household and had a part-time job. They had signed a cohabitation contract and when Ms. Derksen became pregnant, Mr. Bakker recognized the child as his. The author states that they intended to marry. In February 1995, Mr. Bakker died in an accident. Two months later their daughter, Kaya Marcelle Bakker, was born. In July 1995, the author requested benefits under the General Widows and Orphans Law (*AWW, Algemene Weduwen en Wezen Wet*). Her request was rejected, however, because she had not been married to Mr. Bakker and therefore could not be recognized as widow under the AWW. Under the AWW, benefits for half-orphans were included in the widows' benefits.

On 1 July 1996, the Surviving Dependants Act (*ANW, Algemene Nabestaanden Wet*) replaced the AWW. Under the ANW, unmarried partners are also entitled to a benefit. In November 1996 Ms. Derksen applied for a benefit under the ANW. In December 1996, her application was rejected on the grounds that "(…) only those who were entitled to a benefit under the AWW on 30 June 1996 and those who became widow on or after 1 July 1996 are entitled to a benefit under the ANW". Ms. Derksen's request for revision of the decision and further appeals were rejected.

Ms Derksen submitted a complaint to the HRC, arguing that it constitutes a violation of article 26 ICCPR to distinguish between half-orphans whose parents were married and those whose parents were not married. It is stated that the distinction between children born of married parents and children born of non-married parents cannot be justified on objective and reasonable grounds. She further pointed out that under the ANW, half-orphans whose parent died on or after 1 July 1996 do have an entitlement to a benefit, whether the parents were married or not, thereby eliminating the unequal treatment complained of above. According to the author it is unacceptable to maintain the unequal treatment for half-orphans whose parent died before 1 July 1996.

The Dutch Government explained that when the AWW was replaced by the ANW, the transitional regime was based on respect for prior rights, in the sense that existing rights under the AWW were respected and no new rights could be claimed resulting from a death prior to the entry into force of the ANW. From the earlier decisions in which the Committee has reviewed the Dutch social security legislation, the Government concluded that the distinction between married and unmarried couples is based on reasonable and objective grounds. The Government recalled that the Committee has based its view on the fact that persons are free to choose whether or not to engage in marriage and accept the responsibilities and rights that go with it. The Government rejected the author's opinion that the new legislation should be applied to old cases as well. The ANW was introduced to reflect the

changes in the society where living together as partners otherwise than through marriage has become common. In the Government's opinion, it is up to the national legislature to judge the need for a transitional regime. Those persons who are now entitled to benefits under the ANW are persons with established rights. This distinguishes them from persons who like the author do not have established rights. Before 1 July 1996, marriage was a relevant factor for benefits under the surviving dependants' legislation, and people were free to marry and thereby safeguard entitlement to the benefits, or not to marry and thereby choose to be excluded from such entitlement. The fact that the ANW has now abolished the differential treatment between married and unmarried cohabitating persons does not alter this pre-existing position. The Government concluded that the transitional regime did not constitute discrimination against the author. To the extent that the communication related to Ms. Derksen's daughter, the Government stated that its above observations applied *mutatis mutandis* also to the claim of unequal treatment of half-orphans. As was also the case under the old law, it is not the half-orphan herself who is entitled to the benefit but the surviving parent. Since neither the old nor the new legislation grants entitlements to half-orphans, the Government was of the opinion that there can be no question of discrimination within the meaning of article 26 of the Covenant.

The Human Rights Committee recalled that it has earlier found that a differentiation between married and unmarried couples does not amount to a violation of article 26 of the Covenant, since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by marriage lies entirely with the cohabitating persons. By enacting the new legislation the Netherlands has provided equal treatment to both married and unmarried cohabitants for purposes of surviving dependants' benefits. Taking into account that the past practice of distinguishing between married and unmarried couples did not constitute prohibited discrimination, the Committee was of the opinion that the Netherlands was under no obligation to make the amendment retroactive. The Committee considered that the application of the legislation to new cases only does not constitute a violation of article 26 of the Covenant.

The Committee arrived at a different conclusion, however, with respect to the refusal of benefits for the author's daughter. It found that this constituted prohibited discrimination under article 26 of the Covenant. In this respect the Committee recalled that article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons. Yet, a distinction only constitutes prohibited discrimination in the meaning of article 26 of the Covenant if it is not based on objective and reasonable criteria. In the circumstances of the present case, the Committee observed that under the earlier AWW the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new ANW, benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date. The Committee considered that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasised that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them. The termination of ongoing discrimination in respect of children who had had no say in whether their parents chose to marry or not, could have taken place with or without retroactive effect. However, as the communication has been declared admissible only in respect of the period after 1 July 1996, the Committee merely addresses the failure of the State party to terminate the discrimination from that day onwards which, in the Committee's view, constitutes a violation of article 26 in regard of Kaya Marcelle Bakker in respect of whom half orphan's benefits through her mother was denied under the ANW.

The Human Rights Committee concluded the Netherlands was under an obligation to provide half orphans' benefits in respect of Kaya Marcelle Bakker or an equivalent remedy, and to prevent similar violations (Communication 976/2001, views of 15 June 2004).

HRC and differentiation in taxation of holiday payments – On 30 April 2004 the HRC published its views in the case of *Brandsma.* Mr Brandsma alleged to be the victim of a violation of Article 26 ICCPR because of the different treatment in taxation of holiday payments between the applicant and those employees who receive their payments through vouchers. The issue is technical and rather far removed from the core business of international human rights protection – but around 2000 this case of perceived discrimination did receive a lot of publicity in The Netherlands; it was the subject of fierce litigation.

As a civil servant Mr Brandsma was given holiday supplementary payment in addition to his normal wages. These amounts of holiday payments were fully subject to the imposition of income tax, in conformity with the Dutch laws and regulations. Mr Brandsma states that, like he, most employees in the Netherlands receive their holiday payments directly from their employer. In some sectors of industry, notably in the building sector, however, employees receive holiday vouchers. These are entitlements that can be cashed in, at the time of vacation, at a foundation that is funded with contributions from the employers. Because of technical complications in the calculation of wage taxes, which would have led to the holiday vouchers being taxed at a higher rate than normal holiday payments, it was decided in the past that holiday vouchers were taxed at only a percentage of their normal value. Mr Brandsma stated that the system led to criticism from fiscal experts, who claimed that the undervaluation of the vouchers privileged employees receiving holiday payments through vouchers. After consultations with the organisations of employers and employees new rules were issued, effective 1 January 1999, which will gradually abolish the valuation of the holiday vouchers. From 1999 onwards, their valuation will increase with 2.5% every year, reaching 92.5% in 2005. As of 2006, it is proposed to tax the vouchers against their effective value (estimated at around 97.5% because of the discrepancy between the moment of taxation of the vouchers and the moment of effective payment).

In our 'Preliminary remarks' attention was paid to the argument of the Dutch Government that the HRC should follow the case-law of the European Court of Human Rights, which had rejected a similar case. The Committee did not address this issue, perhaps because it found that the complaint was unsubstantiated anyway. The Committee noted that the courts in the Netherlands have decided that the difference in treatment is based on factual and legal differences in the two forms of payment. The Committee further took note of the reasons advanced by the Dutch Government as to why it decided to raise the valuation of the holiday vouchers in a gradual manner. The HRC considered that Mr Brandsma had not substantiated, for purposes of admissibility, his claim that he, as a recipient of holiday pay, similarly to the vast majority of employees in the State party, was discriminated against compared to the small minority of workers who, because of the nature of their work, receive holiday vouchers, the taxation of which continues to be somewhat lower than that of holiday pay. Therefore, the communication was declared inadmissible pursuant to article 2 of the Optional Protocol.

European Court of Human Rights **–** Whereas applicants before the Human Rights Committee can rely on Article 26 ICCP, which protects equal treatment in general, applicants before the European Court of Human Rights must demonstrate in the first place that the matter complained of falls within the scope of application of one of the substantive provisions of the ECHR – only then the prohibition of discrimination contained in Article 14 ECHR can be invoked. In the period under review again a number of attempts were made to argue that allegedly discriminatory practices in the field of social security benefits amounted to a breach of Article 14 ECHR in conjunction with Article 1 of the First Protocol to the ECHR. For a discussion, see Article 17 *supra.*

Legislative initiatives, national case law and practices of national authorities

Protocol 12 to the ECHR – The Netherlands ratified Protocol 12 to the European Convention on Human Rights on 28 July 2004. Article 1 of this Protocol requires the Contracting Parties to secure the enjoyment of any right *set forth by law* without discrimination on any ground. The Netherlands made a declaration that it will apply the provisions of the Protocol to the whole Kingdom, including the Netherlands Antilles and Aruba. The Protocol will enter into force on 1 April 2005. Of all EU Member States only Cyprus, Finland and the Netherlands have ratified Protocol 12.

Implementation of Directives 2000/43/EC and 2000/78/EC – See under Article 21, *infra.*

No need to expand Article 1 of the Constitution – Article 1 of the Dutch Constitution provides for equal treatment of all persons in The Netherlands. Discrimination on account of religion, conviction, political opinion, race, sex or any other ground is prohibited. Time and again it is proposed to extend the list of discrimination grounds. Thus, the *Tweede Kamer* [House of Representatives] adopted in December 2001 a motion to include the grounds "age" and "handicap" in Article 1 (*Kamerstukken II* 2001/02, 28000 XVI, No. 63).

In February 2004 the *Commissie gelijke behandeling* [Equal Treatment Commission] issued, at its own initiative, an advise on this proposal. The Commission proposed to include not only chronically illness and handicap, but also the grounds nationality, hetero- or homosexual orientation, civil status and age (*Kamerstukken II* 2003/04, 29 355, No. 7, annex).

On 20 August 2004, however, the Government submitted a memorandum to Parliament, expressing the view that there is no need to extend Article 1. The Government agreed with the Commission that discrimination on the ground of chronically illness and handicap is repulsive and that the State should offer protection against it. To include these grounds in Article 1 would certainly have a symbolic value. Yet, the Government took as its starting position that legislation should only be changed if the need is sufficiently established. This holds true especially in the case of constitutional fundamental rights, since these embody the basic values of Dutch society. The Government would only consider a change of these provisions if that were absolutely necessary. That is not the case here. Since the prohibition of Article 1 applies to discrimination "on any other ground", Article 1 offers sufficient scope for dynamic interpretation. In addition, to include some grounds would lead to lengthy discussions on whether other grounds should not be included as well. It might also lead to an *a contrario* line of reasoning according to which other grounds, because they are not included, falls outside the scope of the prohibition of discrimination. This conclusion is not altered by the fact that EU law prohibits discrimination on the grounds of handicap, age and sexual orientation, the Government maintains: Article 1 of the Constitution offers an adequate level of protection in these areas too (*Kamerstukken II* 2003/04, 29 355, No. 7; see also Article 26 *infra*).

ILO Convention 118 denounced – In December 2004 Parliament approved of the Government proposal to denounce ILO Convention 118 (*Kamerstukken* 29384; *Staatsblad* 2004, 715). The Convention provides for equal treatment of nationals and foreigners as regards social security. The Dutch Government emphasised that it supported the general idea behind this Convention and that Dutch social security law does make no distinction on nationality. However, under Article 5 of the Convention a foreign recipient who returns to his country of origin may demand that social security benefits continue to be paid to him. Again, the Dutch Government stated that it was not opposed to that principle, provided that the authorities in the country of origin were capable of effectively supervising the situation, including the question whether the person concerned continued to be entitled to benefits. To that end the Netherlands is in the process of signing treaties with third countries. Once a treaty has entered into force, there are, as far as the Dutch Government is concerned, no obstacles to the 'export' of social security benefits. However, Dutch courts have held that foreigners can derive an entitlement to 'export' their benefits directly from Article 5 of the ILO Convention,

i.e. also in the absence of a specific treaty with their country of origin. In these circumstances the Government preferred to denounce the ILO Convention altogether.

The Permanent Committee of Experts on International Immigration, Refugee and Criminal Law (the 'Commissie Meijers') had advised against the proposal to denounce Convention 118. The Committee observed that there are certain technical advantages to the Convention, whereas it is only a very small group of social security recipients who can actually 'export' their benefits to countries with which there is no supervision treaty.

Good practices

Protocol 12 to the ECHR – It would be a welcome development if the other EU Member States were to follow the example set by Cyprus, The Netherlands and Finland and ratify Protocol 12.

Article 21. Non-discrimination

Protection against discrimination

Legislative initiatives, national case law and practices of national authorities

Additional Protocol to the Cybercrime Convention – The Netherlands signed the first additional Protocol to the Convention on Cybercrime of the Council of Europe on 28 January 2003. In the period under review no action has been undertaken to ratify this Protocol.

Implementation of Directives 2000/43/EC and 2000/78/EC – On 1 April 2004 the amended *Algemene Wet Gelijke Behandeling (AWGB)* [Equal Treatment Act] entered into force (*Staatsblad* 2004, 119). It implements, eight months after the set deadline, Directive 2000/43/EC on equal treatment irrespective of racial or ethnic origin and framework Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. The most important changes in comparison with previous legislation are the following: the ordering of unequal treatment is now also forbidden; so is intimidation; the prohibition of unequal treatment on grounds of racial origin is extended to the field of social security; and the standing of individuals lodging a complaint is strengthened. The Committee on the Elimination of Racial Discrimination (CERD), in its Concluding Observations of 2004, welcomed the adoption of the bill.

Directive 2000/78/EC was also implemented by way of more specific laws. On 1 December 2003, the *Wet gelijke behandeling op grond van handicap of chronische ziekte* [Equal Treatment (Handicapped and Chronically Ill) Act] entered into force (*Staatsblad* 2003, 206 – see also last year's report). Interestingly, the Government has announced that the substantive scope of this Act will be gradually expanded. The Act now applies to the areas of work and vocational training. It will extend to transport in the near future. Several members of Parliament had asked for legislation modelled after the *Americans with Disabilities Act (ADA)* (see *Kamerstukken II* 2000–2001, 24 170, No. 68, *Kamerstukken II* 2001–2002, 28 169, No. 15 and *Kamerstukken I* 2002/03, 28 169, No. 48e). The Government is now considering a further extension to the area of housing. On 22 December 2003 the Government announced that a bill would be submitted to Parliament. According to the new plans, the bill would impose, among others, an obligation to offer 'immaterial facilities'- that is, it would require house owners, for instance, to allow handicapped tenants to stall their means of transport in common areas. In preparing the bill, the Government would draw inspiration from the ADA, but also from the experience in Denmark, Sweden and Germany. Apart from the advantages in terms of legal certainty that would flow of the proposed extension of the Equal Treatment (Handicapped and Chronically Ill) Act, an additional benefit would be that individuals could submit complaints to the Equal Treatment Commission, rather than having to start time-consuming and costly judicial proceedings. The Government added that its

legislative plans are in conformity with the jurisprudence of the European Court of Human Rights, citing the *Thlimmenos v. Greece* case *(Kamerstukken II* 2003/04, 29 355, No. 3).

On 1 May 2004 the *Wet gelijke behandeling op grond van leeftijd bij de arbeid* [Equal Treatment at Work (Age) Act] entered into force as well (*Staatsblad* 2004, 30).

Finally, on 1 October 2004, an amendment changed the *Ambtenarenwet* [Civil Servants Act] introducing a prohibition on discrimination in the civil service between people with temporal and fixed contracts (*Staatsblad* 2004, 88). A similar regulation relating to private-law contracts was enacted in 2002 ('WOBOT', *Staatsblad* 2002, 560), implementing Directive 1999/70 EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (*OJ* 1999 L 175/43).

