

The Netherlands and the Development of
International Human Rights Instruments

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Cover: The Netherlands' delegation to the UN Commission on Human Rights, 1 February 1982, UN/DPI Photo.

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The Netherlands and the Development of International Human Rights Instruments

Nederland en de ontwikkeling van internationale mensenrechteninstrumenten

(met een samenvatting in het Nederlands)

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geboren op 24 februari 1975, te Maarn

Promotoren: Prof. dr. C. Flinterman
Prof. dr. F. Grünfeld

Co-promotor: Dr. P.A.M. Malcontent

To Monique Castermans-Holleman

PREFACE

When I started my Ph.D. research in September 2001, I knew relatively little about how international human rights instruments are created. Once I became familiar with the topic, I began to realize that the negotiation processes I studied actually have several things in common with the writing of a Ph.D. thesis. In the first place, because both are usually long-drawn-out and complicated processes that take much longer than one had hoped or expected. For negotiators as well as researchers, the route towards the final text can be so full of difficulties and pitfalls that they may sometimes even start to doubt whether the work can be successfully completed at all. However, the interviews that I have carried out with officials that were involved in the drafting of international human rights instruments have left me with the impression that participation in such negotiations is nonetheless experienced as a pleasant and valuable experience. Personally, I would say the same accounts for writing a Ph.D.

I have chosen to write my dissertation in English to open the possibility of sharing information and knowledge with foreign researchers, and to facilitate, for instance, comparative research. Hence, the need to express myself in a language other than my native tongue was something else I had in common with (many) officials participating in international drafting exercises. I did not always find it easy to find the right words for what I wanted to say, and apparently, this was something the drafters of human treaties also struggle with. The following anecdote clearly illustrates this. After years of negotiations, and careful phrasing and rephrasing of articles, a draft Convention against Torture was about to be completed. However, it appeared to contain a somewhat peculiar provision. It was meant to ensure that victims of an act of torture would obtain redress, but what the drafters had actually laid down was that victims of torture would be redressed, and would in other words receive new clothes.¹ Fortunately, an editor of the UN Secretariat discovered the error before the adoption of the final text.

By its nature, conducting a Ph.D. thesis is a more solitary job than negotiating an international human rights instrument, but completing this study would not have been possible without the help and support of others. I am especially grateful to my team of supervisors, who were willing to give me their time and comment on my work. First of all, I would like to thank my daily supervisor, Peter Malcontent. His suggested improvements and constant encouragement stimulated me to improve my work, while

¹ Document entitled 'Agenda item 10 (a): Torture and other cruel, inhuman or degrading treatment or punishment, concluding remarks made on 29 February 1984 by J.H. Burgers, Chairman-Rapporteur of the Working Group', Archive BZ, VN 1975-1984, 999.232.154, file 2581.

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his sense of perspective and sense of humour helped me to let go when this was needed. I am indebted also to Cees Flinterman, who patiently helped me understand legal problems, and who introduced me to whomever I wanted to interview. My thanks furthermore go to Fred Grünfeld, whose detailed comments stimulated me to critically evaluate what I had written, and to Peter Baehr, who generously shared his enormous knowledge, and who let me benefit from his remarkable accuracy. Finally, I want to express my gratitude to Monique Castermans-Holleman, to whom I have dedicated this book. The idea for this study was hers, but unfortunately, she passed away before it was finished.

Apart from my supervisors, I would like to thank the members of my reading committee, David Forsythe, Willem van Genugten, Jenny Goldschmidt, Bob de Graaff, and Duco Hellema, for reading my manuscript, and for their positive comments. I would furthermore like to express my gratitude to the persons mentioned in the list of persons interviewed. They were willing to make time to answer my questions, and to share information and insights with me, which contributed considerably to my study. A special word of thanks goes to Jan Herman Burgers, who not only made himself available for an interview, but who also allowed me to make use of his personal archive. In addition, I would like to express my appreciation to the Ministry of Foreign Affairs, the Ministry of Justice, and the Ministry of Social Affairs and Employment, who gave me permission to examine their records. I want to thank some persons in particular: Hans den Hollander, Fred Steenbergen, Maarten van Rijn, and Rinske Baan. Without their help, it would have been much more difficult to find the information that I needed.

Many others have in one way or another contributed to the completion of my study. The friendship and support of my colleagues at the Netherlands Institute of Human Rights (SIM) have encouraged me, especially when I was faced with difficulties, or when I was fed up with the research. Special thanks are due to Saskia Bal and Maaike Hogenkamp for their help in tracking down available literature, and to Marcella Kiel for her assistance in the final stages of this project. For the correction of my English and the professional lay-out of this book, I am indebted to Scott Curry-Summer and Titia Kloos respectively. A word of thanks also goes to Carla van Baalen and my new colleagues of the Centre for Parliamentary History (CPG), who gave me the opportunity to finalize my work in time.

Completing this research would furthermore have been impossible without the moral support of my friends and family. I want to thank them for their patience, and for making my life more fun. In particular, I would like to mention my family-in-law for their warm interest in the ups and downs of my life, and Karine van 't Land and Sico van der Meer, who have agreed to be my *paranymphs*. Finally, I would like to thank a few persons who are particularly dear to me. I am very grateful to my parents for their unconditional support and love, and for their confidence in my ability to make the right choices in life. Above all, my gratitude goes to my partner, Philip Bont, who supported me in countless ways. His love and his presence in my life have made me

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very happy and provided me with the strength to overcome all the difficulties that are inherent in writing a Ph.D. thesis.

Utrecht, December 2006

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ABBREVIATIONS

AI	Amnesty International
APT	Association for the Prevention of Torture (former SCT)
AVV	Adviesraad Vrede en Veiligheid [Advisory Council on Peace and Security]
BMO	Breed Mensenrechten Overleg [Broad Human Rights Consultation]
BZ	Ministerie van Buitenlandse Zaken [Ministry of Foreign Affairs]
CAHMIN	Ad Hoc Committee for the Protection of National Minorities (CoE)
CAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT-OP	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDA	Christen Democratisch Appèl (Dutch christian-democratic party)
CDDH	Steering Committee for Human Rights (CoE)
CDSO	Steering Committee for Social Affairs (CoE)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW-OP	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CiO	Chairman-in-Office (CSCE/OSCE)
CNV	Christelijk Nationaal Vakverbond [National Federation of Christian Trade Unions in the Netherlands]
CoE	Council of Europe
CPC	Conflict Prevention Centre (CSCE/OSCE)
CRC	Convention on the Rights of the Child
CRC OPAC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
CRC OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
CSCE	Conference on Security and Cooperation in Europe
CSO	Committee of Senior Officials (CSCE/OSCE)
D66	Democraten'66 [Democrats 1966]
DCI	Defence for Children International
DH-EX	Committee of experts for the extension of the rights embodied in the European Convention on Human Rights (CoE)

Abbreviations

EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council (UN)
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ESC	European Social Charter
ETUC	European Trade Union Confederation
EU	European Union
FCNM	Framework Convention for the Protection of National Minorities (CoE)
FNV	Federatie Nederlandse Vakbeweging [Federated Dutch Trade Union Movement]
G-77	Group of Seventy-Seven (group of developing states in the UN)
HCM	High Commissioner for Minorities (became HCNM)
HCNM	High Commissioner on National Minorities
IAPL	International Association of Penal Law
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
IHR	Inter-American Institute of Human Rights
ILO	International Labour Organisation
IMEC	Industrialised Market Economy Countries (ILO)
IPEC	International Programme on the Elimination of Child Labour (ILO)
IRA	Irish Republican Army
MFA	Ministry of Foreign Affairs
MHP	Vakcentrale voor Middengroepen en Hoger Personeel [Trade Union Federation for Middle Classes and Higher Level Employees]
MJ	Ministry of Justice
MRG	Minority Rights Group
MSAE	Ministry of Social Affairs and Employment
NATO	North Atlantic Treaty Organisation
NGIZ	Nederlands Genootschap voor Internationale Zaken [Netherlands Society for International Affairs]
NGO	Nongovernmental Organisation
NHC	Netherlands Helsinki Committee
NJCM	Nederlands Juristen Comité voor de Mensenrechten (Dutch branch of the ICJ)
NNA	Neutral and Non-aligned (countries)
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organisation for Security and Co-operation in Europe

Abbreviations

PvdA	Partij van de Arbeid (Dutch labour party)
PPR	Politieke Partij Radicalen [Radical Political Party]
SCT	Swiss Committee against Torture (later APT)
SGP	Staatkundig Gereformeerde Partij [Reformed Political Party]
SIM	Studie- en Informatiecentrum Mensenrechten [Netherlands Institute of Human Rights]
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICE	Union of Industrial and Employers' Confederations of Europe
UNICEF	United Nations International Children's Emergency Fund
VNO	Verbond van Nederlandse Ondernemingen [Federation of Netherlands Industry]
VVD	Volkspartij voor Vrijheid en Democratie [People's Party for Freedom and Democracy (liberal party)]
WEU	Western European Union
WHO	World Health Organisation

CHAPTER 1 INTRODUCTION

‘Over the past weeks the fortieth anniversary of the Universal Declaration and how it served as a foundation for a body of international human rights law has been recalled many times. This standard setting in the field of human rights included the setting up of supervisory bodies under the different international human rights instruments... One can truly speak of an imaginative body of law and of impressive machinery to monitor the protection of human rights.’¹

This statement, made by a delegate of the Netherlands to the Third Committee of the General Assembly of the United Nations in 1988, had an appreciative ring, implying that the Dutch government attached great importance to the development of international human rights instruments. As set out in formal policy documents, the creation of international norms and procedures to monitor their implementation are indeed central elements of the Dutch human rights policy.² Up to now, scholars involved in research on the role of human rights in the foreign policy of the Netherlands have largely ignored this part of its policies; this study aims to fill that gap. For reasons that will be explained later in this chapter, the focus will be on the period after 1979.

In the remainder of this introductory chapter, the topic of this research will be further defined, and relevant backgrounds and discussions will be introduced and explained. The first section delves into the historic development of global and regional human rights systems in which the Netherlands is involved. Section 1.2 clarifies the term ‘human rights instrument’. The focus then shifts to the human rights policies of the Netherlands. Section 1.3 deals with discussions concerning Dutch human rights policy in general, whereas section 1.4 concentrates on policy principles that deal with the development of international human rights instruments in particular. In sections 1.5 to 1.7, actors and factors that are relevant to the Netherlands’ policies are singled out and discussed. Section 1.8 gives a summary of the research questions raised throughout the chapter, as well as an account of the selections made and the methods and sources used. Finally, a further outline of the study is given.

¹ Ministerie van Buitenlandse Zaken, 1989, p. 349.

