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

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

IN 2005

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

on 15 December 2005

Reference: CFR-CDF/NL/2005

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union

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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.

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The EU Network of Independent Experts on Fundamental Rights is composed of Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.
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PRELIMINARY REMARKS

The present report was completed on 18 December 2005 – coincidentally International Migrants Day. The primary purpose of the report was to cover developments in the Netherlands in the period of 1 December 2004 until 1 November 2005. However many references to later events have been included as well.

Like in previous years, it was considered desirable to start this report with a number of general observations as well as some methodological remarks. The general observations do not amount to an 'executive summary', and certainly do not intend to give an overall assessment of the state of human rights in the Netherlands – but we wish to highlight a number of salient features that are discussed more extensively in the report itself.

The first thing to note is that the major turmoil that followed the ***assassination of*** writer and film director ***Theo van Gogh***, on 2 November 2004, has slowly faded away. This may not be true for Ms Hirsi Ali and Mr Wilders (both members of Parliament) and Mr Ellian (an academic who takes a critical position on radical Islam). They continue to be placed under permanent police protection – from their perspective, life in the Netherlands is all but normal. But the great tensions in society seem to have diminished considerably.

Perhaps this can be partially attributed to the speedy ***trial against Mr Mohammed B.*** who was accused of killing Mr Van Gogh. B. – a then 26-year old man of Moroccan-Dutch nationality – confessed and indicated that he would perform similar acts if he were in a position to do so. He was sentenced to life imprisonment. See Article 49 *infra* for more details on this case.

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Yet the issue of immigration and integration, which in the Dutch discourse is inseparably connected to the assassination of Mr Van Gogh, continues to play a predominant role in Dutch politics – if only because of the considerable number of incidents that occurred in 2005.

The most dramatic of these is of course the ***Schiphol Fire***. Eleven individuals were killed in a fire that occurred on 27 October 2005 in an aliens detention centre at Amsterdam Airport. An official investigation revealed that, contrary to regulations, there was no direct connection between the various wings of the detention centre and the fire brigade station. As a result precious time was lost when the fire broke out. A detailed review of the way in which the Dutch authorities reacted to the tragedy is given under Article 4 *infra* – we will limit ourselves here to a few observations. Despite assurances, not all surviving detainees seem to have received appropriate care. On the contrary, the Minister for Immigration and Integration stated shortly after the incident that she would proceed to deport survivors as soon as their presence in the Netherlands was "no longer necessary" with a view to the investigation to the causes of the Schiphol fire. Meanwhile it became clear that the Schiphol detention centre was the subject of a dispute between the Ministry of Justice and the local authorities, who believed that the safety of persons required the centre to be closed. Court proceedings between the municipality and the State were still pending when the present report was completed. The courts were also involved in the Schiphol fire in a way one would not have expected. In various cities members of the public displayed posters which held the Minister for Immigration and Integration directly accountable. The authorities removed the posters, stating that the Minister's good name was being tarnished. This led to court proceedings which are described under Article 11 *infra*.

A second major incident relating to Dutch asylum policies is the 'Congo crisis' of December 2005: the Minister for Immigration and Integration had to admit that ***personal data of rejected asylum seekers*** had been ***disclosed*** to the authorities of the Democratic Republic of Congo (DRC). The Minister apologised for having misinformed Parliament: previously she had strongly denied that any sensitive information had been passed. An independent investigation commission found that the problem was not limited to the DRC – although it appears that no detailed information on the *content* of asylum files was disclosed to the Congolese authorities, only the fact *that* the individuals had applied for asylum. Still it is feared that the individuals

concerned might run into trouble upon return to their country of origin. Against this background it is startling to see the laconic position that the responsible Minister took, at least initially: rejected asylum seekers (or "failed immigrants", as the official website of the Ministry puts it) have nothing to fear if the authorities of their countries of origin are aware of the fact that they applied for asylum, and at any rate the Minister "must assume that problems do not occur at the return of rejected asylum seekers".

Less spectacular but as significant is the constant stream of ***complaints***, for instance to the National Ombudsman, about the Immigration and Naturalisation Service (IND). See Article 18 *infra* for more details. The position of ***minor asylum seekers*** also continues to give rise to concerns, both as regards their detention with a view to their removal (see Article 6 *infra)* and as regards their exclusion from the right to social assistance (see Article 34 *infra)*. The continued application of the ***'accelerated procedure'*** for handling requests for asylum remains a cause for deep concern, even more so now the scope of this procedure has been widened. Proposals for a ***"one-strike-out" policy*** – meaning that an alien could be removed after having been convicted of a crime once, without regard being had to the gravity of the crime nor the punishment received – do not augur well for the near future.

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Of course there were other interesting events and trends. A court case that certainly stands out involves the *Staatkundig Gereformeerde Partij (SGP)*, an ***orthodox protestant political party which refused to admit women as full members***. A number of NGOs argued that this situation violates the prohibition of discrimination and the right to political participation. They were partially successful in legal proceedings. In September 2005 the first instance court accepted that the State of the Netherlands acted unlawfully by not taking action against the SGP in this respect, and ordered the State to stop its financial support as long as the SGP excludes women. Some hailed the judgment as an important breakthrough in the fight against sex discrimination; others saw it as an unnecessary and potentially dangerous judicial interference with the freedom of association of political parties. The case is described in more detail under Article 23 *infra.*

A rare instance of ***miscarriage of justice***, the *"Schiedammer Parkmoord"* received a lot of publicity. The case features an innocent man, B., who was found guilty of murder and sentenced to 18 years' imprisonment. He was only exculpated (after four years in prison) when the actual murderer confessed. This led to public debate and discussions in Parliament, during which the proper functioning of the police, the prosecution service and the administration of justice was questioned. The case led to extensive 'soul searching' on the part of the both the judiciary and the Public Prosecutor's Office. See Article 48 *infra* for more details on this case.

For a long time the so-called ***TBS system*** (whereby offenders on account of their diminished responsibility are placed in a custodial clinic) was regarded as one of the 'civilised' cornerstones of the Dutch penal system. It still is, but due to the persistent lack of capacity in custodial clinics it is also a source of concern. Last year we noted that the European Court of Human Rights and a number of domestic bodies held the State responsible for the shortage of 'TBS places'. In 2005 concrete measures have been taken to increase the capacity, and a thorough debate on the merits and disadvantages of the current TBS system is taking place. A research project will take into account practices in other countries – potentially a form of mutual learning that should take place much more often. At the same time a judgment of 14 December 2005 (!) serves as a reminder that many problems remain.

It will not come as a surprise if concerns are expressed about the impact of the ***fight against terrorism*** on human rights. The bill on the use of intelligence information in criminal proceedings (see Article 48 *infra)* is just one in a series of proposed measures which seek to prevent terrorist offences and to investigate and prosecute terrorists. At least five bills are currently under discussion or under preparation – it would go too far to describe each of them in detail. Suffice to say that various bodies, such as the Council for the Judiciary have warned that some of the bills contain broad formulations and open norms, which give little guidance for judges to pass a judgment. At the same time, judges will have limited access to the evidence on basis of which they are supposed to come to a decision. This might result in a decrease of the

confidence in the administration of justice. In an extensive report of November 2005, the NGO *Humanistisch Overleg Mensenrechten* [HOM – Humanist Committee on Human Rights] warned against the combined effect of the proposed legislation. HOM rightly pointed out that each of the proposed measures is considered in isolation, which entails the risk that the oversight is lost. It argued that no less than *nine* different rights are affected by the proposed measures, and proposed a series of conditions that should be met in order to make the measures compatible with human rights standards. There is certainly reason for concern in this area, but the measures are still under consideration, and some even have not been formally tabled in Parliament.

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There is, of course, also ***good news*** to report. Those who endeavour to read this admittedly lengthy report, will come across many interesting initiatives, such as a survey among 10,000 detainees who were asked questions concerning their well-being (see Article 4 *infra*), or measures to reinforce the prohibition on trafficking in human beings (see Article 5 *infra*). There are high unemployment rates among ethnic minorities (see Article 15 *infra*), but the Government does try to find measures to fight discrimination of individuals belonging to ethnic minorities. Interestingly, a more or less systematic pattern is emerging of evaluation of major pieces of legislation, such as the Special Investigative Powers Act (see Article 8 *infra)* or General Equal Treatment Act (see Article 20 *infra)*. Evaluations also focussed on the practical implementation of the principle of equal treatment at work and during recruitment and selection *(idem)* and on the impact of the various instruments of preferential treatment on the position of women and members of ethnic minorities at the labour market (see Article 23 *infra)*.

This report also features interesting and often progressive ***case-law*** from the courts and the *Commissie gelijke behandeling* [Equal Treatment Tribunal] – such as the judgment of Regional Court of The Hague which in October 2005 tried the former head and a high-ranking official of the Afghan Military Intelligence Service. Both men were guilty of having committed ***torture in Afghanistan*** and sentenced to long terms of imprisonment (see Article 4 *infra)*. Another example – although it is bound to be controversial – is provided by the series of judgments concerning the possible extradition of prominent PKK member Ms Kesbir to Turkey. The Court of Appeal of The Hague rejected the ***diplomatic assurances*** offered by Turkey as too general and abstract in nature. The Court stated that an adequate guarantee should at least indicate that, and how, the Turkish authorities will ensure in practice that the judicial and other officials whom Ms Kesbir will encounter during her detention and trial will abstain from torturing her and from inflicting other forms of ill-treatment. The judgment is especially important in light of widespread concern among international NGO's about the use of diplomatic assurances in transfers to countries where there is a risk of torture and ill-treatment (see Article 19 *infra)*.

Thanks to rich and thoughtful contributions of the *Commissie gelijke behandeling* and the *Onderwijsraad*, the debate about measures to counter ***school segregation*** is on. It is clear that there are no easy solutions – just as it is clear that the problem is as pressing in the Netherlands as it is in other European countries. The proposals to base school admission policies on the level of education of the parents, instead of nationality or ethnicity, seem to make sense. It would be worthwhile to engage in a thorough and systematic comparison of the approaches chosen in other EU Member States, so as to identify best practices.

Last but not least, as was noted in our 2004 Report, a government memorandum on ***fundamental rights in a pluralist society*** was submitted to Parliament in May 2004 (*Grondrechten in een pluriforme samenleving*, *Kamerstukken II* 2003/04, 29614, Nos. 1-2). The memorandum, which represents an attempt to wage a principled discussion concerning the basic values of the democratic state and the rule of law, was discussed in Parliament in 2005. A motion was adopted, calling upon the Government to take measures to raise the awareness of fundamental rights. The Government is currently preparing a Plan of Action to this end.

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As far as ***international developments*** are concerned, 2005 saw a number of important steps. For instance ***Protocol 12 to the European Convention of Human Rights*** entered into force on 1 April 2005; it may be recalled that the Netherlands was among the first States to ratify the Protocol. So far no applications in the case-law have been reported.

The speed with which the Netherlands embraced Protocol 12, was not so obvious in their response to the ***Framework Convention for the Protection of National Minorities***. But the good news is that the Netherlands did ratify this Convention on 16 February 2005. In doing so, it limited the scope of application to the Frisians. Unlike Germany, Slovenia and Sweden, it did not recognise Roma and Sinti as minorities.

Furthermore the Additional Protocol to the 1981 ***Data Protection*** Convention of the Council of Europe (ETS 181) entered into force for the Netherlands on 1 January 2005. On 3 June 2005 the Netherlands signed the new Optional Protocol to the UN Convention against ***Torture***. Steps were also taken to ratify the *Optional Protocol to the Convention on the* ***Rights of the Child*** *on the sale of children, child prostitution and child pornography* of 25 May 2000.

The adoption of the Declaration ***Human Rights and the Rule of Law in an Information Society,*** by the Committee of Ministers of the Council of Europe on 13 May 2005 (CM(2005)56), was a moment to celebrate for the Netherlands, as this was the result of an initiative taken during the Dutch chairmanship of the Council of Europe.

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As to ***international supervision***, the major developments took place in Strasbourg. The UN Committee against Torture and the UN Committee on the Elimination of Racial Discrimination did not deal with any cases involving the Netherlands this year; the Human Rights Committee decided four cases, but no violations were found. The HRC views in the cases of *Van den Hemel* and *Sanders* are discussed under Article 47 *infra.*

So the real news comes from Strasbourg. Between 1 December 2004 and 1 December 2005 the ***European Court of Human Rights*** delivered judgment in 10 cases that involved the Netherlands. Most of these judgments are very interesting. For the very first time a 'Dutch' violation of Article 2 ECHR was found in the case of *Ramsahai*; see Article 2 *infra* for a discussion. A violation of Article 3 ECHR was found in the case of *Mathew*, which concerned prison conditions in Aruba; see Article 4 *infra*. Still on Article 3 ECHR, the Court ruled in the case of *Said* that the deportation of the applicant to Eritrea would put him at risk of inhuman or degrading treatment. This was the first time a (potential) violation of Article 3 ECHR was found in a Dutch asylum case; see Article 19 *infra* for more details.

In the area of criminal law a violation of Article 6 ECHR was found in *Bocos-Cuesta:* based on the statements of four young boys between the age of six to eleven the applicant was convicted of sexual assault. The ECtHR found that his right to a fair trial was violated since he had never been provided with an opportunity to question the four children or have them questioned. See Article 47 *infra* for more details. The cases of *Nakach* and *Schenkel* are more technical in nature: the Court found violations of Article 5 ECHR because of a flaw in appeal proceedings about prolongation of the applicants' confinement in a custodial clinic following criminal convictions. The cases are discussed under Article 6 *infra.*

Concerning Article 8 ECHR, a breach was found in the context of immigration law in the case of *Tuquabo-Tekle:* the Strasbourg Court unanimously held it was disproportionate to refuse family reunification of refugees. *No* violation was found in the case of *Üner*, which is about the expulsion of a Turkish resident on public order grounds. However, the case has just been referred to the Grand Chamber, which may arrive at a different conclusion. See Article 7 *infra* for more details on both cases.

In 2005 the ***European Committee of Social Rights*** adopted its conclusions concerning the 17th report by the Netherlands on the application of the ESC. The reports concerned the

rights constituting the second part of the "non-hard core" provisions of the Charter.[1] The Committee found 14 cases of conformity and six 6 cases of non-conformity.[2]

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Finally a few words about the ***institutional dimension*** of the Dutch 'human rights landscape', which is not addressed under any of the specific headings of this Report.

As was noted in our previous reports, the Netherlands do not have a ***national human rights institution***. 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. However, no such draft was published. On the contrary, a year later the Government indicated that it was looking for a solution in line with its general policy to deregulate and to simplify the system of advisory bodies. The Government was therefore unlikely to establish a national human rights commission in the near future.

Against this background, an initiative was taken by three public-law bodies engaged in the protection of fundamental rights (the Ombudsman, the *Commissie gelijke behandeling* [Equal Treatment Tribunal] and the *College bescherming persoonsgegevens* [Personal Data Protection Authority]), together with the 'SIM' research institute of Utrecht University. The four institutions drafted a comprehensive report *De Daad bij het Woord* [Complementing Words with Acts] in which they advised to establish a National Institute for Human Rights. The responsible minister responded positively but did not adopt a firm view on the matter. He emphasised that any new institution should have added value and should be supported by all organisations that are active in the field of human rights. He encouraged the authors of the report to further develop their ideas, and offered them financial support in the pilot phase.

Parallel with the Dutch discussions, the EU is preparing the way for a ***Fundamental Rights Agency (FRA).*** It is worth observing that the *Eerste Kamer* [Senate] was hostile to the current proposals. Apart from a general 'anti EU mode' in some quarters (which seems to imply that any agency is simply one too many), there was a fear that the FRA would duplicate the activities of the Council of Europe. In a series of debates with the Minister of Foreign Affairs, the Senate threatened to exercise its right (which it has under Dutch constitutional arrangements) to force the Minister to veto the proposed regulation and decision setting up the FRA. The Senate was very active at the international level on this dossier: apart from contacting the LIBE committee of the EP, it addressed parliaments of all other EU Member States, and issued press releases in English and French.

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[1] Article 7 (right of children and young persons to protection Article 8 (right of employed women to protection), Article 11 (right to protection of health), Article 14 (right to benefit from social welfare services), Article 17 (right of mothers and children to social and economic protection), Article 18 (right to engage in a gainful occupation in the territory of other Contracting Parties) Article 1 of the Additional Protocol (right to equal opportunities and treatment in matters of employment and occupation without discrimination on grounds of sex), Article 2 of the Additional Protocol (the right of workers to be informed and consulted), Article 3 of the Additional Protocol (the right of workers to take part in the determination and improvement of the working conditions), Article 4 of the Additional Protocol (right of elderly persons to social protection).

[2] Non-conformity was found as regards Articles 7§3, 7§5, 7§6, 17, 18§3 and Article 1 of the Additional Protocol.

Finally it is interesting to observe that the ***National Ombudsman*** issued a compact set of ***standards of proper conduct*** of public authorities. This *behoorlijkheidswijzer* of January 2005 contains 23 rules of good governance that the public administration should take into account. Interestingly the first 6 rules all relate to fundamental rights: (1) the prohibition of discrimination, (2) secrecy of communications, (3) right to respect for the home, (4) privacy, (5) prohibition of arbitrary deprivation of liberty, and (6) other human rights.

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Methodology of the present report – When collecting the raw materials for the present report, I was once again assisted by a considerable number of my colleagues of the *Europa Instituut* of the University of Leiden: Mr Antoine Buyse, Ms Mireille Hagens, Mr Maarten den Heijer, Mr Herke Kranenborg, Ms Lisa Louwerse, Ms Françoise Schild, as well as Ms Nelleke Koffeman (student assistant). Ms Marthe Lot Vermeulen (executive secretary of NJCM) assisted as well. I am most grateful to them all. Of course the full 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 *College bescherming persoonsgegevens* [Data protection supervisory board]
- 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 *Nationale Ombudsman*
- 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.

Like last year, I approached all Dutch ministries 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 believe that we can certainly benefit from the specific expertise of the ministries. 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 2004 to 1 November 2005 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 cross-reference under the other articles.

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'. I 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 I 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***.

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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

Case-law: the Baby Kelly case ("wrongful life") – The *Baby Kelly* case, which concerns the birth of a baby with serious mental and physical handicaps, featured already in our previous reports. Prior to Kelly's birth the midwife had refused to order prenatal examination, despite repeated 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. It was argued that the parents, who as a consequence remained unaware of the serious handicaps of the foetus, were thereby deprived of their right to opt for termination of pregnancy on medical grounds. On that basis both the parents *and* the child were claiming financial compensation from the midwife and the hospital that employed her. The question whether the child itself could claim compensation was the most controversial issue.

It may be recalled that the *Gerechtshof* [Court of Appeal] of The Hague had concluded that the failure to perform the prenatal examination constituted a medical error for which the midwife and the hospital were liable. It allowed claims for compensation of both the parents and the child (judgment of 26 March 2003, LJN[3] AF6263). When the case came before the *Hoge Raad* [Supreme Court], the Advocate General in his Opinion of November 2004 advised to allow the claims for compensation of both the parents and the child – with a limitation of the compensation for the child to damage resulting from her handicaps.

The Supreme Court delivered its judgment on 18 March 2005 (LJN AR5213). Essentially it confirmed the judgment of the Court of Appeal, but added that Kelly's father was also entitled to compensation for immaterial damage. As regards Kelly, the Supreme Court observed that she did not have a subjective 'right to non-existence' or a 'right to have been aborted'. A person in the position of Kelly cannot, therefore, sue his or her parents for not having procured an abortion. On the other hand the duty of care of the doctor vis-à-vis the mother includes an obligation towards the unborn child to perform the necessary prenatal examination. Hence failure to perform this obligation vis-à-vis the mother entails unlawful behaviour towards the unborn child.

The Supreme Court accepted that it was difficult to assess the appropriate amount of damages for Kelly, but this difficulty did not mean that she was not entitled to the costs that she had claimed: all costs for raising and nursing Kelly and meeting the consequences of her handicaps must be compensated in their entirety. The Supreme Court also awarded immaterial damages, underlining that this should not be seen as denial of the human dignity of the handicapped unborn child. The award of damages is not based on the position that the handicapped existence of Kelly must be rated lower than her non-existence.

Political responses to the Baby Kelly case – Commenting on the consequences of the *Baby Kelly* judgment, the Minister of Justice and the State Secretary of Health stated that there was no reason to change the applicable regulations (*Kamerstukken II,* 2004-2005, 29323, No. 11). They confirmed the existing policies as regards prenatal diagnostics. The medical profession has developed guidelines defining the circumstances under which specific tests must be offered. In the instant case the responsible doctor had failed to comply with these guidelines, thereby committing a medical error. Whilst this individual case should not have consequences for general policies, it illustrated once again the importance of careful medical treatment. Finally it was re-emphasised that damages were awarded because a medical error had been committed, not because a handicapped baby had been born.

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3 On LJN numbers see the preliminary remarks.

Article 2. Right to life

Euthanasia

Legislative initiatives, national case law and practices of national authorities

Medical decision-making at the end of life: Dutch position before HRC – On 16 December 2004, the UN Human Rights Committee published the comments by the Netherlands Government on the Concluding Observations (UN doc. CCPR/CO/72/NET/Add.3). The comments, which set out the Dutch Government's position vis-à-vis an evaluation of the current state of affairs concerning euthanasia and related issues, contain extensive references to a research report evaluating medical decision-making at the end of life, associated medical practice and euthanasia review procedures ("*Medische besluitvorming aan het einde van het leven; de praktijk en de toetsingsprocedure euthanasia*"), together with the accompanying report and recommendations of the supervisory committee and a report on medical practice at the end of life ("*Het levenseinde in de medische praktijk*").

Medical decision-making at the end of life: severely handicapped babies – Euthanasia continued to be a source of controversy in 2005. In January a scientific article was published in the *Nederlands Tijdschrift voor Geneeskunde*, the leading Dutch journal of the medical profession. The authors described 22 cases of active euthanasia of new-born babies who suffered from *spina bifida*. In each of these cases, which occurred in the period 1997-2004, the Public Prosecutors Office had decided not to prosecute the doctors who were involved.

The article fuelled public debate – it was argued (both by patients and by doctors) that *spina bifida* is not a sufficient reason for active termination of life – and led to parliamentary questions: how did these cases relate to the existing *Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding* [Termination of Life on Request and Assisted Suicide (Review Procedures) Act], and what are the criteria used by the Public Prosecutors Office when deciding whether to prosecute or not (*Tweede Kamer* 2004-2005, *Aanhangsel* 991 and 1126)? The reply was that these cases did not fall within the scope of the 'Euthanasia Act'. This meant that each of these cases were in principle criminal offences which the Public Prosecutors Office may prosecute.[4] An important element to be taken into account in each case was whether the doctor could raise the defence of necessity *[noodtoestand]*. In assessing this, a number of questions are relevant: did the doctor act with due care; did he act in accordance with medical standards; was there a possibility of recovery; was the suffering unbearable; was it still possible to offer a medically meaningful treatment? In each of these cases the decision not to prosecute the doctor had been discussed with the highest national authorities of the Public Prosecutors Office and the Minister of Justice personally.

The debate again flared up in July 2005 when publicity focussed on the so-called *'Groninger Protocol'* concerning termination of life of new-born babies with severe handicaps. This protocol, developed by doctors from the University Medical Centre in Groningen, was subsequently adopted by the Dutch Association for Paediatrics. Since news reports suggested that the Public Prosecutors Office had been involved in the drafting of the protocol, fresh parliamentary questions were asked (*Tweede Kamer* 2004-2005, *Aanhangsel* 2145 and 2147). The Minister of Justice replied that the Public Prosecutors Office had not been involved and reserved its judgment on the matter. Meanwhile the protocol attracted publicity abroad as well, some reactions reaching remarkable levels of demagogy.

Case-law: assisted suicide – In a judgment of 23 March 2005 the *Hoge Raad* [Supreme Court] confirmed the criminal conviction of *'zelfdodingsconsulent'* ['suicide counsellor'] Willem M.

[4] In the Netherlands the Public Prosecutors Office is generally not obliged to prosecute offences. On the basis of the so-called *opportuniteitsbeginsel* it will decide whether it is appropriate to bring charges against a person.

He had assisted an 81-year-old woman in committing suicide by drawing up a list of all necessary items, preparing medical substances and other items, and assisting the lady in taking the medication. He was found guilty of deliberately aiding and abetting another to commit suicide (Article 294 Criminal Code) and sentenced to 18 months' imprisonment, of which 12 months conditional.

The Supreme Court was asked to clarify the meaning of the words "aiding and abetting" in this context *["bij zelfmoord behulpzaam zijn"]*. Willem M. maintained that purely preparatory acts should not be regarded as a criminal offence; only acts that are directly related to the actual suicide should fall within the scope of the prohibition. The Supreme Court did not give a straightforward answer, but emphasised that the facts and circumstances of each individual case should be taken into account. It seems clear that one can pass on general information and give moral support without violating the law, but all other acts may attract criminal liability. In a reaction the *Nederlandse Vereniging voor een Vrijwillig Levenseinde (NVVE)* [Right to Die-NL] stated that the law is very ambiguous and that it is very difficult to tell what is acceptable and what is not. The NVVE ordered its counsellors to make sure that they are not present when a patient commits suicide – even though this will often mean that a person is forced to spend his last moments in solitude.

Case-law: terminal sedation – A doctor was charged with murder on a patient. The patient, 77 years old, was dying following a major cerebral infarct. A policy of abstention (i.e. no further medical intervention) and palliative care (i.e. offering drugs with the intention of making the last days or hours bearable and free of pain) had been agreed upon. When the patient started to experience serious breathing problems, and suffered as a consequence, the doctor administered 20 mg morphine and supplemented this after a while with 5 mg dormicum. The patient died shortly thereafter.

The public prosecutor considered that in this case sedation was used with the aim of terminating the patient's life. The doctor maintained that his intention was not to terminate life but to diminish the patient's suffering. Having consulted a number of experts, the trial courts agreed with him. They found on the one hand that a causal connection between the administration of dormicum and the death of the patient had not been established. On the other hand, taking into account the nature and quantity of the drugs administered, they accepted that the doctor did not intend to end the patient's life. Thus the doctor was acquitted both in first instance and in appeal proceedings (*Rechtbank* [Regional Court] of Breda, judgment of 10 November 2004, LJN AR5394, and (*Gerechtshof* [Court of Appeal] of 's-Hertogenbosch judgment of 19 July 2005, LJN AU0211). The Public Prosecutors Office announced that it would not appeal to the *Hoge Raad* [Supreme Court].

It may be added that the professional body KNMG adopted a protocol on palliative care and sedation on 7 December 2005.

Domestic violence

Legislative initiatives, national case law and practices of national authorities

Domestic violence (1): towards a "huisverbod" [prohibition order] – Last year, the Minister of Justice announced new measures to combat domestic violence, following studies which suggested that this phenomenon is widespread in the Netherlands (see our 2004 Report). A bill, to be submitted to Parliament in 2005, would introduce a *huisverbod*, i.e. a temporary prohibition to enter one's home. Research had shown that existing remedies, under both criminal law and civil law, are often insufficient to prevent the escalation of domestic crisis situations. An emergency measure was therefore needed, the Minister asserted. A discussion in Parliament, in December 2004, showed that all political parties supported the proposal that the burgomaster should have the power to deny someone access to his/her house for a period of ten days when there is reason to believe that the person concerned might engage in domestic violence. Parliament called for urgent action (*Kamerstukken II*, 2004-2005, 28345, no. 27). The Minister then reiterated that a bill would be prepared, whereas steps towards practical implementation

would be taken on a short term. A draft bill was submitted to a number of advisory bodies in June 2005 for consultation. The latest news, of September 2005, is that the bill will be presented in 2006 (see the Minister's policy announcements in *Kamerstukken II*, 2005-2006, 30300 VI, No. 2, p. 84).

Domestic violence (2): in search of data – Clearly one needs information about the nature and prevalence of domestic violence in order to be able to combat it. With the aim of gathering reliable and comparable data a *Lokale index huiselijk geweld* [Local domestic violence index] was developed. The index was submitted to Parliament in June 2005 (*Kamerstukken II*, 2004-2005, 28345, No. 39).

Domestic violence (3): registration of ethnic background? – A controversial issue is whether the ethnic background of perpetrators and victims should be registered. Currently only the nationality and country of birth are registered. This renders it difficult to get a clear picture of the nature and prevalence of domestic violence among second and third generation immigrants. There is a perceived need for this information, especially in view of the phenomenon of 'honour related violence' – which is discussed below. The impression is that this form of violence mainly occurs within the Turkish community, but there is a need for more reliable data.

Parliament therefore asked the Government to include a reference to ethnicity as well (*Kamerstukken II*, 2004-2005, 28345, No. 17). In November 2005 the Ministry of Justice announced two pilot projects: during the first 6 months of 2006 the police in two regions will systematically register the ethnic background of perpetrators and victims. The outcome will be analysed with a view to improving intervention strategies used by the police and social assistance agencies. Measures will be taken to ensure compliance with privacy standards.

Domestic violence (4): combating "eerwraak" ["honour related violence"] – The issue of *eerwraak* [honour related violence] received considerable publicity. According to police reports concerning only two regions, both within the province of Zuid-Holland, there were at least 79 cases in 6 months (October 2004 to March 2005) where the honour of the family may have played a role. Of these cases 11 involved lethal force, 30 involved violence and another 30 involved threats with physical violence.

The Government submitted extensive research into the phenomenon, which was defined as "any form of violence, mental or physical, which is inspired by a collective mentality and occurs in reaction to conduct that harms (or threatens to harm) the honour of a woman or a man, and thereby the honour of his or her family, whereas the outside world is aware, or may become aware of this harm" (*Kamerstukken II,* 2004-2005, 29203, No. 25).

A research of 20 cases of honour related violence showed that there had often been indications that a crisis was developing; it was suggested that early interventions can make a crucial difference. Existing police powers are adequate but they are not always used to the fullest extent; expertise should be further developed.

The issue was discussed in Parliament in June 2005 (*Kamerstukken II,* 2004-2005, 29203, No. 40); on this occasion measures were announced to strengthen the position of victims, also in connection to their residence status in the Netherlands. In September 2005 the Minister of Integration Policies opened a budget line of € 200,000 for initiatives of minority organisations that seek to eradicate honour related violence (*Staatscourant* 2005, No. 184, p. 13). One of the ideas is to develop a 'civil protocol' setting out how ethnic communities can operate 'early warning systems' and how they should respond to cases of honour related violence once they occur.

Other relevant developments

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

ECtHR: violation of Article 2 ECHR (no independent investigation into incident – case of Ramsahai) – In the period under scrutiny two cases on police violence during arrest operations were decided by the European Court of Human Rights. For the first time in history a violation of Article 2 ECHR by the Netherlands was found – albeit that the violation was 'merely' of a procedural nature.

The case of *Ramsahai* relates to an incident in Amsterdam where a youngster, who had just stolen a scooter, resisted arrest and threatened two police officers, to their surprise, with a gun. One of them fired and hit the boy in the neck; he died on the spot.

Reviewing the incident under the substantive requirements of Article 2 ECHR, the Court accepted that the use of lethal force did not exceed what was "absolutely necessary" for the purposes of effecting the arrest and protecting the lives of the two police officers. The Court also showed understanding for the public prosecutor's decision not to bring charges against the police officer on the ground that he had acted in legitimate self-defence.

However, the proceedings for investigating the incident fell short of the applicable standards. This was not because the official investigation was considered inadequate – on the contrary, the Court found that the investigation was thorough and that its findings were recorded in considerable detail. However, part of the investigation – during the first 15½ hours after the incident – was carried out by the Amsterdam/Amstelland police force to which the two officers belonged. With 5 votes to 2 the Court found a violation of Article 2 ECHR in this respect (ECtHR, 10 November 2005, *Ramsahai a.o. – the Netherlands*, Appl. No. 52391/99).