Case-law on non-discrimination – Following the entry into force of the Equal Treatment (Handicapped and Chronically Ill) Act, in December 2003, and the Equal Treatment at Work (Age) Act, in May 2004 (see above), the *Commissie gelijke behandeling* [Equal Treatment Commission] issued its first decisions on the grounds handicap (CGB 8 March 2004, *oordeel* 2004-21; at www.cgb.nl) and age (CGB 4 May 2004, *oordeel* 2004-46; CGB 24 September 2004, *oordeel* 2004-118).

Some of these decisions, such as the one adopted on 24 September 2004, were controversial. The CGB found that a regulation whereby employees above 45 are entitled to one to three extra holidays amounted to discrimination on the ground of age. The Commission observed that the older employees in the company concerned were not more often ill than their younger colleagues and, more in general, research had shown that there is only a very tenuous link between a higher age and less availability for work. This might be different if the work is physically taxing, but that was not the case in the instant situation. In the same case the CGB found that another regulation, whereby employees would earn a couple of extra days off if they worked longer for the company, was indirectly discriminatory: the longer the employees had worked, the older they were. The CGB accepted that the regulation aimed to promote loyalty to the company, which was legitimate, but found there were other ways to do so, independent of age.

Positive aspects

The implementation of Directives 2000/43/EC and 2000/78/EC should be welcomed. The plans to further extend the applicability of equal treatment legislation aiming are also to welcomed.

Fight against incitement to racial, ethnic, national or religious discrimination

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Committee on the Elimination of Racial Discrimination – On 10 May 2004 the Committee on the Elimination of Racial Discrimination (CERD) issued its concluding observations on the fifteenth and sixteenth periodic reports of the Netherlands (CERD/C/64/CO/7). One the one hand the Committee noted with satisfaction that the Netherlands adopted a National Action Plan against Racism in December 2003, and it commended the Netherlands for its efforts to combat racist propaganda and the spread of racist and xenophobic material on the internet. On the other hand it uttered its concern about anti-Semitic and "Islamophobic" incidents in the Netherlands and of discriminatory attitudes towards minorities. It was also concerned about the sharp increase in the number of complaints which were submitted to the Dutch Complaints Bureau for Discrimination on the Internet.

Legislative initiatives, national case law and practices of national authorities

National Action Plan against Racism – On 19 December 2003 the *Nationaal Actieplan tegen Racisme* [National Action Plan against Racism] was presented by the Government, as a follow up to the World Conference Against Racism (Durban, South Africa, 2001). Three themes are central in the plans to fight racism: the living environment of citizens, sensibilization, and equal treatment in the workplace. In this fight the Government aims at more effective cooperation and co-ordination between all the organisations involved. To counter racism in the living environment the Ministry of Justice will promote the exchange of best practices. One of these is the voluntary agreement between discos in Rotterdam to counter existing practices of discrimination in entry policies. Sensibilization should be achieved by fostering public debate and promoting education on citizenship in schools.

Discrimination on internet – Directive 2000/31/EC, providing for protection against the circulation of material with discriminatory content in services on the internet, was implemented on 30 June 2004 (*Aanpassingswet richtlijn elektronische handel, Staatsblad* 2004, 210).

Evaluating Dutch integration policy – On 19 January 2004 a Parliamentary Inquiry Commission presided by Stef Blok, member of the *Tweede Kamer* [House of Representatives] presented its report on Dutch integration policy in the past decades, *Bruggen bouwen* [Building bridges]. In contrast to widespread views held in society, the report did not consider the integration of foreigners into Dutch society to have been a complete failure but rather a partial success. On discrimination, the report concluded that open discrimination in the Netherlands is a fact. It recommended an active policy to counter stigmatization and to fight occurrences of discrimination (*Kamerstukken II,* 2003-2004, 28689, No. 9).

Statistics on discrimination – The *Landelijke Vereniging van Anti-discriminatiebureaus en –meldpunten* [National Federation of Anti-Discrimination Agencies] received 3589 complaints in 2003, a decrease of 8.6 percent compared to the previous year. Notably, the number of complaints in the four largest cities (Amsterdam, Rotterdam, the Hague, Utrecht) decreased much quicker than in the rest of the country. Although discrimination on grounds of race, colour or origin is still the most important (60.8%), discrimination on the basis of religion is, like last year, on the rise (7.5% of the total compared to 6.9% in the year before). The number of complaints about anti-Semitism decreased with 25% (compare with the CIDI figures). Like last year the report warns that the lower amount of complaints may as well reflect a reluctance to complain because of worsened and harder circumstances in society as it could reflect positive developments. Two other important points from the report: the largest group of complainants whose origin is known have a Moroccan background (18.1%). Ethnic minorities mostly complain about discrimination in the field of work, whereas *autochtonen* [people of Dutch origin] complain more about problems in their neighbourhood (*Annual Report over 2003, Jaaroverzicht Discriminatieklachten bij Antidiscriminatiebureaus en –meldpunten,* www.lvadb.nl).

The research project *Monitoring racism and the extreme right* (a yearly joint endeavour of the Anne Frank Foundation and Leiden University) shows the same light decrease or stabilization in racist incidents: 260 in 2003 as compared to 264 in 2002. Racist anti-Jewish occurrences of violence have gone down from 46 to 39, anti-Muslim from 68 to 59, and anti-refugee from 31 to 15. The researchers did not find cases of racist violence against Roma or Sinti. On the other hand the number of violent confrontations has gone up from 14 to 28. One of the reasons for this is the phenomenon of *Lonsdale* youngsters, groups of Dutch teenagers who generally hold anti-foreigner views, are only loosely organized and are united in their predilection for the British garment brand Lonsdale. These groups regularly seek the confrontation with other young people of different ethnic backgrounds. Finally, it is notable that the terrorist attacks of 11 March 2004 did not lead to an increase of anti-Muslim incidents in the Netherlands. This picture changed, however, following the assassination of

Theo VAN GOGH; see the statistics mentioned in our *Preliminary remarks* to the present report.

The NGO *Centre for Information and Documentation on Israel (CIDI)* reported a small decrease in incidents of anti-Semitic violence over 2003 (334 compared to 359 in the previous year; minus 7.5 percent). Violent incidents of (threats of) physical violence also decreased, with 40 percent. The first few months of 2004 seem to confirm this trend (Annual report on 2003 and the first five months of 2004, December 2004).

Finally, the NGO *Meldpunt Discriminatie Internet* (MDI) [Dutch Complaints Bureau for Discrimination on the Internet] received a large amount of notifications of expressions of hatred on the internet in the first nine months of 2004: 285 on hatred against Muslims (101 of which were considered punishable under law); 419 on anti-Semitism (240); 179 anti-Moroccan expressions (112); and 256 anti-Turkish ones (95). Once again the murder on cinematographer Theo van Gogh in November 2004 caused an instantaneous outburst of anti-Moroccan and anti-Muslim sentiments on the internet; see our *Preliminary remarks* to the present report and the website www.meldpunt.nl

Discrimination on the internet – As was noted under Article 11 *supra,* the *Meldpunt Discriminatie Internet* MDI itself was accused of an anti-Islamic bias. After it had expressed the opinion that certain inflammatory statements against Muslims were not discriminatory, a representative of the Islamic web site maghrebonline.nl posted exactly the same statements on his site, in which the word "Muslim" had been replaced with "Jew". The MDI immediately responded to complaints and denounced the statement as anti-Semitic. Maghrebonline.nl complained to the *Landelijk Bureau ter bestrijding van Rassendiscriminatie (LBR)* [National Agency for Combating Racism] which agreed expressed that the MDI had indeed been applying different standards.

'Artisitc threats' and denial of the Holocaust – Whereas threats against politicians were taken very seriously in 2004, including a rap song targeted at Ms Hirsi Ali MP (for an overview see Article 49 *infra)*, CIDI complained that similar threats against Jews received less attention. According to the NGO, the Public Prosecutor was not interested in pursuing a complaint lodged by CIDI in 2003 about a rap song that called upon *allochtonen* to kill the Jews. On the other hand, a man was sentenced to four weeks' imprisonment in December 2004 for denying the holocaust on his website ( ). CIDI had reported the website to the police in March 2004.

Integration and discrimination – As was mentioned under Article 7 above, the Government attaches great weight to the need of *inburgering* [integration into society] of foreigners. With a view to the speedy integration of *nieuwkomers* [newcomers] into Dutch society, it is considered necessary to secure a basic level of knowledge of Dutch and of Dutch society among potential immigrants.

In addition, the Minister of Immigration and Integration proposed measures to further the integration of *oudkomers* ['old comers', i.e. individuals who immigrated into the Netherlands in the past] – a group consisting of approximately 450,000 individuals. The proposals included an obligation to pass an *inburgeringstoets* [integration exam]; failure to do so would lead to imposition of a fine. One of the central questions was who should be obliged to pass the exam – what about foreigners that had acquired Dutch nationality in the meantime? After extensive discussion in society and Parliament, the Minister decided to distinguish between naturalised persons and Dutch citizens who are born outside the EU/EEA (which includes notably the Netherlands Antilles and Aruba) on the one hand, and Dutch born within the EU/EEA on the other hand. The obligation to pass the *inburgeringstoets* would only apply to the former two categories.

Several NGOs, such as the *Landelijk bureau ter bestrijding van rassendiscriminatie (LBR)* [National Agency for Combating Racism], expressed their concerns about this distinction which, in their view, would run counter to the principle of equal treatment. This criticism was shared by the *Adviescommissie voor vreemdelingenzaken (ACVZ)* [Advisory

Commission on Aliens Affairs] in its report of 3 December 2004. The Commission stated that it was legally untenable to distinguish between various groups of Dutch citizens. It would be better, the Commission suggested, to impose the obligation to pass the *inburgeringstoets* only on those individuals who had had little schooling in the Netherlands. The Minister adopted that proposal, and submitted a new bill to Parliament, according to which the obligation to pass the *inburgeringstoets* applies to all who have had less than eight years of school in the Netherlands.

Reasons for concern

The high numbers of discriminatory incidents continue to give rise to concern. As was noted in our 'preliminary remarks' it is unfortunate that no progress was made as regards the draft Framework Decision on combating racism and xenophobia. A draft text (COM(2001) 664 def.) was adopted in November 2001, but its finalisation was halted in February 2003.

Remedies available to the victims of discrimination

Legislative initiatives, national case law and practices of national authorities

Reversal of the burden of proof – As was mentioned above the amended *Algemene Wet Gelijke Behandeling (AWGB)* [Equal Treatment Act] entered into force on 1 April 2004 (see Article 20 *supra*). The new Act strengthens the position of the victim. The respondent party is not allowed to prejudice the interests of a person complaining about discrimination. As to the burden of proof: although the victim has to bring forward facts that sustain the presumption of discrimination, it is for the respondent party to prove that no discrimination occurred.

Reasonable accommodation of the specific needs of certain groups, especially religious or ethnic minorities

Legislative initiatives, national case law and practices of national authorities

No headscarves in restaurant – For a ruling of the CGB in the case of a restaurant in The Hague denying access to all customers wearing headgear, see Article 10 *supra.*

Positive actions aiming at the professional integration of certain groups

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Expiry of the Employment of Minorities Act – The Committee on the Elimination of Racial Discrimination (CERD), in its Concluding Observations on the fifteenth and sixteenth periodic reports of the Netherlands (CERD/C/64/CO/7), expressed its concern about the negative consequences of the expiry of the *Wet Samen* [Employment of Minorities Act] on 31 December 2003. This law was the only legislative instrument on the professional participation of ethnic minorities. It also required employers to register how many persons from ethnic minorities they employed. The CERD recommended that the Netherlands pursue an adequate policy to ensure proper participation of these groups in the labour market.

Although it was positive about the fact that the number of police officers belonging to ethnic minorities has increased in recent years, the CERD was concerned about the high level of resignations among these groups. Finally, it expressed concern at the situation of de facto school segregation in parts of the Netherlands.

Protection of Gypsies / Roms

Legislative initiatives, national case law and practices of national authorities

Roma and Sinti in the Netherlands – Roma and Sinti in the Netherlands rarely report instances of discrimination to the authorities, shows a special thematic edition of the *Monitor on Racism and the Extreme Right*. Mutual distrust between these groups and the authorities, language problems and the fear that problems will only increase by the reporting are all relevant factors. The position of Roma and Sinti in society is weak and the problems in education and on the labour and housing market are bigger than among other minorities. The report expresses concern and recommends a more active role of the authorities in breaking the cycle of distrust and prejudice. It points to the inconsistency between the Dutch presentation of its treatment of these groups in international fora and the neglect in reality: only minimal efforts are made (*Monitor racisme en extreem-rechts, cahier no. 3, Roma & Sinti, October 2004*).

Article 22. Cultural, religious and linguistic diversity

Protection of linguistic minorities

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Charter for Regional or Minority Languages – The Netherlands submitted its second periodic report on the implementation of the European Charter for Regional or Minority Languages on 26 May 2003 to the supervising Committee of Experts. On 17 June 2004 the Committee adopted a report on the Netherlands which was made public on 16 December 2004. It showed its concern about the negative effects the current governmental efforts to strengthen Dutch language fluency have had on the climate for regional and minority languages, including Frisian, in some schools. It specifically noted that this is caused by a general lack of knowledge about the beneficial effects of bilingualism. Concerning Romanese languages, the Committee noted a lack of communication between the central authorities and Sinti and Roma and an absence of measures (including financial ones) to protect and promote the Romanese language. (Committee of Experts, *Application of the Charter in the Netherlands*, 16 December 2004, ECRML (2004) 8).

Legislative initiatives, national case law and practices of national authorities

Language education for ethnic minorities – The Government announced that it intends to cut subsidies for language education in the languages of ethnic minorities. Children remain free to use these languages, but the Government believes that it is of vital; interest to their future integration into Dutch society that they learn Dutch. Since all efforts should be geared towards that goal, education in the languages of ethnic minorities will no longer be supported (*Nationaal Actieplan Kinderen [National Plan of Action for Children], Kamerstukken II* 2003-2004, 29284, No. 3 Add., p. 18). On this Plan of Action more in general, see Article 24 *infra.*

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Framework Convention – Despite the Government's promise of swift ratification mentioned in last year's report, no progress has been made on the issue of ratification of the Framework Convention on National Minorities. The main debated issue remains whether the scope of application of the Convention should be limited to the Frisians or extended to other groups

such as Roma/Sinti and ethnic minorities. Currently the matter is still pending before the *Eerste Kamer* [Senate].

Fundamental rights in a pluralistic society – As was mentioned in the Preliminary remarks to this report, the Government presented a memorandum on fundamental rights in a pluralistic society (*Grondrechten in een pluriforme samenleving*). The statement is a reaction to questions from Parliament on whether dealing with topical issues in a multicultural society (such as discrimination, the wearing of headscarves, female genital mutilation a.o.) require a change of the Constitution. The Government concludes that this is not necessary. Rather the government recommends a more active advocacy of democratic values and more tolerance, debate and communication in the context of controversial judicial decisions on fundamental rights. Importantly, the government is of the opinion that religious garments should not be forbidden for public servants or teachers, as long as they do not hamper an effective functioning or endanger impartiality (e.g. in the case of judges) (*Kamerstukken II,* 2003-2004, 29614, No. 2).