² See, for example: Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 72.

1.1 THE EVOLUTION OF INTERNATIONAL SYSTEMS FOR HUMAN RIGHTS PROTECTION

1.1.1 Historical roots

In the relations among states, humanitarian principles and beliefs have, in one form or the other, always played a role. The establishment of international human rights norms, and supplementing supervisory procedures are, however, a relatively new phenomenon. Originally, human rights were laid down in domestic constitutions only: the 1689 Bill of Rights by the English Parliament, the American Bill of Rights of 4 July 1776 and the French Declaration of the Rights of Man and the Citizen of 1789 were the first documents that systematically laid down a number of civil and political rights, whereas social rights were first introduced in the constitutions of Mexico (1917) and the Soviet Union (1918).³ Starting from the late nineteenth century, a number of laws and treaties were developed that were based on the idea that the treatment of another state's citizens could in exceptional cases be an issue in international relations and international law. Important examples of what in hindsight can be considered early predecessors of modern international human rights law can be found in the field of slavery, humanitarian law and international labour law.⁴

The establishment of the International Labour Organisation (ILO) in 1919 further boosted the development of international labour standards, or what some would now consider social and economic rights norms, and within the simultaneously set up League of Nations, some innovating arrangements were created to control states' conduct towards their citizens. Firstly, there were the regulations regarding the administration of so-called 'mandated territories'. These territories were former colonies of Germany and Turkey that the victorious powers of the First World War were to administer until the territories reached their independence. Under the League's system, mandatory states were bound by rules that concerned, among others, decent administration, the combat of slavery, and freedom of religion and conscience. Secondly, a so-called minority regime was designed within the League of Nations, which consisted of a series of treaties to protect the rights of minorities in Eastern and

³ Kooijmans, 1990, p. 317-319; Castermans-Holleman, 1992, p. 12-14; Herman, 1996, p. 34-36. See also: Lauren, 2003, p. 4-36.

⁴ In the field of slavery, there were, for instance, the General Act for the Repression of the African Slave Trade of 1890 and the more comprehensive International Convention on the Abolition of Slavery and Slave Trade of 1926. With respect to humanitarian law, important examples are the Geneva Convention for the Amelioration of the Condition of the Wounded of 1864, which was renewed and expanded in the 1906 Red Cross Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, the Convention on the Laws and Customs of War on Land of 1899, and the Convention for the Adaptation to Maritime Warfare of Principles of the Geneva Convention of 1899. In the field of labour law, one could think of the International Convention Respecting the Prohibition of Night Work for Women in Industrial Employment of 1906, and the International Convention respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches of 1906.

Central European states that were newly established after the First World War. Although these restrictions of state sovereignty were unprecedented, it must be noted that they were only of an incidental nature and concerned only specific issues. In general, human rights were still very much viewed as an internal matter of the sovereign state. Among a limited group of intellectuals and lawyers, suggestions had already been made to draw up a general international document of human rights during the Interbellum, but the idea had to await the horrors of the Second World War and the Holocaust to attract broader support and eventually become a reality.⁵

1.1.2 A global human rights system

The increasingly felt need to make human rights a general issue of international concern first found expression in the United Nations Charter of 25 June 1945, in which it was pledged that one of the organisation's purposes was '[t]o achieve international co-operation in...promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...'⁶ As stipulated in the Charter, a Commission on Human Rights was founded in 1946. Among others, it was charged with the task to develop proposals on an international bill of human rights and declarations and conventions on other, more specific human rights issues.⁷ The Commission immediately started its work, and in 1948, the United Nations approved the Universal Declaration of Human Rights (UDHR).⁸ As Lebanese Charles Malik emphasized when he introduced the document to the General Assembly, this was the first time the principles of human rights and fundamental freedoms, as referred to in the Charter, were substantiated and spelled out authoritatively.⁹

The Declaration contained only proclaimed normative standards that were not legally binding, but it proved to be a source of inspiration for a dynamic and evolving codification process, in which a large body of human rights norms were developed and supplemented with different control mechanisms. As intended from the start, the Declaration's principles were translated into binding treaty provisions, which were eventually laid down in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. The implementation of the Covenants would be supervised by different supervisory procedures. Both entailed a reporting procedure, which put states

5 Lauren, 2003, p. 38-46, 58-62, 74, 93-95, 104-115, 147-154; Castermans-Holleman, 1992, p. 12-16; Herman, 1996, p. 34-45; Kooijmans, 1981, p. 42-43; Van Ginniken, 2004, p. 93-102; Burgers, 1994, p. 16-21.

6 Charter of the United Nations, article 1.3. Deliberations concerning the incorporation of references to human rights in the Charter are described in: Lauren, 2003, p. 166-193. See also: Burgers, 1994, p. 21-26.

7 Baehr and Gordenker, 2005, p. 101.

8 The negotiations of the UDHR are described in: Lauren, 2003, p. 199-232 and Burgers, 1994, p. 26-32. An extensive study has also been published on this matter, see: Morsink, 1999.

9 See: Lauren, 2003, p. 227.

under an obligation to report periodically on the measures they had taken to guarantee the rights concerned and the progress made in this regard.¹⁰ The ICCPR also provided for an optional interstate complaints procedure, which offered states parties the possibility to recognize the supervisory Committee's competence to receive and consider other states' complaints about their record of compliance.¹¹ An additional optional Protocol laid down a similar procedure for communications by individuals subject to a state party's jurisdiction.¹²

Apart from these general human rights treaties, which are together with the Universal Declaration referred to as the International Bill of Rights, many other declarations and conventions have been adopted.¹³ Currently some hundred instruments can be found on the website of the Office of the United Nations High Commissioner for Human Rights, and still new ones are being developed.¹⁴ There are different reasons why new human rights instruments have continued to be drafted. Sometimes, the normative framework is expanded to include *new* norms that did not previously exist. New codification efforts can also be made to *specify* existing norms, or to *tighten* the rules. Though relevant from a theoretical point of view, it should be noted that the difference between new, more specified and tightened norms is not always completely clear in practice. Depending on the interpretation that one gives to existing norms, the drafting of more specified norms can also be seen as attempts to tighten the rules, or to develop completely new standards, and the contrary may be true as well.¹⁵ These attempts, in any case, lead to human rights documents that deal with specific themes, such as torture, the death penalty or enforced disappearances. Often, the purpose of

10 See: article 40 ICCPR, article 16 and 17 ICESCR.

11 See: article 41 ICCPR.

12 See: Optional Protocol to the International Covenant on Civil and Political Rights, 1966.

13 Information on the UN human rights system and its development can, for example be found in: Tolley, 1987; Forsythe, 2000, p. 28-83; Donnelly, 1998, p. 7-17 and 51-68; Baehr, 2001, p. 57-71.

14 See: <http://www.ohchr.org/english/law/index.htm>, accessed 18 September 2006. Apart from the two Covenants, within the United Nations the core treaties are: the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social and Cultural Rights (1966); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the Convention on the Rights of the Child (1989); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

15 To illustrate, the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1975 is usually considered a document that specifies what the existing prohibition of torture entails. However, states that previously argued, for instance, that mental pain or suffering did not constitute torture, or that did not interpret the prohibition to torture so as to include an obligation on the part of the government to keep interrogation methods and practices under systematic review, will most likely have experienced the Declaration as a document that created tighter rules and new obligations. Another example is that of the abolition of the death penalty, as dealt with in the Second Optional Protocol to the International Covenant on Civil and Political Rights of 1989. Many would consider this a standard that did not previously exist, but it can, on the other hand, also be seen as a norm that logically follows from the right to life and the prohibition of cruel, inhuman and degrading punishment, which is not new at all.

treaty-making activities is also to give greater protection to specific groups of people that are particularly vulnerable to human rights violations. Examples are: the Convention on the Elimination of All Forms of Discrimination Against Women of 1979, the Convention on the Rights of the Child of 1989 and the Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, which is currently under consideration.¹⁶

Finally, a desire to develop more satisfactory supervisory mechanisms can be a reason for drawing up a new human rights instrument. In this regard, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 2002, or the proposed Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, can be mentioned.¹⁷ Moreover, notice should be taken of human rights instruments that are not treaty-based, but that have been developed within the UN Commission on Human Rights to try and fill remaining gaps between declared principles and actual practice. Instruments one can think of are the procedures based on ECOSOC resolutions 1235 and 1503, which authorized the Commission on Human Rights to discuss violations of human rights in particular countries and to deal with complaints that suggest a consistent pattern of gross human rights violations respectively; the 'special procedures', which are usually Rapporteurs or Working Groups that focus their attention on a specific theme or country; and the post of a High Commissioner for Human Rights, which was created in 1993.¹⁸

Although the norms and control mechanisms developed within the United Nations certainly comprised the most wide-ranging set of global human rights instruments, within specialized organisations such as the ILO or UNESCO, there have also been treaty-making activities that were relevant for the promotion and protection of human rights. Within the ILO, conventions dealing with the right to associate in trade unions and to bargain collectively, the abolition of forced labour and the worst forms of child labour, non-discrimination and protection of indigenous peoples are clear cases in

16 For information on the Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, see: <http://www.ohchr.org/english/issues/disability/convention.htm>, and: <http://www.un.org/esa/socdev/enable/>, both accessed 18 September 2006.

17 For information on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, see: <http://www.ohchr.org/english/issues/escr/group3.htm>, accessed 18 September 2006.

18 See, for example: Forsythe, 2000, p. 64-65 and 70; Donnelly, 1998, p. 9-10 and 53-57; Baehr, 2001, p. 58-59. It should be noted that the UN Commission on Human Rights was replaced by the Human Rights Council in March 2006. The Council has taken over all the Commission's mandates and responsibilities, but a review of its special procedures and mechanisms is to be concluded within one year after its first session. For the establishment of the Human Rights Council, see: General Assembly resolution 60/251, 15 March 2006.

point.¹⁹ Two types of supervisory mechanisms apply to these and other ILO Conventions: reports that states have to submit on the application of treaties are reviewed, and allegations of a state's failure to meet its treaty obligations are investigated.²⁰ Within UNESCO, norms have, for instance, been developed on the right to education or the right to participate freely in cultural life, and implementation is monitored by a reporting and a complaints procedure too.²¹

1.1.3 European human rights systems

In addition to the instruments that have been created at the global level, human rights systems have also developed within regional organisations in Europe, the Western Hemisphere and Africa. Within the Council of Europe, a human rights treaty, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), was adopted one year after the organisation's establishment in 1949.²² The Convention included civil and political rights only, and a separate treaty, the European Social Charter (ESC) of 1961, was drawn up to protect social and economic rights. As had been the case in the United Nations, these general human rights conventions were followed by more human rights legislation. Since their adoption, several Protocols were added to both instruments.