ECtHR: use of force justified (Romijn) – If *Ramsahai* originated in an incident that caught the police by surprise, the second 'Dutch' Article 2 case concerned an arrest operation that had been planned in advance. A specialised arrest team, consisting of nine police officers, set out to arrest one Mr de Pool on drug charges. As Mr De Pool was believed to be armed, the operation took place without prior warning in his home. During the operation a shooting incident occurred. Although the facts of the case are disputed, it would appear that two police officers saw Mr De Pool pointing a silver-coloured object towards them. An officer fired and struck Mr De Pool in the right side of the chest and in his left arm. He died on the spot. The house was then searched under the supervision of an investigating judge. The search yielded several firearms and some live ammunition. One of the weapons found was a small silver and black automatic pistol bearing traces of blood later identified as that of Mr De Pool. It had been lying close to where he had been wounded. It had been loaded with five live rounds and ready to fire.

The Strasbourg Court rejected the complaint that the death of Mr De Pool resulted from the use of force going beyond what was "absolutely necessary". The Court accepted the reasons behind the decision to arrest Mr De Pool without warning by a specialised arresting team. The Court was also satisfied that the procedure chosen was intended to minimise any risk to human life including that of Mr De Pool himself and was, in principle, appropriate to the situation. As to the way in which the operation was carried out, the Court accepted that in the circumstances nothing could reasonably have been done to secure a different outcome.

As to the reliability of the results of the investigation, the Court stated that whatever misgivings may remain in the applicant's mind as regards the debriefing which was apparently held immediately after the incident and the five days which were allowed to pass before the arresting team members were questioned, the authorities' establishment of the facts did not fall short of the standards required by Article 2 ECHR.

Finally, as to the failure to prosecute the police officer concerned, the Court took the view that the public prosecutor and the Court of Appeal did not act unreasonably in sparing him a trial. It would be "perverse", the Court stated, to construe Article 2 or any other Article of the Convention as requiring a criminal prosecution even in circumstances where it is apparent that

the individual prosecuted is entitled to claim self-defence (ECtHR, 3 March 2005, *Romijn – the Netherlands*, Appl. No. 62006/00).

Legislative initiatives, national case law and practices of national authorities

The Mercatorplein incident: follow-up – In our 2004 Report attention was paid to the 'Mercatorplein incident'. It may be recalled that an incident occurred in Amsterdam on 6 August 2003 when Driss Arbib, a youngster of Moroccan background, was killed by the police during a fight 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 latest development dates from 9 December 2005. The reconstruction of the incident took place as ordered by the Court of Appeal. On that basis the Public Prosecutor was confirmed in his initial view that the fatal shot had been fired in self-defence. He therefore intended not to bring criminal charges against the police officer concerned. In accordance with the applicable rules once an 'Article 12 procedure' has been followed, the Public Prosecutor requested the Court of Appeal to allow him *[bewilligen]* to actually take this decision.

In its extensive decision of 9 December the Court of Appeal agreed with the Public Prosecutor (LJN AU7731). The reconstruction of the incident indeed convinced the Court that the police officer had acted in self-defence; it would therefore not be reasonable to bring proceedings against him. Referring to the *Ramsahai* judgment of the European Court of Human Rights (described above), the Court of Appeal accepted that the initial investigation into the incident may not have met all procedural requirements of Article 2 ECHR.[5] However, these potential defects have been cured by the subsequent reconstruction under the authority of an independent judge.

An interesting procedural element of the case is that the applicants (i.e. the family members of late Mr Arbib) were not allowed to question witnesses (including the police officer who had shot Mr Arbib) during the reconstruction. According to the Court of Appeal this was all in the nature of things: proceedings brought by one person to challenge a decision not to prosecute another should not develop into a trial in themselves. As the Strasbourg Court observed in *Ramsahai,* these proceedings "are not to be equated with a prosecution. They are intended solely to review a decision by a public prosecutor not to bring a prosecution. The Court of Appeal may reverse the public prosecutor's decision and order the prosecution to proceed" (§ 419). The Court of Appeal noted in this connection that Article 6 ECHR does not apply to proceedings under Article 12 CCP. This in itself is true, but it remains to be seen if greater involvement of the applicants in the reconstruction would not have been required by Article 2 ECHR.

[5] In *Ramsahai* the Court had remarked that it would have been "far better" for the responsibility of supervising the investigation and deciding whether to prosecute the police officer to be borne "by a public prosecutor unconnected to the Amsterdam/Amstelland police force", especially given the involvement of the Amsterdam/Amstelland police force in the investigation itself. "Even so, the public prosecutor's measure of independence, if considered together with the possibility of review by an independent tribunal, satisfies Article 2", the Court held.

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 – Several proposals to change the *Wet bijzondere opnemingen in psychiatrische ziekenhuizen* (*BOPZ*) [Psychiatric Institutions (Extraordinary Admissions) Act] are being developed. The proposals have not yet been made public, but they relate to the problems experienced in practice with psychiatric patients who refuse treatment, and to the question whether a patient should always expressly accept the conditions that are sometimes attached to judicial confinement orders. According to another proposal, the scope of application of the *BOPZ* would be extended so as to cover all institutions were mentally retarded individuals and patients suffering from dementia are held (*Kamerstukken II,* 2004-2005, 28950, No. 5). The proposed extension should result in uniform application of the law and an improvement of legal protection. We will get back to these plans once they are formally tabled in Parliament.

Meanwhile the *Tweede Kamer* [House of Representatives] has approved yet another change of the *BOPZ*, allowing for the admission to psychiatric institutions and treatment of individuals without their consent, provided that they have given their consent at an earlier stage when they were capable of determining their will (*Handelingen* 2005-2006, No. 15, pp. 868). The bill was submitted to the *Eerste Kamer* [Senate] on 1 November 2005 (*Kamerstukken I,* 2005-2006, 28283, No. A).

Other relevant developments

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). As was noted in our 2004 Report, initiatives to accede to this convention have been stayed, pending the evaluation of both the *Embryowet* [Embryo Act] and the Convention itself (*Kamerstukken II,* 2003-2004, 29700 XVI, No. 195). In June 2005 it was announced that there have been delays; the results of the evaluation will be presented in February 2006 (*Kamerstukken II,* 2004-2005, 29800 XVI, No. 175).

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

Conditions of detention and external supervision of the places of detention

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

ECtHR: violation of Article 3 ECHR (detention conditions on Aruba – case of Mathew) – Complaints about violations of Article 3 ECHR on the part of the Netherlands are rare (if asylum cases are left aside), and cases where the Strasbourg Court actually finds the Netherlands in breach of Article 3 are extremely rare. So far only the regime in a maximum security prison was found to amount to inhuman or degrading treatment (the cases of *Lorsé* and *Van der Ven*, see our 2003 Report).

Yet in the period under scrutiny a violation of Article 3 ECHR was found again: the case of *Mathew v. the Netherlands* (ECtHR, 29 Sept. 2005, Appl. No. 24919/03).[6] Mr Mathew was

[6] Another (potential) violation of Article 3 ECHR, in the context of asylum law, was found in the case of *Said v the Netherlands*; see Article 19 *infra.*

detained from October 2001 until the end of April 2004 in a correctional institution on the Caribbean island of Aruba. During most of that time, he was under a special detention regime which the authorities said was rendered necessary to his violent behaviour. For a certain period, there was a large opening in the roof of his cell through which the rain penetrated. The cell also exposed its occupant to the heat of the (tropical) sun. In June 2002, Mr Mathew was found to be suffering from a serious spinal condition, but he did not receive surgery.

The Court accepted that the detention authorities had found Mr Mathew impossible to control except in conditions of strict confinement. However, the Aruban authorities were aware that he was not a person fit to be detained in this particular institution in normal conditions and that the special regime designed for him was causing him unusual distress. Attempts were made to alleviate his situation to some extent, but the Government could and should have done more. Accommodation suitable for prisoners of Mr Mathew's unfortunate disposition did not exist on Aruba at the relevant time (it is only now being built), but no attempt appeared to have been made to find an appropriate place of detention for him elsewhere in the Kingdom. In conclusion, there had been a violation of Article 3 in that Mr Mathew had been kept in solitary confinement for an excessive and unnecessarily protracted period, kept for at least seven months in a cell that failed to offer adequate protection against the weather and the climate, and kept in a location from which he could only gain access to outdoor exercise and fresh air at the expense of unnecessary and avoidable physical suffering. On the other hand the Strasbourg Court did not find it established that Mr Mathew had been denied necessary medical care.

Following the Court's judgment parliamentary questions were put, relating to the background of the case and the remedies that the Government had in mind. In his replies the Minister of Foreign Affairs announced substantial investments in the detention facility in which Mr Mathew had been kept, as well as changes in the management of the institution (*Tweede Kamer* 2005-2006, *Aanhangsel* No. 285).

ECtHR: complaint of Article 3 ECHR inadmissible (detention conditions on Curaçao – case of Narcisio) – The case of *Narcisio* was interesting because it related to detention conditions in the *Bon Futuro Penitentiary* (previously known as the *Koraalspecht*) on the island of Curaçao. This facility had been examined on four occasions by the CPT (Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment). In the reports of 1994 and 1997, it was concluded that the conditions in the centre did in fact amount to "inhuman and degrading treatment". In the 1999 and 2002 reports by the CPT a number of improvements were noted, despite a prevailing high level of violence at the prison.

Mr Narcisio was arrested in Rotterdam at the request of the prosecuting authorities of Curaçao. When he complained in Strasbourg that his transportation from the Netherlands to Curaçao for the purpose of his detention in *Bon Futuro* breached Articles 3 and 8, the Court noted that the CPT report of 1999, shortly before the applicant's arrival, mentioned some changes for the better. In 2002, further material improvements at the centre were noted, despite the remaining problem of inter-prisoner violence. In the absence of any specific complaints from the applicant on the prevailing level of aggression, it would seem he was not troubled by the violent excesses described in the CPT reports. The Court also found that the lack of access to running water and sanitary facilities complained of cannot be considered of sufficient severity to bring the complaint within the scope of Article 3. The application was therefore rejected as manifestly ill-founded (ECtHR, 27 January 2005, *Narcisio – the Netherlands*, Appl. no. 47810/99).

Penal institutions and institutions for the detention of persons with a mental disability

Legislative initiatives, national case law and practices of national authorities

Structural lack of capacity in custodial clinics (1): the problem – As was noted in our 2004 Report, the Netherlands is facing a structural lack of capacity in custodial clinics. The problem is best illustrated by the cases of *Morsink* and *Brand v. the Netherlands,* both decided in 2004. 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. 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 these delays.[7]

According to statistics, about 220 TBS orders are imposed each year. Every year some 70 TBS orders are terminated – which means that the total population of 'TBS patients' increases with 150 persons per year. According to official estimations, some 2500 'TBS places' will be needed by 2010.

Structural lack of capacity in custodial clinics (2): follow-up cases early 2005 – The *Morsink* and *Brand* judgments were relied upon by the *Raad voor de Strafrechttoepassing* [Board for the Administration of Criminal Justice] in January 2005, when ruling on complaints from convicts who were waiting for placement in custodial clinics. 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 position, the average length of pre-placement detention amounting to 243 days. They receive a compensation of € 75 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.

Structural lack of capacity in custodial clinics (3): expanding the capacity – In August 2005 the Minister of Justice announced that the capacity of custodial clinics will be increased with another 140 'long stay places'. These places are reserved for 'TBS patients' who, despite treatment, continue to pose a serious threat to society (see also the next item). By 2007 there should be 200 of these places (*Kamerstukken II*, 2004-2005, 29452, No. 35).

In October 2005 the Minister made further announcements in response to parliamentary questions: 148 'ordinary' cells in penitentiary institutions will be made suitable for treatment of 'TBS patients' (*Tweede Kamer,* 2005-2006, *Aanhangsel* No. 144). It is easier to transform these cells than to expand existing custodial clinics, but all places will be equivalent in terms of both treatment and security. By the end of 2007 a total of 260 new 'TBS places' should have become available.

Treating 'TBS patients' – Meanwhile the Minister of Justice announced an evaluation of the existing 'TBS policy' (*Kamerstukken II,* 2004-2005, 29452, No. 37). Over the years both the size and the composition of the group of 'TBS patients' have changed considerably. The degree of seriousness and complexity of psychiatric problems has increased as well. He distinguished three groups: (a) the largest group of patients continues to respond well to therapy – which means that at a certain stage they can reintegrate in society, (b) there are those who are in need for protracted psychiatric treatment (the so-called 'long care group'), and (c) those who do not respond to treatment and in addition pose a grave threat to society, so that in addition to continuous care, continuous security measures are necessary (the so-called 'long stay group').

The Minister also announced that the *Wetenschappelijk Onderzoeks- en Documentatie-centrum (WODC)* [Scientific Research and Documentation Centre of the Dutch Ministry of Justice] will carry out research that will address the question whether a differentiation within the existing TBS system is feasible. The research project will include a comparison of similar policies abroad. One of the issues to be examined is the extent to which *behandelbaarheid* [aptitude for treatment] is a material factor when determining admission to and treatment within

[7] Note that in 2005 the ECtHR found two fresh violations of Article 5 ECHR in the context of TBS orders: see the cases of *Nakach* and *Schenkel v. The Netherlands,* discussed under Article 6 below.

the TBS system. Other issues relate to supervision following termination of the treatment and the decision-making procedure relating to temporary leaves. The project should be completed in 2006.

Meanwhile Parliament is considering an official parliamentary inquiry into TBS policies. The TBS system is also under pressure following a number of incidents whereby 'TBS patients' on temporary leave managed to escape and committed offences (on the 'Eibergen incident', which involved the kidnapping a young girl, see our 2004 Report).

Structural lack of capacity in custodial clinics (4): latest developments – Despite all plans to expand the capacity, problems remain on the short term. On the eve of the submission of this Report, the *Rechtbank* [Regional Court] of 's-Hertogenbosch dealt with a convict who was waiting for more than six months for placement in a custodial clinic. He was held in pre-placement detention in an ordinary remand centre and claimed that his continued detention was illegal. The Court first observed that the applicant's criminal conviction served as a legal basis for his present detention, and found that he could not be released while awaiting placement in a custodial clinic. Both the general interest and, probably, the applicant's interest were opposed to that. Yet, after expiry of the six month period the applicant's situation had become unlawful. The question was to which conclusions this should lead. Immediate placement in a clinic was impossible: there was a lack of capacity which resulted from budget choices in the passed, a rapidly growing number of TBS patients to an extent that could not have been foreseen, and a lack of trained personnel. The Minister of Justice was in the process of expanding the capacity, but for the time being he could rely on a state of *force majeure.* In these circumstances it was legitimate for the Minister to operate a waiting list for placement. There were no reasons to grant the applicant priority on this waiting list. Yet the Court found it important to give him a clear perspective of placement, and determined that the applicant must have been placed in a custodial clinic by 1 April 2006 (AU7918, judgment of 13 December 2005).

Positive aspects

Initiatives vis-à-vis the lack of capacity in custodial clinics – Last year we expressed concern about the lack of capacity in custodial clinics, both for 'regular' and for 'long stay' patients. 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. Against the background of all these problems, the fear was expressed that courts will impose less 'TBS orders', even in cases where this would be warranted. Such a development, we stated in our 2004 Report, would undermine one of the 'civilised' cornerstones of the Dutch penal system.

It is good note that on the one hand concrete measures have been taken to increase the capacity, and other hand a thorough debate on the merits and disadvantages of the current TBS system is taking place. It is to be applauded that the *WODC* research project will take into account practices in other countries – potentially a form of mutual learning that should take place much more often. At the same time the judgment of 14 December 2005 serves as a reminder that the problems remain as yet unresolved.

Centres for the detention of foreigners

Legislative initiatives, national case law and practices of national authorities

The 'Schiphol Fire': 11 die in detention centre – Eleven individuals were killed in a fire that occurred on 27 October 2005 at midnight in an aliens detention centre at Amsterdam Airport (Schiphol). The horrible incident attracted international media attention and gave rise to bitter criticism and discussions in the Netherlands. We will try to give a brief summary of the most important development.

At the time of the fire there were 268 detainees in the complex, 43 of them being located in the part were the fire broke out. Apart from the 11 casualties, 15 people were injured, of whom 4 were admitted to hospital. The detention centre was mainly used for asylum seekers whose application had been rejected in final instance and who were awaiting deportation; for aliens without residence permit; and for drugs traffickers. After the incident the surviving detainees were transported to other detention facilities, except for 18 so-called *bolletjesslikkers* for whom the authorities needed special facilities (i.e. drugs traffickers who have swallowed drugs with a view to importing them in the Netherlands; they are assigned to special toilets that prevent them from secretly disposing of the drugs).

The responsible ministers Mr Donner (Justice) and Ms Verdonk (Immigration and Integration) visited the site hours after the fire. They immediately informed Parliament about the incident (*Kamerstukken II*, 2005-2006, 24587, No. 136). In the letter Mr Donner underlined the importance of a thorough and independent investigation into the causes of the fire and the circumstances in which the victims lost their lives. Yet Ms Verdonk stated at a press conference after visiting Schiphol that the staff of the detention centre had "adequately" dealt with the situation. This statement was criticised in Parliament, later that day during an emergency debate, since the investigations had barely started (*Handelingen* TK 14, p. 14-832 and following). In response to this criticism the Minister of Justice acknowledged that 11 individuals who were held under the authority of the State had died in a fire that should not have occurred. He added that the centre's staff and the fire brigade had to respond to the fire under very difficult circumstances, and that his first impression was that these officials did whatever they could in the given circumstances. But he accepted that no final judgment could be given until all investigations had been carried out.

As a matter of fact on 15 December 2005 the results of an official investigation were published. It was noted that, contrary to regulations, there was no direct connection between the various wings of the detention centre and the headquarters of the fire brigade. Any signals indicating a fire would go to the command centre of the detention complex; the staff would then have to alarm the fire brigade. As a result precious time was lost when on 27 October a fire actually broke out.

In a follow-up letter of 1 November the Ministers indicated that 10 of 11 victims had been identified. The victims' families had been informed; in 6 cases a Dutch delegation had personally met the family. The Dutch State was prepared to pay transport and residence costs for family members who wished to travel to the Netherlands in order to attend the funeral or to accompany the remains of the victims. As to the surviving detainees, the Ministers assured Parliament that they had received, and would continue to receive, appropriate care as they (or at least a number of them) had been exposed to an obviously traumatic situation (*Kamerstukken II*, 2005-2006, 24587, No. 137).

However many complaints were heard. Several individuals stated that they had received no attention at all, even in cases were they had seen friends or relatives dying. Others complained of a lack of medical treatment, although they experienced breathing problems after having inhaled smoke. Especially the so-called 'prison boat' in the port of Rotterdam was said not to provide for appropriate care. Lawyers complained that they were not informed of the new location of their clients, who were still facing the risk of deportation. This led to parliamentary questions (*Handelingen*, 2005-2006, TK 15, p. 15-853 ff; *Tweede Kamer*, 2005-2006, *Aanhangsel,* 408). In addition the *Rechtbank* [Regional Court] of The Hague ordered, in summary interim proceedings, that two survivors had to be transferred from the 'prison boat' to another centre (the (LJN AU6022, judgment of 8 November 2005). NGOs such as Amnesty International and NJCM stated that a detention situation is a priori inappropriate for victims suffering from an acute stress syndrome. Heated discussions in Parliament followed (see *Handelingen* TK 25, p. 25-1662, and *Kamerstukken II*, 2005-2006, 24587, No. 139).

Another startling development occurred when Minister Verdonk stated the next day that she would proceed to deport survivors since their presence in the Netherlands was "no longer necessary" with a view to the investigation to the causes of the Schiphol fire. Again there were heated discussions in Parliament, opponents stating that it would be extremely harsh to send back survivors to their countries of origin without clear guarantees for medical and

psychological treatment of the level that could and should be offered in the Netherlands (*Kamerstukken II*, 2005-2006, 24587, Nos. 138-142; (*Handelingen* TK 20, p. 20-1305). It was only after Mr Van Vollenhoven, the chair of the *Onderzoeksraad voor Veiligheid* [Safety Investigation Board, an independent advisory body, charged with the investigation into large incidents and disasters] intervened, that the deportation of survivors was stayed. Mr Van Vollenhoven expressed his surprise that witnesses would be removed from the Netherlands at a time when his Board was still investigating the Schiphol Fire. Amnesty International, in a public statement of 11 November 2005, insisted that the announced expulsions should not be carried out before the end of investigations and publication of its results. Amnesty called on the Dutch Government to include as an integral part of its investigation the alleged irregularities in the detention situation prior to the fire. It further urged the Dutch Government to investigate reports which regard the treatment of survivors after the fire. Amnesty International further believes that the ongoing investigations should include witness statements of the survivors of the fire as this could help survivors to receive compensation (AI Index: EUR 35/002/2005).

This is not the end of the story. On the one hand news reports suggested that other aliens detention centre were unsafe from the perspective of fire prevention as well. Thus the *'kamp Zeist'* holding centre – where a number of survivors was brought – was construed in the same way as the centre at Schiphol Airport. On 28 October, i.e. the day after the Schiphol Fire, the service responsible for the exploitation of detention centres started to assess the fire safety of all institutions. This led to the decision to immediately close a prison in Doetinchem which was scheduled to close anyway in 2007, since the costs of necessary precautionary measures would be disproportionate (*Kamerstukken II*, 2005-2006, 24587, No. 150).

On the other hand – while newspaper cited construction workers who were involved in the preparation of the Schiphol Aliens Detention Centre and stated that they had warned about the materials and constructions used – it became gradually clear that the centre had already become the subject of a protracted dispute between the Ministry of Justice and the local authorities. The latter (the municipality of Haarlemmermeer where Schiphol is located) had been concerned about the safety of the complex, but the Ministry had not been forthcoming with improvements. After the fire of 27 October, the municipality pointed to recent reports which suggested that fire prevention was still problematic; the Minister based its position on another investigation according to which there were no unnecessary safety risks. Feeling responsible for the safety of persons kept at Schiphol, and not believing that the Ministry could be trusted in this matter, the competent burgomaster announced on 6 December 2005 that he would close the centre. The Minister of Justice responded the next day by issuing a *Koninklijk Besluit* [Royal Decree] setting aside the burgomaster's decision (*Staatsblad* 2005, 634) – a step which is extremely rare in modern constitutional practice. He explained that the detention centre is needed for drugs traffickers, and as the minister responsible for the maintenance of public order he felt that the general interest prevailed of local interest. The municipality responded by bringing court proceedings against the State. At the time of completing the present report, the clash is still in full swing.

Schiphol Fire: removal of critical posters violates freedom of expression – There is even more to what might be called the Schiphol Fire saga. In the direct aftermath of the fire, a number of posters were displayed which held the Minister of Immigration and Integration, Ms. Rita Verdonk, directly accountable. The posters and banners sported texts such as *"Eleven burned alive, Rita thank you very much"* and *"Travel agency Rita: arrest, deportation, cremation – adequate to the bitter end"*. The authorities in a number of cities removed the posters, stating that the Minister's good name was being tarnished. This led to court proceedings which are described under Article 11 *infra.*

Reasons for concern

The Schiphol Airport Fire – Terry Davis, the Secretary General of the Council of Europe said in a reaction to the Schiphol Fire, "In the recent months, we have witnessed a series of tragic events in which a number of immigrants have died. This latest incident in the Netherlands, together

with the fires in several buildings housing immigrants in Paris and the recent dramatic events in Ceuta and Mellila, to name just a few, should serve as a warning of the hazardous situation affecting migrants in many of the Council of Europe member states. We must never forget that the bottom line of our migration policies and procedures must be respect for human rights, human dignity and the physical and mental integrity of the persons involved". It must be said that the response of the Dutch authorities to the disaster, although prompt and efficient in a number of aspects, did not always appear to have respect for human dignity as its main preoccupation.

Fight against the impunity of persons guilty of acts of torture

Legislative initiatives, national case law and practices of national authorities

Prosecuting torture in Afghanistan – In our 2004 Report it was already noted that the former head of the *Khad-e-Nezami* (the Afghan Military Intelligence Service), Mr Hesamuddin H., was arrested on 27 November 2004. Having been in charge of the Service under the communist regime, H. was said to be responsible for a widespread practice of torture. He applied for asylum in the Netherlands in 1992, but his application was rejected in 1994 as there were serious reasons to assume that he had been involved in war crimes and/or crimes against humanity in Afghanistan. In 2000 (i.e. six years later!) the file was forwarded by the immigration authorities to the Public Prosecutor's Office; in 2003 criminal investigations were opened. The investigation was complex: a large number of witnesses were interviewed, and several fact-finding missions were sent to Afghanistan. In October 2005 the *Rechtbank* [Regional Court] of The Hague found him guilty of having committed torture in Afghanistan. The lengthy judgment not only contains several horrifying statements of victims of torture, but also a number of principled considerations on the prohibition of torture, the legal qualification of torture under Dutch law and issues of jurisdiction. A prison sentence of 12 years was imposed (LJN AU4347; judgment of 14 October 2005).

On the same day the Regional Court also convicted the former head of the interrogation department of the *Khad-e-Nezami*. He had initially been granted asylum in 1996. This was later withdrawn on the basis of Article 1F of the Geneva Convention, following the disclosure of evidence that he had been involved in war crimes and crimes against humanity. The Regional Court convicted him to 9 years' imprisonment (LJN AU4373).

A somewhat technical but nevertheless very interesting aspect of both cases is that the prosecution was partially based on statements which the suspects had made to the immigration authorities when applying for asylum. The Regional Court rejected the argument of the defence that the use in evidence of these statements would violate the *nemo tenetur* principle as developed in the well-known cases of *Funke* and *Saunders.* The Regional Court noted somewhat laconically that no-one is compelled to seek asylum in the Netherlands; by seeking a residence permit in this country one voluntarily accepts the conditions imposed by the admission procedure. In addition there was no penalty for not replying to questions during the interviews.

Positive aspects

Prosecuting torture in Afghanistan – In the past there has been criticism for the apparent lack of commitment on the part of the authorities to prosecute individuals who were allegedly involved in the practice of torture in their countries of origin. It is obvious that these cases are complex, especially when it comes to gathering evidence, and they lay a considerable claim on scarce resources of the Public Prosecutors Office and the police. Yet there are both legal and moral reasons of a compelling nature to wage the fight against torture also on this front.

It is therefore to be welcomed that the issue is now taken seriously. Following the adoption of the *Wet internationale misdrijven* [International Crimes Act] in 2003 (*Staatsblad* 2003, 270; *Kamerstukken* 28337) there is an unequivocal legal basis to prosecute individuals for, *inter alia*, genocide, crimes against humanity and war crimes. The Act extends to acts committed outside the Netherlands, irrespective of the nationality of the suspect. Where the suspect does

not have Dutch nationality, criminal proceedings can only be brought if he is present in the Netherlands.

What matters now is that prosecutions are actually brought. The two trials described above – which took place on the basis of lengthy and often difficult investigations – are milestones. The judgments of the Regional Court of The Hague are likely to become the leading cases in this area, even if some questions concerning *nemo tenetur* remain.

Protection of the child against ill-treatment

Legislative initiatives, national case law and practices of national authorities

Violence against children – As was noted in our previous Report, the Netherlands was criticised by the UN Committee on the Rights of the Child in 2004 for its failure to adopt legislation against corporal punishment. Shortly thereafter 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. In 2005 a bill was actually tabled (*Kamerstukken II,* 2005-2006, 30316, Nos. 1-3). A change of the Criminal Code is not considered necessary (*Kamerstukken II* 2003-2004, 28345, No. 8).

As a matter of fact the criticism of the UN Committee on the Rights of the Child was echoed in July 2005 when the European Committee for Social Rights stated that the Netherlands was not complying with Article 17 ESC.

There are estimations 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).

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Optional Protocol to CAT – On 3 June 2005 the Netherlands signed the new Optional Protocol to the UN Convention against Torture. The Minister of Foreign Affairs announced that the ratification procedure – which requires parliamentary approval – will now be started (*Kamerstukken II,* 2004-2005, 29800 V, No. 105).

No use in evidence of information obtained through torture – As was noted in our previous Report, a bill was tabled in 2004 concerning the use of information from intelligence services as evidence in criminal proceedings. During the discussion in the *Tweede Kamer* [House of Representatives], a motion was adopted in which the Government is requested to do everything possible to prevent information that has been obtained through torture or inhuman or degrading treatment from entering the criminal proceedings (*Kamerstukken II,* 2004-2005, 29743, No. 25).

Ombudsman: use of force by police – The National Ombudsman criticised the conduct of the police in two cases, as the use of force was not appropriate. In one case (2005/017) a woman had been arrested after a demonstration in front of a court house. Initially she refused to tell her name. At the police station an attempt was made to take her picture of her face. As she refused to cooperate, a police officer pulled her hair in order to lift her face. The Ombudsman established that in fact the woman had already revealed her name by the time the picture was taken. It appeared that the pictures were taken because the regional intelligence service was interested. The Ombudsman therefore concluded that there was no legal basis for taking the picture; consequently he also denounced the use of fore in that connection.

In another case (2005/082) the police arrested a man who had been threatening his neighbours. Upon his arrival at the police station the man behaved very violently. Since the man continued to do so after being locked up in a cell, destructing the interior, the police officers

found it necessary to apply handcuffs. When he still continued to bang the doors and charge anyone who dared to enter the cell, they tied his hands and feet behind his back (applying a technique called *het vogelnestje* [the bird's nest]). The Ombudsman noted that there was no legal basis for using handcuffs inside a cell, and so he concluded that the police officers' conduct was inappropriate. Realising that in practice a need for using handcuffs in a cell may exist, the Ombudsman recommended an evaluation of existing rules.

Second survey among detainees – In 2003 the first so-called "Detainees survey" was published. This survey involved some 10,000 detainees, from among the entire prison population, who were asked questions concerning their well-being. The aim is to identify differences between institutions and – following new surveys in the future – to map out trends (see our Report on 2003).

In February 2005, the second "Detainees survey" was published. Over 13,000 detainees were asked to participate; 48% responded. The survey shows that most detainees (71%) feels secure in prison, but they are not satisfied with the day programmes and the opportunities to prepare for reintegration in society. Many detainees complain that they are no longer allowed to smoke outside their cell. Interestingly detainees were very outspoken that they wished not to share their cell – but the 10% that has actually experienced a shared cell were neutral.

Detention: concern about general conditions – As was noted in our previous Reports, a number of measures have been introduced (multi-person cells, the so-called progressive regime structure) which have resulted in detention conditions which are on the whole less sophisticated than they used to be. Media reports suggest that this has led to growing unrest and an increase of violence in the penitentiary institutions. A number of (former) prison officials and trade union representatives raised concerns that the situation might escalate. Responding to parliamentary questions, the Minister of Justice stated that, quite to the contrary, there were no indications that violence is on the rise. He also pointed to the detention survey mentioned above (*Tweede Kamer,* 2004-2005, *Aanhangsel*, No. 1909). On the other hand, sit-ins and protest actions were organised by inmates in 8 institutions in June 2005.

Article 5. Prohibition of slavery and forced labour

Fight against the prostitution of others

Legislative initiatives, national case law and practices of national authorities

Fight against sexual exploitation – The Minister of Justice entered into a *'convenant'* [a gentlemen's agreement] with a number of newspaper publishers. The latter will ask advertisers, when submitting erotic advertisements, to include the licence number of their business. This will enable potential customers to distinguish between licensed and non-licensed companies; accompanying texts will point out that licensed companies are regularly inspected. It is believed that this part of the sex industry has more or less eradicated abusive situations (exploitation, trafficking, the involvement of minors and similar criminal activities). The Minister intends to enter into similar *'convenanten'* with internet providers (*Kamerstukken II,* 2005-2006, 28638, No. 17).

Trafficking in human beings

Legislative initiatives, national case law and practices of national authorities

Legislation on trafficking in human beings – A bill seeking to reinforce the prohibition on trafficking in human beings has been passed. The *Wet van 9 december 2004 tot uitvoering van internationale regelgeving ter bestrijding van mensensmokkel en mensenhandel* [International regulations on the fight against the smuggling of and trafficking of human beings

(Implementation) Act] entered into force on 1 January 2005 (*Staatsblad* 2004, 645; *Kamerstukken* 29291). A new provision of the Criminal Code, Article 273a, extends the notion of *'mensenhandel'* [trafficking in human beings] to exploitation in other branches than the sex industry, and also addresses the involuntary relinquishment of organs. The new provision is all-embracing and would appear to be '*Siliadin* proof'. New Article 197a CC prohibits smuggling of migrants. In order to effectively enforce the new provisions, a *Landelijk Expertisecentrum Mensensmokkel/Mensenhandel* [National Expert Centre on the smuggling of and trafficking of human beings] became operational in 2005.