Good practices

The Dutch Government should be commended for its initiative to present a memorandum on fundamental rights in a pluralistic society. Admittedly the memorandum has been criticised for avoiding certain sensitive issues – but at the same time the floor has been opened.

Article 23. Equality between man and women

Gender discrimination in work and employment

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

ILO Convention 103 on Maternity Protection – In June 2004 the International Labour Organization (ILO) stated that the Netherlands is negligent in implementing ILO Convention 103 on Maternity Protection. Ever since the Netherlands ratified this Convention in 1981 discussion has flared up now and then on the obligation to fully refund pregnancy-related costs to all female employees. In the Netherlands this is only done for some categories of women (e.g. not for civil servants or teachers). The tripartite Commission on the implementation of treaties and recommendations has now concluded that the Netherlands cannot autonomously interpret this treaty and is fully bound by it. It has asked the Government to consult with ILO before introducing new legislation on the issue (see www.fnv.nl, 11 June 2004).

Legislative initiatives, national case law and practices of national authorities

Coinciding holiday entitlements and pregnancy leave – The *Hoge Raad* [Supreme Court] decided on 23 April 2004 that no problem of discrimination arises where holiday entitlements coincide with pregnancy leave and/or maternity leave. The Supreme Court followed its own case-law in this respect (HR 9 August 2002, but failed to review the case from the perspective of EU law. Arguably the Supreme Court's decision is difficult to reconcile with the Luxembourg case-law (see ECJ 18 March 2004, case C-342/01 *(Merino Gsmez/Continental))*.

Part-time contracts and pensions – A civil servant who had worked on the basis of a *nuluren-contract* for a number of years (i.e. a contract whereby she did not work for a fixed number of hours per week, but whenever the employer called upon her) was excluded from the pension scheme. Basing itself on previous findings of the *Commissie gelijke behandeling* [Equal Treatment Commission], which had found that this practice affected more women than men, the *Rechtbank* [Regional Court] of The Hague decided on 19 August 2004 that the

practice amounted to indirect discrimination on the ground of sex. Citing the 'Barber directive' (Directive 96/97/EG of 20 December 1996, OJ L 46/20), the Court order the applicant's inclusion in the scheme. As result, large numbers of civil servants will be entitled to participation in the scheme (LJN AQ6543).

Women, soccer and truck-driving – A woman who, in 2002, applied for a job as truck-driver was not invited for an interview, because, as the employer said, the function had already been taken. However, when the woman asked her husband to apply, the employer said that the job was still on offer. Both the *Commissie gelijke behandeling* [Equal Treatment Commission] and, in criminal proceedings, the *kantonrechter* [District Court] found that this amounted to discrimination, and a fine of 500 euro was imposed on the basis of Article 429quater Criminal Code.

The woman then brought proceedings against before the *rechtbank* [Regional Court] of Assen, claiming the income that she would have earned had she been hired. Meanwhile, the employer was interviewed by a newspaper. Commenting on the matter, the employer said: *"Ik zeg niet dat dat vrouwtje niets kan. Maar voetbal is een mannensport en chauffeuren is ook een mannensport"* ["I don't want to say that this little woman is worth nothing. But soccer is a game for man and truck driving is a game for men too"]. In its judgment of 1 December 2004, the *Rechtbank* [Regional Court] of Assen found that both the criminal conviction and this statement provided sufficient proof of discriminated on the basis of sex. The employer argued that, even if the applicant had been invited for the interview, the job might still have gone to somebody else. The Court rejected that argument, considering that the mere fact that discrimination had taken place in itself injured the applicant. Referring to ECJ 22 April 1997, case C-190/95, the Court ruled that the lack of a causal connection was irrelevant and awarded 6,000 euro to the applicant (LJN AR 8103).

Positive actions seeking to promote the professional integration of women

Legislative initiatives, national case law and practices of national authorities

Implementation of CEDAW – In February 2003 an independent expert completed a government-commissioned report on the implementation of the Convention on the Elimination of Discrimination against Women. The report was submitted to Parliament only on December 2003, together with an official government reaction. Although the report is positive that emancipation policy is interwoven more and more with other policy areas, it is critical about a number of points: sexual intimidation is not combated actively enough nor is there enough protection for the victims (including in the private sector); the same goes for the equal representation of women in teaching and managerial positions in higher education; spending cuts in health care may have had unaccounted negative effects on women; and finally, slow implementation of the principle of equal pay for men and women.

In a reaction on both the report and the government's reaction, the NGO *Netwerk VN-Vrouwenverdrag* [Network UN Women Treaty] is critical about both. In deplores the fact that NGOs have not been consulted in the process and that the government does not take the legally binding nature of CEDAW seriously enough (*Commentaar van het Netwerk VN-Vrouwenverdrag,* www.vrouwenverdrag.nl, February 2004).

Subsidies for emancipation – The system of subsidies for emancipation has changed since 1 January 2004. Since then subsidies are mainly awarded to projects instead of institutions. The projects will have to concern women in a backward position in comparison with other women. These women themselves should be among the initiators of these projects and participate in them. Whereas in the previous years 80 percent of the budget was assigned to institutions, this will be only 45 percent from 2005 onwards. The total annual budget amounts 3.7 million euros (*Letter of the Minister of Social affairs to the Tweede Kamer [House of Representatives],* DCE-04/1858, 22 January 2004).

Review commission on emancipation – On 25 June 2004 the government appointed a *Visitatiecommissie Emancipatie* [special review commission on emancipation]. It was officially installed on 16 September. The commission will visit each ministry and assess the degree to which emancipation targets have been met. They will also gather good practices and communicate these to other ministries. All the ministers will send the review including their own reaction to it to the *Tweede Kamer* [House of Representatives] (*Staatscourant* No. 120, 28 June 2004).

Remedies available to the victim of gender discrimination (burden of the proof, level of penalties, standing of organisations to file suits)

Legislative initiatives, national case law and practices of national authorities

Legal framework in the Netherlands – People who consider themselves to be affected by gender discrimination in the field of work, goods and services and educational and professional advice can lodge a complaint to the *Commissie Gelijke Behandeling* [Equal Treatment Commission]. Organizations can also lodge complaints either when they are authorized to do so by the potential victim or when their members are discriminated against. Organizations can also submit internal regulations to the Commission to see whether they are in conformity with the law. The unequal treatment has to be proven by the applicant whereas – once this has been established – it falls upon the respondent party to justify this treatment.

The Commission does not impose penalties nor are its judgments legally binding. If a decision is not complied with by the respondent party, it is possible to start judicial proceedings. The judge will have to take the decision of the Commission into account. Regulations (public or internal) of which it has been established that they are in violation of the law on equal treatment of men and women are null and void.

In the period 1 January to 1 December 2004 54 out of 147 decisions concerned complaints on unequal treatment on the grounds of gender (www.cgb.nl). According to the *Network of legal experts on the application of Community law on equal treatment between men and women*, most applications are lodged to the Commission instead of to the courts. The effect is that expertise on the issues involved does not develop within the court system. The knowledge of gender discrimination issues is not always adequate. This frequently leads courts to decide differently on the same issue than the Commission (*Report on Gender Equality Bodies*, 15 October 2004, pp. 4 and 38).

Participation of women in political life

Legislative initiatives, national case law and practices of national authorities

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 NGOs, 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.

Participation of women in politics and public administration – In October 2004 the Ministry of Home Affairs published a survey on the participation of women in politics and public administration. The survey contains figures of the percentage of women active on the national, regional and local level, in political parties, the police and university boards. It shows to what extent the targets of the *Meerjarenplan Emancipatie* [Long-term Plan for Emancipation] of November 2000 have been met. These targets are 40% of women in the relevant functions in 2004 and 50% in 2010. The most recent figures, over 2003, show that the 2004 targets have only been met by the Government itself and by the *Tweede Kamer* [House of Representatives]. Furthermore the percentage of women decreases further down the scale from national to local.

The Government has started several initiatives to increase the participation of women. Two are notable. The first is the setting up of ambassador networks in public administration. These networks, each active in a specific field for one year, are formed by key actors who sustain the cause of increased participation by agenda-setting and raising awareness. Secondly, law-making that facilitates participation. The proposal on pregnancy leave for members of parliament that has been submitted to the *Eerste Kamer* [Senate] is a point in case (*Vrouwen in politiek en openbaar bestuur. Voortgangsrapportage 2003*, October 2004).

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Emancipation of women from ethnic minority groups – On 27 September 2004 the Minister of Social Affairs issued a regulation that aims at stimulating emancipation of women from ethnic minority groups. The regulation is meant for women in an isolated position that have been living lawfully in the Netherlands for more than two years. The 1.5 million euros budget is meant to subsidize local initiatives (*Staatscourant* No. 189, 1 October 2004: *Tijdelijke stimuleringsregeling emancipatie vrouwen uit etnische minderheidsgroepen*, No. DCE/04/66772).

Article 24. The rights of the child

Possibility for the child to be heard, to act and to be represented in judicial proceedings

Legislative initiatives, national case law and practices of national authorities

Participation of minors in civil proceedings – In a letter to the *Tweede Kamer* [House of Representatives] the Minister of Justice concluded that it was unnecessary to amend the Civil Code in order to enable minors to participate formally in judicial proceedings in all civil cases. The current system provides for direct participation only in certain specified instances; in all other situations the child should participate indirectly, through the parents or, if these are unable or unwilling to do so or if their views differ from those of the child, through a custodian appointed by the authorities. The custodian only acts in close deliberation with the child. According to the minister recent research has not shown that this system is insufficient (*Kamerstukken II,* 2003-2004, 29200 VI, No. 116).

Alternatives to the removal from the family

Legislative initiatives, national case law and practices of national authorities

Placement of juveniles with behavioural problems – On the Ombudsman's report of 30 November 2004, concerning the practice to place children with behavioural problems together

with juveniles who have been convicted for criminal offences, see Article 4 *supra*. As was noted there, a working group of juvenile judges many of the children with behavioural problems are mentally somewhat retarded of come from a deprived family background. The best solution would often be to provide intensive help programme to these children in their own environment, but in practice this does not happen. Instead, the children are 'locked away' with juveniles who are criminally convicted.

Introduction of the 'family coach' – 2004 showed increasing interest for and elaboration of the concept of a *gezinscoach* [family coach], an idea which originally started in 1998. The idea came from the Salvation Army that is now experimenting with it in several parts of the country. A family coach can be appointed when a family copes with several grave problems simultaneously, one of which is often the impending risk of removal of children from the family. The coach helps the family in all issues including the education of the children, is the contact person with relevant organisations and in principle is connected to a family on the long-term (if need be until the children reach the age of 18). Since the coach replaces a host of aid institutions, he can provide more stability, continuity and coherence in aid to families in trouble. Currently there are 40 coaches working in six different cities. The new *Wet op de jeugdzorg* [Youth Care Act], which entered into force on 1 January 2005, will enable the use *gezinscoaches* in all cases where the need arises (*Staatsblad* 2004, 306; *Handelingen* 2004-2005, No. 15, pp. 977-897). The pilot projects have not been evaluated yet. The Government awaits these evaluations before considering further steps to be taken (*Kamerstukken II* 2004-2005, 28741, No. 11).

Juvenile offenders

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Committee for the Rights of the Child – The UN Committee for the Rights of the Child has expressed its concern about the fact that children between the ages of 16 and 18 that have come in conflict with the law may be sentenced as adults (*Concluding observations*, 26 February 2004, CRC/C/165/Add.227, para. 58).

Legislative initiatives, national case law and practices of national authorities

"Reasonable time" for minors and adults – The *Hoge Raad* (Supreme Court), in a case where the defence complained about undue delays, rejected the proposition that Article 40 para. 2, (b) (iii) of the Convention on the Rights of the Child imposes stricter requirements than Article 6 ECHR and Article 14 ICCPR. The Supreme Court observed that the notion of a trial "within a reasonable time" already requires the courts to take into account all circumstances of the case, including the age of the applicant concerned. At an earlier stage of the proceedings the Court of Appeal had stated that Article 40 CRC does not require the prosecution to be declared inadmissible if undue delays have occurred in proceedings concerning juveniles; a mitigation of the sentence may suffice in this respect. In its judgment of on 16 December 2003, the Supreme Court agreed (LJN AL9062).

Murat D.: adolescent tried in accordance with adult criminal procedure – On 29 April 2004 the *Rechtbank* [Regional Court] of the Hague delivered a judgment in the case of a 17 year old student, Murat D., who shot the deputy dean of his school in the head and killed him. The case drew enormous media and public attention. Given the gravity of the offence the suspect was tried in accordance with adult criminal procedure, in spite of contrary advice of all the consulted experts. In its reasoning the Court explicitly let the safety of others prevail over the interests of the suspect. In applying this sentencing system the age of the offender, his personality and his state of diminished responsibility served as mitigating circumstances. The

suspect was sentenced to 5 years of imprisonment and a 'TBS order' (confinement in a custodial clinic) was imposed (LJN AO8610).

Positive aspects

Life sentence for 16 and 17 year olds – The Government is considering to amend the Penal Law Code in order to abandon life sentences for 16 and 17 year olds, even when they are tried under the adult sentencing system (*Nationaal Actieplan Kinderen [National Plan of Action for Children], Kamerstukken* II 2003-2004, 29284, No. 3 Add., p. 31).

Reasons for concern

Crime rates among minors – Recent figures show that crime rates among minors are on the rise in the last few years. In the period 1997-2001 47.000 minors on average were heard by the police. This figure increased to 55.000 in 2002. A shift towards more violent forms of crime has been detected, occurring at an ever younger age. Among the offenders the numbers of girls and persons belonging to ethnic minorities is also increasing (*Operatie Jong: Sterk en resultaatgericht voor de jeugd, June 2004*)

Placement of civil and criminal cases in the same detention facility – see Article 6 *supra*, under the heading "Deprivation of liberty of juvenile offenders".

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Committee for the Rights of the Child – The UN Committee on the Rights of the Child presented its concluding observations on the second periodic report of the Netherlands on 26 February 2004. The Committee noted a number of positive developments, the most important being an enhanced youth policy co-ordination through the appointment of a Youth Commissioner (see also: practices of national authorities, below) and efforts to improve youth participation in policy-making. It also expressed its concern on a number of points: important recommendations from the last reporting round have not been implemented, notably the establishment of an ombudsman for children. No comprehensive action plan of action for children in the state party exists (but see under: practices of national authorities, below). The budget for education, protection of children, legal assistance to children and the work of youth organizations has been significantly reduced, endangering continuity. There is no legal prohibition on corporal punishment in the family. The Aliens Act 2001 and its application are not in full conformity with the Convention on the Rights of the Child. The Committee specifically points to the 48-hour accelerated procedure for asylum applications and the treatment of unaccompanied minors seeking asylum, an issue to which our previous report already paid attention (CRC, *Concluding observations on the second periodic report of the Kingdom of the Netherlands,* 26 February 2004, CRC/C/165/Add.227).

Legislative initiatives, national case law and practices of national authorities

Minimum wage for youngsters – See Article 32 *infra.*

Four major initiatives concerning child and youth policy – The authorities have started four major initiatives concerning child and youth policy in 2004. The first is the *Nationaal Actieplan Kinderen* [National Action Plan on Children, *Kamerstukken II,* 2003-2004, 29284, No. 3 Add.] which was presented to the *Tweede Kamer* [House of Representatives] on 5 August 2004. The plan was set up after consultation of children and of children and youth organizations and provides a comprehensive account of all the policies concerning children.