To date, fourteen Protocols have been adopted to supplement or amend the ECHR; some of them have established new substantive rights, others were aimed at improvements in the supervisory system.²³ New standards were, for instance, set by the First Protocol of 1952, which added the right to peaceful enjoyment of property, the right to education and the right to free elections by secret ballot to those already listed in the original Convention, and by the Sixth Protocol of 1983 on the abolition of capital punishment. A Protocol that drastically changed the ECHR's supervisory system was the Eleventh Protocol of 1994. Under the original arrangements, a quasi-judicial European Commission on Human Rights investigated individual or states' complaints. If a state had accepted the jurisdiction of the European Court of Human Rights, it

19 Post-war conventions dealing with these matters are: the Right to Organise and Collective Bargaining Convention of 1949; the Collective Bargaining Convention of 1981; the Abolition of Forced Labour Convention of 1957; the Worst Forms of Child Labour Convention of 1999; the Discrimination (Employment and Occupation) Convention of 1958; the Indigenous and Tribal Populations Convention of 1957; and the Indigenous and Tribal Peoples Convention of 1989. A full list of ILO treaties can be found on: <http://www.ilo.org/ilolex/english/convdisp2.htm>, accessed 18 September 2006.

20 For more information on the ILO-system, see for example: Samson and Schindler, 1999; Mertus, 2005, p. 142-161.

21 For more information on the UNESCO and human rights, see, for example: Coomans, 1999.

22 For information on the negotiations on the ECHR, see: Klerk, 1990; Zwaak, 1994; and Moravcsik, 2000.

23 Information on the Council of Europe's human rights system, and its development, can, for example be found in: Merrills and Robertson, 2001, p. 1-22; Merrills, 1999; Harris and Darcy, 2001; Forsythe, 2000, p. 111-122; and Baehr, 2001, p. 72-74. Information on recently adopted Protocols can be found on the website of the Council of Europe: <http://www.coe.int>, accessed 18 September 2006.

submitted its findings to that organ for a final and legally binding decision; if this was not the case, the Committee of Ministers decided the matter. Protocol Eleven replaced the Commission and the Court with one full-time Court, and the Committee of Ministers was removed from the judicial process.

Protocols have also been added to the ESC. As to the substantive rights contained in this treaty, new and more stringently formulated rights were elaborated in an Additional Protocol of 1988 and a completely revised European Social Charter of 1996. An Amending Protocol of 1991 aimed at improvements in the reporting procedure, and a Complaints Protocol of 1995 introduced a complaints procedure that allowed workers' and employers' organisations as well as nongovernmental organisations (NGOs) to submit communications concerning a state's application of the Charter. Finally, separate Conventions have also been negotiated on some specific issues. In this regard, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987 and the Framework Convention for the Protection of National Minorities of 1995 are the main examples.

Although the Council of Europe's system for human rights protection is probably best-known, other European organisations have also developed important human rights instruments. Within the Conference on Security and Cooperation in Europe (CSCE), or the Organisation for Security and Cooperation in Europe (OSCE) as it was later called, human rights played a role right from the start. For Western states, its inclusion had in fact been a precondition for accepting the Soviet bloc's suggestions to have a European security conference that was the basis for what eventually developed into the CSCE.²⁴ In the Final Act of Helsinki, which was adopted two years after the start of the CSCE-process in July 1973, it was, *inter alia*, laid down that '[t]he participating States will respect human rights and fundamental freedoms' and that '[t]hey will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.'²⁵ Particular references were, furthermore, made to the freedom of thought, conscience and religion or belief and the rights of persons belonging to national minorities.²⁶ Finally, another part of the Final Act, the 'third basket' on cooperation in humanitarian and other fields, dealt with a number of questions – for example, human contacts and the free flow of information – that were closely related to human rights issues.²⁷

During the Cold War, there was relatively little expansion of the normative framework in the field of human rights in the CSCE, and for a long time, there were no

24 See, for instance: Bloed, 1993a, p. 4-6; Brett, 1996, p. 669; Helgesen, 1990, p. 242-244; Baudet, 2001, p. 69-98.

25 Principle VII, Final Act of Helsinki.

26 *Ibidem*.

27 Chapter 'Co-operation in humanitarian and other issues', Final Act of Helsinki.

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specific monitoring procedures either.²⁸ As relations between East and West improved by the end of the 1980s, more norms started to be generated; especially, the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE encompassed a wide range of detailed human rights standards. One year before, the Concluding Document of the CSCE Follow-Up Meeting in Vienna had already established a supervisory procedure, the so-called Vienna Human Dimension Mechanism. The Mechanism obliged participating states to react to requests for information concerning the human dimension by other participating states. The term 'human dimension', which would from 1989 onwards become a commonly used term, referred to CSCE commitments in the field of human rights as well as to 'third basket' issues. The Mechanism provided, furthermore, for the possibility of bilateral meetings about such matters, and gave the requesting state the opportunity to inform eventually all other participating states and to raise the problems concerned in certain CSCE meetings. This system was further elaborated at the Moscow Meeting of the Conference on the Human Dimension of 1991 by adding the option of on-site investigations by independent experts. Finally, another important instrument was adopted when agreement was reached on the establishment of the post of a High Commissioner on National Minorities (HCNM), who was to try to prevent and resolve conflicts over national minorities by means of quiet diplomacy.

In the European Union's history, human rights did not initially play a very prominent role; insofar as the early treaties of the 1950s that laid the foundations for what has now become the European Union (EU) incorporated any human rights principles at all, this had a purely economic background.²⁹ It was only in the Maastricht Treaty of 1992 that it was first made explicit that the EU should respect fundamental rights. In 2000, an EU Charter of Fundamental Rights was drawn up, but this was not a legally binding document. The Treaty establishing a Constitution for Europe of 2004 might change this. As soon as this treaty comes into force, the catalogue of human rights norms it incorporates will have the status of legally binding provisions, but because of the negative outcomes of referendums in France and the Netherlands, the future of the instrument is at best uncertain.³⁰ Another relatively recent idea is that of a Fundamental Rights Agency to continuously monitor the human rights situation within the EU. It has been decided to establish such an Agency, and it is due to become operational as of 1 January 2007.³¹

28 Information on human rights in the CSCE/OSCE can, for example be found in: Martín Estébanez, 1999; Brett, 1996; Bloed, 1993a, p. 89-102; Baehr, 2001, p. 75-78; Forsythe, 2000, p. 124-126. Recent information can be found on the website of the OSCE: <http://www.osce.org>, accessed 18 September 2006.

29 Information on human rights in the EU can, for example be found in: Woods, 1999; Barents and Brinkhorst, 2003, p. 64-74; Baehr, 2001, p. 74-75; Forsythe, 2000, p. 122-124.

30 See: Treaty establishing a Constitution for Europe, Part II.

31 See, for instance: Van der Laan and Prat Bertrams, 2005. For more recent information on the state of affairs, see: http://ec.europa.eu/justice_home/fsj/rights/fsj_rights_agency_en.htm, accessed 18 September 2006. It should be noted that the EU can also apply human rights principles in its relations with third states, but these country policies fall outside the scope of this research.

1.2 HUMAN RIGHTS INSTRUMENTS

From the above sections, it has become clear that ‘expansion’ and ‘accumulation’ are keywords in the evolution of international human rights systems in the post-war period; whereas in the late 1960s one would probably have mentioned only a limited number of early UN Conventions and Declarations and a few Council of Europe treaties as international human rights instruments, nowadays it would be hard even for a human rights specialist to enumerate them all. The amount of human rights instruments has thus increased dramatically.³² Apart from a growth in mere numbers, the construction of human rights instruments has also been a dynamic and evolving process in the sense of pluralization. More rights are categorized as human rights, and new procedures have been invented to ensure that they will be translated into reality.

The broad spectrum of treaties, codes and procedures that are now referred to as human rights instruments makes it extremely difficult to give a precise definition by which one would be able to distinguish international human rights instruments. For the purposes of this study, it is not necessary to do so. In international relations, the question of what constitutes a human rights instrument is very much a consequence and part of government policies, and for a study that aims to investigate the policies one country has carried out in this regard, it might in fact be counterproductive to try and define the concept of a human rights instrument in advance. In this study, a pragmatic approach is therefore taken. I will consider something an international human rights instrument whenever the Netherlands’ government does so in formal policy documents, or whenever international human rights agendas indicate that many other governments do.

Even so, some general observations can be made in regard to human rights instruments. To understand what they are about, two things need to be clarified: what are we talking about when we refer to human rights, and what is covered by the term instruments? The first question is most difficult to answer. Entire studies have been devoted to the matter, and many have tried to define the human rights concept. Representative definitions in common usage, used by human rights and foreign policy specialists Jack Donnelly and David Forsythe, describe human rights as ‘rights that one has simply because one is human’, or ‘fundamental moral rights of the person that are necessary for a life with human dignity’.³³ The Dutch government’s understanding of human rights very much corresponds with these definitions. In a 1979 policy paper on human rights and foreign policy, the following description is given: ‘The rights of man,

³² Note that proliferation has also been the trend in other fields of international law. According to some scholars, the use of international law and accompanying judiciary in international politics has increased so much that one might even consider ‘legalization’ an important feature of contemporary world politics. See: Goldstein, Kahler, Keohane and Slaughter, 2000, p. 388; Kahler, 2000, p. 682; Abbott and Snidal, 2000, p. 456; Keohane, Moravcsik, Slaughter, 2000, p. 457.

³³ Donnelly, 1998, p. 18; Forsythe, 2000, p. 3.

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human rights, or fundamental rights, are names given to those elementary rights which are considered to be indispensable for the development of the individual.³⁴

Within the catalogue of human rights, different categories of rights can be distinguished. First, there is the category of civil and political, or classic, rights, which includes inter alia the right to life, freedom from torture, freedom from arbitrary arrest, detention or exile, the right to a fair trial and freedom of thought, conscience and religion. Second, there is the category of social and economic rights, which covers trade union rights, the right to a fair wage and a reasonable limitation of working hours, and entitlements to socially provided goods and services, such as food, health, or education. Usually, cultural rights, which concern, among others, the right to participation in the cultural life of one's community, are grouped into this latter category as well. Finally, a third category of so-called 'solidarity' rights is sometimes recognized. It includes the right to peace, the right to development, and the right to a healthy environment.³⁵ Contrary to the first two categories of rights, the idea of 'solidarity rights' is very controversial, and thus far, they cannot be said to have gained general acceptance as human rights. Therefore, they are not dealt with in this study.³⁶

As to the international instruments developed to promote and protect human rights, a rough distinction can be made between normative standards on the one hand and supervisory procedures on the other. International human rights standards lay down norms that states have agreed to accept as human rights, and prohibitions and obligations they have accepted to adhere to in order to guarantee these rights. Sometimes, these standards take the form of a legally binding convention, or a protocol that amends or supplements an existing treaty; at other times they are adopted as declarations or politically binding principles only. Although politically binding documents have the advantage that they are comparatively easy to draft and reach general agreement on, conventions with legally binding force are usually perceived to impose stronger obligations on states, and often they are more detailed as well. Oftentimes within the United Nations, non-binding declarations have therefore been drawn up first, later followed by binding standards.³⁷

Supervisory machinery is not so much aimed at the codification of rights, but rather aims to ensure that states actually live up to the standards they are bound to. These

³⁴ Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 15.