Treaties against Trafficking in Human Beings – The changes in the law, mentioned above, also served to pave the way for accession to two important international instruments: the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* as well as the *Protocol Against the Smuggling of Migrants by Land, Sea and Air,* both *s*upplementing the UN Convention Against Transnational Crime (*Trb.* 2004, 35 and 36). The two protocols entered into force for the Netherlands in August 2005. In addition the new Council of Europe Convention on Action against Trafficking in Human Beings (ETS No. 197) was signed by The Netherlands on 17 November 2005.

National measures against trafficking in human beings – Meanwhile a *Nationaal Actieplan Mensenhandel* [National plan of action against trafficking in human beings] was published in December 2004 (*Kamerstukken II*, 2004-2005, 28638, No. 10). The Plan of Action was called for by the National Rapporteur on trafficking in human beings. It is meant to make the existing policies more coherent and visible. The Plan of Action was discussed in Parliament in September 2005 and met with a favourable reaction (*Kamerstukken II*, 2004-2005, 28638, No. 13).

Research is now carried out into the scope and nature of modern forms of slavery, such as the practice which the European Court of Human Rights found incompatible with Article 4 ECHR in the case of *Siliadin v. France (*judgment of 26 July 2005). The results are due early 2006.

Protection of the child

Legislative initiatives, national case law and practices of national authorities

International instruments for the protection of children **–** Steps were taken to ratify the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* of 25 May 2000. This protocol was submitted to Parliament for tacit approval in May 2005 (*Kamerstukken* 2004-2005, 30158, No. A/1, Eerste/Tweede Kamer).

CHAPTER II. FREEDOMS

Article 6. Right to liberty and security

Detention following a criminal conviction

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

European Court of Human Rights: violations of Article 5 ECHR – The European Court of Human Rights found violations of Article 5 ECHR in two similar cases: *Nakach v. the Netherlands* (30 September 2005, Appl. No. 5379/02) and *Schenkel v. the Netherlands* (27 October 2005, Appl. No. 62015/00).

In both cases 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. On these orders see Article 4 *supra.*

These TBS orders were subject to prolongation every two years. In both cases the competent Regional Court extended the applicant's placement order for a further two years. The applicant in each case appealed to the *Gerechtshof* [Court of Appeal] of Arnhem, but again in each case the appeal was rejected after a considerable delay – which in itself raised an issue under Article 5 ECHR. What makes the cases interesting, however, is that it became apparent that the Court of Appeal, for reasons of procedural economy, does not to make official records of hearings concerning prolongations of placements orders. Hence, when the applicant's counsel asked the Court of Appeal for a copy of the official record of the hearing, his request was rejected. Under Dutch law no further appeal lies against these decisions of the Court of Appeal.

The Strasbourg Court found that the failure to make official records violated Article 5 ECHR. After acknowledging in general the usefulness of keeping detailed records of what happens at hearings, the Court analysed the relevant case-law of the Netherlands *Hoge Raad* [Supreme Court]. In a remarkable move, the Strasbourg Court stated "there is no reason to doubt that, had it had jurisdiction to do so, the Supreme Court would have found the practice of the review chamber of the Arnhem Court of Appeal in violation of domestic procedure. The Court is thus led to conclude that the procedure prescribed by domestic law was not followed".

Deprivation of liberty for foreigners

Legislative initiatives, national case law and practices of national authorities

'Schiphol Fire' – On the 'Schiphol Fire', see our account under Article 4 *supra.*

Minor asylum seekers in detention: case-law – A number of cases have been brought before Dutch administrative courts concerning the legitimacy of detention of minor asylum seekers with a view to their removal.

One case concerned the detention of a 10 year-old asylum seeker from Afghanistan, who was refused entry to the Netherlands together with his parents and was kept in a closed facility pending the appeals procedure. A number of circumstances led the *Rechtbank* [Regional Court] Amsterdam to consider the detention of the minor a disproportionate measure: the length of detention (3 months); the young age of the detainee; the absence of educational facilities in the detention centre and a lack of perspective on a swift conclusion of the detention (*Rechtbank Amsterdam,* 14 March 2005, AWB 05/7301).

In two other cases, the *Afdeling Bestuursrechtspraak van de Raad van State* [Council of State, the highest administrative court] held that the detention of minor asylum seekers together

with their parents was legitimate. The first case (*Afdeling Bestuursrechtspraak van de Raad van State,* 16 August 2005*,* 200505443/1) concerned a minor asylum seeker who was detained together with his father. The father had on two earlier occasions tried to escape from the supervision of the immigration authorities. The Court started with the proposition that the Minister of Alien Affairs and Integration has a certain margin of appreciation in deciding whether a detention measure is necessary. With a view to the background of non-compliance on the side of the father, the Court stipulated that the Minister's decision was reasonable and that the decision had taken into account the interests of the child. In a second case (*Afdeling Bestuursrechtspraak van de Raad van State,*13 September 2005*,* 200507132/1) the Council of State considered that since the detained parents had voluntarily decided to keep the children with them in the detention facility, whereas alternative accommodation for the minors was available, there was no ground for appeal. Moreover, the Council of State held that the measure imposed on the parents had taken into account the interests of the children.

Minor asylum seekers in detention: call for better facilities – The *Inspectie voor Sanctietoepassing* [the new inspection service for implementation of sanctions; see below] issued a report concerning the detention of juvenile asylum seekers together with their parents (*Ouders met minderjarigen in vreemdelingenbewaring*, August 2005). The inspection service concludes that, in general, the detention of minor asylum seekers in the Netherlands is in conformity with international norms (Havana Rules, International Convention on the Rights of the Child), but stresses that the facilities where alien juveniles are currently placed, are not designed to accommodate minors. The focus in these detention regimes lies on order and security, which can be detrimental on the mental health of juveniles, especially on those who are forced to stay in the facility for a longer period of time. The inspection service therefore calls on the appropriate Ministers to take a number of measures, including the provision of facilities like sports, education and recreation. The Government responded by announcing that it will investigate the viability of the inspection's suggestions (*Kamerstukken II,* 2005-2006, 29344, nr. 48).

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Inspection for Implementation of Sanctions – On 1 January 2005, the *Inspectie voor Sanctietoepassing* [Inspection for implementation of sanctions] was formally established. This inspection service is a supervisory body which will monitor the proper implementation of liberty depriving measures in facilities across the Netherlands. The inspection is supposed to function as an independent body of the Ministry of Justice. A legislative proposal is currently under consideration which is meant to transfer existing supervisory competences from the *Raad voor Strafrechtstoepassing en Jeugdbescherming* [Council for Criminal Law and Protection of Minors] to the new inspection service.

In its first year of operation, the inspection service published two reports, one concerning the detention of juvenile asylum seekers together with their parents (see above) and one concerning the functioning of a penitentiary facility in the city of Almelo.

Committal for debt – The *Rechtbank* [Regional Court] of Leeuwarden dealt with the remarkable case of a man who was fined for traffic offences on 34 different occasions within a period of 6 months. The man did not pay. In an attempt to force him to pay the fines, the Public Prosecutor applied for a 'hostage order' [*gijzeling*], a committal for debt, which was granted by court. An order allowing his detention for a maximum of 55 days was issued. In summary injunction proceedings, the man claimed that this was incompatible with Article 5 ECHR. In rejecting this argument, the Regional Court paid close attention to the 1996 *Benham* judgment of the ECtHR. It held that the imposition of a hostage order is a means of coercion which is allowed under Article 5 ECHR, even when a person does not possess the financial means necessary to pay administrative fines (judgment of 4 January 2005, LJN AR8715).

Article 7. Respect for private and family life

Private life

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

Legislative initiatives, national case law and practices of national authorities

Legislation: DNA data base with profiles from convicts – A new Act entered into force on 1 January 2005: the *Wet DNA-onderzoek bij veroordeelden* (*Staatsblad* 2004, 465; see *Kamerstukken* 28685). The Act 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). The profiles will be stored in a database with a dual purpose. 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 'cold cases': 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 is 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 was not foreseen by law at the time they committed their offence nor indeed when they were tried. Since the DNA samples will not only be used in future cases but also for the investigation of crimes of the past, a 'double retroactive effect' occurs which raises questions as to its compatibility with the foreseeability requirement as developed by the European Court of Human Rights under Article 8 ECHR.

Legislation: Permanent camera surveillance in cell – A new Act provides a legal basis for permanent camera surveillance in cells (*Staatsblad* 2005, 194; *Kamerstukken* 29413). The legal basis was necessary since this type of surveillance entails a serious interference with the privacy of the detainee. The Act entered into force on 1 July 2005.

By way of background it may be recalled (as was noted in our 2003 and 2004 Reports), that Mr Volkert van der G., who was at the time suspected of killing politician Pim Fortuyn, was placed under permanent camera surveillance upon his arrest in May 2002. This measure was considered necessary to prevent any risk of suicide or other harm to him. When he objected against the 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 G., were under an individual detention regime under permanent camera surveillance. On that same day, the governor issued a new order for his camera surveillance. Mr Van der G.'s appeal was this time rejected as the measure had a sufficient legal basis in the amended rules. This was accepted by the European Court of Human Rights in its admissibility decision of 1 June 2004 (Appl. no. 8704/03). The new Act provides an unequivocal legal basis for permanent camera surveillance in a whole range of situations, extending beyond the situation the Mr Van der G. was in.

Publication of pictures of suspects on police website – Following riots surrounding a football match in April, the Rotterdam police force published a number of pictures of suspects on its internet site. The idea was that the public might assist in identifying suspects. However, the *College bescherming persoonsgegevens (CBP)* [Personal Data Protection Authority] had questions about the privacy aspects of the new method, and announced an investigation.

Ombudsman: taking of picture by police – The National Ombudsman criticised the conduct of the police in the case of a woman who had been arrested after a demonstration in front of a court house. Initially she refused to tell her name; at the police station an attempt was made to take a picture of her face. As she refused to cooperate, a police officer pulled her hair in order to lift her face. The Ombudsman established that in fact the woman had already revealed her name by the time the picture was taken. It appeared that the pictures were taken because the regional intelligence service was interested. The Ombudsman therefore concluded that there was no legal basis for taking the picture; consequently he also denounced the use of force in that connection (2005/017).

Registering drugs traffickers in Schengen Information System – In September 2005 the *College bescherming persoonsgegevens (CBP)* [Personal Data Protection Authority] agreed to the incorporation of a 'black list' of drugs traffickers in the Schengen Information System (SIS). This black list contains personal data of individuals who were caught with drugs at Schiphol Airport. It is already standing practice that these persons will be refused, for a period of three years, on flights between the Netherlands on the one hand and the Netherlands Antilles, Aruba, Suriname and Venezuela on the other. By including the 'black list' in SIS, drugs traffickers may now also be signalled in other EU Member States.

In its submission CBP advised the Minister to exercise restraint in placing individuals on the black list, because of the serious consequences this may entail. Furthermore CBP observed that it is of great importance to prevent innocent individuals from being blacklisted. It is therefore important that every drugs trafficker is actually charged and prosecuted, so that a trial court can establish his guilt or innocence. In case of an acquittal all data should be removed from the black list.

Case-law: Interception of telephone calls with lawyers – For a discussion of the judgment of 15 March 2005 of the *Rechtbank* [Regional Court] of The Hague, on the tapping of telephone conversations of suspects with their lawyers (LJN AT0304), see Article 48 *infra*. On the same issue, see also the judgment of the *Hoge Raad* [Supreme Court] of 15 March 2005 (LJN AS4638).

Voluntary termination of pregnancy

Legislative initiatives, national case law and practices of national authorities

Abortion: statistics – A report issued by the *Inspectie voor de Gezondheiszorg* [Health Care Inspectorate] showed in 2004 that pregnancy was terminated with 8.7 out of 1000 women between 15 and 44 years old. This 'abortion figure' is more or less constant: in 2003 it was 8.5, in 2002 8.7 and in 2001 8.4. Only 42% of the clients is of Dutch origin. The remaining 58% belongs to the first or second generation of immigrants. The differences are considerable. For instance, the estimated abortion figure for Dutch women is 4.7 per 1000, whereas the figure for Surinamese women is 33.1 per 1000, and for women from the Antilles 44.1 per 1000. Most women were between 20 and 24 years old. A possible explanation for the increasing number of abortions in this group is that there was a cut in the financial compensations of contraceptives (source: *Jaarrapportage 2004 van de Wet afbreking zwangerschap,* August 2005).

Abortion: 'tourism' to the UK and Belgium – Newspapers reported in April 2005 that pregnant women may travel to Great-Britain or Belgium in order to procure an abortion after 24 weeks of pregnancy. In the Netherlands, the *Wet afbreking zwangerschap* [Termination of pregnancy Act] does not permit abortion once the foetus is viable. Traditionally clinics applied a term of 24 weeks, and they are in the process of becoming stricter as medical research has recently demonstrated that a foetus may be viable after 22 weeks. It now appears that pregnant women are sometimes counselled to travel abroad where the requirements are less strict. In a reaction the State Secretary of Health stated that neither the counsellors nor the patients commit a

criminal offence under Dutch law (*Kamerstukken II,* 2004-2005, 29800 XVI, No. 221; see also *Handelingen* TK71, pp. 4362-4363).

Family life

Protection of family life

Legislative initiatives, national case law and practices of national authorities

Foreign adoptions – On the possibility that same-sex couples can adopt foreign children, see Article 9 *infra.* On age limits in connection with the adoption of foreign children, see Article 25 *infra.*

Case-law: access to court and parental authority – In a judgment of 27 May 2005, the *Hoge Raad* [Supreme Court] ruled that in the light of the right of access to court a father may, on his own, institute proceedings to apply for joint parental authority with the mother over their child. Prior to this judgment, the standing court practice was that a judge could only assign joint parental authority on the basis of a joint application of the parents; a sole application of the father would not be sufficient. The Supreme Court ruled that this interpretation of the relevant provision (Article 1:252 of the Civil Code) is incompatible with the father's right to access to court in order to claim the protection of his right to 'the exercise of parental rights', as enshrined in Article 8 ECHR (LJN AS7054).

Case-law: Article 8 ECHR and paternity action – On 25 March 2005 the *Hoge Raad* [Supreme Court] decided the case of a woman who asked for a *gerechtelijke vaststelling van het vaderschap* [judicial determination of paternity] on behalf of her son. She claimed that her son was born in 1995 out a relationship with a man, who died in 2000. Indeed, a DNA test had confirmed that the man had actually been the biological father of the boy. However, the man had been married to another at the time that the boy was born; a girl had been born out of that marriage. In the case that came before the Supreme Court, the widow and her daughter opposed the judicial determination of paternity, stating that this would infringe upon their right to respect for family life. The Supreme Court rejected the argument. Judicial determination of paternity can take place as soon as a blood link is established; there is no scope for a balancing of interests with third persons. The Supreme Court recalled that the possibility of a judicial determination of paternity had been introduced to avoid discrimination on the ground of birth (i.e. between children born within and those born outwith marriage), as required by the ECHR. The widow and her daughter had also argued that Article 8 ECHR would only require judicial determination of paternity if "family life" had existed between the father and the boy, *quod non*, but the Supreme Court simply recalled that the ECHR provides for minimum standards; the national legislator is free to offer a higher level of protection (LJN AT0412).

Right to family reunification

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

European Court of Human Rights: violation of Article 8 (Tuquabo-Tekle a.o.) – On 1 December 2005 the Strasbourg Court unanimously found a violation in a case concerning family reunification of refugees. The applicants were Netherlands nationals born in Eritrea. Five of them lived in Amsterdam, but Mehret, a daughter of Mrs Tuquabo-Tekle, still lived in Eritrea. In 1989, during the civil war, her mother fled whereas her children stayed behind in the care of friends and relatives. Her eldest son was able to move to Europe shortly thereafter, but a later request to have Mehret come over as well was rejected. The Dutch authorities considered that close family ties between Mrs Tuquabo-Tekle and her daughter had ceased to exist: the mother

had not acted with expediency, lodging her request several years after she had been legally resident in the Netherlands.

In finding a violation of Article 8 ECHR, the Strasbourg Court held that it was clear from the facts of the case that Mrs Tuquabo-Tekle always intended for Mehret to join her. The Court accepted the fact that she had delayed making an application for family reunion as she believed, and was advised by her legal representative, that she first had to obtain a passport and suitable accommodation for her daughter. The Court noted that Mrs Tuquabo-Tekle and her husband had lived in the Netherlands for a number of years and had opted for Netherlands nationality. They also had two children who had only minimal ties to their parents' country of origin. The Court therefore found that the best way for the applicants to develop family life together was for Mehret to settle in the Netherlands. The Court awarded the applicants € 8,000 for non-pecuniary damage (ECtHR, 1 December 2005, *Tuquabo-Tekle v. the Netherlands* (Appl. No. 60665/00).

European Court of Human Rights: case struck out after residence permit was granted – No judgment on the merits was delivered in the case of *Yuusuf v. the Netherlands* (Appl. No. 42620/02, 19 April 2005). The applicant arrived in the Netherlands with her husband and her two children in 1994. The couple had three more children born in the Netherlands. In 2000 the applicant's husband and the couple's children obtained residence permits, but she was refused a permit on the ground that she had been convicted for taking part in violent disturbances at the refugee hostel where they were living. In Strasbourg Ms Yuusuf complained that this refusal breached Article 8 ECHR. On 4 February 2005 the Netherlands Government notified the Court that the Immigration and Naturalisation Service IND had decided to grant the applicant a residence permit. She had no objection to her application being struck out.

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

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

European Court of Human Rights: no violation of Article 8 (Üner) – On 5 July 2005 a Chamber of the Strasbourg Court rejected a complaint based on Article 8 ECHR in the case of *Üner v. the Netherlands* (Appl. no. 46410/99). However, on 16 December 2005 it was announced that the case is referred to the Court's Grand Chamber. It remains to be seen, therefore, if the Chamber's ruling will be followed in the end. Since the case raises important questions concerning the protection against expulsion of foreigners (and, it may be added, since not all elements of the Chamber's reasoning are as convincing), we will consider the case in some detail.

The case was brought by Mr Üner, a Turkish national who was born in 1969. He came to the Netherlands with his mother and two brothers in 1981, when he was 12 years old, to join his father. He was granted a residence permit (*vergunning tot verblijf*) which was valid for one year at a time, and, in 1988, he obtained a permanent residence permit (*vestigingsvergunning*). Between 1989 and 1992 the applicant was once convicted of breach of the peace and twice of violence against persons. In June 1991 the applicant started living with a Netherlands national. The couple had a son, born in February 1992. The applicant moved out in November 1992, but remained in close contact with both his partner and his son.

The applicant was convicted of manslaughter and assault in 1994 and sentenced to seven years' imprisonment. While serving his prison sentence, he took various courses. His partner and son visited him in prison at least once a week and regularly more often. A second son was born to the applicant and his partner in 1996, whom he also saw every week. Both his children have Netherlands nationality and have been recognised (*erkend*) by the applicant. Neither his partner nor his children speak Turkish.

In January 1997, the competent authorities withdrew the applicant's permanent residence permit and imposed a ten-year exclusion order (*ongewenstverklaring*) on him in view of his conviction of 1994. The applicant lodged an objection, which was rejected. He also

appealed unsuccessfully. The applicant was deported to Turkey on 11 February 1998. However, it appeared that he returned to the Netherlands soon afterwards and was once more deported to Turkey on 4 June 1998. He again appealed unsuccessfully.

The applicant complained in Strasbourg that, as a result of the withdrawal of his residence permit and the imposition of a ten-year exclusion order, he had been separated from his wife and two children, who are Netherlands citizens and cannot be expected to follow him to Turkey. He relied on Article 8 ECHR.

The European Court of Human Rights noted that the expulsion order against the applicant constituted an interference with the applicant's right to respect for his family life and that the interference was in accordance with Netherlands law and pursued legitimate aims, namely public safety and the prevention of disorder or crime.

Concerning whether the interference was "necessary in a democratic society", the Court observed that in 1994 the applicant was convicted of manslaughter and assault. There could be no doubt that those acts constituted particularly serious, violent offences, whose gravity was also reflected in the severity of the punishment imposed on the applicant: seven years' imprisonment. Neither was that the applicant's first conviction. Against that background, the Court was satisfied that there was a legitimate basis for assuming that the applicant constituted a danger to public order and security.

As to the applicant's conduct since the offences were committed, the Court considered that no information relating to the applicant's behaviour following his release had been made available from which it could be deduced that the fears that he constituted a danger to public order and security for the future had been mitigated. On the contrary, the Court observed that, notwithstanding the fact that an exclusion order had been imposed on him, the applicant returned to the Netherlands soon after having been deported from that country in contravention of immigration rules.

At the time of the decision of 30 January 1997 to withdraw his residence permit and to impose an exclusion order on him, the applicant had been lawfully resident in the Netherlands for 16 years, having moved to that country at a relatively young age (12). His close relatives had thus also been residing in the Netherlands for a long time. Even so, the Court reiterated that family ties between adults did not necessarily attract the protection of Article 8. The Court was furthermore not persuaded that the applicant had become so estranged from the country where he spent the first 12 years of his life that he would no longer be able to settle in Turkey. It also attached no relevance to his claim, made in the domestic proceedings, that he spoke little or no Turkish, having regard to the fact that he was assisted by an interpreter at the hearing before the Advisory Board on Matters Concerning Aliens.

Although the Court accepted that moving to Turkey might entail a certain level of social hardship for the applicant's partner and his children, it found no indication that there were any insurmountable obstacles for them to settle with him in Turkey. In that context the Court further noted that, when the exclusion order became final, the applicant's children were still very young – six and one and a half years old respectively – and so of an adaptable age. In addition, only one of the children actually lived with the applicant, and that was for a relatively short time, when the child was six months old. Therefore, if the applicant's partner were to decide to stay in the Netherlands with the children, the disruption of their family life would not have the same impact as it would if they had been living together as a family for a much longer time. Finally, the Court had also taken into account the fact that the exclusion order was not of unlimited duration.

In the circumstances of the applicant's case, the Netherlands State could not be said to have failed to strike a fair balance between the applicant's interests on the one hand and its own interest in preventing disorder or crime on the other. The Chamber therefore held, by six votes to one, that there had been no violation of Article 8.

Legislative initiatives, national case law and practices of national authorities

Expulsion of foreigners: "one-strike-out" policy proposed – On 30 September 2005 the Ministers for Immigration and Integration submitted a policy document to Parliament which

outlined a revision of the current legislation regarding expulsion of aliens on grounds of public order concerns (*Kamerstukken II* 2005-2006, 19637, No. 971). A "one-strike-out" policy was proposed, meaning that an alien could be removed after having been convicted of a crime once without regard being had to the gravity of the crime nor the punishment received. The *Adviescommissie Vreemdelingenzaken (ACVZ)* [Advisory Committee for Alien Affairs] found the proposal not to be in conformity with, *inter alia*, the case law of the European Court of Human Rights, which takes the prospect of future conduct of the alien into consideration instead of just focusing on past behaviour (ACVZ, *Openbare orde en verblijfsbeëindiging*, April 2005).

Article 8. Protection of personal data

Independent control authority

Legislative initiatives, national case law and practices of national authorities

Personal Data Protection Authority –The *College bescherming persoonsgegevens (CBP)* [Dutch Data Protection Authority] is an independent supervisory authority that monitors the application of the legislation concerning the processing of personal data. The CBP advises the Government on data protection issues, gives information to the general public, hears claims concerning possible breaches of the data protection legislation, approves codes of conduct and privacy regulations and has investigative powers too. Our previous reports for the Network have already paid attention to the activities of the CBP. Information on its activities, with English summaries, can be found at its website www.dutchdpa.nl (which is completely in English).

This year too the CBP offered its advice on several occasions, for instance when legislation was evaluated. For reasons of efficiency, we will discuss these advices whenever concrete steps are undertaken by the legislator or in Parliament.

Personal Data Protection Authority: Annual Report 2004 – In its Annual report over 2004, published in May 2005, the CBP observed that "the bombings in Madrid and the murder of Theo van Gogh have resulted in an intensification of the pursuit of a safe society and in particular of the fight against terrorism. In short order a number of extensions to the powers of the police and the Ministry of Justice were implemented or announced, which will result in more and more information on citizens who are not suspects ending up in police files. For years there have been calls for extended powers, but the increased threat of terrorism since September 11, 2001 has made way for a conviction that such an extension is in fact necessary". The CBP stated that it supports the need for the Government to take effective measures to combat terrorism. "However, international treaties, European rules, the Dutch Constitution and other laws demand that new powers meet the joint criterion of usefulness and necessity. Legal protection must also be provided for. It may be necessary to venture out in different directions in the battle against the new terrorism, but there is no reason to give up the view that exercise of power and law enforcement must take place within a system of checks and balances: no powers without demonstrable necessity and no powers without the use of these powers being monitored".

Personal Data Protection Authority: Proposals to Change the Law – On 12 July 2005 the CBP issued a paper proposing a number of changes to the *Wet bescherming persoonsgegevens (WBP)* [Data Protection Act]. The proposals relate, *inter alia*, to 'special data' (such as health, race or religion). Current legislation prohibits the processing of these data, but problems occur in practice, for instance when accountants and auditors have good reason to use these data.

Meanwhile the result of research commissioned by the CBP were published in February 2005 (*Burgers en hun privacy* [Citizens and their privacy]). To the outsiders the outcome was not surprising: that citizens believe that data protection is important, even if they accept that other interests may prevail to a certain extent. People are not exactly aware of how their data are processed, and they tend to mistrust business life in this respect. 92% of respondents believed it

that the WBP is an important asset (although they were not too familiar with its contents) but the CBP is not well known.

Personal Data Protection Authority: Co-operation with other bodies – In July 2005 the CBP concluded a cooperation agreement with the *Onafhankelijke Post en Telecommunicatie Autoriteit* (OPTA) [Independent Post and Telecom Authority]. The two bodies made arrangements for the supervision of the protection of personal data in the telecom sector.

A similar agreement was concluded with the *Inspectie Werk en Inkomen (IWI)* [Inspectorate for Work and Income], again in July 2005. The cooperation will focus on a more effective and efficient supervision of the use of personal data in the area of social security (*Staatscourant* 129, 7 July 2005).

Additional Protocol to Data Protection Convention – On 1 January 2005, the Additional Protocol to the 1981 Data Protection Convention of the Council of Europe (ETS 181) entered into force for the Netherlands (*Trb.* 2004, 288). The Additional Protocol, which was ratified by the Netherlands on 8 September 2004, requires the establishment of a supervisory authority and sets rules for the transmission of data to third parties.

Contra-Terrorism Infobox – In March 2005 the Minister of the Interior presented a new instrument in the fight against terrorism: the Contra-Terrorism Infobox. The 'CT-Infobox' is meant to bring together information about networks and individuals which are involved in terrorism, especially Islamic terrorism, and the processes of radicalisation that accompany it. The information will be provided by the intelligence services, the police, the Public Prosecutors Office and the immigration services. The CT-Infobox operates under responsibility of the general intelligence service *Algemene Inlichtingen- en Veiligheidsdiensten* (AIVD). The Box will receive information, analyse it, and may advise services to cooperate. The Box will not disclose information itself: services will have to exchange information between themselves, in accordance with the rules applicable on each of them (*Kamerstukken II,* 2004-2005, 20754, No. 21).

Protection of personal data

Legislative initiatives, national case law and practices of national authorities

New Act: Camera Surveillance of Public Areas – A new Act *Cameratoezicht op openbare plaatsen* [Camera Surveillance of Public Areas Act] was adopted in June 2005 (*Staatsblad* 2005, 392; *Kamerstukken* 29440). It will enter into force at a date to be determined.

The Act gives 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 asserted 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 new rules, 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. Cameras must be static and surveillance will always cover long periods – i.e. no ad hoc camera monitoring. 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 Government, the proposals meet the requirements of proportionality and subsidiarity and they are fully compatible with Article 8 ECHR.

Evaluation of Act: Special Investigative Powers – Since 1 February 2000, the *Wet bijzondere opsporingsbevoegdheden* [Special Investigative Powers Act] is in force. After almost five years

of practice, an evaluation of the Act was submitted to Parliament on 20 December 2004 (*Kamerstukken II* 2004-2005, 29940, No. 1).

One of the issues reviewed in the evaluation is the obligation to notify the use of special investigative powers. Notification will allow the person concerned to institute judicial proceedings when he considers that his fundamental rights are violated. The obligation to notify was introduced in the Act in order to comply with the requirements of Article 13 ECHR. However, the final evaluation shows that in practise notifications are rarely served. This is partly because exceptions to the obligation to notify can be justified in the interest of the investigation. It is unclear, however, what kind of situations give rise to the use of exceptions. Also, the Act imposes no sanction on the failure to notify.

Proposal: introduce 'Citizen Service Number' – On 29 September 2005 a bill was tabled, aiming at the introduction of a single and unique registration number for every individual residing in the Netherlands (*Kamerstukken II*, 2005-2006, 30312, Nos. 1-3). All public services would use this *Burgerservicenummer (BSN)* [Citizen Service Number]. There is a privacy aspect to this proposal: as the *Raad van State* [Council of State] pointed out, every public service using the BSN will have to verify that it actually relates to the person that it is dealing with. This would come close to the indirect introduction of an overall *identificatieplicht* [a duty to identify oneself] – a controversial issue in Dutch society.

The CBP was critical too. In a letter of 25 October it noted that the BSN would be useful for the authorities, but it entails various risks for the citizens. 'Computer errors' can easily spread, whereas the proposal does not provide for sufficient means that have mistakes corrected. The CBP also observed that the proposals completely ignored a fundamental question, i.e. the extent to which the private sector could use this BSN.

Case-law: access to files Intelligence Service – In December 2000 two Dutch youngsters of Morrocan origin were killed by Indian security forces in Kashmir, India. The *Algemene Inlichtingen- en Veiligheidsdiensten (AIVD)* [General Intelligence Service] stated in its Annual Report 2001 that the men had been recruited for the Jihad by a network of Muslim extremists, and that they had received financial support so as to allow them to prepare to die as martyrs for Islam. The parents stated that this information was incorrect and harmful to the reputation of both their son and themselves. They requested access to the information on which the *AIVD* statements had been based. Their request was rejected by the responsible Minister. The parents appealed to the *Rechtbank* [Regional Court] of The Hague, but they were not successful. On 18 May 2005 the highest administrative court, the *Raad van State* [Council of State] confirmed the findings of the Regional Court. To the extent that the present case came within the reach of Article 8 ECHR, the refusal to grant access was justified under Article 8 (2). The Council of State referred in this connection to the wide margin of appreciation to which national authorities are entitled when interfering with the rights protected by Article 8 ECHR (LJN AT5664).

Ombudsman: disclosing information on activist to employer – The National Ombudsman criticised the conduct of the police in the remarkable case of a member of the fire brigade who, in her spare time, often campaigned for the environment. She was apparently a well-known activist in The Hague, and apparently the police officers who were confronted with her knew that she worked with the fire brigade of Utrecht. In 2003 the head of police in The Hague wrote a letter to the chief of the Utrecht fire brigade, complaining about her behaviour. He stated that she often provoked the police and frequently violated of the law; she had been arrested on dozens of occasions and had often been violent on these occasions. His police officers were annoyed by the fact that 'a colleague' caused so much trouble, and the head of police was afraid that the relationship between police and fire brigade would suffer. The Ombudsman held that the conduct of the head of police was not appropriate, since the information on which he based his letter came from the police data registers. These data must remain confidential, unless one of the exceptions provided for by law is applicable. This was not the case in the instant situation (*rapport* 2005/158)

Other relevant developments

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

Case-law: Requiring EU Citizens to Proof Identity – For a discussion of the case of *Oulane* (ECJ, 17 February 2005, case C-215/03), which addresses the position of an EU citizen staying in another EU Member State, who does not show any evidence of his identity or nationality, see Article 45 *infra.*

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

Legal recognition of same-sex partnerships and recognition of the right to marry for transsexuals

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.