Secondly, the Government has initiated the *Operatie JONG* [Operation Young] on 19 April 2004. The operation has the aim of countering current problems in youth care: families are confronted with a range of institutions which do not always co-operate, and there is a lack of coherence in youth policies and of cooperation between national, regional and local authorities. Furthermore the Operation aims at countering the phenomenon of school drop-outs and of youth crime. A special project bureau has been set up for a period of four years and a special commissioner for youth and youth policy has been appointed. It is his task to co-ordinate the efforts of the different ministries and other institutions involved in the Operation (*Regeling van de Staatssecretaris van Volksgezondheid, Welzijn en Sport*, 19 April 2004, No. DBO-8464687 [Regulation of the Secretary of Health on the institution of Operation Young]).

The third initiative complements this: the government has set up a *Jeugdzorgbrigade* [Youth Care Brigade] that started working on 1 September 2004. The aim of this temporary brigade of three experts is to repeal unnecessary bureaucracy and to initiate and stimulate improvements in the implementation of the new youth care law (see following paragraph).

Finally, a new law on youth care [*Wet op de jeugdzorg, Staatsblad* 2004, 306] will enter into force on 1 January 2005. It aims to provide greater unity in the field of youth and child care, pre-eminently by using the one-stop-shop principle: families with problems will be able to turn to *one* first instance institution, a *Bureau Jeugdzorg* [Youth Care Bureau].

On a somewhat different note, the Minister of Justice has announced legislation to approve the Hague Convention on Child Protection (1996) and to implement EC Regulation 2201/2003 of 27 November 2003. The envisaged act should enter into force in 2005.

Reasons for concern

Child trafficking – As was also noted under Article 5 *supra*, child trafficking does occur in the Netherlands, argued a joint report by UNICEF and Defence for Children International presented in August 2004. Although precise figures are lacking, it is clear that groups of children end up in prostitution, the catering industry, sweatshops, domestic aid or even soccer clubs. The report concludes that the implementation of migration policy often seems to prevail over other policy areas, rendering the interests of the child subservient. The sending back of children to their home countries without thoroughly researching whether they are victims of trafficking is a point in case. In the same vein the prosecution of human traffickers seems to get more emphasis than the protection of the victims. The organisations urge for more flexible implementation of existing rules into policy with a focus on the best interests of the child (UNICEF Netherlands & ECPAT Netherlands/Defence for Children International Netherlands*, 'Ongezien en ongehoord. Kinderhandel in Nederland. Een eerste inventarisatie'* [Unseen and unheard. Child trafficking in the Netherlands – taking stock], August 2004)

Article 25. The rights of the elderly

Participation of the elderly to the public, social and cultural life

Legislative initiatives, national case law and practices of national authorities

Prohibition of age discrimination – As was noted above (see Article 21 *supra)*, the *Wet gelijke behandeling op grond van leeftijd bij arbeid* [Equal Treatment at Work (Age) Act] entered into force on 1 April 2004. The law prohibits age discrimination in the workplace and in professional education when no objective justification exists. 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 Equal Treatment Commission has been given additional resources to cope with possible complaints about age discrimination following the introduction of the law.

Case-law on age discrimination – On 24 July 2004 the *Kantonrechter* [Distict Court] of Amsterdam refused an application to terminate the contract of 67 year old employee who had

worked with the company for 10 years. The Court observed that the parties had not agreed in advance that the contract would be terminated at the age of 65. Since the employer had not advanced any other reasons to justify the dismissal, to terminate the contract would amount to age discrimination (*JAR* 2004, 262).

The possibility for the elderly to stay in their usual life environment

Legislative initiatives, national case law and practices of national authorities

Suitable houses for the elderly – In December 2003, the Ministries of Housing and Welfare awarded 14 million euros to projects which enhance the possibilities for the elderly to stay longer in their usual life environment. In total 89 projects have been given subsidies. Most of these are aimed at making existent housing more suitable for the elderly; the rest is put into the collection and dissemination of information on innovative projects in this field (www.vrom.nl, 2 December 2003).

In a letter to the *Tweede Kamer* [House of Representatives] of 5 July 2004, the Government has unfolded its *Actieplan investeren in de toekomst* [Plan of action: to invest in the future]. The Government plans to cater for the growing needs of the elderly to stay and live in their usual environment. The government aims to do so by a combination of adjusting existing housing, building programmes and transformation of homes for the elderly into more autonomous living units. By 2015 some 395,000 extra houses that are fully accessible must be available. Most of these plans will be elaborated at the local level (*Kamerstukken II 2003-2004*, 28951, No. 99).

The urgency of the problem was underlined by a subsequent report by the Ministry of Housing. The estimated shortage of housing suited for the elderly is around 41,000 units. The most common reasons for moving to housing with more health care facilities or giving up one's own house are health, unsuitable current housing and the neighbourhood. It is to be noted that around 85% of people above the age of 55 will to move out of their current housing. Of the group of people that wants to move, it is impossible for around 12% of them to do since no alternative housing can be found (Report *'Met Zorg Gekozen'* [Chosen with Care], September 2004, www.vrom.nl).

Specific measures of protection for the elderly (ill-treatment and isolation)

Reasons for concern

Ill-treatment of the elderly – Ill-treatment of the elderly seems to be on the rise, concludes a report commissioned by the Ministry of Justice. Although the last quantitative national figures date from 1996 (5.5% of people over the age of 65 are victims), a range of experts have indicated that the problem is structural and possibly increasing. The authors urgently plead for new quantitative research (*Eindrapport 'Een verkennend onderzoek naar ouderen-mishandeling'* [Preliminary research on ill-treatment of the elderly], May 2004, at www.ministerievanjustitie.nl).

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Special emergency aid for people over 65 – In its judgment of 20 July 2004, the *Centrale Raad van Beroep* [Central Appeals Tribunal] concluded that the policy of a municipality to restrict special emergency aid to people over 65 could violate the prohibition of discrimination on the ground of age. The municipality concerned had failed to motivate this restriction sufficiently and had not shown that people under 65 would never have to cope with comparable situations (LJN AQ8881).

Article 26. Integration of persons with disabilities

Protection against discrimination on the grounds of health or disability

Legislative initiatives, national case law and practices of national authorities

Article II-26 EU Constitution: no right but principle – In a somewhat confusing letter to Parliament, the Minister of Foreign Affairs sought to interpret various provisions of the EU Charter of Fundamental Rights, to be incorporated in part II of the EU Constitution. The Minister stated that he had advocated in the IGC to give as much legal significance to the 'explanations' to the Charter as possible, in order to achieve a clear and unambiguous interpretation. To his mind, he had succeeded in this respect. The Minister then emphasised the difference between 'rights' and 'principles', and indicated that in order to determine whether a specific provision embodies a right or a principle one should look at its aim, text and context. He then continued to assert that Article II-26, although its text refers expressly to a 'right', is in actual fact a 'principle' (*Kamerstukken II* 2003-2004, 29213, No. 16)..

No need to expand Article 1 of the Constitution – As was already noted under Article 20 *supra,* the government has declined requests from members of Parliament and from the *Commissie Gelijke Behandeling* [Equal Treatment Commission] to amend Article 1 of the Constitution (prohibition on discrimination) by adding a prohibition on discrimination on grounds of health or handicap. The current provision states that discrimination on the grounds of religion, belief, political opinion, race or sex or on other grounds whatsoever shall not be permitted. The government, in a letter to the *Tweede Kamer* [House of Representatives] states that there is no decisive legal or societal need for change (*Nota mogelijke uitbreiding artikel 1 Grondwet* [Memorandum on the possible amendment of article 1 of the Constitution], (*Kamerstukken II* 2003/04, 29 355, No. 7).

Earlier, the Equal Treatment Commission had argued in favour of such a change on two grounds: legal consistency and practice. The first reason is supported by the fact that the *Algemene wet gelijke behandeling* [Equal Treatment Act] *does* contain handicap as a prohibited reason for unequal treatment; the second by the fact that in practice more protection tends to be given to grounds laid down in the Constitution than to those that are not (*Advies van de Commissie Gelijke Behandeling over artikel 1 Grondwet* [Advise on the possible amendment of article 1 of the Constitution], 26 February 2004, CGB-Advies/2004/03).

Burden of proof – On 5 July 2004 the *Commissie Gelijke Behandeling* [Equal Treatment Commission] issued a decision in the case of a woman who applied for a full-time job in a private company. During the application interviews the woman indicated that she only wanted to work part-time, that she was pregnant and had a past of occupational disability. One day after the final interview she was told that the company had decided not to hire her, since she was not available full-time. The applicant contended that the real reason for the rejection was her past. The Commission concluded that in this case the burden of proof was on the defendant company to prove that this past had *not* played a role in the rejection (CGB, *oordeel* 2004-83).

Good practices

Taskforce Handicap and Society – On 2 April 2004 the Secretary of Health, Welfare and Sports installed the Taskforce *Handicap en Samenleving* [Handicap and Society]. This high-level Taskforce, headed by a member of the Senate, will actively promote equal treatment in practice. It will do so by three means: helping people with a handicap strengthen their own position in society; changing the mentality of society on this topic by publicizing good and bad practices and organizing public debate; and finally, engendering a feeling of

responsibility on the topic through dialogue with individuals and relevant organizations (*www.tfhs.nl*).

Professional integration of persons with disabilities: positive actions and employment quotas

Legislative initiatives, national case law and practices of national authorities

Integrating persons with disabilities – On 8 March 2004 the Minister of Social Affairs sent a letter to the *Tweede Kamer* [House of Representatives] on the reintegration of workers with disabilities. The Minister notes that the percentage of disabled people with a job has decreased from 52 to 49 percent in the period 2000-2002. The absolute numbers have increased from 759,000 to 778,000. Since 2002 there are more women than men among disabled people that want to work. The group concerned relatively often works in health care and in the industrial sector and relatively rarely in services, trade and the public sector. The numbers mentioned reflect the results of the *Monitor Arbeidsgehandicapten 2002* [Monitor on working people with disabilities 2002] which only now has been sent to parliament (*Kamerstukken II 2003-2004*, 29461, No. 1).

Reasons for concern

Ignorance and prejudice – People with disabilities have much smaller chances of being hired than others, according to the report *Onbekend maakt onbemind* [Unknown makes unloved] published by the *Commissie het Werkend Perspectief* [CWP; Commission 'the Working Perspective']. One out of three non-disabled workers indicate that they prefer to work with 'healthy people'. One out of four executives think that it is impossible to co-operate with disabled people in their department. The report argues that the main causes for this are ignorance among future colleagues about the relevant rules and prejudice on the capabilities of the disabled (*Staatscourant* 12 January 2004).

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Committee on the Rights of the Child – The UN Committee on the Rights of the Child in its consideration of the periodic report on the Netherlands welcomed the Dutch efforts to integrate disabled children into mainstream education. It expressed its concern of the fact that children with disabilities in the Netherlands spend a significant amount of time waiting to access services and programmes. It recommended to undertake awareness-raising campaigns to address prejudicial attitudes to the children concerned and promote their full integration (CRC, *Concluding observations on the second periodic report of the Kingdom of the Netherlands*, 26 February 2004, UN Doc. CRC/C/165/Add.227, paras. 46-47).

Positive aspects

Deregulation and vulnerable groups **–** On 28 May 2004 the government announced that in its proposals to lighten the administrative burden of citizens (asking for permits, filling out forms etc.) it will pay special attention to the needs of the elderly, the chronically ill and the disabled. Both because these groups are often facing an especially high burden of this kind and because the risk exists that the authorities do not take these specific interests into account, since relatively small groups are involved (*Staatscourant* 1 June 2004).

CHAPTER IV : SOLIDARITY

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

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Committee on Social Rights – In its Conclusions XVII-1 concerning the Netherlands, the European Committee on Social Rights recalled that the Dutch report had stated that the rules governing the consultative body that must be set up at the request of the majority of the employees by any enterprise with between ten and fifty employees have not been changed, despite the demands of the Netherlands' Trade Union Confederation (FNV). The Committee considered that this is not decisive for the assessment of the conformity of the situation with Article 6§1. It concluded that the situation in the Netherlands is in conformity with Article 6§1 of the Charter.

Article 28. Right of collective bargaining and action

Social dialogue

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Committee of Social Rights – As was noted in our previous report, the European Committee of Social Rights published in 2003 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.

The Dutch Government was of the view that this conclusion was probably based an a misunderstanding. In the Governmental Committee of the European Social Charter, the Dutch delegate explained that the term "flexibility regulations" used in ECSR's conclusion was misleading. In reality the legal framework for working time provided for two different norms: a standard norm and a consultation norm. Although the latter norm allowed for slightly longer, the limits were still strict both as regards ordinary working time and overtime. Application of the limits laid down in the consultation norm is allowed only with the consent of workers representatives on the sectoral (collective agreement) or enterprise level. The ETUC representative did not consider that the situation raised a problem and appealed to the Government to explain the situation more clearly in the next report. The Committee asked the Government to include all the necessary information in the next report. (Governmental Committee of the European Social Charter, 16th Report (II) (*full report*), Strasbourg, 23 January 2004, T-SG (2003) 27, p. 11).

Intervention of the judiciary into collective actions

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Committee of Social Rights – In 2004 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 6 ESC in respect of the Netherlands (Conclusions XVII-1). The Committee concluded that the situation in the Netherlands is not

in conformity with Article 6 § 4 of the Charter, since the Dutch courts may determine whether recourse to a strike is premature. This leads to an impingement on the very substance of the right to strike, the Committee observed, as this allows the judge to exercise one of the trade unions' key prerogatives, that of deciding whether and when a strike is necessary.

Legislative initiatives, national case law and practices of national authorities

Voluntary extension of working hours **–** An employer asked its employees if they were prepared to accept to work forty hours per week instead of thirty-six, in order to improve the company results and its competitiveness. A majority of the employees agreed. However, the trade unions *CNV* and *FNV* filled summary injunction proceedings in order to challenge the agreement. They argued that the employer acted contrary to a *collectieve arbeidsovereenkomst* [collective bargaining agreement] that applied to the sector in which the company operated.

On 6 August 2004, the *Kantonrechter* [District Court] of Groningen found in favour of CNV and FNV and declared the agreement void in order to protect workers' interests. The Court disregarded the fact that all workers (except for one) had voluntarily agreed to work more: every deviation from a collective bargaining agreement that entails a deterioration of working conditions is impermissible, the Court held. Interestingly the Court found that the collective bargaining agreement applied, despite the fact that the company had withdrawn from it in 2002 (case 73636 KG ZA 04-254).

The right of collective action (right to strike) and the freedom of enterprise or the right to property

Legislative initiatives, national case law and practices of national authorities

Strike legitimate despite damage employer **–** The *Rechtbank* [Regional Court] rejected a claim by the Sphinx company that a strike had been illegitimate on various grounds. The fact that the strike had caused Sphinx injury was inherent in the use of the instrument, and as such was insufficient to find that the strike was illegitimate. Sphinx had not substantiated it further claim that the injury was disproportionate. Sphinx finally argued that it had almost reached an agreement with the trade unions and that the difference between the parties was so small that it was disproportionate to call a strike in order to reach a result that was only marginally better. This argument was rejected as well: the Court observed that, if this were the case, it could not be seen why Sphinx had not agreed in order to prevent the strike (LJN AR3166).