³⁵ Sometimes, these rights are also referred to as 'collective rights', but this is confusing, because the term 'collective rights' only answers the question to whom these rights apply; it does not give information on the objects or claims that are represented by the rights in question. 'Solidarity rights' are a form of collective rights that are based on fraternity and solidarity. However, there are also other collective rights, such as the right to self-determination, as laid down in article 1 of the two Covenants, and the term 'collective rights' can also refer to rights of certain communities, such as minorities or indigenous peoples. See: Donders, 2002, p. 93-97.

³⁶ For information on different categories of human rights in general, see, for example: Baehr, 2001, p. 2-7; Donnelly, 1998, p. 22-26. On 'solidarity', or 'third generation' rights, see, for instance: Alston, 1982; Donnelly, 1993; Flinterman, 1990; Kooijmans, 1990; Wellman, 2000.

³⁷ See: Abbott and Snidal, 2000, p. 434-436; Abbott, Keohane, Moravcsik, Slaughter, and Snidal, 2000, p. 411; Morsink, 1999, p. 15 and 19-20; Veerman, 1992, p. 27-28; Burgers and Danelius, 1988, p. 7-8.

instruments are not fully comparable to the mechanisms that are usually available to enforce domestic law. International legal systems usually lack an independent judiciary and there are no real enforcement powers to guarantee observance of rules, and various alternative mechanisms to promote cooperation and compliance have therefore been thought up.³⁸ They are referred to by a variety of terms, e.g. supervisory procedures, control machinery, monitoring systems, which will be used interchangeably in this book.³⁹ Instruments covered by this terminology have one thing in common – their purpose is to put into operation substantive human rights norms – but otherwise they may differ from each other in many respects.

First of all, the independence of the supervisory bodies varies. The European Convention on Human Rights is exceptional in that it provides for an independent Court that can issue legally binding judgments; the UN's human rights conventions typically set up bodies of independent experts that are only allowed to make recommendations; under the European Social Charter, monitoring functions are partly carried out by independent experts and partly by governmental experts; and the OSCE's Human Dimension Mechanism ultimately depends on the decisions of state governments. Second, supervisory machinery may be different in regard to questions of access and the information supervisory bodies can base themselves on. A procedure that is often found in the field of human rights law, is a reporting procedure, which obliges states to report on their own rate of compliance at regular intervals. Complaints mechanisms, which give states, individuals, groups of individuals or certain organisations the right to submit communications concerning alleged violations by a particular state, are also very common instruments of supervision, although they are often of an optional character and allow states to remain beyond the scope of these procedures.

Finally, monitoring mechanisms vary in respect to the question of when they become operational. When a procedure is based on a complaints mechanism, a supervisory body can only act after a violation has taken place. The same is true for investigation procedures that are based on reliable information about human rights violations, such as the special inquiry procedures established under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of 2000. Some human rights instruments are, on the other hand, specifically designed to prevent human rights violations. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,

38 See: Abbott, Keohane, Moravcsik, Slaughter, and Snidal, 2000, p. 402-403; Keohane, Moravcsik, Slaughter, 2000, p. 466; Donnelly, 1986a, p. 613-619; LeBlanc, 1995, p. 185-186; Burgers and Danelius, 1988, p. 8.

39 A term that is also used among diplomats is 'implementation mechanism'. Strictly speaking, this term is incorrect; the actual implementation of human rights norms takes place at the national level. The recommendations and judgments of international supervisory organs can *contribute* to the implementation of the norms, but it is the government of a state that has to take implementation measures. Therefore, the term 'implementation mechanism' will not be used in this book, unless it is part of a quotation. See, for example: Shelton, 2000, p. 5.

which establishes a system of preventive visits to places of detention under the jurisdiction of the states parties, is a clear case in point.

1.3 THE NETHERLANDS' HUMAN RIGHTS POLICY

1.3.1 The ideal of being a leading human rights country

As this study does not primarily deal with human rights instruments as such, but rather with the Netherlands' policies in regard to their development, it is time to shift the focus to this country's human rights policies now.

In an important policy paper on human rights and foreign policy of 1979, it was laid down that '[t]he Netherlands Government regards the promotion of human rights as an essential part of its foreign policy.'⁴⁰ The Netherlands was one of the first countries to publish a memorandum exclusively devoted to this particular issue.⁴¹ One may therefore be tempted to see this publication as a typical occurrence of what has been described as an internationalist-idealist tradition in the foreign policy of the Netherlands. According to Joris Voorhoeve, who developed this concept in his standard work on the foreign policy of the Netherlands, this tradition stands for a combination of typical characteristics, which include among others legalism and moralism.⁴² Several authors have endorsed the idea of a Dutch tradition of legalism and moralism and its interrelation with an active human rights policy.⁴³

Legitimate points of criticism have, however, been raised as well. Some scholars have rejected the tradition-concept's usefulness as a framework for analysis, for example because the definitions of the internationalist-idealist, and the other two traditions Voorhoeve has distinguished as typical for the Netherlands (the maritime-commercialist tradition and the neutralist-abstentionalist tradition), are defined in such general terms that they could actually apply to any foreign policy.⁴⁴ Sometimes, contradictory foreign policy aims are even categorized as belonging to one and the

40 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 71.

41 Castermans-Holleman, 1992, p. 133.

42 Voorhoeve, 1985, p. 42-54. The idea that certain constants or 'traditions' characterize the history of Dutch foreign policy originates from the historian Boogman; Heldring reached similar conclusions for the period after 1945 (see: Boogman, 1978; Boogman, 1984; Heldring, 1978). The concept was then adopted and elaborated in a study of Voorhoeve, which has for a long time been the point of reference of many scholars of Dutch international relations. In regard to the meaning of the terms legalism and moralism, the following descriptions can be found in the literature. Peter Baehr has defined legalism to mean, 'that great confidence is put in international law in general and in the binding nature of international treaties and the obligations which they entail.' Moralism, according to Baehr, refers to 'the idea that decisions in the realm of foreign policy are taken on the merits of the issues at stake.' See: Baehr, 1973, p. 66. According to Monique Castermans-Holleman, moralism also implies an inclination to pass moral judgements on other countries. See: Castermans-Holleman, 1992, p. 87.

43 See: Baehr, 2000, p. 50-52; Castermans-Holleman, 1992, p. 86-89 and 261-262; Everts, 1981, p. 7; Van der List, 1988, p. 64-65; Reef, 1995, p. 17-26 and 217-218.

44 Van Staden, 1985, p. 50, Rozemond, 1983, p. 3-5 and 24-25.

same tradition.⁴⁵ With respect to the internationalist-idealist tradition in particular, one may, for instance wonder whether it is always correct to bracket legalism with moralism.⁴⁶ In his handbook on global politics, political scientist James Lee Ray rightly points out that '[n]ot all legal behaviour is ethical, and illegal behaviour...is not necessarily unethical...'⁴⁷ Especially since the 1990s, the existence of discrepancies between international law and moral duties in favour of human rights have indeed become very clear in the debates about humanitarian intervention, but examples of legal norms conflicting with human rights principles can also be found in other fields of human rights policy.⁴⁸ For example, the suspension of Dutch development aid to Suriname as a sanction for the human rights violations of the Surinam military junta in 1982, was questionable from a legal point of view⁴⁹, and historian Stefan de Boer concludes that in its human rights policy towards South Africa, the Netherlands interpreted international law according to its political preferences of the moment.⁵⁰

Methodological comments furthermore relate to the fact that the traditions-approach does not sufficiently take into account historical circumstances and that terms like traditions, tendencies, or constants have remained undefined: continuity is implied, but how can it be determined whether something is or is not to be labelled a tradition?⁵¹ Although the historians Peter Malcontent and Floribert Baudet do not answer this question either, they do challenge the idea of an international-idealist tradition in the foreign policy of the Netherlands, because before the 1960s, the Netherlands' contributions to the development of an international order and support for international humanitarian initiatives cannot be said to have been outstanding. The ambition to maintain the Dutch colonial empire and to preserve its neutrality in international politics for this purpose usually prevailed over more idealist, legal or moral considerations. With respect to the roots of present international human rights systems, the Netherlands was, for example, not a great supporter of the humanitarian work of the League of Nations. As a consequence of, among others, its colonial interests (which continued to exist until sovereignty over New Guinea was transferred to Indonesia in January 1963), it also did not show great enthusiasm for the creation of the first few international human rights instruments in the United Nations and the Council of Europe.⁵²

45 Baudet, 2001a, p. 17-18, De Boer, 1999, p. 38-39.

46 It should be noted in this regard that so-called 'positivist' international lawyers have also contested the link between legalism and moralism, because they were afraid that using international law for idealistic purposes might eventually discredit the system altogether. See: Boyle, 1985, p. 17-19.

47 Ray, 1998, p. 443.

48 In respect to humanitarian interventions, see for instance: Hellema and Reiding, 2004.

49 Malcontent and Baudet, 2003, p. 91. A similar example can be found in the case of Pinochet-Chile, against which financial sanctions and economic measures were taken while the legal ground for that was actually very weak. See: Baehr, Castermans-Holleman and Grünfeld, 2002, p. 71-72.