Introducing foreign adoption for same-sex couples – In May 2005 the Minister of Justice announced a bill to create the possibility that same-sex couples can adopt foreign children (*Kamerstukken II,* 2004-2005, 28457, No. 23). The existing rules – notably the *Wet opneming buitenlandse kinderen (Wobka)* – do not provide for this possibility yet.

Recognition of the right to marry for transsexuals – There are no specific initiatives or new trends to be reported here either. The Dutch rules provide that a transsexual can apply for a change of his or her birth certificate if certain conditions are met (Article 1-28 of the Civil Code). This possibility exists both for Dutch nationals and for foreigners who are legally resident for more than a year. The change of the birth certificate does not entail any limitations on the right to marry.

Other relevant developments

Private international law aspects of registered partnerships – On 1 January 2005 an Act entered into force regulating various private international law aspects of registered partnerships (*Wet van 6 juli 2004, houdende regeling van het conflictenrecht met betrekking tot het geregistreerd partnerschap, Staatsblad* 2004, 334 and 621). The Act determines which rules are applicable when two persons in an international situation wish to enter into a registered partnerships in the Netherlands. The Act also regulates recognition of registered partnerships entered into in other countries).

Proposal to end the 'flash divorce' – In June 2005 a bill was tabled seeking to end the possibility of a so-called *flitsscheiding* [flash divorce]. This phenomenon was the in-intended effect of the introduction of the rules concerning registered partnerships. A 'flash divorce' can be done within days: a married couple wishing to divorce first replace their marriage into a registered partnership, and then dissolve the registered partnership. Judicial intervention is not needed at all. Since this was considered undesirable – and this type of divorce was not always recognised abroad – proposal was made to amend the relevant provisions of the Civil Code (*Kamerstukken II*, 2004-2005, 30145, Nos. 1-3). The bill also stipulates that parents with children must agree on the care and education of their children when they start divorce proceedings.

Article 10. Freedom of thought, conscience and religion

Incentives and reasonable accommodations provided in order to ensure the freedom of religion, including the right to conscientious objection

Legislative initiatives, national case law and practices of national authorities

Case-law: headscarves – Headscarves continued to be an issue in Dutch public debate and to feature in the case-law. The *Commissie Gelijke Behandeling (CGB)* [Equal Treatment Tribunal] dealt with 8 'headscarf cases' in the first ten months of 2005 alone. One case is discussed here; for more interesting case-law see Article 21 *infra.*

On 20 May 2005 the CGB dealt with the case of a local organisation that offers counselling and advice on issues such as rent subsidies, social security benefits, taxation and debts. About 70% of the clients is of foreign background. The organisation experienced difficulties when counselling women who wear a religious headscarf that covers the face completely. Such a scarf impedes non-verbal communication whereas proper counselling, the counsellors felt, requires at the very least eye contact with the client: one needs to be able to check if, for instance, a client has understood the advice. The organisation therefore wished to introduce a rule, according to which clients should take off a religious headscarf that covers the face completely – or else they would not be accepted as clients. Since the organisation itself was in doubt whether the envisaged rule was in accordance with the principle of non-discrimination, it asked the view of the CGB.

The CGB noted that the envisaged rule made an indirect distinction on the basis of religion: women wearing a particular kind of headscarf out of religious motives were treated differently than others. The CGB found that the aim pursued – good communication with clients with a view to offering good advice – was legitimate, but it doubted whether the means used was appropriate: rejecting clients does not result in a good advice either. What was decisive in this case was that in practice women are prepared to take off their scarf if they are confronted with a female counsellor. Since the organisation had a sufficient number of female counsellors, there was no need for a formal exclusion rule (CGB 25 May 2005, *oordeel* 2005-86).

Article 11. Freedom of expression and of information

Freedom of expression and of information

Legislative initiatives, national case law and practices of national authorities

Apologie du terrorisme: bill submitted – As was already noted in the Network's Opinion 2005-3 on violent radicalisation, the Dutch Government is currently preparing a legislative proposal to criminalise the *apologie du terrorisme*. According to the draft text, a new provision (Article 137h) would be inserted in the Criminal Code. It would prohibit, *inter alia*, the glorification or denial of international crimes, crimes against humanity and terrorist offences which carry life imprisonment, where the person concerned knows or could have known that such statements will or may cause a serious disturbance of public order. Offenders may be fined or imprisoned for a maximum period of a year. Sentences are doubled in case of habitual offenders and where two or more persons co-operate.

The draft text has been submitted for consultation to a number of professional organisations. The *Nederlandse Orde van Advocaten* [Netherlands Bar Association] doubted whether the proposed provision would have any practical significance – but to the extent that it did, it might work counter-productive as it would create martyrs (*preadvies* of 9 September 2005).

The *Raad voor de rechtspraak* [Council for the Judiciary, a public body charged with promoting good quality execution of judiciary duties by the courts] observed that the proposed provisions will force the courts to take positions in historical, political and religious disputes: did

a specific event in the past amount to an international crime? The Council wondered if the courts will be able to decide these issues adequately. In addition the Council noted that according to the explanatory memorandum, the prohibition would only apply if the offender *intends* to cause a serious disturbance of public order. This element has not been included in the description of the offence itself (*advies* 2005/26, 15 September 2005).

The *Vereniging voor Rechtspraak (NVvR)* [Netherlands Association of Magistrates] was critical too: although it is aware of the need to combat terrorism and to comply with international obligations, it found that the draft goes beyond that. The draft raises questions as to the scope of the prohibition and its relation to the principle of legality. One may also question the added value of the proposal, the NVvR observed, if one takes into account the possibilities to prosecute on the basis of existing legislation. The association also noted that cases may raise controversial issues concerning foreign policy, where one may expect a lot of media attention. Some might try to label controversial issues (such as the building of 'The Wall' by Israel) as an international crime, in order to bring proceedings against political opponents (*advies* of 29 September 2005).

The latest news is that, following a heated debate in Parliament on 3 November 2005, a motion was tabled, calling upon the Government to refrain from introducing the 'apology bill' (*Kamerstukken II,* 2005-2006, 29754, No. 59; *Handelingen* 2005-2006, TK17, p. 17-1036). The motion was not voted upon (*Handelingen* 2005-2006, TK21, p. 21-1331).

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Case-law (1): Removal of 'Schiphol Fire' posters violates freedom of expression – The Schiphol Fire, which was already discussed extensively under Article 4 *supra,* led to considerable public outrage. In the direct aftermath of the fire, a number of posters and banners were raised which held the Minister for Aliens Affairs and Integration, Ms. Rita Verdonk, directly accountable. The posters and banners sported texts such as *"Eleven burned alive, Rita thank you very much"; Minister Verdonk, still no blood on your hands?"*, and *"Travel agency Rita: arrest, deportation, cremation – adequate to the bitter end"*.

The authorities in a number of cities wasted no time removing the posters and banners, stating that the Minister's good name was being tarnished. In order to ensure that the police would refrain from removing new posters, the owners of the posters and banners took the State to court in summary injunction proceedings, stating that a democracy should be able to accommodate this kind of expression, and that the levels of acceptable criticism concerning public persons are higher than those concerning private individuals.

The *Rechtbank* [Regional Court] of Amsterdam agreed. It observed that 11 individuals had died whilst the State was fully responsible for their well-being. As long as investigations were running, one should seriously take into account the possibility that the State fell short in its duty of care for the detainees. In these circumstances it could not be seen why those who were concerned could only criticise the Government as a whole, and not the Minister who was directly responsible. Of course criticism should address the Minister in her official capacity and not as a private person. In this case that condition had been met, even if the Minister's first name featured on the posters. Interestingly the Court called upon the Public Prosecutor's Office not to limit its actions to a mere seizure of the posters, but to actually bring criminal proceedings against those who had displayed the posters so that the courts could clarify the legal position (judgment of 24 November 2005, LJN AU6828).

Case-law (2): denial of holocaust – see Article 21 *infra*

Case-law (3): Prohibition of communication imposed on victim's mother – An unfortunate incident during gym class had caused severe neck injury to a girl. Subsequently, the girl's mother had repeatedly made offensive remarks directed against both the school and the gym teacher in the media and on the internet. In summary injunction proceedings the *Rechtbank* [Regional Court] of Zwolle held that although it is only natural that the girl's mother would initially react in an emotional way to such an incident, there must be limits concerning the nature, intensity and duration of the expressions. These limits are justified by art. 10 (2) ECHR and serve to protect the reputation or rights of others. Based on these considerations, the Court

prohibited the mother to make future contacts with the school and teacher and to make future remarks concerning the incident in the media (LJN AS4742, judgment of 2 February 2005).

Case-law (4): Prohibition to use portrait of Prime Minister for advertisement purposes – The *Rechtbank* [Regional Court] of Amsterdam ruled on 2 February 2005 that the use of an image of the Prime Minister for advertisement purposes was illegitimate. The Court had to strike a balance between the right of freedom of expression on the side of the firm against the right of the Prime Minister for respect of his private life. This balance was struck in favour of the respect for private life, since freedom of expression in this case only served commercial interests. The infringement of the freedom of expression could moreover be justified by Article 10 (2) ECHR, since the Court considered such a restriction necessary in order to ensure the proper functioning of a democratic society (LJN AS4748).

Case-law (5): Throwing paint bags outside scope of freedom of expression – On 19 April 2005 the *Hoge Raad* [Supreme Court] delivered its ruling in a case dating from 2 February 2002, the day of wedding between prince royal Willem-Alexander and Máxima de Zorreguieta; a day on which a demonstrator had thrown a small paint bag towards the golden carriage of the just married couple. The demonstrator argued that his act had to be classified as an expression coming within the scope of Article 10 ECHR, but the Supreme Court stipulated that an act can only come within the scope of freedom of expression when the act serves to contribute to a debate which relates to the convictions of the acting person. Throwing paint bags cannot be seen, according to the Court, as a contribution to a public debate (LJN AR 7262).

Media pluralism and fair treatment of the information by the media

Legislative initiatives, national case law and practices of national authorities

Case-law: freedom of expression of the media v. right to privacy (1) – On 14 April 2005, the *Rechtbank* [Regional Court] of Amsterdam rejected a request made by a Public Prosecutor to prohibit the broadcast of a television program in which private files from his computer would be made public. The Public Prosecutor had voluntarily disposed of his computer half a year earlier, by way of placing it at the garbage. The files later made their way to a well-known TV reporter. The Court ruled that in this case the freedom of expression of the television maker prevailed above the right to privacy of the Public Prosecutor, since the private files were likely to contain information which were of general interest to the public and would probably remain covered up without the broadcast of the television program (LJN AT4518). The Public Prosecutor lost his job.

Case-law: freedom of expression of the media v. right to privacy (2) – In another case, the *Rechtbank* [Regional Court] of Amsterdam held that freedom of expression of the television broadcasting station *'SBS'* did not prevail over the right to privacy of prince royal Willem-Alexander, his wife princess Máxima and their daughter. *SBS* had broadcasted home footage of the royal family which came from a stolen digital camera of the family. Since broadcasting of the footage had not served a purpose of public interest other than satisfying public curiosities, *SBS* was ordered to broadcast a rectification (LJN AT4199, judgment of 20 April 2005).

Article 12. Freedom of assembly and of association

Freedom of peaceful assembly

Legislative initiatives, national case law and practices of national authorities

Court overrules restrictions on anti-EU demonstration – The *Rechtbank* [Regional Court] of Arnhem held in summary injunction proceedings that limitations imposed on an anti-EU

demonstration were in breach with the freedom of assembly. The mayor of the city of Arnhem had imposed restrictions both in time and location: the demonstration was banned to an industrial area and had to take place between 09.00 and 11.00 am. These restrictions were deemed necessary to prevent severe public disorder emanating from an announced counter-demonstration on the same day by an anti-fascist movement. The Regional Court ruled however, that the restrictions were of such a severe nature that they could not be justified by just a mere possibility of illegitimate behaviour by third parties. Public authorities are responsible to take the appropriate measures to guarantee the freedom of peaceful assembly; only when a situation of administrative *force majeure* exists, are severe curtailments to the freedom of peaceful assembly justified (LJN AT5504, judgment of 13 May 2005).

Article 13. Freedom of the arts and sciences

Freedom of the arts

Legislative initiatives, national case law and practices of national authorities

Case-law: rap song goes too far – The so-called *Hirsi Ali Dis* was already spotted in our 2004 Report. A rap group had recorded a song about Ms Hirsi Ali MP which included the text "We are now preparing her liquidation / Because of what she said on integration". The song – which was never distributed on record but was put on internet – also contained insults of Ms Hirsi Ali. In convicting the members of the rap group, the *Rechtbank* [Regional Court] of The Hague observed:

> Everyone should be, within the limits of the law, to express his or her opinions without being hindered by others in a unlawful – let alone criminal – fashion. For politicians, in this case a member of Parliament, there is an additional element: they must be able to perform their functions without being exposed to threats and insults. Moreover, the public nature of the established facts bears the risk that third parties are inspired to commit acts of violence and that feelings of unrest and insecurity in society are amplified. Of course the suspects are entitled to the freedom of expression as well, and, if they wish to respond to public statements by which they consider themselves harmed, they have the right to express their views in public in a form – artistic or not – which may be chosen by them. However, in doing so they are bound by law. As been observed above, they have transgressed the limits imposed by law.

The Court imposed a penalty of 140 hours of *taakstraf* [community service] and a suspended prison sentence of two months, with a probationary period of two years (LJN AS4030, judgment of 27 January 2005).

Case-law: no prohibition on future films made by Hirsi Ali - Another case concerning Ms Hirsi Ali related to a request to forbid her to release future films with similar contents as the film *'Submission Part I'. The latter film* was released in 2004 and caused substantial upheaval in the Dutch Muslim community. The *Rechtbank* [Regional Court] of The Hague stipulated that such a prohibition could only be justified if it were proven that Ms Hirsi Ali had intentionally stigmatized and/or hurt a specific group of persons (i.e. Muslims) in *'Submission Part I'*. The Court held that this had not been the case. Although Hirsi Ali had used the words 'pervert' and 'paedophile' in relation to the prophet Muhammad, she had not overstepped the margins of the freedom of expression. She had used these words only once and in a certain specified context. The Court concluded that the impugned expressions were acceptable (LJN AT0303, judgment of 15 March 2005).

Article 14. Right to education

Access to education

Legislative initiatives, national case law and practices of national authorities

Abolishment of tuition fees for 16 and 17 year-olds –The *Tweede Kamer* [House of Representatives] has adopted a legislative proposal abolishing tuition fees for 16 and 17 year-olds taking part in secondary and professional education from the school year 2005-2006 onwards (*Kamerstukken* 30199, *Handelingen* TK, 2005-2006, No. 21, pp. 1328-1329). The bill is now under consideration in the *Eerste Kamer* [Senate]. The abolishment of tuition fees is in line with art. 13 ICESCR, which provides for 'the progressive introduction of free education' with regard to both secondary and higher education. In a letter to the present author, of 24 November 2005, the responsible Ministry of Education, Culture and Science added that the proposal is also in line with Article 14 of the EU Charter of Fundamental Rights. The Government interprets the notion of "free education" as requiring that there are no financial obstacles to participation in secondary and higher education. Present rules applied that principle by offering financial support to indigent parents; the new rules set the next step by abolishing the tuition fees altogether. However, financial support will continue to be available for additional costs, for instance for school books.

Case-law: an assertive triplet's right to education – One remarkable case concerned an alleged violation of the right of a triplet to education. According to the father of the triplet (three teenage girls), he was keeping the girls home because their safety could not be vouched for by the school. A number of students had taken to systematically teasing the triplet, to which teasing the triplet typically reacted in combined force, resulting, *inter alia*, in the alleged molestation of a teenage boy. After the publication of an article about this molestation in a local newspaper, the father feared for his daughters' safety and decided to keep them home from school. The school felt the girls were partly responsible for their plight, and recommended sending each girl to a different school. Refusing to separate the triplet, the parents took the school to court, claiming, *inter alia*, that the school should bear the extra costs of educating the triplets by private tutor at home, as the school's refusal to find the triplet another school which they could attend as a triplet constituted a violation of their right to education. The *Rechtbank* [Regional Court] of Haarlem denied this claim, stating that the school had the triplet's best interests at heart, and that the school cannot be held fully responsible for the safety of the triplet (LJN AU0184, judgment of 28 July 2005).

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

The right to engage in work and the right for nationals from other member States to seek an employment, to establish themselves or to provide services

Legislative initiatives, national case law and practices of national authorities

Requirement of work permit for nationals of new Member States prolonged – The Government decided in April 2005 to continue to make use of the transitional arrangements provided for in the Accession Treaties with the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia. This means that workers from these countries continue to require a work permit to be able to have access to the Dutch labour market. The prolongation has a duration of one year, ending on 1 May 2006. Government will decide in the first half of 2006 whether it will renew the prolongation. The Government's decision was again based on the expectation that an unconditional right to free movement would create an important pull factor for potential migrants from the new Member States (*Staatscourant*, 23 May 2005, No. 96).

The prohibition of any form of discrimination in access to employment

Legislative initiatives, national case law and practices of national authorities

Discrimination and unemployment rates – The *Landelijk Bureau ter bestrijding van Rassen-discriminatie (LBR)* [National Agency for the Prevention of Racial Discrimination] published a report on 10 January 2005 in which it concluded that discrimination on the labour market is one of the major causes for the relatively high unemployment rates of ethnic minorities in the Netherlands. The LBR called on relevant authorities to conduct in depth investigations concerning the exact nature and frequency of discriminatory practices on the Dutch labour market. Figures presented in February 2005 by the *Centraal Planbureau (CPB)* [Central Planning Agency] show that the unemployment rate of non-western minorities has risen from 14% in 2004 to 16% in 2004. Special concerns relate to the position of the Moroccan minority group: the unemployment rate of ethnic Moroccans has doubled since the year 2001 up to 22% in the year 2004.

Equal treatment at work – For a discussion an extensive report issued by the Minister of Social Affairs and Employment on the practical implementation of the principle of equal treatment at work, see Article 20 *infra.*

Article 16. Freedom to conduct a business

Article 17. Right to property

The right to property and the restrictions to this right

Legislative initiatives, national case law and practices of national authorities

Case-law concerning the right to property – A number of cases concerning an alleged violation of the right to property have been filed before Dutch courts, but no violation was actually found. A remarkable case involved a salt-mining concession awarded on the basis of the Mining Act 1810 (as a matter of fact the last Dutch act to be written in French, a legacy from the Napoleonic era). An environmentalist grass-roots group, *"Laat het zout maar zitten"* [perhaps best translated as "Leave the salt at rest"], consisting of over 2000 individuals and legal persons, was opposed the exploitation of the area. It took the State to court for, *inter alia*, violation of Article 1 of the First Protocol to the ECHR. In its decision the *Rechtbank* [Regional Court] of Leeuwarden (which was featured already under Article 6 *supra* with a to-the-point analysis of the *Benham* case) ruled along the lines of the ECtHR in the *Holy Monasteries* case (1994). It decided that the disownment of the previous owners did not consist in a violation of their right to property because it had been subjected to conditions provided for by law (the 1810 Mining Act), it was in the public interest, and the previous owners had been adequately compensated (judgment of 27 September 2005, LJN AU3453).

Article 18. Right to asylum

Asylum proceedings

Legislative initiatives, national case law and practices of national authorities

Disclosing personal data of asylum seekers to Congo – On 15 December 2005, i.e. the very day that this Report was handed in, Minister Verdonk (Immigration and Integration) admitted that personal data of rejected asylum seekers had been disclosed to the authorities of the Democratic

Republic of Congo (DRC). The Minister apologised for having misinformed Parliament: previously she had strongly denied that any sensitive information had been passed. The admission and apologies followed after a lengthy series of press reports, parliamentary debates and an official investigation.

Initially news reporters had claimed that the Immigration and Naturalisation Service IND had released the identity of individual asylum seekers to the DRC authorities. The fear was obviously that the individuals concerned might run into trouble upon return to their country of origin: the authorities might wish to query why they had fled the country and what exactly they had told Dutch immigration authorities.

Despite categorical denials of Minister Verdonk, an independent commission was established to investigate the matter (*Kamerstukken II*, 2004-2005, 19637, No. 959). It found that indeed a number of documents, which had been handed over to the DRC authorities, contain indications that specific individuals had applied for asylum. In a response the Government acknowledged that the IND had provided similar administrative asylum data to countries other than the DRC – in over 100 documents concerning 31 states in total. But the Minister underlined that the failure to shield data was made inadvertently. Moreover, no detailed information on the *content* of asylum files was disclosed to the Congolese authorities – only the fact *that* the individuals had applied for asylum.

The Minister took a somewhat laconic position: rejected asylum seekers (or "failed immigrants", as the official website of the Ministry puts it) have nothing to fear if the authorities of their countries of origin are aware of the fact that they applied for asylum. She seemed happy to note for instance that "the Congolese representation in the Netherlands takes the view that nearly all foreign nationals who returned to the Congo have applied for asylum at some point in time", and she apparently derived from this that the individuals concerned had nothing to fear. On 14 December 2005 she confirmed, in replying to parliamentary questions, that some 31 third countries were involved. As regards one third of these, the country reports of the Ministry of Foreign Affairs stated that rejected asylum seekers had nothing to fear upon return. Of the remaining countries of origin, about half consisted of (candidate) EU Members or parties to the ECHR, "so one must assume that they comply with their human rights obligations under these treaties". The Minister then continued: "As regards those countries which are neither (candidate) EU Members nor parties to the ECHR, I must assume that such problems do not occur at the return of rejected asylum seekers" *["Voor de landen die geen (kandidaat)lid zijn van de EU of partij zijn bij het EVRM geldt dat ik ervan uit dien te gaan dat bij terugkeer van uitgeprocedeerde asielzoekers dergelijke problemen niet voorkomen"]*. No legal basis for this statement was provided, nor did the Minister explain how this presumption could be reconciled with, for instance, Strasbourg case-law.

At any rate, on 15 December it became clear that these arguments did not convince a majority in Parliament, and the Minister had to retreat. Yet a motion tabled by the opposition calling for her resignation was rejected by a majority in Parliament (*Kamerstukken II*, 2005-2006, 19637, No. 993).

The Ombudsman, the Court of Auditors and the Immigration and Naturalisation Service – As was noted in our 2004 Report, the National Ombudsman expressed his concerns, in August 2004, about the Immigration and Naturalisation Service (IND): 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 .

This criticism led to a general discussion about the functioning of the IND. At the request of the responsible Minister, the *Rekenkamer* (Netherlands) assessed the performance of the IND. In September 2005 the conclusions were published. The report showed a number of deficiencies: both in asylum cases and in other contexts decisions were not delivered within the legal timeframes. In addition corruption was found to exist (*Kamerstukken II*, 2004-2005, 30240, Nos. 1-2). In a response the Government announced measures to shorten decision periods. The

IND would become the only organization giving decisions regarding admission. A new body would be created to regulate return (*Idem,* No. 4).

Meanwhile the Ombudsman continued to receive many complaints about the IND. They reveal systematic problems on the part of the IND. Many complaints are about delays. For instance, three months before a residence permit expires, the IND sends forms for an extension. However, once these forms are received back, the IND is often not capable of processing them within the three months period. The Ombudsman also noted that the "bad service stands in marked contrast to the high fees that are required". The Ombudsman also dealt with 50 cases where the IND had failed to respond to complaints, are rejected the complaints whereas they were clearly well-founded (*rapporten* 2005/176 and 2005/177). The Ombudsman also expressed concern about the fact that the IND did not execute judicial decisions (letter of 23 June 2005). In a reply, the Minister accepted the criticism and announced improvements.

Wider application of accelerated procedure – In December 2004 the Government decided that the so-called accelerated procedure (AC-procedure) would in the future also be used to process seemingly promising asylum claims (*Staatscourant* 3 December 2004, No. 234, p. 13). Both the *Nederlandse Orde van Advocaten* [Netherlands Bar Association] and the *Stichting Rechtsbijstand Asiel* (Association of Pro Bono Asylum Lawyers) criticized this measure in a letter to the Minister of Alien Affairs and Integration. They stated that the accelerated procedure – which was already under heavy criticism – would not allow for due process and that the proposed policy was not in conformity with the existing legislation which prescribes more extensive periods between interviews (*Nieuwsbrief Asiel- en Vreemdelingenrecht* 9-2005, p. 547).

Reasons for concern

Disclosing personal data of asylum seekers – The 'Congo crisis', if that is an appropriate name, gives rise to serious concern. Initially the responsible Minister Verdonk (Immigration and Integration) denied that relevant information about asylum seekers was disclosed to the authorities of their countries of origin. She then tried to downplay the consequences of disclosure. It is difficult to determine whether this was a matter of naïveté or an attempt to cover up potentially serious mistakes in the administrative handling of asylum cases. But it is clear that the Netherlands bear both moral and legal responsibility if the disclosure of information leads to ill-treatment, or worse, of the individual concerned in his country of origin.

Accelerated procedure – To many observers the continued application of the accelerated procedure remains a cause for deep concern, even more so now the scope of this procedure has been widened as described above.

<u>Unaccompanied minors seeking asylum</u>

Detention of minor asylum seekers – For a discussion of cases on the detention of minor asylum seekers, see Article 6 *supra.* A reference to the recent report of the *Inspectie voor Sanctietoepassing* [the new inspection service for implementation of sanctions] on the detention of young asylum seekers is also included under Article 6 *supra*

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

Subsidiary protection and 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 other 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: deportation would violate Article 3 ECHR (Said) – On 5 July 2005 the Strasbourg Court decided the case of *Said* v. *The Netherlands* (application number 2345/02). Mr Said claimed that his expulsion to Eritrea would put him at risk of inhuman or degrading treatment in breach of Article 3 ECHR. The Court unanimously agreed.

When serving in the Eritrean army Mr Said had voiced criticism of his superiors. He stated that he had been detained for that reason, but managed to escape. He applied for asylum in the Netherlands. In rejecting his application in the so-called accelerated procedure, the Dutch immigration authorities considered that the claim was not sufficiently substantiated.

In its assessment the Court observed that the applicant's statements had been consistent and that the applicant had submitted persuasive arguments to refute the argument that his account lacked credibility. The Court stated that, seen the facts of the case, it was difficult to imagine by what means other that desertion the applicant could have left the army even if the account of his escape was somewhat remarkable. Concerning the alleged risk of ill-treatment the Court took into account the information of the Country Report prepared by the Netherlands Government, reports by NGO's and other public sources as well as a recent account of a group of Eritreans collectively expelled by the Maltese government.

The *Said* judgment received considerable attention: this was the first time a (potential) violation of Article 3 ECHR was found in a Dutch asylum case. The judgment reinvigorated complaints about the remedies available to asylum seekers and the so-called accelerated procedure. As Judge Thomassen underlined in her concurring opinion, Dutch courts only undertake a marginal review which substantially limits the meaning of the remedies available. In the present situation only the European Court of Human Rights offers such a review.

Legislative initiatives, national case law and practices of national authorities

Removal of 26,000 rejected asylum seekers – Our previous reports already paid attention to the announced removal of 26,000 individuals whose application for asylum had been rejected. It was noted that several organisations (such as 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 the UN Committee on the Elimination of Racial Discrimination) criticised the policy, but a majority of the *Tweede Kamer* [House of Representatives] supported the Government plans.

On 14 January 2003 Minister Verdonk (Immigration and Integration) announced that she was prepared to re-examine the most harsh cases *[schrijnende gevallen]*. This led to no less than 18,900 letters of individuals who claimed to fall in that category. In 2004 the *Raad van State* [Council of State] decided that those letters constituted official claims which deserved a motivated answer from the Government. In March 2005 the Minister announced that, even though it had been promised that she would re-examine all cases once more "with compassion", the present situation would lead to an additional burden on the administrative and judicial system. The so-called *14/01 letters* would therefore not be given preferential treatment (*Kamerstukken II*, 2004-2005, 19637, No. 910).

The Netherlands Refugee Council criticised this decision and noted that prolonged insecurity about their status led many asylum seekers to "depart with unknown destination" (see the report *Geen pardon maar terugkeer*, 2005).

Case-law: no extradition of PKK leader to Turkey; the role of diplomatic assurances – Our previous Report paid attention to a series of judgments concerning the possible extradition of Ms Nuriye Kesbir, a prominent PKK leader who asked political asylum in the Netherlands in 2001. Turkey requested her extradition. The Dutch Government is willing to grant the extradition, but Ms Kesbir argues that she will be subjected to torture and receive an unfair trial upon her return in Turkey. The latest development covered by our 2004 Report, was that the *Rechtbank* [Regional Court] of The Hague decided on 8 November 2004 that Ms Kesbir should not be extradited to Turkey (KG 04/1161).

This was confirmed by the *Gerechtshof* [Court of Appeal] of The Hague in its judgment of 20 January 2005 (LJN AS3366). The Court found that Ms Kesbir, being a woman and a prominent PKK leader, ran an increased risk of torture during detention in Turkey. The Court noted improvements in the human rights situation in Turkey, and considered that there were no reasons to distrust firm and concrete insurances that the rights of an individual would be respected. Yet the Court observed that "torture in Turkey is not a thing of the past (...) apparently there is a discrepancy between the intentions of the Government and what actually happens at a lower level in the prisons and the police stations". The risk for Ms Kesbir might be taken away by firm and concrete guarantees, the Court considered, but the diplomatic assurances offered by the Turkish Government were too general and abstract in nature. The Court considered – and this is also very interesting in the light of current discussion involving, inter alia, proposed policies in the UK – that an adequate guarantee should at least indicate that, and how, the Turkish authorities will ensure in practice that the judicial and other officials whom Ms Kesbir will encounter during her detention and trial will abstain from torturing her and from inflicting other forms of ill-treatment.

The Minister of Justice announced on 16 March 2005 that he would appeal to the *Hoge Raad* [Supreme Court]. Meanwhile the NGO Human Rights Watch has already written three letters to the Minister of Justice asking him not to extradite Ms Kesbir (HRW, *Letter III to Dutch Minister of Justice*, 17 December 2004; see also HRW, *Still at Risk. Diplomatic Assurances No Safeguard Against Torture*, April 2005).

Deportation to Iran – Following reports on the execution of two homosexuals in Iran, on 19 July 2005, the Minister of Immigration and Integration decided to temporarily stay the deportation of Iranian homosexuals (*Kamerstukken II*, 2004-2005, 19637, No. 970). The moratorium will last for 6 months and will then be reconsidered.

Good practices

Case-law on diplomatic assurances in the context of extradition – The series of judgments concerning the possible extradition of prominent PKK member Ms Kesbir yields interesting materials – even more so in light of the widespread concern among international NGO's about the use of diplomatic assurances in transfers to countries where there is a risk of torture and ill-treatment.[8] The Court of Appeal of The Hague rejected the diplomatic assurances offered by the Turkish Government as too general and abstract in nature. The Court stated that an adequate guarantee should at least indicate that, and how, the Turkish authorities will ensure in practice that the judicial and other officials whom Ms Kesbir will encounter during her detention and trial will abstain from torturing her and from inflicting other forms of ill-treatment.

[8] See, e.g., the joint statement on this matter by Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation for Human Rights, International Helsinki Federation for Human Rights, and World Organisation Against Torture (of 12 May 2005).

Foreigners under a life-saving medical treatment

Legislative initiatives, national case law and practices of national authorities

Case-law: HIV infection and deportation to Angola – On 11 August 2005 the *Rechtbank* [Regional Court] of The Hague dealt with a case of a woman who was about to be deported to Angola. She was pregnant, and during a medical examination an HIV infection had been detected. In summary injunction proceedings, the Court accepted that there was no adequate medical treatment available in Angola: over 500,000 individuals are infected with HIV, whereas there is enough capacity to provide treatment for 2,000. The Court also noted that the Dutch authorities, in ordering her deportation, had failed to examine whether the woman had family or a social network supporting her once in Angola. Since it seemed likely that deportation would violate Article 3 ECHR, the Court granted the application (LJN AU6565).

A similar decision followed on 20 September 2005 in a case of deportation to Uganda (LJN AU3694).