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Committee of Social Rights – In 2004 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 5 ESC in respect of the Netherlands (Conclusions XVII-1). The Committee noted that the closed-shop clause in the print workers collective agreement was abolished following the collective bargaining negotiations that began in January 2003. The violation of Article 5 of the Charter that was previously found (see Conclusions XVI-1, p. 441-442) was therefore rectified. As regards the other aspects taken into consideration in order to assess the conformity with Article 5, the report does not mention any development of the situation which the Committee has previously considered to be in conformity with the Charter.

Article 29. Right of access to placement services

Access to placement services

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Committee of Social Rights – In 2004 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 1 para. 3 ESC in respect of the Netherlands (Conclusions XVII-1). The Committee noted that employment services underwent substantial changes in 2001. The Work and Income Act created 130 Centres for Work and Income (CWI's), which register and classify job-seekers using a newly developed tool called "Jobseeker Classification Instrument". The idea of the system is to classify job-seekers into four different groups, depending on their prospects of finding employment. The first group includes people classified as "immediately employable". Those who require a short vocational training (of up to 12 months) are registered within the second group and those who require longer training (between 12 and 24 months) are classified as group three. Finally, people with very poor perspectives of finding a job, those who require "social activation", constitute the fourth group. The responsibility of finding work for job-seekers classified in the first group lies within CWI's. Local authorities and Employee Insurance Schemes (UWV - the successor to the social security benefit agencies) are in charge of placement and reintegration of the rest of job-seekers.

It is the UWV and local authorities that are responsible for co-ordination of public and private free employment services. Public authorities are to apply transparent tendering procedure before concluding a contract with an agency. The agencies themselves must meet certain minimum requirements; they must for example, have complaints procedures and regulations protecting clients' privacy. There is no requirement of certification.

Pending further information, the Committee concluded that the situation in the Netherlands is in conformity with Article 1 § 3 of the Charter.

Article 30. Protection in the event of unjustified dismissal

No significant developments to be reported.

Article 31. Fair and just working conditions

Health and safety at work

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Committee of Social Rights – As was noted in our 2003 report, the European Committee of Social Rights published in 2003 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.

The Dutch Government is of the view that Article 2 § 4 is out-dated: to prevent risks is preferable to compensating risks by way of reduced working hours or additional paid holidays. Against that background, the Government argues, a different wording has been chosen for the corresponding provision in the Revised ESC. In this respect the 'Explanatory Report' to the Revised ESC states in connection to Article 2 (4)*:* "This provision, which in the Charter provides for additional paid holidays or reduced working hours for workers engaged in dangerous or unhealthy occupations, has been amended so as to reflect present-day policies

which aim to eliminate the risks to which workers are exposed. The idea is that additional paid holidays or reduced working hours should only be provided where it has not been possible to eliminate or reduce sufficiently the risks inherent in dangerous or unhealthy occupations. This provision should be seen as a complement to the revised Article 3, which emphasises the prevention of occupational accidents".

It should be added that the Netherlands so far has not ratified the Revised ESC, but apparently there are now plans to do so.

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

Protection of minors at work

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Committee of Social Rights – As was noted in our 2003 Report, the European Committee of Social Rights published in 2003 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.

The Dutch Government replied to this criticism in its 17th report of 2004 that "15-year-olds are still subject to compulsory education full-time, and 16 and 17-year-olds part-time. In 2002, 98.8% of 16-year-olds attended school, and 85.4% of 17-year-olds. Since 15-year-olds are subject to compulsory education, it is not meaningful to talk in terms of a fair wage. In the case of 16 and 17-year-olds, the level of the minimum wage is justified in the light of labour market policies for young people (the prevention of youth unemployment) and efforts to reduce early school leaving. The Netherlands has a good reputation – particularly internationally – in the area of prevention of youth unemployment. In 2000 the percentage of youth unemployment (15 to 24-year olds) was 6.8%, compared with 3.7% for the total working population. By 2002 these figures had risen to 8.5% and 4.1% respectively because of the deterioration in the state of the economy. This shows that the labour market position of young people is particularly vulnerable when there is a cyclical downturn. The most important thing is to prevent young people dropping out of school, since workers without basic qualifications are the unemployed of tomorrow. One crucial way of preventing early school leaving is to ensure a sensible development of youth minimum wages, taking into account the fact that young workers are less productive. High wages would have an adverse effect on the demand for young people in the labour market".

The Dutch Government added that a comparison between the fairness of the minimum wage of 15 to 17-year-olds and that of 18 to 22-year-olds does not take into account the fact that the wage for the first age group is not intended to be a subsistence wage. It should be regarded as 'extra earnings' and not as family income. (www.coe.int/T/E/Human_Rights/Esc/).

Legislative initiatives, national case law and practices of national authorities

Minimum wage rules for youngsters – As was already noted in our 2003 Report, the *Rechtbank* [Regional Court] of The Hague delivered a judgment on 13 December 2003 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 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. It 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 Regional 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. In the meantime the State has appealed against this judgment. A ruling of the Court of Appeal is expected in January 2005.

Article 33. Family and professional life

Parental leaves

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Committee of Social Rights – In 2004 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 16 ESC in respect of the Netherlands (Conclusions XVII-1). The Committee took note of the legislative developments initiated by the Working Hours (Adjustment) Act and by the Work and Care Act aiming at the assistance of parents in combining their family and work responsibility. It also noted that the system for day-care of children aged 0-5 years is growing at a fast pace in the Netherlands. In reply to the Committee, the report indicated that, at the end of 2002, there were 171 000 places, that is more than planned. The employer's childcare schemes still remained relevant, covering more than 60 % of the employees. In addition, 58 %-71 % of the children aged 2 to 3 (225 000-275 000 children) attended 4 255 pre-school playgroups in 2000. Pending receipt of additional information, the Committee concluded that the situation in the Netherlands is in conformity with Article 16 of the Charter.

Article 34. Social security and social assistance

Social assistance and fight against social exclusion (in general)

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Committee of Social Rights – In 2004 the European Committee of Social Rights published its conclusions concerning, *inter alia*, Article 12 ESC in respect of the Netherlands (Conclusions XVII-1). The Committee considered that making the public sickness insurance scheme subsidiary for the majority of workers called into question the foundation and spirit of social security. The principle of collective funding is a fundamental feature of a social security system as foreseen by Article 12 of the Charter as it ensures that the burden of risks are spread among the members of the community, including employers, in an equitable and economically appropriate manner and contributes to avoiding discrimination of vulnerable categories of workers (the above-mentioned Committee of Ministers resolution refers to negative effects regarding selection for recruitment of workers with a history of medical problems). Nevertheless, before reaching a conclusion as to conformity with Article 12§1, the Committee wished to have a more complete picture of the workings of the new funding system and notably of the safeguards that have been implemented or are under consideration with a view to mitigating any negative effects of the privatized funding system. To this end, it asks that the next report contain information on any problems of implementation encountered, on the role of workers' representatives in the management of the system, especially vis-à-vis benefit providers, on safeguards and data protection in relation to the medical history of workers, on the functioning of the occupational health and safety services (*Arbodienst*) in

relation to the new system and plans for improved sick leave supervision. The report should also include statistical information on the extent to which enterprises take out collective insurance with private insurance companies.

Where the invalidity branch is concerned, the Committee has previously acknowledged that the objectives of the financing reform (the *PEMBA* Act) of making employers more responsible for safe and healthy working conditions and for (re)integrating disabled persons in the company are in keeping with Article 12. It notes in particular that employers have to establish a plan for the reintegration of employees who have been absent for longer than thirteen weeks and that reduction of contribution levels are envisaged in the event of the recruitment of a disabled person.

The Committee also notes FNV's comments concerning the Self-Employed Persons Disablement Act (WAZ) pursuant to which insured workers combining self-employment and an employment relationship are entitled to the WAZ maternity benefit in so far as it exceeds the amount of maternity benefit paid under the Sickness Benefit Act. However, there is no entitlement to a combined benefit based on total income from both sources of employment. The Committee asks the Government to explain in detail the rationale behind the WAZ scheme and it also asks whether the Government has any plans to introduce a combined benefit taking into account income from both sources.

Legislative initiatives, national case law and practices of national authorities

Integrating benefit recipients into the labour market – The *Wet werk en bijstand* [Reformed Social Assistance Act] was introduced in 2004 (*Kamerstukken* 29420; *Staatsblad* 2003, 376; see also *Staatsblad* 2004, 362), The Act puts greater emphasis on so-called 'activation', which aims at supporting and if necessary stimulating benefit recipients to actively participate in society, preferably by means of employment. Also, local authorities have been given more freedom and responsibility in the administration of social assistance. They now have a greater role in effectively integrating benefit recipients into the labour market and are responsible for the local social assistance budget.

Benefits are paid to all eligible persons above the age of 18 who legally reside in the Netherlands. In order to receive benefits people are required to actively look for work and accept any reasonable job offer. If all attempts fail, social services will assist in finding work or providing training facilities. If the recipient refuses to co-operate, social services may impose sanctions.

Social assistance for undocumented foreigners and asylum seekers

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Committee of Social Rights – In 2004 the European Committee of Social Rights published its conclusions concerning, inter alia, Article 1*3* ESC in respect of the Netherlands (Conclusions XVII-1). The Committee noted from the Dutch report that there have been no changes to the situation in which emergency social assistance is not available to all nationals of the Contracting Parties to the Charter and Parties to the Revised Charter other than European Union members and parties to the Agreement on the European Economic Area who are lawfully present but not resident in the Netherlands.

As far as tourists are concerned the report points out that a tourist in trouble can turn to the police. Some police departments have even set up special sub-division for assisting tourists. Moreover, there are several private organisations that offer help to tourists in an emergency, e.g. the Amsterdam Tourist Organisation and during the summer months the *Toeristenhulp* (Tourist Assistance) in Zeeland. These organisations offer support, provide information and help to organise board and lodging as well as help in transferring cash from abroad and maintain contact with consulates. Finally, there are various private charities that offer clothes, board and lodging to people in need.

The Committee concluded that the situation in the Netherlands is not in conformity with Article 13 § 4 on the grounds that emergency assistance is not guaranteed for all nationals of other Contracting Parties and Parties to the Revised Charter who are lawfully present but not resident in the Netherlands.

Article 35. Health care

No significant developments to be reported.

Article 36. Access to services of general economic interest

No significant developments to be reported.

Article 37. Environmental protection

Right to a healthy environment

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Netherlands and EC environmental law – On a number of occasions did the ECJ find in 2004 that the Netherlands had violated EC environmental law – which is of course not to say that the Netherlands necessarily breached the standards of Article 37.

Two of the three cases were infringement procedures. In Case C-113/02 (judgment of 14 October 2004) the ECJ found that the Netherlands had failed to fulfil its obligations under Article 7(4) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community and under Article 1(e) and (f) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991 and Commission Decision 96/350/EC of 24 May 1996. The second case (C-422/03, judgment of 18 November 2004), related to the failure to implement Directive 2001/18. The Government gives a periodic account of the infringement proceedings against the Netherlands that are pending; see *Kamerstukken II* 21 109.

The third case (case C-127/02, judgment of 7 September 2004) emanated from preliminary questions from the *Afdeling Bestuursrechtspraak van de Raad van State* [Administrative Litigation Division of the Council of State]. The reference was made in proceedings between the *Landelijke Vereniging tot Behoud van de Waddenzee* (National association for conservation of the Waddenzee) and the *Nederlandse Vereniging tot Bescherming van Vogels* (Netherlands association for the protection of birds) on the one hand, and the Secretary of State for agriculture, nature conservation and fisheries on the other. The applicants challenged the licences which the latter issued to the Cooperative producers' association of Netherlands cockle fisheries) for the mechanical fishing of cockles in the special protection area (SPA) of the Waddenzee. The Waddenzee is classified within the meaning of Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) ('the Birds Directive'). The ECJ ruled *inter alia* that under Article 6(3) of Directive 92/43, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it

will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

Article 38. Consumer protection

Protection of the consumer in contract law

Legislative initiatives, national case law and practices of national authorities

Strategic action program – On 21 June 2004 the Government announced an action program for consumer policy (*Kamerstukken II*, 2003-2004 27879 nr. 9).

CHAPTER V : CITIZEN'S RIGHTS

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

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

Legislative initiatives, national case law and practices of national authorities

Legal framework in The Netherlands – According to Article 12 of Directive 93/109/EC of 6 December 1993 (laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals) the authorities should inform EU citizens in an appropriate and timely fashion of the conditions and detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament. Following a recommendation to the Member States of the Commission (2000), the electoral law was amended. Article Y32 lid 5 of the *Kieswet* now obliges the municipal authorities to send a registration form to every non-Dutch EU citizen. The forms are available in all EU languages, including those of the 10 new Member States.

Right to vote for residents of Netherlands Antilles and Aruba – An interesting case is pending before the *Afdeling bestuursrechtspraak van de Raad van State* [Administrative Litigation Division of the Council of State]. A number of residents of Aruba and the Netherlands Antilles, of Dutch nationality, wanted to vote in the 2004 elections for European Parliament. They were not registered as voters, however, since they did not meet the requirement of having lived in the Netherlands (that is, the Kingdom in Europe) for at least ten years. This requirement initially applied to national elections, but it was later extended to elections for European Parliament. The individuals concerned challenged their rejection as voters, arguing that the regulation is arbitrary and discriminatory, in breach of their rights as EU citizens, and in violation of Article 3 of Protocol No. 1 to the ECHR (right to vote).

On 13 July 2004 – as a matter of fact a month *after* the elections for European Parliament had taken place – the Administrative Litigation Division decided to refer the matter for a preliminary ruling to the ECJ (LJN AQ 3775). The preliminary questions relate to the applicability of Title II of the EC Treaty to Aruba and the Netherlands Antilles as well the meaning of Articles 17 and 19 EC Treaty in conjunction with the right to vote as protected by Article 3 of Protocol No. 1 to the ECHR. On 23 August 2004 the President of the ECJ rejected a request of the Administrative Litigation Division to deal with the case by way of an accelerate procedure (case C-300/04, *Eman & Sevinger).*

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

Participation of foreigners in public life at local level

Legislative initiatives, national case law and practices of national authorities

Implementation of Convention on Participation of Foreigners in Public Life at Local Level – It may be noted that the Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144) of 1992 was signed by The Netherlands in 1994 and ratified in 1997. It entered into force on 1 May 1997. Council Directive 94/80/EC of 19 December 1994 was implemented in Article B3 of the *Kieswet* [Election Law] in 1996.

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 report submitted to CERD in 2003, 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 analysed 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 analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 43. Ombudsman

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

Article 45. Freedom of movement and of residence

No significant developments to be reported

Article 46. Diplomatic and consular protection

Protection of EU citizens by diplomatic and consular representations abroad

Legislative initiatives, national case law and practices of national authorities

Ransom for kidnappers – The remarkable case of Arjan ERKEL raises a number of principal questions. Mr ERKEL, working in Dagestan for *Artsen zonder Grenzen / Médecins sans frontières,* was kidnapped on 12 August 2002. He was released on 11 April 2004, apparently after an amount of 750,000 euro had been paid to the kidnappers. Subsequently a dispute arose between the Ministry of Foreign Affairs and MSF concerning the money. The Ministry claimed the amount from MSF, arguing that it had paid the amount on behalf of the NGO. MSF said it had nothing to do with the deal and refused to pay. Mr ERKEL himself took the side of the Ministry. In July 2004 the Ministry even brought court proceedings against MSF; at the time of writing the case is still pending.