50 De Boer, 1999, p. 396-397.

51 Wels, 1984, p. 22; Schaper, 1984, p. 41; De Boer, 1999, p. 400-401.

52 Malcontent and Baudet, 2003, p. 72-83

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Even though there are thus many reasons for being critical about the notion of a Dutch international-idealist tradition, different authors that have denied its existence in foreign policy practice have stressed that it is nonetheless important to recognize that in the Netherlands' political discourse there has generally been remarkably little talk of 'power' or 'national interests', and relatively much reference to idealist goals.⁵³ Dutch Ministers and members of parliament have, for instance, regularly referred to the idea of an international-idealist tradition.⁵⁴ Sometimes, there may have been strategic reasons behind this. Emeritus professor of political geography, Herman van der Wusten, has, for instance, pointed out that the construction of indications of long historical roots has served to realize the ambition to make The Hague the 'legal capital of the world'.⁵⁵ On the other hand, the belief that there are certain traditions the Netherlands has to uphold also tells us something about its self-image, about the role it would like to fulfil, and about the way it would like to be seen by other countries. As has rightly been pointed out by other authors, perceptions and belief systems are part of the contextual framework in which foreign policy decisions are made, and can therefore also be factors of influence.⁵⁶

Considering this, it was probably no coincidence that the increasing attention for international human rights matters from the 1960s, and in particular the 1970s onwards, roughly coincided with a renewal of the idea that the Netherlands had a special role to play in the world. An article the leader of the left-wing Radical Political Party, Bas de Gaay Fortman, wrote in 1973 was the basis of this revival. He made an appeal to the Netherlands to act as a 'guiding' or leading country. Its foreign policies should set an example for other states, and should therefore be more than reactions to acts by other states. They should instead be based on a vision of a world society in which peace, justice and human dignity – or so-called 'positive peace' – would be achieved for all.⁵⁷ Although the article was actually written to explain his party's foreign policy ideas, the idea of the Netherlands as a leading country found fertile soil in the activist climate of those years, and was embraced by broader sections of society.⁵⁸

Apparently, the government of the Netherlands felt that it lived up to these expectations in the field of human rights. In 1975, the Dutch Minister of Foreign Affairs claimed that in standing up for human rights, the Netherlands was the most active country in the world.⁵⁹ Another example to illustrate this can be found in the explanatory memorandum to the national budget of 1985, in which it was stated that the

53 Schaper, 1984, p. 43; De Boer, 1999, p. 43.

54 See, for example: Malcontent and Baudet, 2003, p. 70; Van Goudoever, 1998, p. 284; Ministerie van Buitenlandse Zaken, 1986, p. 285-286.

55 Van der Wusten, 2006, p. 263.

56 See, for instance: Baudet, 2001a, p. 20-21.

57 De Gaay Fortman, 1973.

58 Kennedy, 2005, p. 24-26. It should be noted that Kennedy interprets the 'guiding' country concept so as to include much more than foreign policy issues only. However, in this study, the focus is on the international component, and in particular on the human rights element.

59 Malcontent, 1998, p. 11.

Netherlands had more than once played a leading role with respect to the international promotion of human rights.⁶⁰ The government felt that this position brought with it special responsibilities, implying an active policy for the future whenever this could be expected to be effective.⁶¹ However, according to the historian James Kennedy, the idea that the Netherlands had a special role to fulfil in the world gradually began to fade in the period from 1985 to 1995, though it did not actually disappear until shortly after the turn of the century.⁶² In recent years, the need to uphold national interests has indeed received more explicit attention in formal foreign policy documents.⁶³ An important policy memorandum that the government published in 1995 to adjust its international policies to post-Cold War circumstances, was, for instance, very clear about the central place of national interests in its foreign policies. In spite of this slightly different tone, it was, however, pointed out that the national interest would not necessarily be defined in narrow terms; in fact, a well functioning international order in which human rights are respected was also perceived to be a national interest.⁶⁴ Moreover, those that adhered to the idea of the Netherlands as a 'guiding' country in the 1970s have not abandoned it, and are still trying to realize it.⁶⁵ However, a desire or a claim of international humanitarian leadership and the actual performance of such a role are still two different things. What counts are the policies that are carried out in practice.

1.3.2 Country policies

It was already indicated that international human rights questions did not loom particularly large in the Netherlands' foreign policy of the first decennia after the Second World War. According to political scientist Monique Castermans-Holleman, the human rights policy of the Netherlands in the period from 1945 to the 1960s can best be described as 'reserved, traditional and loyal to its Western allies'.⁶⁶ There is general consensus among researchers that the Netherlands attitude gradually started to change from the 1960s onwards, and that it was not until the mid-1970s that one

60 Appendices to the reports of the Second Chamber, 1984-1985, 18 600, chapter V, no. 2, p. 60.

61 *Ibidem*.

62 Kennedy, 2005, p. 26.

63 Hellema, 2001, p. 388.

64 Appendices to the reports of the Second Chamber, 1994-1995, 24 337, no. 2, p. 11-13. It should also be noted that formal policy papers still speak of ideals too. For a very explicit example, see: Appendices to the reports of the Second Chamber, 2004-2005, 29 800, chapter V, no. 2, p. 7.

65 See, for example, De Gaay Fortman, 2001. Among members of parliament, the idea that the Netherlands should set an example is still alive as well. See, for instance: Reports of the Second Chamber, 2004-2005, no. 66, 30 March 2005, p. 4239; Reports of the Second Chamber, 2005-2006, no. 26, 24 November 2005, p. 1828; Appendices to the reports of the Second Chamber, 2005-2006, 30 300, chapter VII, no. 72, p. 2.

66 Castermans-Holleman, 1992, p. 127.

could speak of a mature human rights policy.⁶⁷ The 1979 policy paper on human rights and foreign policy, already referred to in the previous section, can be regarded as the tail end of this development. Follow-up memoranda have been issued in 1987, 1991, and 1997 respectively, and in 2001, a new policy paper was drawn up. The latter's description may presuppose an entirely new direction, but on the very first page it is already made clear that the policy is still based on the 1979 principles, so in fact this policy paper and the so-called follow-up memoranda are not of a very different character.⁶⁸

The policy paper of 1979, which was issued at the request of parliament, officially designated human rights as a goal of foreign policy.⁶⁹ At the same time, it was, however, added that '[t]he Government's desire to work for human rights does not alter the fact that this is a part of its total policy and cannot under all circumstances enjoy priority over the other aims of that policy.'⁷⁰ The government would thus always need to co-ordinate the promotion of human rights with the promotion of other values and interests. In parliament and among NGOs, there was criticism that these policy principles were too platitudinous to give direction to the Dutch foreign policy. They asked for criteria, but the government was of the opinion that a general blueprint could not be given and that each particular situation should be assessed on its own merits.⁷¹

Internationally, the Dutch policy practices have often been praised, and in scholarly research, the Netherlands is often mentioned as an example of a state that takes human rights seriously. The 1984 statement by the Norwegian researcher Jan Egeland that 'the Netherlands has probably become the most effective human rights advocate today' is probably cited most often to demonstrate this, but other authors have come to similar conclusions.⁷² In an overview-study of human rights in Dutch foreign policy, it is stated, however, that '[t]he Netherlands' reputation in the field of human rights is on the whole greater abroad than at home.'⁷³ Indeed, a more mixed picture emerges from studies that Dutch researchers have carried out since the 1990s.

On the one hand, there are examples of situations where the Netherlands actually acted in the interest of human rights. Sometimes, other foreign policy interests were

67 See: Castermans-Holleman, 1992, p. 111-122 and 129-131; De Goede, 1996, p. 258; Malcontent, 1998, p. 33-55; De Boer, 1999, p. 41-43; Van den Berg, 2000, p. 13-14; Baudet, 2001a, p. 44; Malcontent and Baudet, 2003, p. 85-90.

68 See: Appendices to the reports of the Second Chamber, 1986-1987, 19 700, chapter V, no. 125; Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91; Appendices to the reports of the Second Chamber, 1996-1997, 25 300, chapter V, no. 1; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 1.

69 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 71. More information on the background of the memorandum's coming into being can be found in: Castermans-Holleman, 1992, p. 134-135 and Malcontent, 1998, p. 63-66.

70 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 71.

71 Malcontent, 1998, p. 64-66; Castermans-Holleman, 1992, p. 140-141.

72 Egeland, 1984, p. 210. For other examples, see: Sikkink, 1993, p. 142-145; Donnelly, 2000, p. 319; Tolley, 1987, p. 99 and 218; Schmitz and Sikkink, 2003, p. 530.

73 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 217.

absent or at least limited, as a consequence of which human rights goals were of course more readily pursued. This was, for instance, the case with Dutch policies towards Guatemala in the 1980s and 1990s.⁷⁴ In other cases, the Netherlands was, however, also prepared to let human rights considerations prevail over other interests. In 1979, the Netherlands decided to reduce development aid to Pakistan in reaction to a deteriorating human rights situation in spite of the strategic importance in the region of this non-communist country.⁷⁵ In reaction to the military coup in Chile of 1973, bilateral development aid was even stopped completely, and the Dutch government also appeared to be ready to take economic measures, such as freezing export credit reinsurances with regard to this country.⁷⁶ In 1982, it even showed itself ready to lodge a complaint under the European Convention on Human Rights against NATO-ally Turkey, as it had, in 1967, also done against the military regime in Greece.⁷⁷ Finally, a more recent example that is often referred to, is the preparedness of the Netherlands to sponsor a resolution on human rights violations in China in the 1997 session of the UN Commission on Human Rights, although major EU-countries had dropped their initial support for economic reasons.⁷⁸

There are, however, also various instances where human rights considerations lost out against economic or security-political interests. This was obvious in the case of the Netherlands' bilateral relations with Argentina in the late 1970s and early 1980s, when it let trade relations and business interests prevail over human rights.⁷⁹ Another example can be found in the Dutch policies towards South Africa's apartheid-government, which were to a large extent determined by Cold War strategies and economic considerations.⁸⁰ The same holds true for its attitude towards Turkey. Even though the Netherlands started a complaints procedure against the country in 1982, it has on other occasions been more hesitant to raise the human rights situation in Turkey because it wanted to avoid possible alienation from the European continent and NATO.⁸¹ A very specific strategy was followed in regard to Eastern European countries in the period from 1972 to 1989: the Soviet Union's most loyal allies could count on a lot of criticism, but states that were comparatively liberal or that acted relatively independent from Moscow, such as Yugoslavia or Poland before 1981, were approached with a more benevolent attitude, because they were considered crucial for undermining the Soviet system in the long run.⁸²

74 *Ibidem*, p. 73-98.

75 Malcontent, 1998, p. 235-236.

76 Malcontent, 1998, p. 177; Baehr, Castermans-Holleman and Grünfeld, 2002, p. 70-72; Groenendijk, 1984, p. 147-150.

77 For the complaint against Turkey, see: Baehr, Castermans-Holleman and Grünfeld, 2002, p. 107-109. For the complaint against Greece, see: De Goede, 1996, p. 249-252.

78 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 156-157; Malcontent and Huijboom, 2006, p. 59-64.

79 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 35-42; Groenendijk, 1984, p. 151-157.

80 De Boer, 1999; Baehr, Castermans-Holleman and Grünfeld, 2002, p. 212-216.

81 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 117-118.