CHAPTER III. EQUALITY

Article 20. Equality before the law

Equality before the law

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

Human Rights Committee: discrimination in taxation? – The case of *De Vos* is not the first one in which certain aspects of Dutch taxation law are challenged on the basis of Article 26 ICCPR. Recent applications tend to relate to fairly technical issues and most have been rejected off-hand (see also our previous reports). Mr De Vos complained about the Dutch taxation regime on private use of company cars. He claimed that the increase of his taxable income by 4% of the catalogue price of the company car used by him, because his private use of that car exceeded 1,000 km per year, was in violation of the prohibition of discrimination of Article 26 ICCPR. The Committee rejected the complaint since Mr De Vos had failed to substantiate how such a difference in treatment between him and people who used their company car for less than 1,000 km was based on one of the prohibited grounds of discrimination of Article 26 (HRC, 5 August 2005, *De Vos v. the Netherlands* (Comm. No. 1192/2003). On this case see also Article 47 *infra.*

ECtHR: indirect discrimination in the context of occupational disability? – On 6 January 2005 the Strasbourg Court decided the case of *Hoogendijk* (Appl. No. 58641/00). Ms Hoogendijk complained about the discriminatory effects of the *Reparatiewet Algemene arbeidsongeschiktheidswet*, an act aimed at countering unintended negative consequences of the General Occupational Disability Act, which provided for allowances in cases of occupational disability. Due to an income requirement the law affected a much larger group of women than men. The Court held that in spite of this, the indirect difference in treatment had a reasonable and objective justification since the *Reparatiewet* was introduced in order to remove the discriminatory exclusion of married women in the original legislation. The Court declared the application manifestly ill-founded.

Legislative initiatives, national case law and practices of national authorities

Entry into force of Protocol 12 ECHR – Protocol 12 to the European Convention on Human Rights, which the Netherlands ratified in July 2004, has entered into force on 1 April 2005. 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. As yet there is no case-law where Protocol 12 was applied.

Expanding the scope of 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. On the proposal to include "disability" in this list, see Article 26 *infra*.

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

The law provides that an evaluation of the Act should take place every 5 years. The first evaluation led to a report by the CGB itself (*Gelijke behandeling in beweging,* 2000) and a Government response (see *Kamerstukken II,* 2001-2002, 28481, No. 1). This year the second evaluation – entitled *"Het verschil gemaakt"* [The difference made] was submitted by the CGB. The CGB noted an increase in compliance with its findings (which are non-binding): from 66% in 2001 to 84% in 2004. It also observed that courts attach more weight to the findings of the CGB. The CGB proposed to consider an extension of its mandate, so as to include the conduct of authorities and of private associations. Despite the overall positive assessment of the applicable legal framework and its own functioning, the CGB underlined that discrimination continues to be a serious problem. According to estimations about 1.6 to 2 million individuals were confronted with discrimination or unequal treatment in 2003-2004. Only a small part of these victims actually lodged a complaint with the CGB.

In a first response the Government announced that it will commission scientific research into the effectiveness of the AWGB (see *Kamerstukken II,* 2004-2005, 28481, No. 3). The recommendations of the CGB will be taken into account in this research project, and the same applies to the relationship between the prohibition of discrimination and the fundamental freedoms such as the freedom of association and the freedom of religion.

Equal treatment at work **–** In June 2005 the Minister of Social Affairs and Employment submitted an extensive report (215 pp.) on the practical implementation of the principle of equal treatment at work and during recruitment and selection (*Gelijke behandeling in bedrijf*, June 2005; *Kamerstukken II*, 2004-2005, 30347, No. 1). No less than six different acts seek to combat discrimination in the sphere of employment; other acts and regulations apply to recruitment and selection. The question was to what extent organisations and companies are actually aware of non-discrimination legislation and which stance they take on these issues. Familiarity proved to be higher among larger companies than among smaller ones, whereas older rules were better known than more recent ones. As to implementation of the rules, the study found similar patterns. Companies are free to use affirmative action, which has caused some of them to abolish it as it failed to deliver the desired results. In general new anti-discrimination legislation has made companies and organisations more aware of their responsibilities, but the report also shows that they tend to perceive their own policies on this point too favourably. Although in general the objectives of such legislation are widely endorsed by employers, they put strong emphasis on organisational autonomy in choosing how to implement, without too much governmental intervention.

Case-law: housing policy in Rotterdam indirectly discriminatory – On 7 July 2005 the *Commissie Gelijke Behandeling (CGB)* [Equal Treatment Tribunal] issued an advisory opinion on proposed changes in the housing policy of the city of Rotterdam. Rotterdam was planning to introduce local regulations permitting only persons with an income of 120% of the minimum wage or more to be eligible for renting a house in the city. The plans were intended to stop the influx of so-called *kansarmen* [people with less opportunities in society] in order not to aggravate the instable social situation in several neighbourhoods. The CGB concluded that such a policy would amount to indirect discrimination on the grounds of ethnicity, nationality and gender. No objective justification was put forward for the policy. Either the reasons mentioned by Rotterdam were illegitimate since they directly had a discriminating aim, or they were legitimate but not necessary. The latter concerns the aims of strengthening social cohesion in the neighbourhoods concerned and the combating of illegal occupation of housing. The CGB concluded that alternatives on these points have been proven to be available and are in fact already being implemented, such as the fight against illegal sub-letting. Since national legislation on similar policies is in the making, both the CGB and the Government are in agreement that local authorities should always assess whether specific measures do or do not amount to indirect discrimination (*Kamerstukken II,* 2005-2005, 30091, no. C; CGB, *Advies* 2005/03).

Case-law: headscarves – Headscarves continued to be an issue in Dutch public debate and to feature in the case-law. The *Commissie Gelijke Behandeling (CGB)* [Equal Treatment Tribunal] dealt with 8 'headscarf cases' in the first ten months of 2005 alone. Some interesting cases will be dealt with under Article 10 *supra* as well as under Article 21 *infra.*

Article 21. Non-discrimination

Protection against discrimination

Legislative initiatives, national case law and practices of national authorities

Evaluating preferential treatment – For a discussion of the *Nota Voorkeursbehandeling* [White Paper on Preferential Treatment], see Article 23 *infra.*

Case-law: headscarves (2) – A 'headscarf case' that underlined the existence of positive obligations for schools, was decided by the *Commissie Gelijke Behandeling (CGB)* [Equal Treatment Tribunal] on 30 May 2005 (*oordeel* 2005-91). The complaint in this case was that not that a school itself discriminated, but rather that it failed to 'protect' its students when trying to find internship places. The school (with a student population 40% of which was Muslim) was incidentally confronted with institutions that would not accept interns wearing a scarf. Whenever this happened, the school would contact the institution concerned and discuss the matter. Often it managed to persuade the institution to accept the student, but if the institution persisted in its refusal, the school would leave it that – considering that this was the responsibility of the institution concerned – and find an alternative place to do the internship. The school had 600 students and had a shortage of 164 internship places.

As a matter of fact the student who had triggered the present case was denied an internship *twice*: one time because she was wearing a scarf, the second time because she refuses, on religious grounds, to shake hands with men. In both cases alternative places could be found.

The CGB observed that a provider of services, such as school, is not merely obliged to refrain from discrimination but is also under a positive obligation to take measures. The latter obligation includes a duty to protect students against discrimination on the basis of their religion and to carry out a thorough investigation if students complain about such discrimination. The key question was which concrete steps can be expected from a school when confronted with institutions that refuse scarves, even if these institutions themselves are obliged by law to refrain from such discrimination. The CGB found that the school did not go far enough. By not taking concrete action (such as lodging a formal complaint with the board of the institution, or bringing the case before the CGB), the school contributed to the continuation of a situation that was incompatible with the law. In addition the number of internships available for women wearing headscarves decreased when compared to the places for others. Especially a school having so many Muslim students may be expected to engage in a pro-active policy, which also signals that the students who experience problems on account of their religion can rely on the support of their school.

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

Legislative initiatives, national case law and practices of national authorities

National Action Plan against Racism – On 19 December 2003, after extensive consultations with civil society, 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, awareness raising, and equal treatment in the workplace. An extensive 'progress report' was submitted to Parliament in March 2005 (*Kamerstukken II,* 2004–2005, 29800 VI, No. 154). Since it is an extremely informative overview of Dutch policies in this area,

the integral text of the report was attached to the Networks Opinion 2005-5 *Combatting racism and xenophobia through criminal legislation*.

Enforcing prohibition of discrimination on the labour market – In October 2005 a White Paper *Rechtshandhaving en discriminatie op de arbeidsmarkt* [Enforcing the prohibition of discrimination on the labour market] was submitted to Parliament (*Kamerstukken II*, 2005-2006, 27223, No. 73). The White Paper reviewed the various possibilities that civil law, administrative law and criminal law have to offer in the struggle against discrimination of individuals belonging to ethnic minorities. The general conclusion was that the legal framework is adequate. It is conceivable that a system of fines is introduced in some areas (for instance in vacancy announcements which refer to age without good reason), but the Government does not consider this desirable at this stage. Similar hesitations were expressed about the proposals to introduce 'naming and shaming' and to establish blacklists of companies that discriminate.

The White Paper also emphasized that the fight against discrimination is a shared responsibility of many actors. The Government has tried to give extra impetus to their efforts by launching a *Breed Initiatief Maatschappelijke Binding* [which might be translated as a Grand Initiative for Commitment to Society]. A special meeting, featuring the Prime Minister and several Cabinet Members, took place in The Hague on 26 January 2005 (*Kamerstukken II*, 2004-2005, 30054, No. 1). A number of follow-up conferences were organized throughout the year, one of the aims being to strengthen the ties between representatives of minorities and employers.

Bill to criminalise 'apologie du terrorisme' – see Article 10 *supra*.

Statistics on discrimination **–** The NGO *Centre for Information and Documentation Israel (CIDI)* reported a stabilization of anti-Semitic incidents over 2004: 326 (334 in 2003). Violent or other grave incidents such as (threats of) physical violence slightly increased to 26 (25 in 2003). The report notes a radicalization among youngsters at schools after the murder on Theo Van Gogh and the position of the internet as an increasingly influential forum for spreading anti-Semitic ideas. These trends seem to continue in the first five months of 2005 (*Annual report on 2004 and the first five months of 2005*, August 2005).

The NGO *Meldpunt Discriminatie Internet (MDI)* [Dutch Complaints Bureau for Discrimination on the Internet] in its annual report over 2004 reported an increase of discriminatory remarks on the internet: 2939 (against 1496 in 2003). According to MDI the increase is partly due to the fact that more people know MDI and report to it, but also that discrimination on the internet is a widespread phenomenon. Particularly significant increases can be seen in the following contexts: anti-Islam: 409 (231), anti-Turkish 309 (47), anti-Moroccan 268 (59), anti-Dutch (sic!) 266 (50), anti-African/black 232 (99), and discrimination on the basis of sexual orientation 149 (44). In most cases *MDI* asked the provider to remove the contested content, but in six cases reported to the police. One of these cases led to a court judgment fining the author of the expression concerned for denying the holocaust (see below) (*Jaarverslag 2004*, www.meldpunt.nl).

Cybercrime surveillance system – Upon request of the *Tweede Kamer* [House of Representatives] the Ministry of Justice is working on a surveillance system of cybercrime. The system, which the Government aims to set up on 1 January 2006, covers illegal expressions on the internet in the broadest sense, including child pornography, incitement to terrorism and discrimination. It will work with the "notice and takedown" method: individuals can complain about possible illegal expressions on the internet. The system will then check the legality, notice the provider and ask him to remove the content concerned (take down). The police will be asked to investigate on the person(s) responsible for the content. The system will not replace the current internet anti-discrimination mechanisms, but aims to enforce those (*Kamerstukken II,* 2004-2005, 28197, no. 22).

Case-law: denial of the holocaust – In December 2004 a man was sentenced to four weeks' imprisonment for denying the holocaust on his website. The NGO *Centre for Information and*

Documentation on Israel (CIDI) had reported the website to the police. The Rechtbank [Regional Court] of 's-Hertogenbosch considered that the statements were unnecessarily insulting – both when read in isolation and when seen in context – and could not be seen as contributions to the public debate on historic and societal issues. Taking into account the limits that Article 10(2) ECHR sets to the freedom of expression, the Court found the man guilty of libel (21 December 2004, LJN AR7891).

Case-law: insulting Islam – A few months later the same court also convicted a man who had displayed a poster (A3 size) on a window of his house containing the text *"Stop het gezwel dat Islam heet! Theo is voor ons gestorven. Wie wordt de volgende? Kom in verzet NU! Nationale Alliantie, wij buigen niet voor Allah. Word lid! (...)"* ["Stop the cancer that is called Islam! Theo died for us. Who will be next? Resist NOW! The National Alliance does not bow for Islam. Join! (...)"]. The Court found that this text, notably the first sentence, went far beyond what was acceptable in any debate. The freedom of expression was not unlimited; criminal sanctions can and must be used to fight excesses of intolerance which have a clearly negative impact on society. The Court also noted that the statements were not made in the context of a political debate or satire (where broader margins apply), nor were they the expression of religious beliefs. Consequently the man was found guilty of deliberately insulting a group of people (Article 137c of the Criminal Code). The Court imposed a conditional prison sentence of two weeks, which would not be executed if the man would not commit any other criminal offences within a period of two years (Rechtbank [Regional Court] of 's-Hertogenbosch, 19 July 2005, LJN AT9494)

Case-law: school segregation – In February 2005 the *Commissie gelijke behandeling (CGB)* [Equal Treatment Tribunal] dealt with the issue of school segregation. The background to this case is the emergence, in many parts of the Netherlands, of schools which are only or predominantly frequented by allochtonous children. Although the freedom of education is highly cherished in the Netherlands and parents have the constitutional right to establish a school in accordance with their believes, the emergence of 'black schools' is not so much the result of deliberate choice but rather the unintended consequence of high concentrations of migrants in relatively deprived neighbourhoods. The latter phenomenon is widely considered undesirable as it may seriously hamper the children's integration into society and at the same time may lead to lower quality teaching because many pupils have language difficulties.

In an attempt to counter this development, a so-called *spreidingsbeleid* was adopted by the municipal authorities and a number of primary schools in the town of Tiel. According to this *spreidingsbeleid* allochtonous children were 'spread out' or 'dispersed' over primary schools. Each primary school operated a maximum percentage for non-Dutch children (which were defined in accordance of a number of criteria); this percentage was related to the percentage of non-Dutch inhabitants of the neighbourhood were the school was located. In practice this meant that non-Dutch inhabitants had to find schools outside their own neighbourhood, and often they were sent from one school to another.

The CGB found that although no pupils were refused access to schools (they were merely redirected to other schools) the case was about access to schooling and thereby fell within the scope of applicable equal treatment legislation. Further the policy led to a distinction between pupils of Dutch origin and others, and, taking into account the criteria developed to define 'allochtonous pupils', this amounted to direct discrimination based on race. In this respect the case was distinguished from an earlier case where a Protestant school operated a maximum per class on the number of pupils for whom Dutch is the second language – a system which the CGB regarded as indirect discrimination on the basis of race (see our 2003 Report). The CGB therefore concluded that the Tiel policy was unlawful (CGB, 18 February 2005, *oordeel* 2005-25)

Case-law: discriminating employer – A job-seeker of non-Dutch origin applied by e-mail for a job with a construction company which had a number of vacancies on his website. A week later, after he had sent a reminder, he was rejected by e-mail. The next day a friend, with a Dutch name, applied to the same company by sending a highly similar e-mail; he immediately received

a reply asking for his telephone number. Believing that he had been refused because of his last name, the 'real' job-seeker applied to the *Commissie gelijke behandeling (CGB)* [Equal Treatment Tribunal].

The employer disputed the facts and stated that, before rejecting the applicant, an interview by telephone had taken place. Having concluded that he was not fit for the job, the management decided to reject him. The CGB observed that facts of the case gave rise to a suspicion of discrimination based on race. As a result the burden of proof shifted to the company. The CGB therefore asked the company to prove that a telephone conversation had actually taken place on the day indicated by the company. When the company did not provide a list of telephone calls of that particular day (although the telephone company was known to keep records), the CGB concluded that the company had violated the prohibition of discrimination (CGB, 21 July 2005, *oordeel* 2005-136).

***Report on 'the Lonsdale issue'* –** On 14 December 2005, i.e. on the eve of the submission of the present Report, an extensive report on *'the Lonsdale issue'* was published. The phenomenon of *Lonsdale* youngsters was already spotted in our 2004 Report: 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. In its fresh report, the research project *Monitoring racism and the extreme right* (a joint endeavour of the Anne Frank Foundation and Leiden University) closely scrutinises the group that is often loosely referred to as *Lonsdale* youngsters.

Remedies available to the victims of discrimination

No significant developments to be reported (but see the CGB case reported immediately above, which illustrates the significance of a reversal of the burden of proof).

Positive actions aiming at the professional integration of certain groups

Legislative initiatives, national case law and practices of national authorities

Measures to counter school segregation – Attention was already paid to *oordeel* 2005-25 of the *Commissie gelijke behandeling (CGB)* [Equal Treatment Tribunal] on the issue of school segregation. In that case the CGB rejected the so-called *spreidingsbeleid* in the town of Tiel, according to which allochtonous children were 'spread out' over primary schools. In that case the representative of Tiel had asked the CGB to indicate what kind of policy would be acceptable to counter the emergence of 'black schools'. The CGB declined that invitation, observing that a general advice was being prepared by the *Onderwijsraad* [Education Board], an advisory body to the Government. The CGB was involved in that process as well.

In its advice *"Bakens voor spreiding en integratie"* [Beacons for dispersion and integration] the *Onderwijsraad* noted that this is a complex problem for which there are no easy solutions. There are many tensions: between the collective interest (to have better proportions of allochtonous and autochthonous pupils per school) and the individual freedom of choice for parents when selecting a school for their children; between schools that wish to pursue their own policies and local authorities; between the overall support among parents for 'mixed' schools and their actual choice for a 'white' school when push comes to shove; between the international prohibition to distinguish on the basis of nationality or ethnicity, and the international obligation to counter segregation.

Unlike the CGB, which performs such a strict review that in fact it leaves no scope for any *spreidingsbeleid,* the *Onderwijsraad* believes that a school admission policy may legitimately take into account the level of education of the parents. So-called *achterstands-leerlingen*, literally speaking pupils that lag behind, should go to the same schools as pupils who are not disadvantaged by the level of education of their parents. In practice such a policy may only work, however, if neighbourhoods are sufficiently mixed. Especially in the big cities, such

as Rotterdam, this is often no longer the case. Another element to be taken into account is that there is no empirical support for the proposition that *spreiding* of pupils will lead to better results in terms of teaching. It is even conceivable that 'black schools' have developed special expertise in countering learning problems. But this is not the only factor to take into account: schools also have a role to play in the broader process of integration. Against this background the *Onderwijsraad* advised against a *spreidings* policy that is determined at the national level. A 'US styled' compulsory anti segregation policy may work counter-productive and should not be followed. Solutions must be found at the local level.

In her response of 14 October 2005, the Minister for Education largely agreed with the *Onderwijsraad* (*Kamerstukken II*, 2004-2005, 30304, no. 5). She spoke out in favour of school admission policies that take into account the level of education of the parents, since this is often a decisive factor for a pupil's success or failure at school. Unlike the *Onderwijsraad,* however, the Minister continued to support a new policy which requires newly established schools[9] to ensure a 'mixed' school population. Financial support from the State will be withdrawn if 5 years after its establishment a school has more than 80% of *achterstandsleerlingen* or disadvantaged pupils. Of course no school can force 'non disadvantaged pupils' to join, but at least the school can do its best through admission policies and promotion.

Positive aspects

Debate about school segregation – Thanks to rich and thoughtful contributions of the *Commissie gelijke behandeling* and the *Onderwijsraad*, the debate about measures to counter school segregation is on. It is clear that there are no easy solutions – just as it is clear that the problem is as pressing in the Netherlands as it is in other European countries. The proposals to base school admission policies on the level of education of the parents, instead of nationality or ethnicity, seem to make sense. It would be worthwhile to engage in a thorough and systematic comparison of the approaches chosen in other EU Member States, so as to identify best practices.

Protection of Gypsies / Roms

Legislative initiatives, national case law and practices of national authorities

Roma and Sinti in the Netherlands – Our 2004 Report referred a special thematic edition of the *Monitor on Racism and the Extreme Right* on the position of Roma and Sinti in the Netherlands. Since an English translation was published in April 2005, it is useful to repeat the main findings of the study, which may be of relevance to other countries as well. Research has shown that Roma and Sinti rarely report instances of discrimination to the authorities. 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

[9] 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. 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 were alleged to 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.

reality: only minimal efforts are made (P. Rodriguez & M. Matelski, *Monitor on Racism and the Extreme Right – Roma & Sinti*, special report 2004 (English translation April 2005) also available via www.annefrank.nl)

Effects of integration policies – In a letter to the *Tweede Kamer* [House of Representatives] the Minister of Integration has indicated that in spite of targeted local policies aimed at integrating Roma and Sinti many problems remain: relatively high levels of unemployment and of school drop-outs and persistent discrimination. The Minister points to some initiatives to counter these problems: inclusion of Roma and Sinti in a new campaign against discrimination and local employment projects funded by the European Social Fund (*Kamerstukken II*, 2004-2005, 29837, No. 4).

No renewed funding for Sinti or Roma organisations will be given, the Minister of Integration indicated. Since this kind of funding has been abolished several years ago with the agreement of the *Tweede Kamer,* restarting the funding would create an unwanted precedent, the Minister indicated in a letter to Parliament on 3 Januari 2005 (int0500002).

Reasons for concern

Framework Convention and Roma and Sinti – As will be noted below, the Netherlands finally ratified the Framework Convention for the Protection of National Minorities. However the Netherlands on this occasion did not recognise Roma and Sinti as minorities – unlike Germany, Slovenia and Sweden.

Article 22. Cultural, religious and linguistic diversity

Protection of religious minorities

Legislative initiatives, national case law and practices of national authorities

Framework Convention – On 16 February 2005 the Netherlands finally ratified the Framework Convention for the Protection of National Minorities. The Convention has entered into force for the Netherlands on 1 June 2005 (*Staatsblad* 2004, 681). In a separate declaration the Netherlands has limited the scope of application to the Kingdom in Europe and has declared that it will apply the Convention only to the Frisians (*Tractatenblad* 2005, 77). It may be noted that, unlike Germany, Slovenia and Sweden, the Netherlands did not recognise Roma and Sinti as minorities.

Article 23. Equality between man and women

Gender discrimination in work and employment

Legislative initiatives, national case law and practices of national authorities

Implementing Directive 2005/73/EC – A bill seeking to implement Directive 2005/73/EC was tabled on 16 September 2005 – i.e. less than three weeks before the expiry of the period within which the directive should have been implemented. Technically the bill seeks to amend the existing Equal Treatment (Men and Women) Act (*Kamerstukken II*, 2004-2005, 30237, Nos. 1-3). At the time of writing, the bill is under consideration of the *Tweede Kamer* [House of Representatives].

Case-law: protecting pregnant workers – According to applicable regulations, a worker who has been ill for more than 18 months will receive only 80% of the salary instead of the full amount. This raises the question how one should measure this period if a pregnancy occurs in

the meantime. Citing Directive 76/207 and the ECJ judgment in *Mary Brown* (case C-394/96, of 30 June 1998), the *Centrale Raad van Beroep* [Central Appeals Tribunal] ruled that one should not take into account (a) the period of pregnancy leave, (b) the period of maternity leave, and (c) the period during which pregnancy related complications occurred, when determining the length of a period during which a worker was not fit to work (25 February 2005, LJN AS9294).

Case-law: protecting pregnant apprentice lawyers – An apprentice lawyer *(stagiaire)* must work for three years under supervision of an established lawyer *(patroon)* before he or she can establish himself as a practising lawyer. According to existing regulations, each apprentice lawyer must have three years of 'pure playing time'. This means that the apprenticeship will have to be extended if a period of inactivity occurs; the extension will be commensurate to the period that was 'lost'. There is one exception, allowing for some flexibility: the three year period will not have to be prolonged if the apprentice lawyer is unable to work, for instance due to illness, for periods up to one month.

This raises the question how one should proceed if a pregnancy occurs in this period. It is clear that pregnancy leave will last longer than one month. Observing that only women can become pregnant, and that consequently women are much more likely to face prolongation of their apprenticeship when children are born, the *Rechtbank* [Regional Court] of Groningen found that automatic application of the one-month rule to pregnancies would amount to direct discrimination based on sex (LJN AT7761, 7 June 2005). In reaching this conclusion the Court referred to the ECJ judgment in the case of *Sass* (case C-284/02, 18 November 2004).

A similar conclusion was drawn by the *Rechtbank* [Regional Court] of Amsterdam in its judgment of 14 July 2005 (LJN AU0651). The Court added that there may still be cases where the apprenticeship will have to be extended after a pregnancy: the test must be whether the lawyer concerned has obtained enough practical experience. Prolongation should not, however, be automatic.

No pregnancy benefit after premature death of baby – According to applicable regulations, a self-employed mother is entitled to a *bevallingsuitkering* [pregnancy benefit] after a pregnancy of at least 24 weeks. In the case at hand pregnancy was terminated on medical grounds after 21 weeks and 5 days. The mother nevertheless applied for pregnancy benefit, but this was refused because she did not fall within the scope of beneficiaries. She appealed to the *Centrale Raad van Beroep* [Central Appeals Tribunal]. In its judgment of 29 April 2005 the Tribunal expressed its awareness of the tragic dimension of the case – but it rejected the complaint (LJN AT5883).

Taking into account working experience – A female teacher of 50 disagreed to the fact that her limited working experience was taken into account in the determination of her salary. She agreed that she had limited working experience, but this was because she had raised a daughter instead. She pointed out that female workers are in practice more likely to interrupt their careers, or to delay entry into the labour market, in order to raise children. It was therefore unfair to relate the working experience to the height of the salary. The *Centrale Raad van Beroep* [Central Appeals Tribunal], in its judgment of 26 May 2005, agreed that this was indeed a case of indirect discrimination. Yet it accepted that the distinction served a legitimate aim (i.e. to take into account teaching experience when appointing teachers) and was proportionate to the aim sought (LJN AT6727).

Positive actions seeking to promote the professional integration of women

Legislative initiatives, national case law and practices of national authorities

Participation of women in the workforce: some statistics – The position of women at the labour market has improved. Of the total number of women, 55% was working in 2003 as compared to 44% in 1995. Unemployment among women has decreased from 11% in 1995 to 6% in 2003. Among men the statistics showed a decrease of 6% to 5% over the same period (*Kamerstukken II*, 2004-2005, 28770, No. 11).

The level of education of women is generally lower than that of men. To a certain extent this is reflected in the position women have in the workplace. Whereas 6% of men have top-level jobs, only 2% of women do. By contrast, 45% of women work in low-level jobs as opposed to 30% of men. The percentage of women with an occupational disability allowance was 15, as opposed to 13% of men (*Kamerstukken II*, 2004-2005, 28770, No. 11).

Evaluating preferential treatment – In May 2005 the *Nota Voorkeursbehandeling* [White Paper on Preferential Treatment] was submitted to Parliament (*Kamerstukken II,* 2004-2005, 28770, No. 11). Dutch legislation allows for preferential treatment of women and members of ethnic minorities (and, since 2003, of the handicapped and chronically ill) but it does not oblige to do so. Research had shown that the various instruments of preferential treatment had a positive impact on the position of women and members of ethnic minorities at the labour market. Two out of three employers were well aware of the applicable regulations, and one out of three is actually pursuing these policies. Of all companies that have recruited personnel under these regulations, 84% indicated to support the policies.

Recent case-law of the ECJ has defined the limits within which preferential treatment may be offered. This case-law so far only relates to the position of women, but the Government indicated that it will follow the same approach vis-à-vis other target groups. The White Paper underlined that men cannot be excluded from recruitment procedures. It is permissible to hire a female candidate if candidates of both sexes are equally fit for the job, or to encourage women to apply.

Enforcing prohibition of discrimination on the labour market – For a discussion of a White Paper on the enforcement of the prohibition of discrimination on the labour market (which did not focus on the position of women, but on ethnic minorities) see Article 21 *supra.*

Gender discrimination in the access to goods and services

Legislative initiatives, national case law and practices of national authorities

Lawyer cannot refuse male clients because of their sex – The *Commissie gelijke behandeling (CGB)* [Equal Treatment Tribunal] dealt with a case of a practising lawyer who refused to defend male clients in divorce cases. The lawyer wished to limit her services to female clients since they have different emotions in divorce cases. She maintained – and the Dutch Bar Association supported that view – that *'vrouw en recht'* [woman and law] should be seen as a separate specialisation, and that this warranted her making a distinction on the basis of sex, just as barbers may specialise in male or female clients. The CGB rejected this argument, considering that not all female clients are in a position that they need extra attention and a specific form of assistance; nor can it be said that solely female clients can be in that position. In addition the CGB noted that the lawyer had not substantiated her position that female clients since they have different emotions in divorce cases; nor can it be maintained that a person's sex by definition prevents the existence of a bond of trust between lawyer and client (CGB, 13 September 2005, *oordeel* 2005-169)

Remedies available to the victim of gender discrimination

Standing to sue and equal treatment – For an extensive discussion of a case that was brought by a number of NGOs against the *Staatkundig Gereformeerde Partij (SGP)*, an orthodox protestant political party that excludes women as full members, see below.

Participation of women in political life

Legislative initiatives, national case law and practices of national authorities

Participation of women in politics and public administration – In October 2005, after a year of activity, the "ambassador's network in public administration" ended its work. The network consisted of key actors from different professional backgrounds who sustained the cause of increased participation by agenda-setting and raising awareness. Their work consisted mainly of lobbying for an increased participation of women in their fields of expertise, ranging from public broadcasting to sports and politics. Concerning the latter, the Minister of Social Affairs, at the closing meeting of the network, called on political parties to put 50% of female candidates on their local election lists. Although on the national level the level of participation of women in politics is quite high, the local level is lagging behind: the percentage of women among mayors is 20% and among city aldermen there has been a decrease from 20 to 16 % in the last twelve years (Ministry of Social Affairs and Employment, press release 05/171).

Political parties and equal treatment – An interesting case has just been decided, at least in first instance: a number of NGOs were partially successful in challenging the *Staatkundig Gereformeerde Partij (SGP)*, an orthodox protestant political party, in its refusal to admit women as full members. The SGP invoked the freedom of association and the freedom of religion; the NGOs maintained that the prohibition of discrimination and the right to political participation outweigh the freedom of association.

By way of background it may be noted that 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. Basing itself on the Gospels, the SGP believes that men and women have a different vocation and place in society, the man being placed above the woman. Whilst measures recognising the equivalence of men and women are welcomed, the SGP is opposed to extend the right to vote and the right to be elected to women. 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 Tribunal] rejected a complaint against the SGP since the applicable legislation did not apply to political parties such as the SGP (*oordeel* 2001-150). This prompted a number of NGOs, amongst whom 'NJCM' (*Nederlands Juristen Comité voor de Mensenrechten*, the Dutch section of the International Commission of Jurists) to bring legal proceedings. Initially they brought their action together with a woman who wanted to become a full member of the SGP, but she later withdrew from the case.

On 7 September 2005, the *Rechtbank* [Regional Court] of The Hague delivered judgment in two separate cases. The first action, which was directly addressed against the SGP, was dismissed on procedural grounds: the NGOs did not have standing to sue the SGP (LJN AU2091). The Court observed that the legal proceedings brought by the NGOs could not be seen as a general interest action, since the position of the SGP only affected those women who approved of the political views of that party and wanted to become members of it – which is not a characteristic common to all women in the Netherlands. The Court likewise considered that the legal proceedings brought by the NGOs could not be seen as a group action: among the applicants there were no women who actually wanted to join the SGP; it appeared that potential female members wanted to wage a discussion within the SGP and therefore refrained from bringing court proceedings against the SGP. Finally the mere fact that the NGOs had as their statutory purpose to promote human rights and combat discrimination, was not sufficient to accept that the political party had acted unlawfully towards them.