Dutch involvement in child pornography in Brazil – On parliamentary questions concerning the Dutch consulate-general in Rio de Janeiro, which was allegedly involved in the disappearance of two Dutch nationals who had been convicted in Brazil for trade in child pornography, see Article 4 *supra*.

CHAPTER VI : JUSTICE

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

Access to a court

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Court of Human Rights – In 2004 the European Court of Human Rights found a violation of Article 6 ECHR concerning the fairness of the proceedings in the rather unusual case of *Marpa Zeeland a.o. v. the Netherlands*. After an investigation on suspicion of forgery and fraud, two companies were fined and their director was sentenced to two years imprisonment. The companies and their director initiated an appeal but following a meeting with the Advocate-General, withdrew their appeal on an understanding that their request for remission of their sentences would be granted. When such remission failed to materialise and the proceedings on their appeal had come to an end, the applicants were unable to reinstate their appeal due to overdue time limits and were left with neither remission of their sentence nor the possibility to appeal.

The Court considered, unanimously, that, in those circumstances, the applicant companies were denied effective access to court and were unable to employ their right of appeal in a meaningful manner. The Court also found a violation of the reasonable time requirement of Article 6. It awarded the applicant companies EUR 7,000 for non-pecuniary damage and EUR 4,000 for costs and expenses. (Eur. Ct. H.R., *Marpa Zeeland B.V. and Metal Welding B.V. v. the Netherlands* (application no. 46300/99) judgment of 9 November 2004)

Legislative initiatives, national case law and practices of national authorities

Double criminality – In March 2004 the Minister of Justice submitted a memorandum on national and international developments concerning the requirement of double criminality. This requirement implies that a person may only be prosecuted in the Netherlands for a crime committed abroad, when the act is considered a criminal offence both in that particular country and in the Netherlands. The same requirement normally applies where there is a request for judicial co-operation from abroad. In the light of developments within the European Union in the field of judicial co-operation, it is proposed to drop this requirement in situations where a request for assistance comes from one of the other Member States. Two conditions must be met, however. In the first place the act concerned should not have been committed in the Netherlands. Secondly, the Netherlands will refuse co-operation if the reason why the act is not considered a criminal offence in the Netherlands is because that would, according to Dutch standards, be considered incompatible with fundamental rights (*Kamerstukken II* 2003-2004, 29 451, Nos. 1-2)

Independence and impartiality

Legislative initiatives, national case law and practices of national authorities

The Council of State 'post Kleyn' – Following the decision by the Strasbourg Court in the case of *Kleyn*, the structure of the *Raad van State* [Council of State] has been subject to new legislative proposals to enhance by law the guarantees of objective impartiality and independence of the *Afdeling Bestuursrechtspraak* [Administrative Jurisdiction Division]. The Government inferred from *Kleyn* (Eur. Ct. H.R., *Kleyn a.o. v. the Netherlands* (application nos. 39343/98 a.o) judgment of 6 May 2003, as discussed in our report of 2003) that neither the combination of exercising both advisory functions and judicial functions, by

determining appeals under administrative law, in one organ nor the participation of one person in both tasks at the same time is in breach of Article 6. Still, in order to secure the objective impartiality and independence of the Council of State, the Ministers of Justice and of Home Affairs have proposed to institute a *Afdeling wetgeving* [Division of Legislation] and to lay down by law that a member of the Council of State does not participate in appeal proceedings if that person has also been involved in advising on the same matter. In addition, members of the Council of State may be entrusted by Royal Decree with solely either the advisory function or the judicial function. (*Kamerstukken II* 2003/04, No. 7)

Good practices

Guidelines on impartiality of judges – The *Nederlandse Vereniging voor Rechtspraak* (NVvR) [Dutch Association of Magistrates] together with the presidents of Regional Courts and Courts of Appeal have drafted guidelines on the impartiality of judges. These guidelines are drafted to support judges in checking their impartiality in a concrete case as well to secure permanent alertness on impartiality of the judiciary (NVvR, 16 March 2004; see www.nvvr.org).

Reasonable delay in judicial proceedings

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Court of Human Rights – The European Court of Human Rights held, unanimously, in the case of *Marpa Zeeland a.o.* that the Netherlands had failed to conduct judicial proceedings within a reasonable time. The proceedings in this case had lasted six years, nine months and 14 days without there being justifying factors. (Eur. Ct. H.R., *Marpa Zeeland B.V. and Metal Welding B.V. v. the Netherlands* (application no. 46300/99) judgment of 9 November 2004; see more extensively above). In the case of *Hutten* (appl. no. 56698/00) a friendly settlement was reached.

Legislative initiatives, national case law and practices of national authorities

Courts meet their targets – The *Raad voor de rechtspraak* [Council for the Judiciary] published its annual report on 12 May 2004. The Council was happy to report that the courts, by further increasing their efficiency, had managed to deal with the agreed number of cases (which involved a 15% increase of the case-load at a time of cuts in the budget).

No right to execution within reasonable time – The *Rechtbank* [Regional Court] of Amsterdam] has concluded that Article 6 ECHR does not contain the right to execution of a sentence within a reasonable time. The case concerned an extradition request of the French authorities who intended to execute a sentence to which the defendant had been convicted in 2000. Since the French authorities had waited over four years with the execution of the sentence, the defendant argued that the 'reasonable time' requirement of 'Article 6 ECHR had been exceeded. The Regional Court, however, did not follow that line of reasoning (*Rechtbank Amsterdam*, judgment of 16 July 2004, LJN AQ6071). The case is an interesting permutation of the *Hornsby* case (Eur. Ct. H.R., *Hornsby v. Greece* (application no. 18357/91) judgment of 19 March 1997).

"Reasonable time" for minors and adults – As was already noted under Article 24 *supra*, the *Hoge Raad* (Supreme Court), in a case where the defence complained about undue delays, rejected the proposition that Article 40 para. 2, (b) (iii) of the Convention on the Rights of the Child imposes stricter requirements than Article 6 ECHR and Article 14 ICCPR. The Supreme Court observed that the notion of a trial "within a reasonable time" already requires the courts to take into account all circumstances of the case, including the age of the applicant

concerned. At an earlier stage of the proceedings the Court of Appeal had stated that Article 40 CRC does not require the prosecution to be declared inadmissible if undue delays have occurred in proceedings concerning juveniles; a mitigation of the sentence may suffice in this respect. In its judgment of on 16 December 2003, the Supreme Court agreed (LJN AL9062).

"Reasonable time" in administrative law cases – On 3 March 2004, the *Centrale Raad van Beroep* [Central Appeals Tribunal] found a violation of the 'reasonable time' requirement 'in an administrative law case where the proceedings had lasted for 6 years and 9 months. In accordance with its jurisprudence, the Tribunal ruled that the applicant had to institute proceedings in a civil court in order to gain compensation for this undue delay (LJN AO5006). Concerns have been expressed that this remedy is not sufficient since this is a very slow procedure. Also the request for compensation may be rejected since the civil judge may come to a different conclusion than the administrative court as to the reasonableness of the length of the proceedings. The need for a fast and effective procedure has been expressed, both by the *Raad van State* [Council of State] and by academics, but no legislative initiatives have been taken.

On 8 December 2004, however, the Central Appeals Tribunal adopted a broader application of the right to compensation, basing itself on Article 13 ECHR (LJN AR7273). In the past the Tribunal had adopted the position that not all cases in which an administrative organ fails to act within a reasonable time lend themselves for compensation claims, such as cases concerning the application of regulations that do not leave discretionary powers to the administrative organ: in that case the undue delay would not affect the position of the victim. In the present case, however, the Tribunal decided that in *every* case in which organs have exceeded the reasonable time limit, compensation claims have to be examined. But it still took the view that, as far as delays had occurred in the judicial proceedings themselves, the applicant had to institute proceedings in a civil court in order to obtain compensation.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Government still opposed to ratification of Protocol 7 ECHR – The Netherlands is one of a minority of Council of Europe Member States that have not ratified Protocol No. 7 to the ECHR. Time and again it is argued that the Netherlands should accede to this instrument, but on 12 October 2004 the Minister of Justice indicated again that he was opposed to ratification (*Kamerstukken II* 29800 VI, No. 9). The reason for his objections is that Article 2 guarantees the right to appeal in criminal cases. Yet there are certain types of cases where under Dutch law an appeal is not possible (see Article 404 of the Code on Criminal Procedure), and the Minister considers this indispensable in view of the workload of the judiciary and the need to secure trials within a reasonable time. The Minister noted that Article 2 para. 2 of Protocol No. 7 provides that the right to appeal may be subject to exceptions in regard to offences of a minor character, but he was concerned that the case-law of the Strasbourg Court might evolve to such an extent as to allow only very few exceptions.

These reasons do not appear to be very convincing. The existing case-law on Article 2 of Protocol 7 is fairly cautious (see for instance ECtHR, 13 February 2001, *Krombach v. France* (Appl. *No.* 29731/96), para 96: "The Court reiterates that the Contracting Status dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised"). Also the Strasbourg Court has made it clear that it attaches due weight to the explanatory reports to the recent protocols (see, for instance, the case of *Maaouia v,. France*). Of course all other contracting parties have similar concerns about the workload of the judiciary; yet they did ratify Protocol No. 7. And finally, if the Netherlands do not want to take any chances, it can always enter a reservation to Article 2 when ratifying the protocol.

Participation of victims in criminal proceedings – An Act allowing for formal participation of victims in public hearings has been passed (*Staatsblad* 2004, 382). Victims or the victim's relatives now have the right to voice the impact of the act of which the suspect is accused. The new procedure is part of broader initiative to strengthening the position of victims in criminal proceedings (see *Kamerstukken II*, 27632).

Videoconferences in criminal proceedings – A bill introducing the possibility to use videoconferences in criminal proceedings has been submitted to Parliament. This would allow for the possibility to hear persons, such as the accused, witnesses and experts, throughout the criminal proceedings as well as in the pre-trial stage. The introduction of videoconferences will save travel costs and other costs involved in getting such persons to court. In addition, it will reduce the waiting times to hold trials and the length of the sessions in court.

The explanatory memorandum notes that the European Court of Human Rights has not dealt with videoconferences in the light of the requirements of Article 6 ECHR yet, although it is clear that the right to fair trial includes the right of the accused to be present at trial. Accordingly the *Raad van State* [Council of State], in its capacity as advisor to the legislator, has voiced concerns. It observed in particular that videoconferences will never equal physical presence in court and the defence has only access to the images the judge decides to show. The Council of State also observes that non-verbal communication is reduced. It, therefore, recommends making the use of a videoconference dependent on the approval of the accused. The Minister of Justice, however, remains of the opinion that the judge is in the best position to decide whether the use of a videoconference is appropriate or not. In addition, an *Algemene Maatregel van Bestuur* [Order in Council] will be drafted that defines specific cases in which videoconferences may not be used, one of these cases being juvenile criminal proceedings (*Kamerstukken II*, 29828)

Increasing efficiency of the legal system – Also to increase the efficiency and capacity of the legal system, a number of bills have been passed: the wider use of administrative sanctions (law of 30 June 2004, *Staatsblad* 13 July 2004 and *Staatsblad* 28 September 2004); extending the length of pre-trial detention whilst limiting the number of hearings of the suspect (passed on 9 November 2004; *Kamerstukken* 29 253); extending the possibilities for the Courts of Appeal to refuse the hearing of witnesses *à décharge* in appeal proceedings (passed on 9 November 2004; *Kamerstukken* 29 254); lowering the requirements for reasoning of criminal judgments against persons that have confessed to the charge (passed on 9 November 2004; *Kamerstukken* 29 255).

Imposition of pecuniary sanctions by the Public Prosecutor – A bill has been submitted to Parliament with a view to allowing the *Openbaar Ministerie* [Public Prosecutor's Office] to impose pecuniary sanctions for certain criminal offences (*'Wet OM-afdoening', Kamerstukken II*, 2004/05, 29849). Concerns have been voiced, regarding, *inter alia*, the requirement of impartiality. The *Raad van State* [Council of State] has brought a negative advice on the initial proposal. It mentioned in particular that compliance with the guarantees of a fair trial was not secured and that no reference was made in the draft Explanatory Memorandum to Article 113 of the Constitution (which states that criminal offences shall be adjudicated by the judiciary) and to Articles II-47 and II-48 of the Constitutional Treaty of Europe. The draft bill has accordingly been amended so as to secure the guarantee of 'impartial and independent judge' by giving a judge complete review on the decision of the Public Prosecutor if the citizen, on whom a sanction has been imposed, wishes to institute an appeal (*Kamerstukken II*, 2004/05, 29 849, No. 5).

Right to remain silent – A bill containing the *Vierde Tranche Algemene wet bestuursrecht* [Fourth part of the revision of general administrative law] has recently been submitted to Parliament. This Bill includes the right to remain silent in administrative proceedings. The right applies when he is being heard with a view to imposing a punitive sanction, but it does

not where the hearing serves other public functions, such as the collection of taxes. (*Kamerstukken II* 2003/04, 29702, Nos. 1-3).

Article 48. Presumption of innocence and rights of defence

Presumption of innocence

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Court of Human Rights and the presumption of innocence (1) – The European Court of Human Rights found a violation of Article 6(2), the presumption of innocence, in compensation proceedings in the case *Del Latte v. the Netherlands*. The applicants, Vincenzo and Angelo Del Latte, were held in pre-trial detention charged with attempted murder or, in the alternative, attempted manslaughter of victim Y. Following a quarrel with Y in a bar, the applicants had gone to Y's home and fired three shots through the window of Y's living room, where Y was present at the time. The applicants were acquitted and released from detention on remand since it could not be established beyond reasonable doubt that the shots were fired with the intention to kill Y. Subsequently the applicants applied for monetary compensation for the time they had spent in pre-trial detention. Their claims were refused by the Court of Appeal on the ground that their pre-trial detention was lawful and that their acquittal had "merely been technical" since, had they been charged with the lesser crime of threatening to commit a crime directed against life, they would have been convicted.

The European Court of Human Rights held that the Court of Appeal's approach to the applicants' compensation claim amounted to a determination of their guilt of a specific offence without them having been 'proved guilty according to law'. It referred to *Baars v. the Netherlands* (Eur. Ct. H.R., (application no. 44320/98) judgement of 28 October 2003; see our 2003 report), where the Court made a distinction between decisions which describe a 'state of suspicion' and decisions which contain a 'finding of guilt' in compensation proceedings and found that only the second category is incompatible with Article 6(2) ECHR. The Court therefore held, unanimously, that there had been a violation of Article 6(2) and awarded one of the applicants EUR 500 for costs and expenses (Eur.Ct. H.R., *Del Latte v. the Netherlands* (application no. 44760/98) judgment of 9 November 2004).

European Court of Human Rights and the presumption of innocence (2) – No violation of the presumption of innocence was found in *Falk v. the Netherlands*. The applicant had been fined with an administrative fine for a traffic offence that had been committed with a car registered in his name, in accordance with Article 5 of the *Wet Administratiefrechtelijke Handhaving Verkeersvoorschriften* (*WAHV*) [Act on the Administrative Enforcement of Respect for Traffic Regulations]. The applicant filed an appeal against this decision and informed the public prosecutor of the name and address of Mr. B who, according to the applicant, had driven the car while the offence was registered. Due to the fact that the company of Falk had gone bankrupt, Falk's personal relation with Mr. B had worsened to a point that Falk could not demand Mr. B. to pay the fine to him. In further appeal proceedings, the Dutch courts held that the person whose name the car was registered on remained liable, in accordance with the strict liability rule enshrined in Article 5 *WAHV*. Therefore, the fine imposed on him was not in breach of Article 6(2) ECHR.