82 Baudet, 2001a, p. 260-264 and 269-272.

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It can thus be concluded from the literature that human rights have become part of the Netherlands' foreign policy, and in some cases the Netherlands can even be said to have played a pioneering role, but on the other hand, other interests have often withheld it from doing so. As compared to many other states in the world, the preparedness of the Netherlands to stand up for human rights may be more than average, but it would go too far to state that the Netherlands has actually acted as a model country. Insofar as it did fulfil such a role, it only did so on an ad hoc basis, and in many cases it was at least as concerned with promoting its other foreign policy interests. Apart from that, the overview-study that was mentioned earlier in this section alleged that the Netherlands has paid serious attention to certain categories of human rights only. Even though 'classic and social rights are of equal importance' according to its formal policy, in the Dutch foreign policy practice towards other countries social rights were largely ignored.⁸³ Hence, insofar as the Netherlands has acted as a 'guiding' country, this does in any case not seem to be true in respect to all human rights categories.

Furthermore, it may be questioned whether human rights have continued to play an equally important role in the Netherlands' foreign policies since the 1970s. In the previous section, it was already mentioned that the idea that the Netherlands should try and set an example for the rest of the world has been said to have lost importance since the second half of the 1980s. According to three human rights specialists, Peter Baehr, Monique Castermans-Holleman and Fred Grünfeld, this has affected the Netherlands' human rights policies. They conclude that, in comparison, the policies of the late 1990s were less outspoken on the subject of human rights than those of the 1970s.⁸⁴ However, in a recent study on the Netherlands' policies in the UN Commission on Human Rights in the late 1990s and the beginning of the twenty-first century, it is maintained that the Netherlands is still very active, and has also kept a favourable reputation among foreign diplomats when it comes to the international protection of human rights.⁸⁵ Others who do not agree with the view that attention for human rights has decreased have pointed to the Netherlands' country assistance activities, and the Dutch contributions to humanitarian interventions all over the world. In their view, the fact that the Dutch government decided to resign because of the critical conclusions of the so-called NIOD-report about the role of the Netherlands in the tragic events in Srebrenica can also be seen as an indication that human rights are still taken very seriously. According to their opinion, the conclusion that human rights are less prominent on the Dutch agenda was drawn because of a focus on certain parts of the

83 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 219-220. For the quotation, see: Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 137.

84 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 233-234. In an interview with the author, Menno Kamminga, who served as a Legal Advisor of the International Secretariat of Amnesty International in the period from 1978 to 1987, expressed a similar opinion. See: Interview with M.T. Kamminga, 24 May 2005.

85 Malcontent and Huijboom, 2006, p. 105, and 107-108.

Netherlands' human rights policies only.⁸⁶ The same can, however, be said of most other studies that have been carried out in this field.

1.4 POLICY PRINCIPLES ON INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

1.4.1 A largely neglected policy area

For a long time, the development of international norms and supervisory procedures has been ignored as a topic for scholarly study. As the political scientist Andrew Moravcsik remarked in 2000, '[h]istorians have conducted almost no detailed case studies of the formation of international human rights regimes'.⁸⁷ In recent years, theorists of international relations have engaged in a number of studies relating to the creation of international human rights norms and supervisory procedures,⁸⁸ but even within this discipline relatively little is still known about the role and motivations of state actors.⁸⁹ In the beginning of this chapter, it was mentioned that Dutch historians have not paid much attention to this issue either; scholarly research on the Netherlands' human rights policies has concentrated on the government's reactions to violations in other countries. An early study by Monique Castermans-Holleman is the most notable exception in this respect. It was the first study that was solely devoted to the Netherlands' human rights policy, and it included the contributions of the Netherlands to multilateral country policies as well as to the development of new human rights instruments within the United Nations. The case-studies dealt with in Castermans-Holleman's study were, however, partly selected to answer the question what factors might contribute to the Dutch influence in UN decision-making, as a consequence of which relatively little attention is paid to the details of the policy-making process that will be examined in the present study.⁹⁰

It should be noted that the generally prevailing concentration on reactions to human rights situations in other states automatically leads to the neglect of certain human rights issue-areas. In the above it was mentioned that the Netherlands was less likely to act in response to situations where people's social and economic rights were not

⁸⁶ See: Kuitenbrouwer, 2003, p. 183-184. Similar opinions were expressed in an interview with the, at that time outgoing, Minister of Foreign Affairs, Jozias van Aartsen, and during a conference held at the occasion of the publication of the overview book by Baehr, Castermans-Holleman and Grünfeld. For the interview, see: Van Westerloo, 2002, p. 7. For a report of the conference, see: H. Reiding, 'Bookpresentation 'Human rights in the foreign policy of the Netherlands'' - In: *Newsletter School of Human Rights Research*, Vol. 6, No. 2, 2002, pp. 4-5.

⁸⁷ Moravcsik, 2000, p. 219.

⁸⁸ See, for example: Moravcsik, 2000; Clark, 2001; Hawkins, 2004. A number of interesting papers were also presented at the Fifth Pan-European Conference on International Relations, which was held in The Hague from 9 to 11 September 2004. See: Deitelhoff, 2004; Stoeva, 2004; Smith, 2004.

⁸⁹ Schmitz and Sikkink, 2003, p. 525.

⁹⁰ See: Castermans-Holleman, 1992. Note that some articles have been written on the Netherlands' contributions towards certain particular human rights instruments (see, for example: Baehr, 1989; Baudet, 2001b) too, but a more comprehensive study like the one presented here has been lacking.

fulfilled, and in the policy papers it is made clear that the government's efforts to improve concrete human rights situations are indeed directed at certain rights only. The government felt that if it would adopt too broad a definition of human rights in its policies towards other countries, it would 'arrive at far-reaching involvement with the internal affairs of States', and its efforts to bring about improvements in specific situations would therefore in principle be 'concentrated on cases where there are grave violations of fundamental human rights, particularly when such violations appear to proceed from a systematic policy.'⁹¹ Although it is not always clear which criteria should be met before a violation is labelled 'grave and systematic', it is obvious that a country that continuously violates the prohibition of torture or that is carrying out so-called extra-judicial executions, is much more likely to expect a reaction from the Dutch government than a state that structurally discriminates against women or that has never taken any action against child labour.⁹²

Apart from this, the lack of scholarly attention for the Netherlands' policy towards the establishment of international human rights instruments does also, and more importantly, mean the neglect of a complete policy area, which is in many respects very different from country policies that are carried out for the purpose of human rights protection. Referring to similar tendencies in public opinion, the government has in this regard made the following observation: 'Sometimes there seems to be a tendency for public opinion practically to identify human rights policy with action against specific abuses. However, ...human rights policy is much more than this: in particular, it includes the promotion of standard-setting, education and international supervision.'⁹³ Work on international norms and procedures to monitor their implementation was considered part of a comprehensive human rights policy, and in its policy papers on human rights and foreign policy the Netherlands always paid attention to it.

1.4.2 Standard setting

According to the Dutch government, the existence of international norms on human rights has been a crucial precondition for any human rights policy. The fact that human rights had become a subject of international norms meant that they had become a legitimate subject of international concern, and therefore, international agreement on norms constituted a first step towards a worldwide protection of human rights.⁹⁴ In the

91 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 90 and 136.

92 See: Ministerie van Buitenlandse Zaken, 1987b, p. I-11-I-14. On the issue of gross and systematic violations, see also: Baehr, 2001, p. 20-31.

93 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 80-81. Comparable statements can be found in other policy documents. See, for example: Appendices to the reports of the Second Chamber, 1985-1986, 19 200, chapter V, no. 2, p. 67; Appendices to the reports of the Second Chamber, 1986-1987, 19 700, chapter V, no. 125, p. 8.

94 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 11 and 143.

light of this, it is understandable that the creation of international norms has been one of the general aims of the Netherlands' human rights policy.⁹⁵

In the policy paper of 1979, it was claimed that the Netherlands had from the start 'given vigorous support to the standard-setting work in the field of human rights, in both the United Nations and the Council of Europe'.⁹⁶ This was not fully in conformity with reality, because the Netherlands had actually been hesitant about the early human rights projects in both organisations.⁹⁷ By the time the policy memorandum was issued, it had nonetheless changed that attitude, and, as other sources reveal, it had indeed taken an active part in the standard-setting efforts that it mentioned as examples to illustrate its statement.⁹⁸ Its policy conclusion for future standard-setting activities was that it would continue to participate actively.⁹⁹ At the same time, it felt, however, that 'the lion's share of the standard-setting work... is already complete, so that any further norms will be largely of a supplementary nature.'¹⁰⁰

For a proper understanding of this statement, it is useful to realize that the proliferation of international human rights norms has evoked different reactions. Some have welcomed the expansion of the normative framework¹⁰¹, but others have been critical of the continuing codification process. In a study on the work of the UN Committee against Torture, Chris Ingelse, for instance, has questioned the additional value of the UN Convention against Torture. He has pointed out that there are certain drawbacks to the further elaboration of a general human rights norm into more specific provisions. Detailed provisions may be helpful for human rights implementation in benevolent states parties, but on the other hand, a greater degree of detail also means a loss of flexibility, especially since states that negotiate new conventions can be expected to build in restrictions and limitations that can work as a barrier when it comes to dealing with more reluctant states.¹⁰² According to Ingelse, it would therefore be better to leave it to independent supervisory organs to further develop human rights law by means of its case law than to do so by the creation of new human rights treaties.¹⁰³ Martin Scheinin, a professor of constitutional and international law and former Human Rights Committee member, has expressed similar views. He has, for instance, expressed the fear that 'thinking of minority rights as separate from universal human rights... may result in insufficient attention to the dynamic potential of existing human rights and in an over-emphasis on standard-setting activities.'¹⁰⁴ Being 'sceptical about present-day preconditions for States' ability to reach agreement on genuinely progressive new

95 *Ibidem*, p. 72.

96 *Ibidem*, p. 73.

97 See: Castermans-Holleman, 1992, p. 169-183; Klerk and Van Poelgeest, 1991.

98 See: Castermans-Holleman, 1992, p. 184-221; Ministerie van Buitenlandse Zaken, 1979b, 312-313.

99 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 74 and 131.

100 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 74 and 131-132.