The second action, however, had a different outcome (LJN AU2088). The NGOs had brought proceedings against the State of the Netherlands, claiming on the one hand that it violated its international obligations by allowing the present situation to exist (rather than obliging all political parties to accept female members), and on the other hand that the State should stop the financial support which the SGP – like all political parties represented in Parliament – receives. Here the NGOs were successful. The Court found essentially that Article 7 (c) of the UN Convention was directly applicable, and recalled that the UN Committee had already determined that the Netherlands acted in breach of this provision. Next the Court agreed with the argument of the State that it also had to take into account the freedom of association and the freedom of religion, and that the prohibition of discrimination will not automatically prevail over these freedoms. Indeed it is conceivable that the SGP would invoke these freedoms when sued by private citizens; in that case all applicable rights would have to be balanced. In the instant case, however, the application was directed against the State, which was bound by the positive obligations flowing from Article 7 CEDAW. Basing itself on the *travaux préparatoires* of this provision, the Court noted that the drafters of the Convention decided to omit a reference to private social clubs in Article 7, but agreed that the prohibition of discrimination should prevail over the freedom of association in the context of political parties. This meant that the balancing exercise had already taken place when CEDAW was concluded and subsequently ratified by the Netherlands without a reservation. According to Article 7 State Parties should take all appropriate measures to fight discrimination. However, although Dutch law offered various possibilities to take action against the SGP (ranging from dissolution to criminal prosecution), the State had not availed itself of these measures at all.

By way of conclusion the Court held that the State had acted unlawfully by not taking action against the SGP's refusal to admit women as full members. On constitutional grounds the Court refrained from ordering the State to amend its legislation, but it did order the State to stop the financial support which the SGP receives as long as it excludes women. The Court agreed with the NGOs that this in itself may not be sufficient to meet all obligations flowing from Article 7 CEDAW, but at least it ends the present situation whereby the State actively violates CEDAW by subsidising a political party that discriminates women.

As could be expected, the judgment was received with mixed emotions. Some hailed it as an important breakthrough in the fight against discrimination based on sex; others saw it as an unnecessary and potentially dangerous judicial interference with the freedom of association of political parties. The State has lodged an appeal, which is now pending.

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

Right of minors to institute proceedings – The *Rechtbank* [Regional Court] of Groningen rejected an application by a minor for an interim injunction. The minor had been subjected to a *onder toezicht stelling* [supervision order] by the juvenile judge, who had also ordered him to be placed away from his family. He was placed in a juvenile correction centre and, following a criminal conviction, transferred to a 'closed setting' for treatment. When the supervision and placement orders were prolonged, the minor brought proceedings challenging these decisions. This raised the question whether a minor can bring legal proceedings independently, i.e. without involving his legal representatives. In December 2003 the *Gerechtshof* [Court of Appeal] of Leeuwarden answered this question in the affirmative, but an appeal in cassation was submitted to the *Hoge Raad* [Supreme Court]. In her conclusion of September 2004, the Advocate General stated that the minor was inadmissible. Whilst the case was still pending with the Supreme Court, fresh proceedings were brought by the minor who challenged a further prolongation of his placement orders. He based himself on Article 5 (4) ECHR and Article 37 of the International Convention on the Rights of the Child.

In its judgment of 3 November 2004, the Court noted that a minor is in principle not competent to bring court proceedings independently: he must be represented by his legal representatives. This may lead to problems if there is a conflict of interests, for example between the child and his parents. However, in this case no such problems arose since the mother fully shared her son's concerns. The minor was therefore inadmissible; Article 5 (4) did not impose a different conclusion. The Court then continued and stated *obiter dictum* that, even if the challenge were declared admissible, it would have to be rejected on substantive grounds (LJN AR5195).

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Placement of juveniles with behavioural problems – In 2007 the responsibility for juveniles with behavioural problems, who are now regularly 'locked away' in detention centres together with convicted juveniles, will be fully transferred from the Ministry of Justice to the Ministry of Health. This entails that from then onwards no non-convicted juveniles will be placed in these centres anymore, but in appropriate (psychiatric) health care institutions. In the meantime placement in detention centres will be avoided as much as possible. However, when this is unavoidable immediate screening of the person involved will be effected in order to care for his or her specific needs in terms of care. To achieve these aims additional funding will be allocated on a structural basis. The *Wet op de jeugdzorg* [Youth Care Act] will be amended in order to accommodate for the changes needed (*Kamerstukken II,* 2004-2005, 28741, No. 12).

Minimum wage rules for youngsters – For a discussion of the judgment of 24 March 2005, in which the *Gerechtshof* [Court of Appeal] of The Hague decided that the refusal to establish minimum wages to those under the age of 15 is not in conformity with art. 26 ICCPR (LJN AT3175), see Article 32 *infra.*

Social assistance for minor asylum seekers – For a discussion of the decision of 8 August 2005, in which the *Centrale Raad van Beroep* [Central Appeals Tribunal] held that the exclusion of minor asylum seekers from the right to social assistance is not in conformity with Article 27 ICRC (LJN AU0687), see Article 34 *infra.*

Article 25. The rights of the elderly

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

Legislative initiatives, national case law and practices of national authorities

Policies for the elderly – This year's award for the most tastefully designed report goes to the Ministry of Health, Welfare and Sport. The lyrics of The Beatles' *When I'm 64* feature on the cover of the White Paper *Ouderenbeleid in het perspectief van de vergrijzing* [A Policy for the Elderly in the Perspective of an Ageing Population] (April 2005). The report emphasizes the importance of autonomy for the elderly and the concomitant self-responsibility. It considers participation to be a challenge which requires efforts by the elderly themselves and solidarity from the rest of society (*Kamerstukken II*, 2004-2005, 29389, No. 5).

Age limits and foreign adoption – In May 2005 the Minister of Justice addressed the issue of the maximum age for parents who wish to adopt foreign children. According to the existing rules (notably the *Wet opneming buitenlandse kinderen (Wobka)*) there should be a difference of no more than 40 years between the parents and the child. In practice this means that parents should be younger than 42 when applying for adoption, and younger than 46 at the time of adoption (since children up to 6 years are eligible for adoption). The Minister argued that this rule is

justified: the system follows the patterns of biological parenthood (only 0.4% of all children born have a mother of 41 years or older); parents of adoptive children face a challenging task which requires them to be fit; the age limit is broadly accepted both in the Netherlands and abroad. Yet the Minister was prepared to introduce some exceptions (*Kamerstukken II,* 2004-2005, 28457, No. 23). It remains to be seen if the arguments advanced by the Minister would withstand the kind of close scrutiny that the *Centrale Raad van Beroep* [Central Appeals Tribunal] or the *Commissie gelijke behandeling (CGB)* [Equal Treatment Tribunal] exercise in cases where they are competent.

Case-law on age discrimination: Central Appeals Tribunal – Like in previous years, there were several cases concerning discrimination based on age.

On 14 December 2004 the *Centrale Raad van Beroep* [Central Appeals Tribunal] found that a local social security regulation discriminated on age and should be disapplied (LJN AR8451). In this case the municipality of Amsterdam had decided to make an extra benefit available for certain groups of individuals who had been dependent on social security benefits for more than 5 years. The idea was that these individuals would not have the financial reserves that are necessary to cope with incidental extra costs, such as a washing machine that breaks down. The problem was that two groups had been singled out for the extra benefit: individuals with minor children and persons of over 65. This was incompatible with the prohibition of discrimination as laid down in Article of the Constitution and Article 26 ICCPR, the Tribunal observed: there were also individuals below 65, without dependent children, who might be in exactly the same condition. They should not be excluded from the extra benefit.

On 17 February 2005 the Central Appeals Tribunal decided a case brought by a (former) member of the voluntary fire brigade who had to retire on reaching the age of 55. He invoked, *inter alia,* Directive 2000/78/EC as well as the *Wet gelijke behandeling op grond van leeftijd bij arbeid* [Equal Treatment at Work (Age) Act] which entered into force on 1 April 2004. The Tribunal observed that a distinction based on age had been made; it had to be examined whether there was a reasonable and objective justification. Unlike the discrimination grounds mentioned in Article 1 of the Constitution and Article 26 ICCPR, "age" is not an *a priori* suspect criterion. The Tribunal proceeded to observe that the retirement age of 55 served a legitimate aim – the protection of the person concerned, his colleagues and third persons who are dependent on assistance by the fire brigade. It was common ground that the work of a fire fighter is physically challenging, whereas man's physical condition tends to deteriorate as one comes of age. It was also clear that not every person becomes unfit for this job upon reaching the age of 55, so that it would be preferable to perform individual assessments rather than having recourse to a blanket rule. However, there is as yet no adequate test available to assess a person's fitness for the job of fire fighter in the Netherlands. Taking into account that the applicant's dismissal had occurred before the expiry of the deadline for implementation of Directive 2000/78/EC and prior to the entry into force of the Equal Treatment at Work (Age) Act, the Tribunal held that the generic age limit could still be regarded as appropriate and necessary (LJN AS8564).

Case-law on age discrimination: Equal Treatment Tribunal –The *Commissie gelijke behandeling (CGB)* [Equal Treatment Tribunal] dealt with a number of cases involving age discrimination. The CGB's decision are relatively detailed and nuanced; for reasons of space we will limit ourselves to rather brief summaries.

In the first case the CGB dealt with the refusal of a health insurance company to continue a contract with a general practitioner on the sole ground that he was older than 65 (in fact, the doctor had reached the age of 80!). The company had argued *inter alia* that it wanted to ensure a high level of medical care. The CGB rejected this argument, noting that the professional body of general practitioners had developed accreditation mechanisms to ensure that their members met specified quality requirements (CGB 25 March 2005, *oordeel* 2005-49).

On the same day the CGB reached the opposite conclusion in a case where a health insurance company had refused continuation of a contract with a psychotherapist on the sole ground that he was older than 65. Unlike in the previous case, no accreditation mechanism

existed which would ensure that ageing psychotherapists continued to meet specified quality requirements (CGB 25 March 2005, *oordeel* 2005-50).

The CGB confirmed the latter decision in a later case that involved a psychiatrist of 69. It noted that the professional body of psychiatrists was in the process of developing an accreditation mechanism, but this was not yet operational (CGB 21 July 2005, *oordeel* 2005-135).

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

Legislative initiatives, national case law and practices of national authorities

Housing for the elderly – Currently there is a discrepancy of 41.000 between the suitable housing units needed and those actually available for the elderly. The causes for this are a shortage of so called *nultredenwoningen* [housing without any stairs or doorsteps] and the lack of adequate care facilities in the neighbourhoods involved, or combinations thereof. The Government aims to solve this problem by building 32.000 *nultredenwoningen* until 2009. The situation will be monitored yearly (*Kamerstukken II*, 2004-2005, 29389, No. 5).

Specific measures of protection for the elderly

Legislative initiatives, national case law and practices of national authorities

Participation as safeguard against isolation – The *Raad voor Maatschappelijke Ontwikkeling* [Council for Societal Development], an advisory council of the Government, issued two reports on the elderly on 12 January 2005. The reports emphasize that instead of pressuring the elderly to keep on working and of paying for elderly-targeted amenities, the Government should use different strategies. Isolation of the elderly is countered much more efficiently by enlarging the possibilities for part-time pensions which in turn engenders better opportunities for volunteer work. In addition the reports show that general amenities (public transport, post offices, local shops) have a bigger impact on the well-being of the elderly than targeted amenities, such as community centres for the elderly. Keeping society accessible for all is thus a more effective, but also less costly way of accommodating the needs of the elderly than specific implementing specific measures. The reports also warns for the risks of perceiving all the elderly as active and self-sufficient. About one fifth of the elderly is relatively poor and vulnerable; they need support instead of complete freedom of choice (www.adviesorgaan-rmo.nl; www.regeling.nl).

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

Expanding the scope of 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. Although the list of discrimination grounds is clearly not exhaustive, it is proposed time and again to extend the list. Also in 2005 this proved to be a bone of contention. This time the discussion focused on discrimination on account of disability. According to an advisory opinion of the *Commissie gelijke behandeling* [Equal Treatment Tribunal] of 2004 (see last year's report), a ground that is explicitly mentioned in Article 1 receives a higher level of protection in judicial practice than other grounds – such as disability. The Government held and continues to hold the opposite view. After repeated queries by the *Tweede Kamer* [House of Representatives] to reconsider the issue, the Government decided in September 2005 to appoint a commission of three experts to report on the differences in level of judicial protection (*Kamerstukken II* 2005-2006, 29355, No.

23). The three experts are prof. Alkema (University of Leiden), Mr Huydecoper (Advocate General at the *Hoge Raad*) and Mr Vermaat (a practising lawyer specialised in disability cases).

Penalizing discrimination on grounds of disability – Articles 137c to 137f and Article 429quater of the Criminal Code were amended in order to penalize insults as well as incitement to hatred, discrimination and violence on the grounds of physical, psychological or mental disability (*Staatsblad* 2005, 111; see *Kamerstukken* 28221). The amendment will enter into force on 1 January 2006.

Down's syndrome at school – A school in Rotterdam decided to remove a pupil with the syndrome of Down. The school pointed out that the pupil was in need of extra attention and care, which the staff could not provide, and she was disrupting the class. In summary injunction proceedings, brought by the pupil's parents, the *Rechtbank* [Regional Court] of Rotterdam quashed this decision. The Court noted that public policy is presently aimed at the integration of handicapped pupils in regular schools, and at respecting the parent's freedom to opt for regular or specialised schools. On the other hand, these aims are not absolute and one must take into account that schools need to have sufficient staff, means and expertise to provide for the required level of care. It is essential that schools make individual assessments, balancing the interests of the child and those of the school in a fair and careful way, taking into account independent expertise and involving the parents in the decision making process. Against that background the Court considered that the school's decision was not sufficiently motivated (24 January 2005, LJN AS4379).

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

Legislative initiatives, national case law and practices of national authorities

Statistics on professional integration – The percentages of people working are the following for the different categories: 52% of the chronically ill, 38% of the physically handicapped, and finally 36% for the people that fall under both categories combined. People with disabilities are underrepresented in the highest level of jobs (16 compared to 24% of the total working population) and overrepresented at the lowest level (12 compared to 7%) (*Kamerstukken II*, 2004-2005, 28770, No. 11).

Statistics on civil servants with disabilities **–** In a letter to the *Tweede Kamer* [House of Representatives] the Minister of Social Affairs provided statistics showing that the percentage of persons with disabilities among civil servants is slightly lower than among the working population in general. Depending on the year considered and the sources of information used the difference ranges between 0.7 and 1.2%. The most recent figures of the *Centraal Bureau voor de Statistiek* [National Statistics Agency], over 2003, show a percentage of 9.5 on the total of all civil servants (*Kamerstukken II,* 2004-2005, 29801, No. 9).

Reasonable accommodations

Legislative initiatives, national case law and practices of national authorities

Equal treatment and housing – On 12 December 2004 the *Commissie Gelijke Behandeling* [Equal Treatment Tribunal] has issued an advisory opinion on Government plans to widen the scope of the Equal Treatment Act concerning the handicapped and the chronically ill. Currently the act solely covers equal treatment in the workplace and in professional education. The plans aim at extending the scope to equal treatment in the field of housing. The Commission generally welcomes the extension, but has asked the government to clarify the personal and material scope of the proposed legislation more precisely. Additionally, it strongly advocates in favour of accelerating equal access to public transport for the groups concerned, since this is an essential component of the possibility to work and participate in society. The plans at hand provide for

such right to equal access only in the long term: 2010 for public transport and 2030 for trains (CGB, *Advies* 2004/08).

Disability and reimbursement of transport costs – In 2004 a new regulation relating to the reimbursement of transport costs for the disabled (known as the Valys system) was introduced. The new system, which was intended to limited the costs involved, provided the individuals concerned with a personal budget that allowed them to travel outside their region by public transport for 450 km per year, for a reduced price of € 0.16 per km, for recreational and social purposes. If they wished to travel more, they had to pay € 1.25 per km. The new system was challenged by a number of NGOs that represent the interests of the handicapped and the chronically ill, as well as by an number of individuals who were directly concerned. In 2004 summary injunction proceedings were brought before the *Rechtbank* [Regional Court] of The Hague (which rejected the claim on 9 July 2004) and, in appeal, before the *Gerechtshof* [Court of Appeal] of The Hague. The applicants were assisted by two experts, prof. Van Hoof (Utrecht) and prof. De Schutter (Louvain-la-Neuve).

In a judgment of 31 March 2005, the Court of Appeal rejected the application as well (LJN AT2882). The Court stated that one cannot derive from either the right to equal treatment or the right to respect for private life and family life an obligation for the State to finance a system of transport or to compensate an unlimited mileage. A political choice had been made to reserve a maximum budget and grant each handicapped person an equal share from the amount available. This regulation had been brought about in consultation with Parliament, and a balance of interests has taken place. Since the outcome is not manifestly unreasonable or illegitimate, the Court rejected the appeal.

CHAPTER IV. SOLIDARITY

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

Workers' information on the economic and financial situation of the undertaking

Legislative initiatives, national case law and practices of national authorities

Reform of the system of worker participation – A foreseen lack of support in Parliament prompted the Minister for Social Affairs and Employment to withdraw on 29 September 2005 the legislative proposal *Wet Medezeggenschap Werknemers* [Bill on the Participation of Employees], which was supposed to replace the *Wet op de Ondernemingsraden (WOR)* [Worker's Council Act]. The Cabinet will now develop new proposals, taking into account opinions of Parliament and workers and employers organizations. The revoked proposal expressly intended to offer workers and employers organizations more leeway to develop participation structures deviating from standards currently prescribed in the Worker's Council Act.

Another part of the Government's scheme to reform the system of worker participation will proceed. The so-called *Wet Harrewijn* [Harrewijn Act] was adopted by the *Tweede Kamer* [Lower House] in June 2005 (*Kamerstukken* 28163; *Handelingen II*, 2004-2005, No. 86, p. 5131) and is currently pending in the *Eerste Kamer* [Senate]. The Act, which might enter into force in the first half of 2006, will replace certain provisions of the Worker's Council Act and obliges undertakings with at least 100 employees to provide annual information to their respective Worker's Councils regarding salary increases in all echelons of the undertaking. The Harrewijn Act is one of the instruments with which the Dutch government hopes to put a brake on excessive salary increases of the management.

Article 28. Right of collective bargaining and action

The right of collective actions (right to strike) and the freedom of the enterprise or the right to property and the issue of the intervention of the judiciary into collective actions

Legislative initiatives, national case law and practices of national authorities

Case-law regarding the right to strike – As was noted in our previous report, the European Committee of Social Rights published in 2004 its conclusions concerning, *inter alia*, article 6 ESC in regard with Dutch national practice on the right to strike (Conclusions XVII-1). The Committee concluded that the situation in the Netherlands was not in conformity with Article 6 (4) of the Charter, since a Dutch judge may determine whether recourse to a strike is premature – i.e. not used as last resort – which, according to the Committee, is an impingement of one of the trade unions' key prerogatives, i.e. that of deciding whether and when a strike is necessary. In summary injunction proceedings, the Utrecht Regional Court seemed hesitant to share the Committee's conclusion. It stated that the question whether the Committee's conclusion should lead to a change in Dutch case-law could remain unresolved, since it was clear that in the present case the strike was not in conflict with the last resort-requirement (*Rechtbank* [Regional Court] of Utrecht, 20 December 2004, LJN AR7826).

Bonus to non-strikers in breach with European Social Charter – The *Gerechtshof* [Court of Appeal] of Arnhem ruled on 9 August 2005 that the promise of a bonus to employees who will not take part in future strikes is in breach with the right to strike as guaranteed by Article 6 (4) of the European Social Charter (LJN AU3100). The case concerned a letter issued by an employer to those employees who had not participated in an earlier strike. The letter contained a clear message regarding possible future strikes: when the financial situation of the company would

allow so, employees who would not take part in a future strike could count on a financial bonus. The Court of Appeal ruled that since such a message puts severe financial pressure on employees not to take part in future strikes, it infringes the right to strike as guaranteed in the Charter.

Article 29. Right of access to placement services

Access to placement services

Legislative initiatives, national case law and practices of national authorities

Popularity of individual placement agreements – A report published in August 2005 (*Tweede voortgangsrapportage IRO*) revealed that the instrument of the *individuele reïntegratieovereenkomst (IRO)* [individual placement agreement], which can be utilized by unemployed persons receiving state allowances since 14 July 2004, enjoys great popularity. The individual placement agreement was set up to offer unemployed persons the possibility to devise their own personal placement scheme, instead of following a state-organized programme. The IRO arrangement allows individuals to choose one or more certified private placement companies, with whom the individual will devise a plan including facilities like education, internships, personal guidance and occupational preference tests, which should eventually lead to durable employment of the individual. The placement scheme is funded by the UWV [Agency for Employment Insurances] on a *no cure, less pay* basis and must be authorized in advance by the UWV. Maximum costs of the scheme are set at €5,000; the maximum duration of the programme is 2 years.

The evaluation report shows that up to May 2005, 14,426 individual placement agreements have been agreed upon. Moreover, individuals making use of individual placement agreements have welcomed the personal approach the arrangement offers and are in general satisfied regarding the execution of the programme. Government obviously hopes that a more flexible and personal approach to placement programmes will eventually lead to more effective and faster placement of unemployed persons. The evaluatory report, however, maintains that it is too soon to draw such conclusions. New evaluations which are due in 2006, 2007 and 2008, should show whether the IRO-arrangement truly leads to an enlarged amount of placement.

Article 30. Protection in the event of unjustified dismissal

Reasons for dismissals

Legislative initiatives, national case law and practices of national authorities

Flexibility of dismissals on economic grounds – The Minister for Social Affairs and Employment presented a Cabinet position on measures to be taken to ensure a more flexible labour market (Ministerie van Sociale Zaken en Werkgelegenheid, *'Met de WW en het ontslagrecht aan het werk voor een flexible arbeidsmarkt'*, 29 April 2005). Regarding dismissals on economic grounds, the government suggests: (1) to replace the currently employed *last in first out* principle ('lifo') with the principle of representation which stipulates that dismissals should be spread proportionally among different age categories and (2) to offer social partners the possibility to draw up deviating criteria for dismissals on economic grounds in collective labour agreements. Although the *Tweede Kamer* [House of Representatives] has expressed some concerns, a majority of the House supports the government's intention to reshape collective dismissal procedures in order to make it possible for employers to take better account of individual performances of employees (*Handelingen 2004-2005*, No. 105, pp. 6336-6340).

Detention no ground for dismissal – The *Rechtbank* [Regional Court] of Haarlem (LJN AU0195) held on 7 July 2005 that the sole fact that an employee is not able to work due to detention is in itself not a justified ground for dismissal. The case concerned an employee who faced criminal charges and who was held in detention, but who was not convicted. The Court ruled that the employer could not, anticipating on a conviction by the criminal court, dismiss an employee; the employer should await the verdict of the criminal court. The Court took into account the facts that (1) the detained employee had worked for the employer for more than 18 years and (2) the employer did not suffer grave consequences by reversing the dismissal, since the salary payments had already been stopped and temporarily replacement of the employee could easily be arranged for.

Case-law: HIV infection no ground for dismissal – An applicant for a job as a barber did not mention during an interview that he was infected with HIV. He only told his employer after he had been employed for a month. The employer immediately dismissed him for two reasons: (1) the barber had given misleading information during the job interview and (2) he endangered the health of customers, since the occupation of barber incorporates a risk of blood-to-blood contamination. In summary injunction proceedings the *Rechtbank* [Regional Court] of Utrecht held the dismissal to be invalid (28 January 2005, LJN AS6427). Regarding the failure of notification during the job interview, the Court stipulated that whereas it was true that the employer had indeed asked the job-applicant whether he suffered from medical deficiencies, the applicant could very well maintain that this was not the case, since a HIV infection which has not manifested itself as AIDS does in principle not limit the infected person in his working capacities. Regarding the risk of contamination in his occupation as barber, the Court said that proper application of relevant working conditions standards and hygiene protocols exclude the risk of blood-to-blood contamination. The infection with HIV was therefore not an essential limitation which the barber should have mentioned during the interview.

Article 31. Fair and just working conditions

Health and safety at work

Legislative initiatives, national case law and practices of national authorities

Reform of Working Conditions Act – On 1 July 2005 a number of amendments to the *Arbowet* [Working Conditions Act] entered into force. The reform is a response to the ECJ judgment that the Working Conditions Act was not in conformity with Council Directive 89/391/EEC on the safety and health of workers at work (ECJ, 22 May 2003, *Commission v. the Netherlands,* case C-441/01). Since 1994 every undertaking in the Netherlands was obliged to enter into a contractual relationship with a so-called *arbodienst* [certified private working conditions-company]. Within the undertaking, the *arbodienst* was responsible for risk assessment and evaluation, the supervision and guidance of sick employees and the staffing of a consultation hour for employees on working conditions. The ECJ held that Directive 89/391/EEC lays down an order of preference with regard to the organization of working conditions policies. The Directive gives precedence to the internal organization of such activities; only where there is a lack of competent personnel within the undertaking should employers enlist external services.

The reformed Working Conditions Act now pays proper account to the Directive. The amendments hold that a number of tasks related to working conditions still need to be provided by certified experts, but the Act no longer requires undertakings to hire the external services of an *arbodienst*. Companies are free to hire other external experts, or train internal employees to perform these tasks. Apart from this free choice of means, the Working Conditions Act stipulates that all companies with at least 15 employees must appoint one or more *preventiemedewerkers* [prevention employees]. The prevention employee is responsible for the daily supervision on health and safety issues within the company, must advise both the employer

and the employees council on working conditions-policies and should serve as intermediary in contacts between the undertaking and external experts.

Sexual and moral harassment at work

Legislative initiatives, national case law and practices of national authorities

Strengthening of the legal position of victims of sexual harassment – On 12 September 2005 the Government tabled a bill with a view to incorporating the prohibition of sexual harassment in the *Wet gelijke Behandeling Mannen en Vrouwen* [Equal Treatment (Men and Women) Act]. Such incorporation is in line with Directive 2002/73/EC, which stipulates that since sexual harassment is considered to be a form of gender based discrimination, policies governing sexual harassment must form an integral part of domestic regulations on equal treatment. Currently, sexual harassment is only covered in the Dutch Penal Code. The incorporation of the prohibition of sexual harassment in the Equal Treatment (Men and Women) Act strengthens the position of victims of sexual harassment in two ways. First, it opens up the possibility for victims to lodge a complaint at the *Commissie Gelijke Behandeling* [Equal Treatment Tribunal], which offers a more accessible – but non-binding – procedure. Second, the incorporation of sexual harassment in equal treatment law significantly lowers the burden of proof on the victim's side: when the victim succeeds in presenting facts and circumstances which give rise to the assumption that the prohibition of sexual harassment has been breached, the burden of proof shifts to the employer. It must be noted here that the Equal Treatment (Men and Women) Act principally addresses the role of employers in guaranteeing equal treatment on the work floor; a ruling of the Equal Treatment Tribunal may also serve as a basis for a successful claim for compensation against an employer. The Tribunal is not competent to deal with complaints against the actual offenders of sexual harassment.

Working time

Legislative initiatives, national case law and practices of national authorities

Judgment on 'on call' service – In a case brought by the trade union CNV the *Rechtbank* [Regional Court] of Arnhem reviewed the categorisation of 'on call' service as rest time in the Dutch *Arbeidstijdenbesluit* [Working Time Decision] (9 September 2005, LJN AU2499). Referring *inter alia* to the *Jaeger* judgment (ECJ 9 September 2003, C-151/02), the Regional Court found that the Dutch regulations are not in conformity with Directive 2003/88/EC. In *Jaeger,* the ECJ held that the period of duty of a doctor on call, where presence in the hospital is required, must be regarded as constituting in its entirety working time, even when the person concerned is permitted to rest.

The judgment of the Regional Court echoes the ECJ ruling. The Court had to answer the question whether new established duty rosters of ambulance personnel in the province of Gelderland were in conformity with the *Arbeidstijdenwet* [Working Time Act], which holds that the average working time per week, measured over a period of 13 weeks, should not exceed 40 hours. The Court held that it could not apply Article 1 (3) of the Working Time Decision, which stipulates that 'on call' service whereby employees are obliged to stay at a certain designated location is classified as rest time. Such a classification is clearly in conflict with the *Jaeger* ruling. Since a correct classification of 'on call' service as working time would lead to a breach of the maximum amount of hours employees are allowed to work, the Court ordered a revision of the duty-rosters.

Meanwhile the Government has announced that it would repair the relevant provisions in the Working Time Decision, in order to ensure compliance with Community legislation. The Government intends to publish this revision before the end of 2005.

Statistics on overtime in 2004 – The *Centraal Bureau voor de Statistiek* (CBS) [Central Bureau of Statistics] presented a report in August 2005 on working in overtime in the Netherlands in the

year 2004 (CBS, *'Overwerken in Nederland',* 2005). Present Dutch law does not require employers to pay for work in overtime. It is up to employers and employees to conclude agreements about compensation either in time or in payment. The only legal limit is imposed by the *Arbeidstijdenwet* [Working Time Act], which holds that employees cannot be required to work for more than 54 hours a week. The report of the CBS shows a wide variation in practice concerning the way employers dealt with overtime compensation. Around 37% of Dutch employees regularly worked in overtime in 2004. Of this group, almost a third did not receive any compensation at all, neither in time nor in payment. The report shows furthermore that male employees work in overtime more often than female employees, that female employees receive compensation more often than male employees and that highly educated employees work in overtime more often than others.

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

Protection of minors at work and monitoring of the protection

Legislative initiatives, national case law and practices of national authorities

Minimum wage rules for youngsters – In our 2004 Report, we noted the judgment of the *Rechtbank* [Regional Court] of The Hague on the absence of minimum wage rules for 13 and 14 year olds (LJN AF1787). The *Rechtbank* held, in proceedings brought by the trade unions FNV and CNV, that the refusal to extend minimum wages to those under the age of 15 was discriminatory on the grounds of age and amounted to a violation of Article 26 ICCPR. On 24 March 2005, the *Gerechtshof* [Court of Appeal] of The Hague delivered its appeal judgment. It upheld the Court's ruling: the *Besluit houdende vaststelling van een minimumloonregeling* [Decision concerning the establishment of minimum wage for youngsters] is not in conformity with art. 26 ICCPR (LJN AT3175). The Court of Appeal rejected the Dutch government's submission that the distinction between 13 and 14 year olds and persons aged 15 years and older is justified, since 13 and 14 year olds should not receive any financial incentive whatsoever to enter the labour market. It considered the distinction disproportionate, since the Court was not convinced that the establishment of a minimum wage for 13 and 14 year olds would lead to an increase of the amount of labour in this age category. Moreover, the Court held that the goal to prevent labour becoming an attractive alternative for education, could be achieved by other, non-discriminatory means, like an increased monitoring of young people at work or a more restrictive regime for 13 and 14 year olds in the *Arbeidstijdenwet* [Working Time Act].

The State however, maintains that it should not establish minimum wage rules for 13 and 14 year olds and has decided to bring the case before the *Hoge Raad* [Supreme Court].

Reports of Inspection Services – In December 2004 and January 2005, the *Arbeidsinpectie* [Labour Inspection] published two reports, one concerning holiday employment for youngsters (*Projectverslag Vakantiewerk 2004*) and one concerning employment of youngsters in supermarkets (*Projectverslag Vakkenvullen jeugdigen in supermarkten*). The reports show breaches of relevant legislation, i.e. the *Arbeidstijdenwet* [Working Time Act] and the *Arbowet* [Working Conditions Act] in 29% and 22% of the companies inspected. Most breaches concern non-compliance with the proscribed maximum working hours per day/week and breaches of the prohibition to work on Sundays. A positive conclusion which can be found in both reports is that the Inspection Services did only sporadically encounter working youngsters under the age of 14.

Baby's and Big Brother – Television producer *Endemol Nederland* has been issued a permit by the Dutch Labour Inspection for the filming of a baby which will be born during the real-life television show *'Big Brother'*. Endemol had asked for an unrestricted permit, in order to be able to film the baby for the entire duration of the show, but the Labour Inspection has limited the permit to a duration of eight days, with a maximum of two hours per day, in accordance with the provisions of the *Arbeidstijdenwet* [Working Time Act]. The Labour Inspection and Endemol

have made practical arrangements in order to give effect to the restricted permit. The baby will have to be placed in a separate camera-free room, to which the mother will have unrestricted access.