The applicant complained that the imposition of the administrative fine on him based on the strict liability rule violated his rights under Article 6(2) ECHR. The Strasbourg Court disagreed. It held that the right to be presumed innocent in criminal cases is not absolute, since 'presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence'. The Court considered that the principle of proportionality had been observed by the

Dutch courts since the impugned liability rule, when an offence is registered by technical means and committed by a driver whose identity could not be established at the material time, was introduced in order to secure effective road safety by ensuring that traffic offences would not go unpunished whilst taking into consideration the need to ensure that the prosecution and punishment of such offences would not entail an unacceptable burden on the domestic judicial authorities. It further noted that persons fined under Article 5 of the Act have ample opportunity to challenge the fine before a trial court with full competence in the matter and that, in any such proceedings, the guarantees of a fair trial were observed. Therefore, the Court rejected the application as manifestly ill-founded and declared the application inadmissible (Eur. Ct. of H.R., *Falk v. the Netherlands* (application no. 66273/01) decision of 19 October 2004).

Legislative initiatives, national case law and practices of national authorities

Presumption of innocence and press statements by the authorities – Under Article 2 *supra* we have already mentioned the case of a Dutch sergeant-major serving in Iraq, Eric O., who was arrested and brought back to the Netherlands on suspicion of having killed an Iraqi under questionable circumstances. As was noted there, the case received a lot of media attention.

When the case came to trial, the defence argued that the presumption of innocence was violated. The defence pointed to certain statements of Mr DE WIJKERSLOOTH, the chairman of the *College van P-G's* [Board of Procurators General], i.e. the head of the Public Prosecution Service, in an interview after Eric O. was arrested. These statements, which had been broadcasted on television, could at least lead the public to believe the accused was guilty. Accordingly, these statements barred the accused of having a fair trial and had affected his personal life which had led to irrepairable damage. The defence referred to Article 6(2) ECHR and to the case of *Allenet-de Ribemont v. France* (1995) where the presumption of innocence had been breached because certain statements "firstly encouraged the public to believe him guilty and secondly, prejudged the assessment of the facts by the competent judicial authority".

In its judgment of October 2004, the *Militaire Kamer van de Rechtbank Arnhem* [Military chamber of the Regional Court in Arnhem] rejected this argument. It held that the statements made by Mr DE WIJKERSLOOTH did not amount to a "prejudgment of the assessment of the fact by the competent judicial authority" since they merely expressed a suspicion of guilt of the accused of a criminal act, which an objective observer could have suspected on the basis of the facts and available public information as well (LJN AR4029).

Statements on HIV – In September 2004, the *Rechtbank Den Bosch* [Regional Court in Den Bosch] has ruled that revelation of the fact that a suspect is infected with HIV is not in breach of Article 6 para. 2 and 8. The court rejected the claim of the defence that the case should be declared inadmissible since the public prosecutor office had confirmed in a newspaper that the suspect was HIV infected before his guilt had been established (LJN AQ5696).

<u>The rules governing the evidence in criminal matters</u>

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Court of Human Rights: telephone tapping – On the *Doerga* case, which concerned the tapping and recording of the telephone conversations of a prisoner without a proper legal basis, see Article 7 *supra.*

Interception and recording of telephone calls with lawyer: HRC – In the case of *Van Hulst* the HRC rejected the claim that the admission as evidence of certain tapped telephone conversations between the author and his lawyer, and their use during criminal proceedings,

violated his right to a fair trial. Since this issue has attracted more attention (see below), we will deal with it in more detail.

The origin of the case lies in a preliminary inquiry against Mr. A.T.M.M., the author's lawyer. In that context telephone conversations between A.T.M.M. and the author were intercepted and recorded. On the basis of the information obtained by this operation, a preliminary inquiry was opened against the author himself, and the interception of his own telephone line was authorised. In 1990, the author was convicted of, *inter alia,* participation in a criminal organisation, fraud and extortion; he was sentenced to six years' imprisonment.

During the criminal proceedings, counsel for the author contended that the public prosecutor's case should not be admitted, because it contained a number of reports on telephone calls between the author and his lawyer, A.T.M.M, which it was unlawful to receive in evidence. Although the Court agreed that the telephone calls between the author and A.T.M.M. could not be used as evidence, insofar as the latter acted as the author's lawyer and not as a suspect, it rejected the author's challenge to the prosecution's case, noting that the prosecutor had not relied on the contested telephone conversations in establishing the author's guilt. While the Court ordered their removal from the evidence, it admitted and used as evidence other telephone conversations, which had been intercepted and recorded in the context of the preliminary inquiry against A.T.M.M., and which did not concern the lawyer-client relationship with the author.

Before the HRC the author claimed, *inter alia*, a violation of article 17 ICCPR: as a client of Mr. A.T.M.M., he should have been accorded judicial protection from the wire tapping and recording of his telephone conversations with his lawyer, since he could not know that the latter was a suspect in criminal investigations. The right to consult a lawyer of one's own choice is undermined if the protection of confidentiality depends on whether a lawyer is himself a criminal suspect or not.

Having accepted that the interference was "lawful" within the meaning of article 17, paragraph 1, of the Covenant, the Committee considered whether the interference was "arbitrary" in the circumstances of the case. While acknowledging the importance of protecting the confidentiality of communication, in particular that relating to communication between lawyer and client, the Committee found that it must also weigh the need for States parties to take effective measures for the prevention and investigation of criminal offences. The HRC took into account a number of procedural and substantive requirements for the interception of telephone calls, which are clearly defined in Section 125g of the Dutch Code of Criminal Procedure and in the Guidelines for the Examination of Telephone Conversations of 2 July 1984. Both require interceptions to be based on a written authorisation by the investigating judge.

The Committee also considered that the interception and recording of the author's telephone calls with A.T.M.M. did not disproportionately affect his right to communicate with his lawyer in conditions ensuring full respect for the confidentiality of the communications between them, as the trial court distinguished between tapped conversations in which A.T.M.M. participated as the author's lawyer, and ordering their removal from the evidence, and other conversations, which were admitted as evidence because they were intercepted in the context of the preliminary inquiry against A.T.M.M. Although the author contested that the Dutch courts accurately made this distinction, he has failed to substantiate this challenge.

Insofar as the author claimed that the reports of the tapped conversations between him and his lawyer should have been destroyed immediately, the Committee noted the Dutch Government's uncontested argument that the records of the tapped conversations were kept intact in their entirety, separately from the case file, for possible inspection by the defence. As the right to privacy implies that every individual should have the right to request rectification or elimination of incorrect personal data in files controlled by public authorities, the Committee considers that the separate storage of the recordings of the author's tapped conversations with Mr. A.T.M.M. cannot be regarded as unreasonable for purposes of article 17 of the Covenant. The Committee concluded that there was no violation of article 17 of the Covenant (Communication 903/1999, views of 15 November 2004).

Interception and recording of telephone calls with lawyer: ECHR – In our 2003 Report it was already noted that a number of lawyers, supported by the *Nederlandse Vereniging van Strafrechtadvocaten* [Dutch Association of Criminal Defense Lawyers], had lodged a complaint in Strasbourg about the interception of telephone calls between suspects and lawyers. On 25 November 2004 the Court declared this case, *Aalmoes a.o. v. the Netherlands* (Appl. No. 16269/02) inadmissible.

The Court accepted that it is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged; lawyers have a reasonable expectation of protection of and respect for their 'professional privacy'. Yet the Court found that the Dutch domestic rules were sufficiently precise and contained sufficient safeguards against abuse; the legal regime as such was therefore compatible with Article 8 ECHR.

One of the central complaints in this case was that the statutory obligation of destruction of taped conversations had been disregarded on a large scale, entailing that confidential information might still be kept in digital files held by the judicial authorities without any possibility for the applicants to obtain clarity on this point. The Court appreciated the applicants' concerns and noted that there had indeed been failings in specific cases. However, these failings were apparently the result of a lack of professional knowledge and/or negligence on the part of the responsible officers. In light of the constructive reaction of the authorities in response to the applicants' complaints, the Court found that the claim that there had been a structural problem remained speculative.

In this connection it is interesting to note a report of the *College Bescherming Persoonsgegevens (CBP)* [Dutch Data Protection Authority] of 16 July 2003 (*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], www.cbpweb.nl). The CBP stated that the police practice as regards taping and registration of confidential telecommunication with lawyers or other legal advisors was illegal. In 2004 the CBP again expressed its concern about the practise of access of the Public Prosecution Office to confidential communication between lawyers and their clients. The CBP accepts that there may be cases where this is inevitable. However, as a standard procedure, this amounts to unlawful interference. The CBP advised the Minister of Justice to amend the *Wetboek van strafvordering* [Code of Criminal Procedure] to lay down restrictions on the access of the Public Prosecutor's Office to communication between lawyers and citizens.

Deals with co-suspects: European Court of Human Rights (1) – The European Court of Human Rights concluded in the cases *Lorsé* and *Verhoek v. the Netherlands*, two high profile cases involving prominent criminal organisations and large-scale drug-trafficking, that the agreements made by the Public Prosecutor with co-suspects in order to incriminate the applicants, were not in breach of Article 6 ECHR.

In *Lorsé*, two of the co-suspects, De Brakeleer and Stewart, at a certain point indicated to the Public Prosecutor that they were willing to make a statement incriminating the applicant, but that these statements would also be self-incriminatory. Thereupon, the leaders of the investigative team concluded agreements with them, which contained the guarantee that Stewart would not be prosecuted for any crime to which he confessed (with the exception of murder) and no active investigation would be carried out into crimes committed by De Brakeleer, provided that they stated the truth and confirmed their statements before a judge. After the agreement was concluded, both co-suspects were interrogated and the notes were elaborated in an official report. On the basis of *inter alia* these statements, the applicant was arrested. After the statements were taken, Stewart was shot dead and De Brakeleer was arrested in Morocco for drugs offences unrelated to the present case.

The Court observed that the Public Prosecutor concluded agreements with Stewart and De Brakeleer, that the defence was unable to question them and that statements from them were used in evidence against the applicant. In judging the fairness, the Court firstly

observed that the fact that Stewart and De Brakeleer could not testify and appear in the presence of the defence was not due to negligence on the part of the authorities. Serious effort had been made to question De Brakeleer in a way that did justice to the rights of the defence. Secondly, the defence was aware of the agreements and of the identity of Stewart and De Brakeleer. The proceedings were conducted in a way that the defence had ample opportunity to examine the agreements, the reliability of Stewart and De Brakeleer and the credibility of their statements.

With regard to the agreements, the Court observed that during the proceedings against the applicant the national courts showed that they were well aware of 'the dangers, difficulties and pitfalls surrounding agreements with criminal witnesses.' The Court considered that in the judgements of the Dutch courts all aspects of the agreements were extensively and carefully scrutinised and that the numerous objections raised by the defence had been taken into account. In addition, the Court emphasised that the conviction of the applicant was not based to a decisive degree on the statements of Steward and de Brakeleer since these statements were to a large extent corroborated by other evidence.

In addition, the Court rejected that claims that the Public Prosecutor had deliberately withheld information on infiltration in violation of Article 6 ECHR, since the judicial system of the Netherlands allows for complete rehearing in the appeal proceedings so that omissions made in first instance were cured in the appeal proceedings. It also found no violation of Article 6 on the refusal of the Court of Appeal to order the submission of the official reports of the infiltration since the Dutch courts had adequately scrutinised the question of the submission of the official reports. Accordingly, the Court declared the case inadmissible (Eur. Ct. of H.R. (Second Section), *Lorsé v. the Netherlands* (application no. 44484/98) decision of 27 January 2004)

Deals with co-suspects: European Court of Human Rights (2) – In the case of *Verhoek* agreements between co-suspects K. and A. and the Public Prosecutor had been made during the investigative stage in order to incriminate the applicant. According to the agreement with K., K. would make truthful statements about the criminal offences of which he had knowledge without relying on his right to remain silent and to testify before a judge if requested to do so. In exchange, he was released from detention on remand and was given an undertaking that if the prison sentence imposed on him exceeded the time he had already spent in detention pending extradition and detention on remand, the sentence would not be executed. In the agreement with A, A. was able to trade off any criminal prosecution in the Netherlands in respect of the criminal offences to which he had confessed by making a payment of 1,800,000 Netherlands guilders (820,000 euros) in exchange for truthful statements about the criminal offences of which he had knowledge without relying on his right to remain silent and to testify before a judge if requested to do so.

The European Court of Human Rights held again that the agreements were in compliance with the requirements enshrined in Article 6 ECHR. It argued that the defence was aware of the agreements and the proceedings were conducted in such a way that the trial courts as well as the defence had ample opportunity to examine the agreements and the credibility of both K. and A. Both men were questioned extensively by the trial judges and by the defence at every stage of the proceedings. In addition, the Public Prosecutors were questioned about the agreements and about their contacts with K. and A. In addition, three experts were heard about the legal aspects of the agreements and several relations of K. and A. were questioned about the reliability and credibility of their statements.

Secondly, the Court observed also in this case that throughout the hearings as well as in their judgments these courts showed that they were well aware of the dangers, difficulties and pitfalls surrounding agreements with criminal witnesses. The Court of Appeal had agreed with the defence on the point that the Public Prosecutor had exceeded his authority in respect of the undertaking given to K. relating to the non-execution of any prison sentence that might be imposed on him. The Court further considered that the Dutch courts had displayed extreme caution in their assessment of the admissibility of the statements of K. and A. and they had provided thorough reasoning as to why they considered these statements credible and reliable

in spite of the doubts raised by the defence and in spite of part of the agreement concluded with K. having been found unlawful. Therefore, the Court declared the case inadmissible (Eur. Ct. of H.R. (Second Section) *Verhoek v. the Netherlands* (application no. 54445/00) decision of 27 January 2004).

Legislative initiatives, national case law and practices of national authorities

More scope for the use of intelligence information in criminal proceedings (1): case-law – As we noted in Thematic Observation No. 1 (2002), the *Rechtbank* [Regional Court] of Rotterdam acquitted four persons suspected of terrorist offences and ordered their release in December 2002. The four had been arrested on 13 September 2001 (i.e. two days after '9/11') following a search of their house, during which *inter alia* false passports had been found. The search had been ordered on the basis of evidence gathered by the *Binnenlandse Veiligheidsdienst (BVD)* [Internal Security Service; now replaced by the *Algemene Inlichtingen- en Veiligheidsdienst* (AIVD)]. The *BVD* believed that the two men, together with Mr Trabelsi (who was arrested and later convicted in Belgium), prepared an attack in Europe. The Court observed that it is the *BVD*'s task to protect national security, not to investigate crime. If the *BVD* finds evidence pointing to criminal acts, it should inform the Public Prosecutor's office which can start its own investigations. The person concerned cannot, however, at that stage be considered a 'suspect', since it was only the *BVD* that has carried out investigations vis-à-vis this person. Since one can only search houses if there is a 'suspect' and since in the instant case the search had been ordered solely on the basis of evidence gathered by the *BVD*, the Court found that the information against the persons had been unlawfully obtained (LJN AF2141).