101 See, for example: Castermans-Holleman, 1996, p. 6.

102 Ingelse, 2001, p. 404. See also: Ingelse, 2000, p. 324.

103 Ingelse, 2001, p. 389, 404-405; Ingelse, 2000, p. 324-325.

104 Scheinin, 2003, p. 490.

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human rights standards'¹⁰⁵, he considers this unwise from a strategical point of view. According to Scheinin, the same holds true for special treaties the UN is now considering on the topics of disappearances and people with disabilities. Besides, if a creative use of existing standards would be relied on, situations of double standards, coordination problems or conventions with extremely low ratification rates would also be more easily avoided.¹⁰⁶

In the light of the above disadvantages, Scheinin has claimed '[t]here is reason to be concerned about the proliferation of human rights treaties and mechanisms'.¹⁰⁷ It should be noted, however, that he is critical about the way gaps in existing human rights treaties are covered, but not about the expansion of the human rights agenda itself. The same can be said about Ingelse. For this reason, these two authors should be distinguished from another group of critics who are worried about the proliferation of human rights for reasons of principle, and whose general aim is, in contrast, to restrict a broadening of the concept of human rights rather than to seek ways to further stretch it. In the Netherlands, the philosopher of law, Paul Cliteur, is the main representative of this view. The drift of his argument is that there is a tension between the proliferation of human rights and their distinct profile as rights of special importance: if too many rights are given the status of a human right, human rights will gradually lose their status as rights of a special category, and will ultimately stop to exist at all.¹⁰⁸ Apart from that, two other important drawbacks of an accumulation of human rights norms Cliteur has summed up are an increasing likeliness of conflicts between fundamental rights and – given the fact that human rights are supposed to be of a category that cannot be interfered with even by the legislature – costs in terms of democracy.¹⁰⁹

Although Cliteur is probably most explicit in this matter, others have raised comparable concerns. In an article of 1995, one of the most prominent international law specialists in the Netherlands, Peter Kooijmans, advocated a 'back to basics' approach as well,¹¹⁰ and more recently, in her inaugural address as a professor of human rights in Utrecht, Jenny Goldschmidt also denounced the tendency to categorize all forms of injustice as human rights questions. According to Goldschmidt, this leads to a situation in which cases that are relatively unimportant from a human rights perspective detract attention away from important human rights violations.¹¹¹ Goldschmidt also pleads against the development of ever more sub-categories of rights and

105 *Ibidem*, p. 487.

106 *Ibidem*, p. 23-26.

107 *Ibidem*, p. 23.

108 Cliteur, 1995, p. 18-21; Cliteur, 1996, p. 23-27. See also: Schermers, 1995, p. 3. This line of thinking was also described in an article in a Dutch newsmagazine. See: Van Doorn, J.A.A., 'Wildgroei en woekering' [Uncontrolled and morbid growth] – In: *HP/De Tijd*, Issue 23 December 1994, pp. 14-19.

109 Cliteur, 1995, p. 17-18 and 21-23; Cliteur, 1996, p. 27-30.

110 Kooijmans, 1995, p. 27. For a comparable statement, see also: Van Hoof, 1996, p. 59-60 and 62-64.

111 Goldschmidt, 2005, p. 8-10. Note that Goldschmidt is in this respect also referring to developments in the jurisprudence of the ECHR. On this particular issue, see also: Alkema, 1995.

people as right holders, because this way one might lose sight of the coherence of general human rights principles, and connections between violations.¹¹²

In reaction to Cliteur's line of argumentation in particular, others have defended the proliferation of human rights norms as a generally valuable development. In the first place, they do not believe that the concept of human rights will lose its meaning when more norms become accepted as human rights norms. In an editorial comment in the NJCM-Bulletin, the magazine of the Dutch branch of the International Commission of Jurists, it was, for instance, maintained that the recognition of a certain right as such is not determinative in this respect. Its actual impact depends on the way it is applied by the judiciary, which is in practice very well able to distinguish the most fundamental human rights from other human rights norms.¹¹³ Another important argument brought to the fore by authors that have contested Cliteur's view is that the need to adapt to changing insights and circumstances justifies a further expansion of the human rights agenda. Technical developments and human evil continue to pose threats to human dignity, and, at any rate, views on the question of what this human dignity is comprised of continue to develop; therefore, neither can nor should the concept of human rights be static.¹¹⁴

Finally, as has been remarked by Castermans-Holleman, the difficulty with the statement that the concept of human rights should only apply to really fundamental rights is that it is very hard to determine where the line should be drawn.¹¹⁵ Whereas some would possibly start to worry only when a separate Convention on the social rights of handicapped female children of a national minority would be on the international human rights agenda, others may prefer only a limited set of general human rights norms, and even this might go too far for some. In this respect, it should be noted that the founding father of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Raphael Lemkin, did indeed object to the creation of the UN Covenants. As compared to genocide, even torture or discrimination seemed relatively low-level abuses, and fearing that general human rights would only detract attention away from the greatest crime of all, Lemkin opposed their codification in international law.¹¹⁶ Would it indeed have been better not to adopt a general prohibition of torture and discrimination? The critics of a proliferation of human rights that were mentioned above do seem to consider these principles fundamental human rights, but then again: where should the line otherwise be drawn?

In the context of this study, the Netherlands' stand on this question is of course of particular interest, but the policy papers do not, in this respect, provide very clear answers. On the one hand, the government recognized the risk of an inflation of rights. Reflecting on the continuing process of standard setting, the Dutch government

112 Goldschmidt, 2005, p. 30.

113 NJCM, 2004, p. 621-622. For a similar line of reasoning, see: Baas, 1996, p. 36-37.

114 Kamminga, 1996, p. 48-49; Castermans-Holleman, 1996, p. 45-46; Baas, 1996, p. 35-36. A similar line of reasoning can also be found in: Thornberry, 1995, p. 56-57.

115 Castermans-Holleman, 1996, p. 41-43.

116 Power, 2003, p. 74-78.

concluded that 'one consequence of the increasingly broad interpretation of the concept of human rights is that the concept is becoming less manageable. It no longer indicates minimum conditions for an existence worthy of human dignity, but [it] is beginning to include practically everything which is considered desirable for human development. In this way the very success of the idea of human rights in recent decades threatens to rob it of part of its operational significance.'¹¹⁷ This 'tendency to place ever more aspects of policy under the denominator of human rights' would, in other words, inevitably lead to 'a dilution of the idea of human rights itself'.¹¹⁸ Yet, even though it was of the opinion that the codification process should to a large extent be brought to an end, the Netherlands still left some room for a further proliferation of norms, and it wished to play an active role in supplementary standard setting. It is not entirely clear from its policy principles whether a supplementary nature of proposed norms was a precondition for an active involvement. If so, it was in any case not clear what criteria would apply to judge the additional value of possible standard setting projects, and it was also not indicated what the Netherlands would do if it felt that such additional value was absent.¹¹⁹

Although the principles that were laid down in the 1979 policy paper provide some insight into the considerations the Dutch government has taken into account with respect to the issue of human rights standard setting, unequivocal policy choices cannot be derived from it. The follow-up memoranda and other formal policy documents have not been any clearer in this respect; the drawbacks of an expansion of the normative framework were recognized, but on the other hand, the Netherlands continued to participate in this process and did not close its eyes to possible advantages either.¹²⁰ Nonetheless, there was one element that continued to be constantly stressed: the focus of international human rights involvement should be shifted from the establishment of norms to ensuring their actual implementation.¹²¹ Fundamental concerns about an ever-expanding human rights agenda were probably one reason for this order of priorities, but another reason was that international practice showed that

117 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 25.

118 *Ibidem*, p. 29.

119 See: *Ibidem*, p. 74 and 131-132. It should be noted, however, that it is clear from this and other policy papers that the Netherlands government did not wish to recognize the so-called solidarity rights as human rights. See, for instance: Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 29.

120 See, for example: Appendices to the reports of the Second Chamber, 1986-1987, 19 700, chapter V, no. 125, p. 4; Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 4, 12 and 37-38; Appendices to the reports of the Second Chamber, 1996-1997, 25 300, chapter V, no. 1, p. 5.

121 See, for example: Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 74 and 143; Appendices to the reports of the Second Chamber, 1986-1987, 19 700, chapter V, no. 125, p. 9; Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 4; Appendices to the reports of the Second Chamber, 1996-1997, 25 300, chapter V, no. 1, p. 9; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 1, p. 2 and 8; Appendices to the reports of the Second Chamber, 2002-2003, 28 600, chapter V, no. 2, p. 46; Appendices to the reports of the Second Chamber, 2003-2004, 29 540, no. 10, p. 24.

it was relatively easy for many countries to talk about standards, while ignoring them in actual practice. Whereas countries that violated human rights preferred, for this reason, to concentrate on the creation of norms in policy areas that they considered less sensitive, the Netherlands wanted to shift emphasis to the observance of existing human rights standards.¹²²

1.4.3 Supervisory mechanisms

As to the development of supervisory mechanisms, Dutch policies have been based on the belief that such mechanisms can promote the actual implementation of human rights.¹²³ As was explained above, the Dutch government has regarded these procedures as the more crucial elements of international human rights systems,¹²⁴ though it was of the opinion that the effectiveness of existing mechanisms differed considerably.¹²⁵ The government maintained that it had 'systematically worked for the acceptance of the most effective possible implementation procedures', and ranging this statement under its policy principles, it made a commitment to continue doing so.¹²⁶

The Netherlands recognized that the growing number of supervisory mechanisms also had some clear disadvantages; disputes of competence between the supervisory organs, interpretation differences and confusion on the part of the parties seeking justice were mentioned as examples.¹²⁷ In spite of this, proliferation of supervisory procedures was considered less problematic than a further expansion of norms. As was maintained in the 1979 policy paper, the Netherlands was, in principle, a proponent of a further co-ordination between the different procedures, but it also felt that caution should be taken to prevent bringing the most favourable procedures into line with the less far-reaching ones. Rationalization of the numerous procedures should in any case not be pursued in the short run, because new procedures should first be given the time and opportunity to develop to their full potential.¹²⁸ In the follow-up memorandum that was issued in 1991, it was repeated that the existing pluralism of supervisory procedures was unavoidable, and it was stressed that it even had certain advantages, because this way, there were several mechanisms to choose from to combat human rights violations.¹²⁹ In the follow-up memorandum of 1997, it was maintained that an attempt should be made to limit the further proliferation of procedures,¹³⁰ but none of the other policy papers on human rights and foreign policy nor any of the explanatory memorandums to the national budget issued since then contain any similar statement. Some-

122 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 28-29.

123 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 7.

124 See: Appendices to the reports of the Second Chamber, 1986-1987, 19 700, chapter V, no. 125, p. 4.

125 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 75-76 and 132.

126 *Ibidem*, p. 77 and 132.

127 *Ibidem*, p. 79. On this issue, see also: Ingelse, 2001, p. 5.

128 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 79-80 and 133.

129 *Ibidem*, p. 7.