Article 33. Family and professional life

Parental leaves and initiatives to facilitate the conciliation of family and professional life

Legislative initiatives, national case law and practices of national authorities

Right to long-term leave – Since 1 June 2005 employees in the Netherlands have the right to unpaid long-term leave to be able to provide care to relatives who suffer a life-threatening illness. The right to long-term leave is incorporated in the *Wet Arbeid en Zorg* [Labour and Care Act] and as such considered to be the 'final piece' of the act, which already provided for adoption leave, calamity leave, short-term care leave, parental leave, pregnancy leave and baby leave for the partner. The maximum duration of the long-term leave is fixed at 6 weeks per year, preferably taken up in portions. During the period of leave the employment contract may not be terminated, but employers are not obliged to continue the salary payments. Employees can apply for a State-based compensation arrangement however, which compensates salary losses up to a maximum of 70% of the minimum wage.

The right to long-term leave is not absolute. Employers can refuse the leave when company interests are at stake. If an employer is able to show that the absence of an employee will have grave consequences for the conduct of business of the company, it can refuse the right to long-term leave. Furthermore, employers and employees can decide by way of alternative agreement to deviate from the provisions in the Labour and Care Act.

'Life planning arrangement' enters into force – During the negotiations leading up to the establishment of the present Government (2003), the coalition parties agreed to devise and adopt a *Levensloopregeling* [Life planning arrangement] during the term of this Government. The Life planning arrangement has been fine-tuned this year and will enter into force on 1 January 2006. The Life planning arrangement offers employees the possibility to save up to 12% of their gross income per year in order to finance periods of unpaid leave or to retire earlier. Employees can save up to an amount of 210% of their last income, which equals to a maximum period of leave of 3 years against 70% of their last income. The arrangement has been made financially attractive by giving employees who make use of the arrangement a number of tax rebates and advantages. The arrangement is especially meant to offer employees a certain amount of flexibility during their career and serves to finance periods of parental leave, care leave, study or sabbaticals. Experts expect that the arrangement will mostly be used to bridge advanced retirement however. The Life planning arrangement is primarily a financial arrangement and does not offer a *right* to leave. Prior authorization for the leave by the employer is required.

New act on day nursery – On 1 January 2005 the *Wet kinderopvang* [Day Nursery Act] entered into force, which has brought about a liberalisation of the subsidy regime for day nursery. Instead of subsidizing nursery facilities, the new act offers an income-dependant compensation to parents who make use of a registered day care facility. This regime-change is meant to lead to an increased (female) work participation rate and an increased awareness at nursery facilities about their pricing and the quality of their services. The new act also imposes national quality standards on nursery facilities. Compliance with these standards is monitored by the local health care authorities (GGD's).

The Government announced in September 2005 that the resources allocated to day nursery policies will increase with the amount of € 200 million in the year 2006. A majority of this amount (€ 165 million) will be allocated directly to the parents.

Protection against dismissal on grounds related to the exercise of family responsibilities

Legislative initiatives, national case law and practices of national authorities

Case-law: protection against dismissal during pregnancy – An employee indicated a wish to work for four instead of five days after her period of pregnancy leave – and was dismissed. The *Rechtbank* [Regional Court] of Rotterdam ruled on 19 September 2005 that this was unlawful (LJN AU3128). The employer had informed the employee before she took up her period of pregnancy leave that part-time work was not possible and that she was better off looking for another job. The employee refused to sign a termination of the labour contract however. After her period of pregnancy leave she reported for duty but was immediately dismissed by her employer. The employer concurrently filed a request for termination of the labour agreement at the Regional Court, which ruled, *inter alia*, that such a termination would be in breach of the prohibition of dismissal during the period of pregnancy, which also covers a period of six weeks after the expiration of the period of pregnancy leave.

Article 34. Social security and social assistance

Social assistance and fight against social exclusion

Legislative initiatives, national case law and practices of national authorities

Social monitoring report – In September 2005, the *Sociaal en Cultureel Planbureau* [Social and Cultural Planning Agency] published an extensive social monitoring report describing contemporary living conditions in the Netherlands (SCP, *De sociale staat van Nederland*). With regard to poverty, the Agency observes that the percentage of households which are classified as low income-households has increased from 8,8% in the year 2002 to 10% in 2003 and an estimated 11% in 2004. The Agency presents similar figures regarding the income perception of individual households: whereas in 2001 8% of the households indicated they experienced severe difficulties in ensuring sufficient means of subsistence, this figure has risen to 15% in 2004. The report attributes these increases mainly to a deterioration of general economic parameters in the Netherlands

Comparable tendencies exist with regard to the number of people who enjoy social security benefits. The report shows that since 2001, both the number of persons receiving unemployment benefits and the number of persons enjoying social assistance benefits, has significantly increased. In the period 2001-2004, 156.000 extra unemployment benefits were granted, supplemented by an additional rise of 19.000 in the first quarter of 2005. The amount of persons enjoying social assistance benefits has risen with the amount of 17.000 in the years 2002-2004, with another spectacular rise in the first quarter of 2005 of 11.000.

The report concludes with the observation that these negative tendencies are likely to persist in the coming years, since most economic scenario studies predict rather modest economic recovery rates for the next few years.

Social assistance for undocumented foreigners and asylum seekers

Legislative initiatives, national case law and practices of national authorities

The Netherlands violate Convention on the Rights of the Child – The *Centrale Raad van Beroep* [Central Appeals Tribunal] held in summary injunction proceedings that the *Wet Werk en Bijstand (WWB)* [Employment and Social Assistance Act] is not in conformity with Article 27 of the International Convention on the Rights of the Child (8 August 2005, LJN AU0687). Article 11 of the Act provides that all Dutch nationals and non-Dutch nationals who are legally present in the Netherlands are to be provided with the necessary means to ensure an adequate standard of living. Minors are excluded from the right to social assistance under this provision,

unless they have pressing needs, in which case city boards can decide to provide assistance to minors as well. This exception is formulated in art. 16 (1) of the Act. Paragraph 2, however, expressly stipulates that persons without a valid residence permit cannot be the beneficiary of such an exception. The city board of Zaanstad had based a refusal to grant social assistance to two minor asylum seekers – who clearly had pressing needs – on this exclusion clause. The *Centrale Raad van Beroep* held that by doing so, the city board had violated article 27 (3) ICRC, which obliges States Parties to provide assistance to minors in case of need. The *Centrale Raad van Beroep* made clear that in a case like this, no effect could be given to the exclusion clause of article 16, paragraph 2 of the Employment and Social Assistance Act.

Article 35. Health care

Access to health care

Legislative initiatives, national case law and practices of national authorities

Health Insurance Act – The *Zorgverzekeringswet* [Health Insurance Act] was adopted on 16 June 2005 (*Staatsblad* 2005, 358) and will enter into force on 1 January 2006. The Act brings about a major reform in the health insurance system. Whereas currently different health insurance regimes coexist, the new act will create a single insurance regime. This regime is best described as a private insurance system under strict social conditions. All citizens are obliged to insure themselves against health risks, but are free to choose between private insurance companies who should compete on aspects as price-setting, quality and service. The private insurance companies must offer at least a legally prescribed insurance package and may not refuse to insure persons who suffer higher health risks, neither may they differentiate their premium settings. Insurance companies with a relatively large amount of 'high health risk' customers will receive compensation from the State.

The *Centraal Planbureau* (CPB) [Central Planning Agency] has estimated that the average annual premium insurance companies will charge is around €1100 (CPB, *Centraal Economisch Plan 2005*). Persons lacking enough resources will receive a State based compensation with a maximum of €420 for bachelors and €1200 for couples. Apart from the nominal premium, insured persons will have to pay an income dependant contribution, which will be reimbursed by either the employer or the Social Security Agency.

Closure of street prostitution zones – In the 1980s, most of the major cities in the Netherlands decided to regulate street prostitution by way of designating special zones or streets where prostitutes were allowed to offer their services, so-called *tippelzones*. These zones were meant to reduce nuisances emanating from street prostitution and to enhance the health of prostitutes. The special zones provided for police supervision to reduce the chances of abuse and institutionalised medical and social assistance to prostitutes, who were provided with, among others, clean needles, vaccination and condoms. Recently, three of the four major cities have decided to put an end to this form of legalisation of street prostitution. The city of Amsterdam already closed its *tippelzone* on 15 December 2003, Rotterdam followed suit on 14 September 2005 and the city board of The Hague has announced it will close the zone on 1 March 2006. The change of thinking by the respective city boards is motivated by multiple considerations. Public order considerations include the proliferation of criminal activities surrounding the zones with regard to drug dealing and human trafficking; moral considerations include the proposition that local governments should not sponsor or facilitate prostitution by addicted women and illegal residing women.

Although the city board of Rotterdam has coupled the closure of the zone with a number of policies aimed at reducing incentives for women to engage in prostitution – i.e. the granting of housing, increased social and medical assistance, the supply of heroine to addicted women under strict medical criteria etc. – women's rights organizations have expressed grave concerns regarding the consequences of closure. They fear that closure will lead to a rise of illegal and

unmonitored street prostitution, which would deteriorate women's rights even more; most notably with regard to their safety and their possibilities of access to health care.

The foreseen closure of the *tippelzone* in The Hague in March 2006 leaves five cities which will continue to facilitate street prostitution zones: Utrecht, Eindhoven, Arnhem, Nijmegen and Groningen.

Article 36. Access to services of general economic interest

Access to services of general economic interest in the economy of networks: transports, posts and telecommunications, water-gas-electricity

Legislative initiatives, national case law and practices of national authorities

Increased guarantee of supply of electricity – A scenario report conducted by the national guarantor of the electricity network TenneT (TenneT, *Rapport monitoring leveringszekerheid 2004-2012*, Arnhem, May 2005) has shown that the domestic supply of electricity in the Netherlands will significantly increase in the years 2006-2012, due to private investments in new electricity plants and the prolongation of use of existing plants. This increased capacity will under normal circumstances meet the demands of the market, at least up to the year 2012. Moreover, the report underscores that domestic disruptions in the energy supply can be compensated by imports; adequate interconnection capacities exist. The Government has adopted the TenneT conclusions and will not develop new measures aimed at improving the level of guarantee of supply (*Kamerstukken II*, 2003-2004, 29023, No. 12).

Other services of general interest

Legislative initiatives, national case law and practices of national authorities

Fight against spam – For the first time OPTA (the national post en telecom supervising authority) imposed fines on natural persons and small undertakings for transferring spam (OPTA, 9 December 2004, Jboe04002; 23 December 2004, Jboe04004/Jboe04005). The prohibition of spam was incorporated in the *Telecommunicatiewet* [Telecommunications Act] in May 2004. The fines concerned both spam sent by email and text messaging. The largest fine – € 42.500 – was imposed on a person who was involved in the transfer of four different spam mailings, advertising a variety of products. The grounds for the fines were based on Article 11 (7) of the Telecommunications Act: the sending of messages without prior authorization by the customer, the failure to include the true identity of the sender and the failure to include a valid postal address or phone number which could be used to issue a request for termination of the communication concerned. In April 2005, OPTA imposed another fine on a person responsible for spam (OPTA, 19 April 2005, Jboe05001).

With regard to spam, the OPTA operates on the basis of complaints lodged by victims of spam on a special website established by OPTA (*www.spamklacht.nl*). The complaints serve as starting point for investigations, which can either lead to warnings or the imposition of fines.

Article 37. Environmental protection

Right to a healthy environment

Legislative initiatives, national case law and practices of national authorities

Non-compliance with air quality norms – Air quality norms as laid down in Council Directive 1999/30/EC of 22 April 1999 and implemented by the *Besluit Luchtkwaliteit* [Air quality Decision] (Stb. 2001, 269) have severely troubled Dutch planning authorities and builders. The

Directive lays down limit values for concentrations of sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air. Based on these limit values, Dutch courts have put a stop to numerous building projects.

The first case concerned the construction of 20 kilometers of so-called 'rush hour-lanes' on the motorway between the cities of Eindhoven and Den Bosch. The *Raad van State* [Council of State], in its capacity as supreme administrative court, ruled that since the concentration of filth in the air in the area of concern already failed to meet proscribed standards, the Dutch State could not embark on a building project without assessing whether additional measures would be necessary to ensure compliance with air quality norms (LJN AR2181, 15 September 2004). The submission by the Minister of Public Transport that the pollution emanating from the motorway did not affect residential areas was dismissed. Air quality norms as proscribed in the Directive cover the entire territory of the Member States; exceptions are only allowed regarding places of work. This means, according to the Council of State, that outside air in general has to meet Directive standards, regardless of the vicinity of residential areas.

This decision paved the way for a series of judgments whereby all sorts of local and provincial development plans were declared void, on the grounds that they would either lead to a breach of air quality norms proper, or because these plans failed to contribute significantly to an enhancement of air quality in areas where filth concentrations already exceeded limit values. A far from complete list of cases include construction plans in the cities of Dordrecht (LJN AS8543), Amsterdam (LJN AS5492; LJN AT8012; LJN AT8013), Leiden (LJN AT4229) and Hendrik-Ido-Ambacht (LJN AR2528). The case law prompted the Minister of Public Transport to suspend several projects concerning highway-restructuring, in order to allow for prior investigations regarding possible effects on the air quality of these projects.

Both Government and Parliament expressed grave concerns regarding the consequences of the EU air quality norms and the way the Dutch courts dealt with these norms. Not only could the approach adopted by the Council of State lead to the postponement of important infrastructural projects; policies which would result in a complete compliance with EU air quality norms could moreover cost an estimated amount of €30-40 billion (*Kamerstukken 2004-2005*, 21501-08, No. 189). The Government has concurrently developed a multi-tiered strategy in order to cope with the EU norms. Apart from proposing an investment of €900 million to be allocated in the period 2005-2015 to reduce emissions emanating from traffic, agriculture and industry, it adopted on 5 August 2005 a new *Besluit Luchtkwaliteit* [Air quality decision], which offers considerable more leeway in interpreting the EC Directive on air quality (*Stb.* 2005, 316). Most noteworthy of this decision is Article 7, paragraph 3, which expressly stipulates that building projects in areas where air quality standards are not met, can continue as long as they do not deteriorate the quality of air in that area. Secondly, article 7, paragraph 3 offers a 'balancing approach' to authorities in developing building plans. This balancing approach holds that policies which result in a local deterioration of air quality are allowed when these policies at the same time lead to an improvement of air quality in a wider area. In using this approach, authorities can for example devise infrastructural adjustments which would increase traffic pollution in a certain local area, but would lead to an overall decrease of pollution in an entire town or city. The Government considers such an approach to be in conformity with the purposes of the Directive. Experts and environmental organisations are concerned, however, about the large amount of discretion this balancing approach offers to authorities. The Government has announced that the possibility to balance different effects should be restricted in time, place and substance, but no concrete limits have been imposed.

The balancing approach incorporated in the Air quality decision will be elaborated in a new *Wet luchtkwaliteit* [Air quality Act], which the Government has drawn up and is currently under consideration with the *Raad van State* [Council of State]. The *Raad van State* will expressly test whether the new act is in compliance with European norms.

Article 38. Consumer protection

Protection of the consumer in contract law and information of the consumer

Legislative initiatives, national case law and practices of national authorities

Towards a new 'Consumer Authority' – On 21 June 2004, the Government announced a 'strategic action programme' for consumer policy (*Kamerstukken II,* 2003-2004, 27879, No. 9). In order to implement Regulation No. 2006/2004 on consumer protection, the Dutch Government will put forward a bill in Parliament with a view to establishing a new 'Consumer Authority'. This authority would be entitled to take enforcement measures so as to stop or prohibit infringements of consumer law. On 29 April 2005, the Government submitted a blueprint for this new bill and the envisaged Authority (*Kamerstukken II,* 2004-2005, 27879, No. 11). A formal proposal was to be submitted late 2005.

Online conclusion and termination of insurances – Parliament urged Government on 11 October 2005 to come up with a legislative change to the *Burgerlijk Wetboek* [Civil Code] which should make it possible for consumers to conclude and terminate insurance contracts online (*Handelingen 2005-2006*, no. 10, p. 555-556). Current Dutch law proscribes closure and termination of insurance agreements by letter. The proposal has been welcomed by consumer organisations. Apart from the motivation that the possibility of online termination will make it easier for consumers to end contractual obligations, Parliament hopes that a more flexible regime will result in transaction cost reduction and increased competitiveness among insurance companies.

Financial Services Act – The *Wet financiële dienstverlening* [Financial Services Act] has been accepted by Parliament and is foreseen to enter into force either before the end of 2005 or at the beginning of 2006. The act intends to provide a coherent level of protection to consumers with regard to – almost – all financial services. The current state of Dutch law on consumer protection with regard to financial services is sector-based and is hampered by notable gaps concerning quality and expertise standards and legal monitoring mechanisms. Codes of conduct and other instruments of self-regulation have partly succeeded in closing these gaps, but since dishonest service providers are not obliged to take part in these mechanisms significant consumer risks continue to exist.

The new Act covers the following services: insurances, consumptive loans, mortgage loans, payment and savings services and investment services. Financial service providers are defined as financial advisors, financial intermediaries and financial product providers. The act lays down quality standards on transparency, expertise, reliability, the supply of information and the content of advises. All service providers will moreover need to be granted a license by the national financial supervising agency, the *Autoriteit Financiële Markten* (AFM). The *AFM* will monitor compliance with the act.

Consumer organisations have welcomed the new Act, but have expressed worries concerning the efforts financial service providers have undertaken to give effect to its provisions. An enquiry by the *AFM* showed that financial service providers have not yet implemented the Act's provisions in their internal company structures and processes. The Ministry of Finance has announced however, that the Financial Services Act will only enter into force after service providers have been given the time required to correctly implement the act.

Fight against spam – On the first fines imposed for transferring spam, see Article 36 *supra.*

CHAPTER.V. CITIZENS' 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

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 para. 5 of the *Kieswet* [Elections Act] 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 – In our report on 2004 mention was made of a case that 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 only, but it was later extended to elections for European Parliament. The regulation was challenged as arbitrary and discriminatory, in breach of EU citizens' rights, and in violation of Article 3 of Protocol No. 1 to the ECHR (right to vote).

On 13 July 2004 – 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 related 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 accelerated procedure.

The latest development so far relates to a *second* request for an accelerated procedure. The Administrative Litigation Division made this request with a view to the then up-coming referendum on the European Constitution, to be held on 1 June 2005. On 18 March 2005 the President of the ECJ rejected this request as well. The rejection was based on three elements: the request was prompted by an issue that was not related to the main proceedings; the entitlement to participate in the referendum as such was an issue not directly connected to Community law; the subject matter was so complicated and sensitive that it was uncertain if an accelerated procedure would enable the Court to reach a timely decision (case C-300/04 2, *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

Implementation of Convention on Participation of Foreigners in Public Life at Local Level – 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* [Elections Act] 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 an increase of the political representation of ethnic minorities, although this trend was more marked at national than at local level.

The election campaign for the March 2002 municipal elections 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 was set aside for this purpose. (b) A similar sum 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.

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 next municipal elections are scheduled for spring 2006.

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

Other relevant developments

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

Case-law: Requiring EU Citizens to Proof Identity – The case of *Oulane* (ECJ, 17 February 2005, case C-215/03) addresses the position of an EU citizen staying in another EU Member State, who does not show any evidence of his identity or nationality.

On 3 December 2001, Mr Oulane was stopped by the Dutch authorities on grounds of suspicion of illegal residence. During questioning, Mr Oulane, who did not have any identity documents in his possession, stated that he was a French national staying in the Netherlands for approximately three months on holiday. The Netherlands authorities detained him with a view to deportation on the grounds, *inter alia*, that there was a risk that he would seek to evade deportation. On 7 December 2001, he presented a French identity card to the authorities. They then accepted that he was a Community national and no longer contested his status as a tourist. By decision of 10 December 2001, the detention order was lifted.

On 27 July 2002 Mr Oulane was again arrested, this time by the railway police in Rotterdam Central station, in a goods tunnel closed to the public. As he had no identity documents in his possession, he was questioned and detained for deportation. In the course of questioning, he stated that he had been in the Netherlands for 18 days and that he wished to return to France. The Netherlands authorities relied on public policy to justify the detention on the grounds that it was reasonable to assume that Mr Oulane would attempt to evade deportation. On 2 August 2002 Mr Oulane was deported to France.

Before the *Rechtbank* [Regional Court] of The Hague Mr Oulane challenged the legality of the detention measures and claimed damages. This Court referred a series of questions to the ECJ for a preliminary ruling. In its ruling the ECJ pointed out that a Member State may require recipients of services who are nationals of other Member States and who wish to reside in their territory to provide evidence of their identity and nationality. However, the ECJ added, one cannot require that such evidence be provided in all cases only by presentation of a valid identity card or passport, as this clearly goes beyond the objectives of Directive 73/148. If the person concerned is able to provide unequivocal proof of his nationality by means other than a valid identity card or passport, the host Member State may not refuse to recognise his right of residence on the sole ground that he has not presented one of those documents.

Another aspect of the case related to the fact that Dutch legislation at the time did not provide for a universal, general identification requirement, but for limited requirements restricted to specific situations. Under existing case-law, a person who states in response to questioning that he has Netherlands nationality must provide proof of his identity. His identity may be established, apart from by means of an identity card, a valid passport or even a driving licence issued in the Netherlands, through a check of the data available from the local Netherlands authorities. However, if a person states that he is a national of another Member State but is not able to produce a valid identity card or passport, the national authorities detain him until he can produce those documents. The practical result was that nationals of other Member States residing in the Netherlands must always be in possession of proof of identity, whereas no such requirement was imposed on Netherlands nationals. This obvious difference of treatment as between Netherlands nationals and nationals of other Member States was prohibited by the Treaty, the ECJ stated: Community law does not prevent a Member State from carrying out checks on compliance with the obligation to be able to produce proof of identity at all times, provided that it imposes the same obligation on its own nationals as regards their identity card.

Finally the ECJ addressed the detention and deportation of Mr Oulane. The ECJ observed that these measures, when based solely on his failure to comply with legal formalities concerning the monitoring of aliens, impair the very substance of the right of residence directly conferred by Community law and are manifestly disproportionate to the seriousness of the infringement. A detention order can only be based on an express derogating provision, such as

Article 8 of Directive 73/148, which allows Member States to place restrictions on the right of residence of nationals of other Member States in so far as such restrictions are justified on grounds of public policy, public security or public health. However, failure to comply with legal formalities pertaining to aliens' access, movement and residence does not by itself constitute a threat to public policy or security. On the other hand, it is for nationals of a Member State residing in another Member State in their capacity as recipients of services, to provide evidence establishing that their residence is lawful. If no such evidence is provided, the host Member State may undertake deportation, subject to the limits imposed by Community law.

Article 46. Diplomatic and consular protection

No significant developments to be reported. An evaluation of the consular assistance offered to Dutch nationals who are detained in foreign prisons (and who receive € 30 per month, when detained outside Europe, as gift of the Dutch Government) was scheduled to take place in the course of 2005 (*Tweede Kamer,* 2004-2005, *Aanhangsel* 1112).

CHAPTER VI. JUSTICE

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

Access to a court and, in particular, the right to legal aid / judicial assistance

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

European Court of Human Rights: effective remedy in asylum cases? – In the case of *Bonger* it was argued that no effective remedy was available in asylum cases as the principle of *non-refoulement* was not effectively guaranteed. The Strasbourg Court, however, noted that Mr Bonger, in the eventuality of an act of the Dutch authorities aimed at his effective expulsion, would be able to take administrative appeal proceedings in accordance with Article 72 § 3 of the Aliens Act 2000. This would allow him to obtain a determination of the question whether his expulsion will be contrary to his rights under Article 3 ECHR. The Court has found no reasons for holding that such administrative appeal proceedings cannot be regarded as an effective remedy for the purposes of Article 13 ECHR in the instant case (ECtHR, 15 September 2005, *Bonger v. the Netherlands* (Appl. No. 10154/04)).

***Human Rights Committee: effective remedy again discrimination in taxation?* –** As was noted under Article 20 *supra*, the case of *De Vos* features a tax consultant who used a company car to commute between his home and his office. He also used this car for private purposes and therefore had to add a percentage of the car's value to his taxable income. He complained of discrimination since the rules distinguished between employees whose private use of their company car did not exceed 1,000 km per year, and those who used it for more than 1,000 km. In fact that argument had been accepted by the *Hoge Raad* [Supreme Court] in proceedings brought by a person in a similar situation as Mr De Vos. The Supreme Court found that the distinction was contrary to Article 26 ICCPR but observed that it was for the legislator rather than the judiciary to remove this inequality; the fact that a new Income Tax Bill was soon to be submitted to Parliament showed that the legislator was in the process of resolving the problem. To Mr De Vos this indicated that he did not have an effective remedy available**.**

The Committee, however, rejected the complaint about unjustified unequal treatment, simply noting that Mr De Vos has not substantiated how his different treatment was based on one of the prohibited grounds of discrimination enumerated in Article 26, or on any comparable "other status" referred to in that article. It followed that his complaint with regard to the alleged absence of an effective remedy was also inadmissible since for purposes of the Optional Protocol the right to an effective remedy can only be invoked in conjunction with a substantive Covenant right (HRC, 5 August 2005, *De Vos v. the Netherlands*, Comm. No. 1192/2003).

Legislative initiatives, national case law and practices of national authorities

Imposition of pecuniary sanctions by the Public Prosecutor – As was mentioned in our 2004 report, a bill was 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*, 2004-2005, 29849, Nos. 1-3). In response to concerns, the draft bill was amended so as to secure judicial review of the decision of the Public Prosecutor if the citizen, on whom a sanction has been imposed, wishes to institute an appeal. Meanwhile the bill has been approved by the *Tweede Kamer* [House of Representatives]. The bill is now pending before the *Eerste Kamer* [Senate]. Here questions were raised as to the compatibility of the proposal with Article 6 ECHR.

Revision after a violation found by the ECHR – In a memorandum submitted to Parliament of 12 August 2005, the Minister of Justice stated that he considers it undesirable to introduce a

revision procedure *(herzieningsregeling)* for those civil and administrative cases in which the European Court on Human Rights has found a violation. The background to this statement is a revision procedure that was introduced for criminal cases in 2003 (Article 457 of the Code on Criminal Procedure). Critics had maintained that the same possibility should exist for civil and administrative cases as well, but the Minister of Justice disagreed. He stated that a revision procedure in civil cases would lead to legal uncertainty, in particular with regard to third parties. He further noted that administrative law (Article 4:6 Awb) already provides for the possibility to institute fresh proceedings on the basis of new facts, which includes Strasbourg case-law (*Kamerstukken II* 2004/05, 29279, No. 28).

Special Investigative Powers: Evaluation – On the evaluation of the Special Investigative Powers Act, see Article 8 *supra*.

Supreme Court: access to court and parental authority – In a judgment of 27 May 2005, the *Hoge Raad* [Supreme Court] ruled that in the light of the right of access to court a father may, on his own, institute proceedings to apply for joint parental authority with the mother over their child. Prior to this judgment, the standing court practice was that a judge could only assign joint parental authority on the basis of a joint application of the parents; a sole application of the father would not be sufficient. The Supreme Court ruled that this interpretation of the relevant provision (Article 1:252 of the Civil Code) is incompatible with the father's right to access to court in order to claim the protection of his right to 'the exercise of parental rights', as enshrined in Article 8 ECHR (LJN AS7054).

Reasons for concern

No revision in civil and administrative cases after a violation found by the ECHR – One must regret the position of the Minister of Justice that it would be undesirable to introduce a revision procedure *(herzieningsregeling)* for civil and administrative cases in which the European Court on Human Rights has found a violation. This means that important categories of successful applicants still have no remedy at their disposal to obtain *restitutio in integrum*. It will be noted that *Recommendation R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights* does not distinguish between different types of procedures. What matters is, in the words of the Recommendation, that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where: (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

Independence and impartiality

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

Human Rights Committee: biased judges (1)? –At the origins of the case of Mr Van Den Hemel was a dispute between the author and an insurance company, *Royal*, about responsibility for a traffic accident. Both the Utrecht Regional Court, the Court of Appeal and the Supreme Court found against Mr Van Den Hemel. Before the Human Rights Committee he claimed that his right to a fair trial was violated because (a) two of the judges who rendered judgment in the Court of Appeal also sit as substitute judges on the Utrecht Regional Court; (b) two Supreme Court judges who considered his case were biased because of their possible links to Royal, as

they sat on the Supervisory Board of the Dutch Association of Insurers; and (c) the judges who pronounced on his case "could" have been shareholders of Royal.

The HRC rejected the complaints. As to the first claim, the Committee noted that the author has adduced no evidence to the effect that the two judges of the Court of Appeal had in fact also participated in any way in the adjudication of his case at first instance. In as far as the second claim is concerned, the Committee expressed some doubts about the propriety of a system that allows judges to sit on a supervisory board established by a business association. However, the Committee observed that Mr Van Den Hemel challenged the two Supreme Court judges in question and requested that they recuse themselves. The Supreme Court had heard the author's recusal challenge in a different composition, proceeded to a full hearing of the positions and the evidence advanced by the author and the judges in question, and in the end dismissed the challenge. The HRC detected no defects in these procedures. "The same applies with even more force", the HRC continued, "to the author's claim that one of the Supreme Court judges who considered the author's challenge of the two Supreme Court judges had been a former colleague of one of these judges in the University of Amsterdam".

In as much as the author's final claim was concerned, the Committee concluded that the author did not raise this issue in the course of the domestic judicial proceedings. Therefore, the author failed to exhaust the domestic remedies with respect to this claim (HRC, 5 August 2005, *Van den Hemel v. the Netherlands,* Comm. No 1185/2003.

Human Rights Committee: biased judges (2)? – A similarly unsuccessful claim was brought by Mr Sanders. He was engaged in a dispute with two organisations. When the case came before the Regional Court of The Hague, Mr Sanders asked the case to be referred to another court. He claimed that this court could not be considered independent and impartial since "a number of lawyers" serving as substitute judges on that court actually worked at the same law firm as the lawyers representing his opponents. The request was rejected. A similar incident took place before the Court of Appeal of The Hague.

Mr Sanders then applied to the European Court of Human Rights, which rejected his complaint on 29 May 2002. Next he submitted a complaint to the Human Rights Committee – another example of the practice that was already identified in our previous report. Before the HRC Mr Sanders added that the lawyer for one of his opponents was also a professor at the *Vrije Universiteit* in Amsterdam, and that three other professors of the same university were substitute judges on The Hague Regional Court. In rejecting the complaint, the HRC limited itself to the observation that Mr Sanders could not substantiate his claim that the judges who considered his case had any ties with this particular law firm. The HRC implicitly declined to entertain Mr Sanders' most principled claim, i.e. that the institution *per se* of substitute judges, who always have additional functions besides their work as judges, violates article 14 ICCPR, as it inevitably leads to conflicts of interest (HRC, 5 August 2005, *Sanders v. the Netherlands,* Comm. No 1193/2003).

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: undue delay – In the case of *Van Houten* the applicant complained of the length of the proceedings following on his request for social security benefits. The case is interesting, not so much because of the issues involved (undue delays have been encountered more often) but rather from a procedural point of view. Mr Van Houten claimed € 17,000 in respect of non-pecuniary damage and € 1,000 in respect of costs and expenses. The Dutch Government, however, whilst acknowledging the unreasonable duration of the domestic proceedings, was prepared to pay a maximum of € 5,000 for immaterial damages as well as the legal costs as requested by the applicant. In a unilateral declaration, the Government suggested that this information might be accepted by the Court as 'any other reason' justifying the striking out of the case.

The Court went along with the Government's proposal. Recalling recent case-law (notably *Tahsin Acar v. Turkey*, [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI), the Court understood the Government's declaration as an undertaking to pay those sums to the applicant in the event of the Court's striking the case out of its list, as contemplated in Article 37 § 1 (c) of the Convention. And so it did, there being no substantive need to continue the examination of the application (ECtHR, 29 September 2005, *Van Houten v. the Netherlands* (Appl. No. 25149/03)).