On 21 June 2004, the *Gerechsthof* [Court of Appeal] of The Hague overruled the Rotterdam acquittal and convicted the two main suspects for participation in a terrorist organisation that would have links with Al-Quaeda. The two men were sentenced to six and four years' imprisonment. The Court of Appeal accepted that the legal basis of the *BVD's* activities was insufficiently clear at the time of the investigations in the instant case (the new *Wet op de inlichtingen en veiligheidsdiensten* only entered into force in May 2002) and as such did not meet the requirements of Article 8 ECHR. However, the Court of Appealed did not attach any consequences to this observation. It noted on the one hand that the *BVD* was under control of the Government and Parliament, and that judicial review of its activities could only be marginal. On the other hand it found no indications in the present case that the *BVD* had exceeded the limits of its powers. The Public Prosecutor and the courts may start from the presumption that the *BVD* conducted its investigations in a legitimate way, the Court of Appeal observed. Hence it found that evidence collected by the *BVD* can be a sufficient basis to conduct further criminal investigations, to arrest people and to search houses. It added that this should not lead to situations where the limits to the investigatory powers of the police and the Public Prosecutor are circumvented by leaving certain actions to the *BVD* (LJN AP2085).

The judgment was welcomed by the Minister of Justice, who does not normally comment on individual court decisions, but in this case said that the fight against terrorism was greatly facilitated. He felt that the judgment offered support for a bill that he was preparing; see the next item. Critics spoke of a blind confidence in the Security Service which in their view was not warranted.

More scope for the use of intelligence information in criminal proceedings (2): legislation – Early September 2004, the Government submitted a bill to the *Tweede Kamer* [House of Representatives] in order to enhance the possibility to use information from the intelligences services *Algemene Inlichtingen- en Veiligheidsdienst (AIVD)* and the *Militaire Inlichtingen- en Veiligheidsdienst (MIVD)* in criminal proceedings. The proposals are made expressly against the background of the fight against terrorism.

The Government proposes in the first place that the *rechter-commissaris* [investigating magistrate] may obstruct the disclosure of certain information in the interest of

national security; in the second place that he may hear witnesses as *afgeschermde getuigen* [protected witnesses] in the interest of national security; and thirdly that information from public services can be used in evidence, even if a particular document was not intended to prove facts (*Kamerstukken II*, 29743, No. 3). The explanatory memorandum to the bill deals extensively with the question whether the proposed rules are in conformity with Article 6 ECHR. Following questions on this issue by the *Raad van State* [Council of State], in its capacity as advisor to the Government on legislative proposals, the Government emphasised that the principles of proportionality and subsidiarity must always be taken into account when the new powers are applied (*Kamerstukken II*, 29743, No. 5).

The *College bescherming persoonsgegevens (CBP)* [Personal Data Protection Authority] was very critical of the proposals. The CBP stated that the Government had failed to demonstrate the necessity of the measures, many of which entailed interferences with the private life of citizens against whom there was no suspicion. In addition – and contrary to what is required by international treaties, European rules and he constitution – the proposals did not provide for adequate supervision of the flow of information among the police and the security services. The CBP agreed, of course, that that effective measures against terrorism must be taken. At the same time, however, the citizen must be able to remain confident that the authorities exercise their powers act in a legitimate fashion. The CBP added that the new plans came too early. New anti-terrorist legislation had only entered into force on 1 September 2004 (*Wet terroristische misdrijven* [Terrorist Offences Act], see under Article 49 *infra*). The CPB felt it was preferable to wait and see if the new powers were sufficient in practice, before contemplating yet further extensions (letter to the Minister of Justice of 22 September, z2004-1222).

Yet in an initial exchange of thoughts several members of Parliament responded positively to the proposals, although they regretted that the usual advisory bodies were not consulted on the issue. In addition they raised the question whether the proposals were fully in conformity with the *Guidelines on human rights and the fight against terrorism*, as adopted by the Council of Europe (*Kamerstukken II*, 29743, No. 6). See also under Article 8 *supra.*

Proposal: earlier recourse to special investigative powers in the fight against terrorism – The Minister of Justice is preparing legislation that would allow for earlier recourse to special investigative powers in the fight against terrorism. The existence of a "reasonable suspicion of an illegal act" would no longer be required for the use of infiltration, observation and the tapping of telephone conversations. "Indications" that a terrorist attack is being prepared would suffice. The new proposals were announced in Parliament in September 2004 (*Kamerstukken II* 2003/04, 29 754, No 1).

Reliance on 'private evidence' – Courts should be more cautious in accepting evidence that has been collected by private parties, such internal services of banks, security officers, forensic departments of large accountants firms, and so on. This is the conclusion of a research conducted by Mr NUIS, formerly Advocate-General with the Court of Appeal in The Hague and now judge of the Court of Appeal in Amsterdam (*Particuier speurwerk verplicht*, September 2004). He noted that many police officers leave the service and join companies who hire them as private detectives. It also occurred that a private investigator was asked to follow a suspect because the police did not have the necessary capacity. In principle there is nothing against the use of materials provided by private parties, Mr NUIS said, but the courts should be careful to review the materials that are collected by these private agents, who do not necessarily follow the rules meant to protect, for instance, the privacy.

In a reaction the *College Bescherming Persoonsgegevens* (*CBP*) [Dutch Personal Data Protection Authority] announced that it would start an investigation into the work of private detective agencies in 2005. A spokesman of the Ministry of Justice added that the Ministry would follow-up on that in 2006. The CBP remarked that a Code of Conduct was adopted in 2003, in co-operation with the association of private detective agencies. The Code of Conduct defines the situation in which cameras may be placed and so on. The Minister of Justice will only grant a licence to an agency if it complies with the Code of Conduct.

Reasons for concern

On the ***extensions of investigative powers*** and its ramifications on the right to respect for private life, see our remarks under Article 8, *supra.*

Other relevant developments

Reasons for concern

Lawyers subject to threats – Below (see Article 49 *infra*) we will pay attention to threats against politicians and the judicial response to them. On 2 July 2004 the *Orde van Advocaten* [Bar Association] expressed its concern over the growing number of threats against *advocaten* [sollicitors/*avocats*], after a lawyer specialising in family law had been killed. The lawyer, who had been representing a woman in divorce proceedings, was murdered by her 18-year old son who felt that the lawyer tried to ruin his father. In December 2004 he was sentenced to 15 years' imprisonment (LJN AR 8485).

Following the incident, the Bar Association made a survey amongst 60 lawyers. More than half of them felt that violence against lawyers was increasing. The Bar Association will monitor all cases of threats and violence. Meanwhile several law firms started to train their lawyers how to handle conflicts.

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

Legality of criminal offences and penalties

Legislative initiatives, national case law and practices of national authorities

Terrorist offences – The *Wet terroristische misdrijven* [Terrorist Offences Act], which was adopted on 24 June 2004, entered into force on 1 September 2004. The Act introduces as separate offence recruitment for the *Jihad* as well as conspiracy with the aim of committing serious terrorist offences. The Act also increases by 50% maximum sentences for a number of offences (including manslaughter, grave assault, hijacking and kidnapping) if these offences are committed with a terrorist intention (see *Staatsblad* 2004, 290 and 373; see also *Kamerstukken* 29 754).

Detention conditions – On 16 October 2004 the *Rechtbank* [Regional court] of The Hague determined that economizing the detention regime resulting in a decrease in hours of daily activities for detainees was not in breach of Article 7 ECHR. In this case, the defendants claimed that such a cut-down leads to an increase in their sentence, unforeseeable at the time when they committed the acts for which they were convicted or even during their trial. The Court, however, considered that the impugned measure merely affected the execution of the detention regime, whereas Article 7 ECHR only applies to the imposition of sentences, not on the execution of sentences (LJN AR5713).

Proportionality of criminal offences and penalties

Legislative initiatives, national case law and practices of national authorities

Relatively severe penalties for threats against politicians – One might perhaps expect that the qualification of a criminal offence as being of a "terrorist" nature would attract higher sentences, but as far as Dutch judicial practice in 2004 is concerned, one of the remarkable developments is that during the year more severe penalties were imposed for threats against politicians. The explanation seems obvious: the assassination of politician Pim FORTUYN in 2002, the numerous death threats against political opponents of Mr FORTUYN in 2002, and against members of Parliament such as Ms HIRSI ALI and Mr WILDERS in 2004 and of course

the general atmosphere after the assassination of Theo VAN GOGH. Yet this may lead to the uneasy situation that high sentences are imposed, not so much because of what exactly the person concerned has said or done, but rather to respond to general trends in society. Here is a brief review of the cases.

- One of the earliest cases in 2004 involving death threats, concerned a man who had sent death letters to a large number of public figures, including politicians, TV personalities and even football coaches. The Court took into account that the man had suffered brain damage in a car accident in 1985 and therefore could not be held fully accountable for his acts. It imposed a sentence of 24 months, of which 8 were suspended provided that he would accept psychiatric help(LJN AO8559).
- On 16 June 2004 the 'ketchup incident' occurred: two women poured tomato ketchup over Minister VERDONK (Immigration and Integration) as a means to protest Dutch asylum policy. The women were arrested immediately after the incident, but the *rechter-commissaris* [investigating judge] ordered their release the next day, considering that the facts were not serious enough to warrant prolonged custody. This led to strong criticism, both in the media and in Parliament. In a response, the Public Prosecutor appealed against the decision of the *rechter-commissaris* to the *politierechter* which again ordered their custody for a period of 10 days. On 23 July 2004 the two women were sentenced to 18 days' imprisonment, of which one week was conditional (with the result that the sentence equalled the time spent in pre-trial detention). The women also had to pay the laundry costs of the Minister (ad 15.35 euro). In imposing this mild sentence the *politierechter* considered that the act should be judged independently, that is without taking into account more serious threats. He disagreed with the Public Prosecutor who had stated that the acted "bordered terrorism". On the other hand he rejected the claim of the defence that the trial was unfair as a consequence of the heavy political involvement with the case.
- Within 48 hours after the 'ketchup incident', a man called a local radio station during a live programme and told the reporter that Ms VERDONK should change her immigration policies within two weeks, or else "she will feel the consequences". The man referred to Pim FORTUYN (who was assassinated in 2002) and said that Ms VERDONK might meet a similar fate. The Public Prosecutor brought charges on the basis of both Article 285 Criminal Code (threatening with violence) and Article 95a Criminal Code (threatening the Council of Ministers with a view to forcing it to take a certain decision). The latter provision, which carries a maximum penalty of life imprisonment, had been in disuse for a long time. The Public Prosecutor asked for a sentence of three years' imprisonment. On 23 December 2004 the *Rechtbank* [Regional Court] of Amsterdam convicted the man to two years' imprisonment, of which 8 months were suspended (LJN AR8090).
- In July 2004 a man was convicted for threatening Prime Minister BALKENENDE. Between December 2003 and March 2004 the 35-year old man sent three e-mails to the Prime Minister, containing statements such as "I am going to kidnap you". The third e-mail included a picture of the man wearing a bivouac and a gun as well as the PM's private address and the statement "this time you are really going to die". The *Rechtbank* [Regional Court] of The Hague noted that public figures were increasingly threatened by dissatisfied citizens and observed that this has a destabilising effect on society. A prison sentence of 30 months, of which 10 were suspended, was imposed (LJN AQ2890)
- A man threatening Mr WILDERS MP was convicted, in appeal proceedings, in December 2004. He had posted a picture of Mr WILDERS on Internet in September 2003, making fun of his haircut and adding that the MP really ought to be killed because of his statements on Islam and Muslims. Interestingly, the Public Prosecutor had initially (in January 2004) demanded a fine of 250 euro and a conditional prison sentence of a month. The court of first instance sentenced the man to 120 hours of community service and a conditional sentence of two months' imprisonment. When the man appealed, the Public Prosecutor's Office substantially increased its claim,

this time asking an unconditional sentence of three months' imprisonment. An explanation might be that in the meantime the 'ketchup incident' and the assassination of Mr VAN GOGH had taken place. The Court of Appeal however, whilst expressing its grave concern over the threats, followed the court of first instance and sentenced the man to 120 hours of community service and a conditional sentence of two months' imprisonment.

- Of a somewhat different nature was the threat against member of Parliament Ms HIRSI ALI. A rap group, *Den Haag Connection*, recorded a song in 2003 which included the text "We are now preparing her liquidation / Because of what she said on integration". The song also contained insults of Ms HIRSI ALI. The members of the group wrote a letter to apologise, explaining that the text was written out of frustration which they, as Muslims, felt after her statements on Islam. Observers remarked that violent texts belong to the hip-hop culture and should not be taken too seriously. They suggested that rap songs never led to a political murder. Yet the men were taken in custody in July 2004 on the charge of making threats, which according to Article 285 Criminal Code carries a maximum penalty of 4 years' imprisonment. The public prosecutor considered to also bring charges on the basis of Article 121 Criminal Code (obstructing a member of Parliament in the performance of his functions), which even carries a maximum penalty of life imprisonment. The *rechter-commissaris* [investigating magistrate], however, when ruling on continuation of the pre-trial detention, said that Article 121 Criminal Code was not an appropriate ground to base the detention on. At the time of writing, no court judgment appears to have been delivered in this case.
- For a discussion of the TV interview with imam Mr Abdul-Jabber VAN DE VEN, in November 2004, and the (over-)reactions to it, see Article 11 *supra*.
- Luckily not all cases of threats are as serious. In November 2004 it became known that the chairman of the political party LPF had sent a death letter to *himself* and one of the party's members in Parliament. He was arrested.

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

No significant developments to be reported.

APPENDIX: CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (O.J. C-364 OF 18.12.2000)

CHAPTER I: DIGNITY

Article 1: Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2: Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3: Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
a) the free and informed consent of the person concerned, according to the procedures laid down by law,
b) the prohibition of eugenic practices, in particular those aiming at the selection of persons,
c) the prohibition on making the human body and its parts as such a source of financial gain,
d) the prohibition of the reproductive cloning of human beings.

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

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

CHAPTER II: FREEDOMS

Article 6: Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7: Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8: Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

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

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11: Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Article 12: Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13: Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14: Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

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

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16: Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 17: Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Article 18: Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

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

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

CHAPTER III: EQUALITY

Article 20: Equality before the law

Everyone is equal before the law.

Article 21: Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic
features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 22: Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23: Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24: The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views

freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25: The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26: Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

CHAPTER IV : SOLIDARITY

Article 27 : Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

Article 28: Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 29: Right of access to placement services

Everyone has the right of access to a free placement service.

Article 30: Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

Article 31: Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32: Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33: Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34: Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient
resources, in accordance with the rules laid down by Community law and national laws and practices.

Article 35: Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Article 36: Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

Article 37: Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38: Consumer protection

Union policies shall ensure a high level of consumer protection.

CHAPTER V: CITIZENS' RIGHTS

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

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

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

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41: Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
a) the right of every person to be heard, before any individual measure which would affect him or her
adversely is taken;
b) the right of every person to have access to his or her file, while respecting the legitimate interests of
confidentiality and of professional and business secrecy;
c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42: Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

Article 43: Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

Article 44: Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered

office in a Member State has the right to petition the European Parliament.

Article 45

Freedom of movement and of residence
1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

Article 46: Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

CHAPTER VI : JUSTICE

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

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48: Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

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

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission
which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

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

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

CHAPTER VII: GENERAL PROVISIONS

Article 51: Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Article 52: Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under

the conditions and within the limits defined by those Treaties.

Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 53: Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54: Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.