European Court of Human Rights: violation of Article 5 § 4 ECHR – In the case of *Schenkel* the Court found a violation of Article 5 § 4 ECHR (right to have lawfulness of detention decided speedily by a court). Mr Schenkel had been found guilty, in 1996, of attempted homicide and assault. Given that he was mentally disturbed, and had a history of violent offences, the court ordered that he be confined in a custodial clinic (*terbeschikkingstelling met bevel tot verpleging van overheidswege*; "TBS order"). When it was decided, in 1998, to prolong his confinement in the clinic, Mr Schenkel appealed. Only in May 2000, the Arnhem Court of Appeal decided the case. The Strasbourg Court found the delay of more than seventeen months in determining the applicant's appeal in breach of the required speed under Article 5(4) (ECtHR, 27 October 2005, *Schenkel v. the Netherlands* (Appl. No. 62015/00)).

Legislative initiatives, national case law and practices of national authorities

Regional Court: undue delay and damages à l'italienne – In a decision of 8 August 2005 (LJN AU1627), the *Rechtbank* [Regional Court] of Amsterdam applied the standards of the Strasbourg Court to calculate the damages in a case where the reasonable delay requirement was violated. In doing so the Amsterdam Court based itself on the judgment of the European Court of Human Rights in *Pizzati v. Italy* (10 November 2004, Appl. No. 62361/00).

Thus, the Amsterdam Court observed a that sum varying between € 1,000 and 1,500 per year's duration of the proceedings (and not per year's delay) is a base figure for the relevant calculation. The outcome of the domestic proceedings (whether the applicant loses, wins or ultimately reaches a friendly settlement) is immaterial to the non-pecuniary damage sustained on account of the length of the proceedings. The aggregate amount will be increased by € 2,000 if the stakes involved in the dispute are considerable, such as in cases concerning labour law, civil status and capacity, pensions, or particularly serious proceedings relating to a person's health or life. On the other hand the basic award will be reduced in accordance with the number of courts dealing with the case throughout the duration of the proceedings, the conduct of the applicant – particularly the number of months or years due to unjustified adjournments for which the applicant is responsible – to the stakes involved in the dispute – for example where the financial stakes are of little importance for the applicant – and on the basis of the standard of living in the country concerned. A reduction may also be envisaged where the applicant has been only briefly involved in the proceedings, having continued them in his or her capacity as heir.

Applying these standards to the case before it (and operating a reduction factor of 0,7 based on the standard of living in Morocco, where the applicant was residing), the Amsterdam Court awarded € 2,450 in damages.

"Reasonable time" in administrative law cases: a breakthrough – It was noted in our previous reports that the *Centrale Raad van Beroep* [Central Appeals Tribunal] was traditionally hesitant to find violations of the 'reasonable time' requirement – and when it did, the Tribunal ruled that the applicants had to institute as different set of proceedings in the civil courts in order to gain compensation. Commentators observed that this remedy is not sufficient since this is a very slow procedure.

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.

The next step was taken in a decision of 11 March 2005 (LJN AT1576). Having noted that the procedure had lasted for four years and nine months, the Central Appeals Tribunal found that this duration was incompatible with the reasonable time requirement, as the case was not complex and the applicant had not contributed to the delays. It then observed that compensation of any damage may be awarded on the basis of Article 13 ECHR in conjunction with Article 8:73 Awb [General Administrative Procedure Act]. In the instant case, however, the applicant had not substantiated that he suffered either pecuniary or non-pecuniary damage as a result of the undue delay. As there were no other reasons to award compensation, the Central Appeals Tribunal held that the finding of a violation was sufficient compensation for the undue delay.

Reasons for concern

No effective domestic remedy for undue delays – Despite the extensive Strasbourg case-law on the meaning of Article 13 ECHR for undue delay cases (starting with the well-known *Kudla* judgment of 2000), the Dutch legal order still does not contain an effective remedy for undue delays. Compensation for undue delays in criminal cases may be offered in the form of a mitigation of the sentence – a practice that has been accepted by the Strasbourg Court; see ECtHR, 23 March 1999, *Bakker v. the Netherlands* (adm.dec.) (Appl. No. 39327/98) – but no similar possibility exist in civil and administrative cases. In theory victims could bring a tort action against the State, arguing that the responsible courts acted unlawfully by failing to hear the case within a reasonable time, but it has been asserted by many commentators that these actions are bound to fail since State responsibility is not easily accepted. So far the Minister of Justice has refused to create new remedies, despite repeated calls in the literature to do so. A conviction by the Strasbourg Court would of course force the Dutch Government to take the necessary steps in this area, but the Government has been eager to settle all reasonable time cases.

Article 48. Presumption of innocence and right 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: presumption of innocence – On 9 November 2004, i.e. just before the start of the period covered by the present report, the Strasbourg Court of Human Rights found a violation of Article 6(2) in the case *Del Latte v. the Netherlands*. The applicants in this case had applied for monetary compensation for the time they had spent in pre-trial detention. Their claims were refused by on the ground that their pre-trial detention was lawful and that their acquittal had "merely been technical" since, had the charges been somewhat different, they would have been convicted. The European Court held that this amounted to a determination of the applicants' guilt without them having been 'proved guilty according to law' (ECtHR, 9 November 2004, *Del Latte v. the Netherlands* (Appl. No. 44760/98)).

Legislative initiatives, national case law and practices of national authorities

Supreme Court: the "post Van Mechelen" case – In 1997 the European Court of Human Rights found a violation of Article 6 ECHR in the case of *Van Mechelen a.o. v. the Netherlands*

(judgment of 23 April 1997, *Reports* 1997, p. 691). The Court found that the conviction of the applicants on the basis of statements of witnesses who remained anonymous was incompatible with the rights of the defence. Amounts of 25,000 to 30,000 guilders (approximately € 11,000 to 14,000) were awarded by way of just satisfaction on the basis of Article 50 (now 41) ECHR.

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

On 18 March 2005, the *Hoge Raad* [Supreme Court] upheld this decision. It noted that the State could be held responsible for the judicial decisions which had led to the imprisonment of Mr Van Mechelen and the others, and which had been found in breach of the ECHR. The Supreme Court also noted that, since their convictions had been based to a decisive extent on evidence obtained in breach of Article 6 ECHR, there had not been a legal basis for their continued deprivation of liberty. *Restitutio in integrum* being impossible in the instant case, financial compensation was appropriate. The Supreme Court also observed that it would be incompatible with the presumption of innocence if civil courts in compensation proceedings, where the rights of the defence are not fully safeguarded, were to assume that the convicted persons could have been convicted (or at least that there would have been a reasonable chance that this would have happened) if the violation of the right to a fair trial had not occurred (LJN AR3144).

The case of Eric O.: lethal force in Iraq – Our Reports on 2003 and 2004 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 television interview, days after the incident, the head of the national Public Prosecution Office defended the decision to prosecute Mr O., as he had shot a person and might be guilty of manslaughter or murder. In a judgment of 18 October 2004 the Military Chamber of the *Rechtbank* [Regional Court] in Arnhem acquitted Eric O.

In a judgment of 4 May 2005 (LJN AT4988), the *Militaire Kamer van het Gerechtshof Arnhem* [Military Chamber of the Arnhem Court of Appeal] upheld the first instance decision. What is important for present purposes is the Court of Appeal's handling of the complaint that the presumption of innocence had been infringed upon. The Court of Appeal agreed with Eric O. that the Public Prosecutor's Office had initially adopted a much too heavy-handed approach ("het openbaar ministerie [heeft] de zaak aanvankelijk veel te zwaar ingezet"] and it also observed that the statements which the head of the Public Prosecution Office made during a television interview had not displayed the restraint that was preferable in view of the very early stage of the investigation. In fact, the Court of Appeal observed, the tone of the statements had been against the guidelines of the Public Prosecution Office, which call for a subdued approach to high-profile cases. Yet the Court of Appeal noted that these elements in actual fact did not lead to any disadvantage of Eric O., who had been released from pre-trial detention on the day following the TV interview. Hence, no violation of the presumption of innocence had occurred.

However, when ruling, in a separate decision, on a request for damages for the time spent in pre-trial detention, the Military Chamber of the Court of Appeal in Arnhem awarded a relatively high amount, i.e. € 10.000 (although much less than the amount claimed, i.e. € 300.000). The Chamber expressly took into account the "rather unrestrained" *("weinig terughoudende")* statements made on television by the head of the Public Prosecution Office (12 October 2005, LJN AU4184).

Miscarriage of justice: the "Schiedammer Parkmoord" – The case of the *"Schiedammer Parkmoord"* features an innocent man, B., who was found guilty of murder and sentenced to 18 years' imprisonment as well as compulsory treatment in a custodial clinic. He was only exculpated (after four years in prison) when the actual murderer confessed. Because of the importance of the case to the Dutch legal order (and to Mr B.), it is described in a certain detail.

On an evening in June 2000, a 10-year-old girl was killed and an 11-year-old boy was injured in the Beatrixpark in Schiedam. They had been on their way home when a man grabbed them and pulled them into the bushes. The two children had to undress and were forced to commit sexual acts with each other. Afterwards the man tried to strangle the boy and stabbed him with a knife. The boy pretended to be dead. The man then strangled the girl and left the spot.

A large investigation followed. On 5 September 2000 Mr Kees B. was arrested as the prime suspect. Initially, on 9 and 10 September, B. made statements to the police in which he stated that he had committed the offence. However, after 11 September 2000 he consistently denied. B. was convicted in May 2001 by the *Rechtbank* [Regional Court] of Rotterdam. This decision was upheld in March 2002 by the *Gerechtshof* [Court of Appeal] of The Hague. B.'s initial confessions played an important role in the evidence against him. The Netherlands Forensic Institute (NFI) had found no traces of B. One researcher had found possible traces of an unknown third person. However, these traces were not added to the case-file. B.'s appeal in cassation and his request for a review were dismissed.

In August 2004 another man, H., confessed that he had been involved in the incident in the Beatrixpark. This confession led to an intensive investigation, involving advanced DNA techniques. The investigation resulted in incriminating evidence against H. He was eventually convicted and sentenced to 18 years imprisonment and compulsory confinement in a custodial clinic (TBS) (*Rechtbank* [Regional Court] of Rotterdam*,* 27 April 2005, LJN AT4777, and *Gerechtshof* [Court of Appeal] of The Hague, 22 November 2005, LJN AU 6566).

In January 2005 the Supreme Court allowed the request for review of the criminal case against B. and suspended the execution of his sentence. Prior to that, on 10 December 2004, the Public Prosecution Office released B., even before the outcome of the review procedure. This miscarriage of justice has led to public debate and discussions in Parliament, during which the proper functioning of the police, the prosecution service and the administration of justice was questioned (see *Kamerstukken II,* 2004-2005, 29800-VI, No. 171 and 172; see also *Handelingen II* 2004-2005, No. 107, pp. 6491 ff.).

In view of these concerns, the Regional Court of Rotterdam and the Court of Appeal of The Hague each started an internal investigation into their own handling of the case against B. Two outsiders – the vice president of another Court of Appeal and the former president of another Regional Court – were involved in this process of 'self reflection'. The results were not published in order to protect the secrecy of deliberations, but the presidents of the two courts published short articles in the September 2005 issue of the law review *Trema* (pp. 293-297). In addition a number of general conclusions were made public by the Regional Court of Rotterdam. It stated that caution should be exercised vis-à-vis confessions, especially if these were later withdrawn; in serious cases confessions should be videotaped. Secondly it underlined that the trial judge has its own responsibility in establishing the facts and that he should order the investigatory measures that he considers necessary, even if one of the parties is opposing this. The Court of Appeal of The Hague did not make any general findings public.

In addition the *College van procureurs-generaal* [Board of Procurators General] initiated an independent inquiry into the case. To this end an advocate general who had not been involved in the case, to be assisted by independent external experts, was assigned. After a lengthy investigation, in which over 60 persons were interviewed, an extensive evaluation report (198 pages) was published (*Kamerstukken II*, 2004-2005, 29800 VI, No. 168). Seven main conclusions were reached:

(1) The investigation took place without a sufficiently coherent structure. No clear checklists were used. Some lines of investigation seemed to be established intuitively. From the moment that B. had made a confession, an offender approach/oriented investigation instead

of a crime oriented investigation took place. The management team of the public prosecution office and the police force did not pay enough critical attention to the investigation.

(2) At the start of the investigation mistakes have been made in the collection and storage of technical traces. These mistakes made it easier to justify that exculpatory evidence – the fact that no technical traces of B. had been found – was disregarded.

(3) The tactics of the criminal investigator lacked the adequate moments of adversarial argument and evaluation. There was a lack of critical analysis and comparison of the various statements made.

(4) The 11 year-old boy had been improperly treated during the investigation. In turn he was regarded as a victim, a suspect and a principle witness that was not taken seriously. During the interviews he had not been granted the normal safeguards of a child under interrogation. The way in which he was treated has indirectly affected the conviction of B., since exculpatory statements regarding B. were reasoned away.

(5) Insufficient account has been taken of the possibility of B. making a false confession without unlawful or inadmissible pressure to make such a confession. It is difficult to retrieve the way in which the interrogation of B. had been conducted since the authorities failed to use video cameras to record the interrogation.

(6) The way in which the investigation was documented showed gaps. The public prosecutor handling the case choose to act decisively after the confession of B. instead of finishing the case in a critical and objective manner. After the conviction of B. in first instance, the public prosecutor became aware of the doubts within the NFI, but failed to share these doubts with the prosecutor's service at the Court of Appeal.

(7) The advocate general at the Court of Appeal acted with professional distance and critical involvement. However, it is likely that in view of the seriousness of the facts, he has ignored the adagio 'in dubio pro reo'.

In a memorandum to Parliament, dated 11 November 2005, the Minister of Justice proposed a *Programma versterking opsporing en vervolging* [Programme to strengthen the investigation and prosecution], which was based on the recommendations of the evaluation report. Thus, in cases concerning capital offences, the management team of the public prosecution office should stimulate adversary argument so that exculpatory evidence will be adequately assessed. Registration of interrogations of suspects where serious crimes are at stake will become obligatory. All results of technical evidence, even if the evidence is negative or exculpatory, will be included in the case files. The knowledge of public prosecutors in the area of forensic techniques should be enhanced and expanded. Also, attention should be paid in training programmes to the theory and practice of interrogation of suspects as well as to false confessions. Furthermore, a commission will be created that will evaluate whether an investigation and the proceedings that follow have shown failures or serious lacks. These evaluations will take place after officials have lodged a complaint. Scientific researchers may also address the commission. These reports will be public.

Positive aspects

Supreme Court: the "post Van Mechelen" case – The approach of the Dutch courts to the consequences of the *Van Mechelen* case may be applauded. They rightly observed that the fact that the Strasbourg Court had already awarded amounts by way of 'just satisfaction' did not affect the applicants' right to obtain full financial compensation of the damage they had suffered in accordance with Dutch legal principles.

It is interesting to compare this development to the position of the Dutch Government in the more recent case of *Ramsahai*. When addressing the issue of just satisfaction in that case, the Government assumed that "the Court will also take into account the fact that, on the basis of Article 6:162 of the Dutch Civil Code, the applicants can initiate a civil action for tort". Here the suggestion was – contrary to the position of the Dutch Supreme Court in *"post Van Mechelen"* – that compensation offered by the domestic courts may take the place of just satisfaction awarded by the Strasbourg Court. The ECtHR was right in rejecting that suggestion: "it should be pointed out that the Court makes, under Article 41, such awards as in its view constitute 'just

satisfaction' for the violations which it has found; the eventuality of any additional award at the domestic level cannot concern it" (ECtHR, 10 November 2005, *Ramsahai v. the Netherlands* (52391/99), § 444).

Reasons for concern

The "Schiedammer Parkmoord" – A rare instance of miscarriage of justice, the *"Schiedammer Parkmoord"* received a lot of publicity and led to widespread concerns. It is only fair to say, however, that the issue was picked up by the authorities once there was evidence that a major mistake had been made; a thorough investigation was ordered and speedily executed; the institutions that were involved in the drama appear to have realised that the confidence in the administration of justice was at stake and were prepared to draw the lessons.

The rules governing the evidence in criminal matters

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

European Court of Human Rights: hearing of witnesses – The case of *Bocos-Cuesta* features an issue that was also at stake in earlier Dutch cases such as *Kostovski, Van Mechelen* and *Doorson*: the hearing of witnesses. Mr Bocos-Cuesta, a Spanish national, was convicted in 1997 by the *Rechtbank* [Regional Court] of Amsterdam of sexual assault and of acts of indecency with persons younger than sixteen. The conviction was mainly based on the statements of four boys between the age of six to eleven. The *Gerechtshof* [Court of Appeal] of Amsterdam upheld the decision of the Regional Court. Referring to the case *Doorson* (1996), it noted that Article 6 ECHR leaves room for the balancing of interests when it comes to the use in evidence of statements given by witnesses whom a suspect has not been able to question. It found that the interests of the four children in not being exposed to reliving a possibly traumatic experience outweighed those of the suspect. The Supreme Court rejected Mr Bocos-Cuesta's appeal.

Before the ECtHR he alleged, in particular, that his right to a fair trial under Article 6 § 1 and § 3 (d) (right to obtain attendance and examination of witnesses) of the Convention was violated in the criminal proceedings taken against him, since he had never been provided with an opportunity to question the four children. Neither was he given the possibility to have them questioned, to see or hear what exactly they had said and, therefore, to observe their behaviour under direct examination.

The Strasbourg Court considered that principles of fair trial may require that the interests of the defence are balanced against those of witnesses or victims called upon to testify. However, judicial authorities may have to take measures to compensate the handicaps under which the defence has to operate. The Court noted that in the present case the statements of the four victims were the only direct evidence. Therefore, they had been of a decisive importance for the courts to establish the applicant's guilt. It recognized that the trial courts undertook a careful examination of the statements that were taken from the children and gave the applicant ample opportunity to contest them. However, the applicant had not been able to follow the manner in which the police had questioned the children nor was he then or later given an opportunity to have questions put to them. The Court also noted that the children's statements to the police were not recorded on videotape. Consequently, neither the applicant nor the trial court judges had the opportunity to observe their demeanour under questioning and thus form their own impression of their reliability. The Court found the reason for the dismissal of the applicant's request to hear the witnesses, namely that the interests of the witnesses outweigh the interests of the defence, unsubstantiated. No concrete evidence such as an expert opinion was found in the case file to this respect.

Consequently, the Court found that the applicant was not provided with an adequate opportunity to exercise his defence rights as enshrined in Article 6 of the Convention. No pecuniary or non-pecuniary damages were awarded since the applicant was entitled to revision

of his trial under the 'new' Article 457 of the Code of Criminal Procedure (ECtHR, 10 November 2005, *Bocos-Cuesta v. the Netherlands* (Appl. No.54789/00)).

Legislative initiatives, national case law and practices of national authorities

Use of intelligence information in criminal proceedings: legislation pending – As was noted in our previous Report, a bill was tabled in 2004 with a view to enhancing the possibility to use information from the intelligence services *Algemene Inlichtingen- en Veiligheidsdiensten* (AIVD) and the *Militaire Inlichtingen- en Veiligheidsdiensten* (MIVD) as evidence in criminal proceedings (*Kamerstukken II*, 2003-2004, 29743, No. 3). In 2005 the bill was passed in the *Tweede Kamer* [House of Representatives]. The bill is now under discussion in the *Eerste Kamer* [Senate]. In a first exchange of views, of 11 October 2005, questions on the necessity and the scope of the bill were raised (*Kamerstukken I,* 2005-2006, 29743, B herdruk). As was mentioned above, under Article 4, a motion was adopted in which the government is requested to do everything possible to prevent information that has been obtained through torture or inhuman or degrading treatment from entering the criminal proceedings (*Kamerstukken II,* 2004-2005, 29743, No. 25).

Fight against terrorism: cumulative effect of measures – The bill on the use of intelligence information in criminal proceedings is just one in a series of proposed measures which seek to prevent terrorist offences and to investigate and prosecute terrorists. At least five bills are currently under discussion or under preparation – it would go too far to describe each of them in detail. Suffice it say that the *Raad voor de Rechtspraak* [Council for the Judiciary] has warned that some of the bills contain broad formulations and open norms, which give little guidance for judges to pass a judgment. At the same time, judges will have limited access to the evidence on basis of which they are supposed to come to a decision. This might result in a decrease of the confidence in the administration of justice (Raad voor de Rechtspraak, *Advies inzake het wetsvoorstel Wet bestuurlijke maatregelen nationale veiligheid* (15 July 2005) and *Advies betreffende het ontwerpwetsvoorstel strafbaarstelling verheerlijking, vergoelijking, bagatellisering en ontkenning zeer ernstige misdrijven* (15 September 2005)).

In an extensive report of November 2005, the NGO *Humanistisch Overleg Mensenrechten* [HOM – Humanist Committee on Human Rights] warned against the combined effect of the proposed legislation *(Rechtsbescherming op de helling – effecten van anti-terreurwetgeving opgeteld*). HOM rightly pointed out that each of the proposed measures is considered in isolation, which entails the risk that the oversight is lost. It argued that no less than *nine* different rights are affected by the proposed measures, and proposed a series of conditions that should be met in order to make the measures compatible with human rights standards.

There is certainly reason for concern in this area, but since the measures are still under consideration (and some even have not been formally tabled in Parliament) no formal concerns are expressed in this report yet.

Video conferences in criminal proceedings – Parliament has passed a bill introducing the possibility to use video conferences in criminal proceedings (see *Kamerstukken* 29828). This allows 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, by video connection. The Act, which inserts new Articles 78a and 131a in the Code of Criminal Procedure, has been published in the *Staatsblad* 2005, 388. It will enter into force at a later point in time, which is still to be determined.

Terrorist intentions and evidence: the case of Samir A. – More detailed attention will be paid, under Article 49 *infra*, to the case of Samir A. He was charged for preparing attacks on *inter alia* Schiphol Airport, Parliament and a nuclear power plant. He was found in possession of weapons, detailed maps, and notes that allegedly indicated that he intended to carry out terrorist attacks. However, both the first instance court and the appellate court found the evidence not sufficient to prove the charges and acquitted Samir A.

Indirect evidence – In a judgment of 6 April 2005, the *Gerechtshof* [Court of Appeal] of 's-Hertogenbosch confirmed that in criminal proceedings indirect evidence needs strong corroborative evidence before the facts can be considered proven. A man was accused of acts of indecency with a young child, but there was no direct evidence (such as statements of eyewitnesses). The statement of the mother of the alleged victim only consisted of a representation what her son had told her. The boy himself had not been heard in the context of the criminal investigation. The suspect had acknowledged that the boy had been in his flat, but this in itself did not amount to sufficient corroborative evidence to conclude that the boy had been sexually abused by him. A conviction based on this evidence would be contrary to the safeguards of Article 6 ECHR, the Court concluded (LJN AT4761).

The right to freely choose one's defence counsel and the right to an interpreter

Legislative initiatives, national case law and practices of national authorities

Interception of telephone calls with lawyers: the aftermath of the Aalmoes case – On 15 March 2005 the *Rechtbank* [Regional Court] of The Hague ruled that the police and the Public prosecution office may tap telephone conversations of suspects, even if they communicate with privileged holders of confidential information such as lawyers (LJN AT0304). The *Nederlandse Vereniging van Strafrecht Advocaten (NVSA)* [Dutch Association of Criminal Defence Lawyers] had instituted interlocutory injunction proceedings regarding the interception and recording of these telephone conversations. In its judgment the Regional Court recalled that the European Court of Human Rights has declared the case *Aalmoes a.o. v. the Netherlands* inadmissible (see our 2004 Report). The Regional Court concluded that the complaint was therefore without any ground and thus the interception and recording of telephone conversations does not violate the Convention rights. Meanwhile a majority of the *Tweede Kamer* [House of Representatives] was reportedly in favour of adjusting the legislation to prohibit the interception of telephone conversations in which lawyers participate.

On 30 March 2005, the Parliamentary Committee for Justice [*Vaste commissie voor Justitie*] and the Minister of Justice discussed the issue of guarantees for confidential communication of lawyers through interception. The Minister promised to submit the official instructions [*ambtsinstructie*] and to examine the possibility to assign another public prosecutor than the one assigned to the case to be in charge of the interception of the confidential conversations. Also, an overview would be submitted of the technical means that could be used to guarantee the confidentiality of the communication between the lawyer and the client (*Kamerstukken II*, 2004-2005, 29800 VI, No. 134).

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

Legality of criminal offences and penalties

National case law

Terrorist offences – As was reported last year the *Wet terroristische misdrijven* [Terrorist Offences Act], 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, Nos. 290 and 373; see also *Kamerstukken* 29754). Subsequently the new provisions were applied by the Dutch courts on three occasions, which are described in some detail so as to show the circumstances which led the courts to find that terrorist offences had occurred.

Terrorist offences I – Preparing a bomb attack and threatening politicians – On 14 February 2005 the *Rechtbank* [Regional Court] of Middelburg convicted an 18-year old on three counts: preparing a terrorist attack; threatening two Members of Parliament, Ms Hirsi Ali and Mr Wilders; and incitement to hatred (LJN AS5730). Taking into account his age and reduced criminal responsibility, the court sentenced him to 140 days youth detention and, also taking into account psychiatric assessments of the suspect, imposed placement in a corrective institution for juveniles. As to the first count, the suspect had been found in possession of chemical substances that can be used to make explosives; he had been experimenting with these substances; he had repeatedly stated to friends and on the internet that violence should be used to establish an Islamic *kalifaat* [empire] in the Netherlands; when he was arrested he was in possession of maps of governmental buildings and embassies; he was also carrying a farewell letter stating that he accepted all responsibility for his (unspecified) act and that he had died as a martyr. The Court concluded that the suspect had made all these preparations with a view to cause major disturbances to the political and constitutional structures of the Netherlands. The Court continued:

> *Door zo te handelen heeft de verdachte zich schuldig gemaakt aan voorbereiding van één van de ernstigste misdrijven tegen de Nederlandse democratische rechtsstaat. Tevens heeft hij de gevoelens van angst en onveiligheid die sinds de terroristische aanslagen van de afgelopen jaren de samenleving beheersen, aangewakkerd, hetgeen de rechtbank hem zwaar aanrekent.*
> [By acting in this way the suspect became guilty of preparing one of the most serious crimes against the Dutch democratic legal order. He has also amplified to feelings of fear and insecurity which have ruled society since the terrorist attacks of the last couple of years, which is an element that the court takes very seriously.]

The court did take into account that the preparatory acts had remained limited to the gathering of information and substances, and that the substances had not been treated in a way that they could cause a major explosion.

Terrorist offences II – The case of Mohammed B. – Considerable media attention was given to the trial against Mr Mohammed B., who was suspected of killing Mr Theo van Gogh on 2 November 2004. In its judgment of 26 July 2005, the *Rechtbank* [Regional Court] of Amsterdam convicted B. and imposed a sentence of life–imprisonment (LJN AU0025). Neither B. nor the public prosecutor appealed.

B. was convicted on several counts: attempted murder of several police officers and bystanders, possession of a gun and ammunition; threatening and obstructing a Member of Parliament, Ms Hirsi Ali, in her activities. The major conviction, however, and the one that is most relevant for present purposes, was for murdering Mr Van Gogh *with a terrorist intent* within the meaning of Article 83a of the Dutch Criminal Code. In this connection the *Rechtbank* observed:

> *Bij beantwoording van de vraag of er sprake is geweest van terroristisch oogmerk zijn de volgende omstandigheden van belang. De moord is gepleegd in een drukke straat, tijdens spitsuur, op een bekende Nederlander, en op een gruwelijke wijze. Daar komt bij dat op het lichaam een brief is achtergelaten met dreigende inhoud, niet alleen aan Tweede-Kamerlid [lid van de Staten-Generaal] maar ook aan geheel Nederland. Bovendien heeft verdachte, naar een getuige verklaart, aan een omstander op diens uitroep: "Dit kan toch niet, dit kan je toch niet maken" gereageerd met de mededeling: "Dat kan ik wel en dan weten jullie ook wat je te wachten staat." Al deze feiten tezamen genomen rechtvaardigen de conclusie dat verdachte welbewust heeft beoogd de Nederlandse bevolking vrees aan te jagen. De rechtbank acht aldus het terroristisch oogmerk [...]wettig en overtuigend bewezen.*
> [When seeking to establish whether a terrorist intent was present, the following circumstances are of importance. The murder was committed in a crowded street, during rush-hour, on a well-known Dutchman, and in a horrible way. In addition a letter with threatening contents addressed not just to [Ms Hirsi Ali] MP but to Dutch society in its entirety, was left on the victim's body. Moreover a witness has stated that the suspect, after a by-stander said "This is impossible, you cannot do this", replied "Well, yes I can, and now you all know what is awaiting you". All these

> facts together support the conclusion that the suspect deliberately wished to scare the Dutch population. Accordingly the Court finds that the terrorist intent [...] is lawfully and convincingly established.]

Terrorist offences III – Preparing an attack and threatening politicians – The most recent example dates from 7 November 2005 and in some respects resembles the *Middelburg* case reported above. In this case the *Rechtbank* [Regional Court] of Amsterdam tried a 17-year old who was found in possession of explosives and who had twice sent threatening e-mails to Mr Wilders MP. The mails, which contained texts such as "The fighters of Islam and the soldiers of Allah will put Islam into practice and introduce every enemy of Islam to the sword", also contained threats to Ms Hirsi Ali MP. The Amsterdam Court observed in this connection:

> *Verdachte heeft ter zitting laten weten deze bedreigingen te hebben geuit in verband met uitspraken van beide politici jegens de Islam. Door een volksvertegenwoordiger te bedreigen naar aanleiding van zijn uitlatingen kan deze worden gehinderd in de uitoefening van zijn ambt en kan daarmee de Nederlandse democratie in haar wezen worden aangetast.*
> [The suspected stated during the trial that he has uttered these threats in reaction to a number of statements of these politicians about Islam. By threatening a representative of the people because of his statements, the latter can be obstructed in the exercise of his office; Dutch democracy may thereby be undermined in its essence.]

The Court found the suspect guilty and, taking into account psychiatric assessments of the suspect, imposed placement in a corrective institution for juveniles (LJN AU5675).

- **Evaluation**

It is too early to evaluate the actual impact of the Terrorist Offences Act. Taking into account the facts of the three cases above, it cannot be said that the qualification of certain offences as 'terrorist' was arbitrary or unpredictable. Likewise, it cannot be said with certainty that the application of the new provisions led to higher penalties. As was noted in our 2004 report, politicians such as Mr Wilders and Ms Hirsi Ali received a large number of death threats – especially in the weeks after the assassination of Mr Van Gogh – and the courts reacted promptly by imposing relatively high sentences. In the three cases described above, two of which where rather similar to the 'threat cases' of 2004, the new provisions on terrorist offences were found to be applicable. In theory they allowed for higher penalties, but it cannot be said that the courts would have imposed lower penalties if the new provisions had not existed.

The more controversial question is to what extent a person may be convicted for preparatory acts, as happened in the Middelburg case. On the one hand the combination of facts (the presence of explosives, detailed maps, statements made to third persons, farewell letters and so on) may give very strong indications that an attack is being prepared. On the other hand, where there is no information available about the precise object of this attack, or where the preparations were in an early stage, there is necessarily an element of speculation which is difficult to reconcile with a criminal conviction. This dilemma played a key role in the highly publicised case of *Samir A.* As was mentioned in our 2004 report, 17-year old Samir A. was arrested and charged in July 2004. The trial courts (the Regional Court of Rotterdam and the Court of Appeal of The Hague) accepted that he was in possession of materials to make bombs, as well as detailed maps of Parliament and the Ministry of Defence in The Hague, Schiphol Airport, the AIVD headquarters and a nuclear power plant. The trial courts had little doubt that Samir A., possibly with the help of others, was preparing a terrorist attack. However, the Regional Court of Rotterdam observed, it was not clear what the object of the attack would be. Hence Samir A. was acquitted (6 April 2005, LJN AT3315). The Court of Appeal of The Hague noted that the preparations were in such an early stage that an attack was not imminent; it confirmed the acquittal (18 November 2005, LJN AU6181).

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

No significant developments to be reported. The Netherlands is party to the 1990 Convention implementing the Schengen Agreement, but it has not entered a reservation as foreseen in Article 55 (1)(a) of this Convention.