130 Appendices to the reports of the Second Chamber, 1996-1997, 25 300, chapter V, no. 1, p. 26.

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times, the creation of new and stronger supervisory procedures was, to the contrary, stimulated.¹³¹

It will be clear from the above that 'effectiveness' was central to the Netherlands' policy principles in regard to the establishment of human rights control machinery. It should be noted that an instrument's *real* effectiveness, that is to say its actual ability to influence concrete human rights situations, depends on a great variety of factors, e.g. the amount of political support it receives among states. Even though it is true that the legal form alone does not determine a procedure's effectiveness, its formal characteristics can at least partially influence this.¹³² Insofar as the policy papers dilate upon the qualification of effectiveness, it is in particular these formal dimensions that are referred to.¹³³ For the Netherlands, the pursuit of effective supervisory procedures meant, for example, that it would not 'as a rule regard it as sufficient to oblige participating States to submit reports: provision should also be made for complaints procedures both for States and for individuals.'¹³⁴

Although certain strengths have been attributed to periodic reporting procedures, e.g. its broad coverage and its functions in terms of awareness raising about its own performance on the part of the state¹³⁵, this type of mechanism is usually considered rather weak. The main reason for this, is that its functioning ultimately depends on the cooperation of the states parties, which may fail to deliver a report, and which are in any case not naturally inclined to furnish the supervisory organs with information that would shed an unfavourable light on their domestic state of affairs.¹³⁶ Due to this, it is understandable that the Netherlands considered it insufficient for human rights to be supervised by means of consideration of states reports.¹³⁷ Petition systems that allow individuals or groups of individuals to complain about alleged human rights violations

131 See, for example: Appendices to the reports of the Second Chamber, 2001-2002, 28 000, chapter V, no. 2, p. 30.

132 See: Keohane, Moravcsik, and Slaughter, 2000, p. 487-488; Herman, 1994, p. 109.

133 It should be noted that the question whether international human rights instruments have in fact contributed to real-life human rights improvements will not be dealt with in this study, so whenever the term effectiveness is used in this study, it should also be understood to relate to the formal characteristics of human rights instruments.

134 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 77 and 132.

135 See, for example: Craven, 1995, p. 33-34; Advisory Committee on Human Rights and Foreign Policy, 1988, p. 9.

136 See, for example: Donnelly, 1986a, p. 610; Forsythe, 2000, p. 77-78; Van Bueren, 1998, p. 379; Boerefijn, Heringa and Schokkenbroek, 1991, p. 48.

137 It must be noted though, that the Netherlands would itself not always desist from a use of the inherent weaknesses in the reporting procedures either. A remark the Netherlands delegation made in a dialogue with the ICESCR's supervisory body, the Committee on Economic, Social and Cultural Rights, in 1998, clearly illustrates this. In response to the Committee's conclusion that the Netherlands report lacked information on problems it experienced in regard to the realization of the rights incorporated in the Covenant, the delegation indicated that it felt that government officials could not be expected to be disloyal to their own governments. See: Coomans, 1998b, p. 941.

are generally considered much more effective and meaningful.¹³⁸ Even though procedures may be lengthy, it gives victims direct access to the supervisory system.

In practice, this has worked much better than interstate complaints procedures, which have hardly ever been used. In diplomatic relations, bringing a case to a human rights court or supervisory organ is a far-reaching measure, and states will always fear undesirable boomerang effects, for instance, in the form of a counter-complaint against themselves.¹³⁹ The Netherlands realized this would reduce the value of this procedure well before 1979,¹⁴⁰ but apparently, it still considered it desirable to include this instrument of last resort in supervisory systems. Recognizing that a preparedness to submit internal human rights practices to international review was an indispensable element of a convincing and comprehensive human rights policy, the Netherlands announced that it would always be prepared to accept applicability of individual as well as interstate complaints provisions.¹⁴¹

The Netherlands' policy principles thus expressly indicated that its aim to develop effective international supervisory procedures should be interpreted to mean that it would consider the creation of complaints procedures a key concern.¹⁴² Otherwise, there were no explicit policy conclusions drawn in this respect, but between the lines, the policy papers contain a lot more information about the Dutch opinions on preconditions for effectiveness. In the 1979 policy paper, it was, for instance, recognized that if an organ were composed of government delegations, this was likely to have detrimental effects on its supervisory functions. Governments will always take into account different kinds of political considerations, which may not necessarily correspond with the need to take an objective and impartial attitude towards violations in question; therefore, according to the Netherlands, organs made up by government representatives could not be regarded to be very well suited to exercise a control function.¹⁴³ Furthermore, it was of the opinion that supervision was made more effective if NGOs were given a role in the procedure. Their information can be of crucial importance, especially as victims of human rights violations may not always be in a position to appeal

¹³⁸ See, for example, Van Bueren, 1998, p. 378; Craven, 1995, p. 32-33.

¹³⁹ See, for example, Forsythe, 2000, p. 75, 78, and 114-115; Van Bueren, 1998, p. 379. On the issue of access to international supervisory organs in general, see: Keohane, Moravcsik, and Slaughter, 2000, p. 462-466, and 472-476.

¹⁴⁰ See: Ministerie van Buitenlandse Zaken, 1966, p. 601.

¹⁴¹ Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 12, 77 and 132. In the literature, a willingness to accept international supervision has also been qualified as an essential element of a comprehensive human rights policy. See: Sikkink, 1993, p. 142-145.

¹⁴² This remained important also in later years. See, for example: Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 7; Appendices to the reports of the Second Chamber, 2002-2003, 28 600, chapter V, no. 2, p. 45.

¹⁴³ Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 76 and 78. On the issue of judicial independence in general, see: Keohane, Moravcsik, and Slaughter, 2000, p. 459-462, and 470-472.

to supervisory organs or to inform other governments.¹⁴⁴ In addition, in one of the follow-up memoranda, it was maintained that the Netherlands considered it important that supervisory procedures were as open and transparent as possible, and that sufficient administrative and financial means would be made available for the effective functioning of monitoring mechanisms.¹⁴⁵ Finally, and especially since the 1990s, the importance of mechanisms for preventive action has been recognized by the Netherlands, and it has declared that it would support their further creation.¹⁴⁶

In sum, the Netherlands' views on the establishment of international supervisory procedures were thus much more clear than its policy principles on standard setting. In 1979, it declared that it was simply in favour of making the international supervision of human rights implementation as effective as possible, and it has never left this position since.¹⁴⁷

1.5 OTHER POLICY INTERESTS

From the above policy principles, it can be concluded that the Netherlands attached importance to well-functioning international human rights systems. What is striking is that in this area its policies seemed to be based solely upon humanitarian considerations. It was mentioned above that the Dutch government has regarded the promotion of human rights as one out of several foreign policy aims only, but in the policy papers, basic dilemmas that can arise from the coordination of different interests are dealt with only in relation to possible reactions to violations in other countries.¹⁴⁸ According to the government, this part of human rights policy is indeed the 'category most fraught with problems and dilemmas'.¹⁴⁹ Furthermore, it is remarkable to note how many examples of Dutch contributions to the development of new international human rights instruments are summed up in formal policy documents. To mention some examples, the Netherlands had, according to its own statements, 'worked hard for a declaration against religious intolerance and for universal recognition of conscientious objections to military service'¹⁵⁰ and it had 'been calling... for the establishment of the office of a High Commissioner for Human Rights'.¹⁵¹ A few years later, it claimed that it had exerted an influence on a number of Protocols to the ECHR, that it had had an active part in CSCE discussions on further human rights standard setting

144 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 77. See also: Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 36.

145 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 7.

146 Appendices to the reports of the Second Chamber, 1992-1993, 22 800, chapter V, no. 2, p. 17; Appendices to the reports of the Second Chamber, 1996-1997, 25 300, chapter V, no. 1, p. 9.

147 See, for example: Appendices to the reports of the Second Chamber, 1996-1997, 25 300, chapter V, no. 1, p. 9; Appendices to the reports of the Second Chamber, 2002-2003, 28 600, chapter V, no. 2, p. 45; Appendices to the reports of the Second Chamber, 2004-2005, 29 800, chapter V, no. 2, p. 22.

148 See: Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 71-72, and 80-88.

149 *Ibidem*, p. 80.

150 *Ibidem*, p. 74.

151 *Ibidem*, p. 78.

and that it had played a prominent role in several codification efforts in the UN.¹⁵² Apart from proposals relating to the so-called solidarity rights¹⁵³, there do not seem to have been many initiatives the Netherlands did not support.

The research published thus far hardly challenges this picture, at least not insofar as the period after the early 1960s is concerned. It has been described in this literature that the Netherlands was instrumental in the adoption of the Optional Protocol to the Covenant on Civil and Political Rights, the Declaration on Torture, the Special Rapporteur on Torture, and, after initial hesitations, the Convention against Torture.¹⁵⁴ Apart from that, it also tried to obtain the creation of international standards on the subject of conscientious objections to military service.¹⁵⁵ According to existing literature, in the CSCE, and the later OSCE, the Netherlands was also the driving force behind the creation of the Vienna Human Dimension Mechanism, the High Commissioner on National Minorities, and the adoption of substantive rules that put limitations to the application of the state of emergency.¹⁵⁶ The picture that arises from this is again one of the Netherlands as a country that supports initiatives for new international human rights instruments. The question is, however, to what extent this image really accords with reality. Did the Netherlands always take a favourable position towards newly proposed international human rights instruments? And if so, how did that relate to proclaimed reservations against unlimited expansion of the normative framework?

A second question that can be posed is whether the Dutch policy was indeed driven by human rights considerations only. In the policy papers, no mention is made of other policy interests that might have to be taken into account when it comes to the development of new international human rights instruments, and the above literature does not challenge this idea of incompleteness either. Professor of international relations, R.J. Vincent, has indeed maintained that standard setting 'is the level at which ... human rights are a prominent, if not the dominant criterion.'¹⁵⁷ Other scholars of international relations have, however, pointed to the fact that the creation of international human rights instruments is a rather political affair, in which interests other than the aim to promote and protect human rights may come into play as well.¹⁵⁸ According to the so-called realist school of international relations, international law – and thus also international human rights law – should even be seen as completely dominated by

152 Appendices to the reports of the Second Chamber, 1986-1987, 19 700, chapter V, no. 125, p. 4. The other policy memoranda on human rights and foreign policy, as well as explanatory memoranda to the national budget, contain numerous other examples. It would go too far to mention them all, or even to refer to all the pages where they are to be found.

153 See, for example: Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 29; Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 37-38.

154 Castermans-Holleman, 1992, p. 184-197 and 213-227; Baehr, 1989.

155 Castermans-Holleman, 1992, p. 197-211.

156 Baudet, 2001b; Zaagman and Zaal, 1994; Zaagman, 1990; Zaagman, 1991.

157 Vincent, 1986, p. 131.

158 See: Forsythe, 2000, p. 16; Freeman, 2002, p. 6-7, 12 and 132; Harris, 2001, p. 6.

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political power interests. Due to the absence of a central authority that stands above the sovereign states, international law should, in their eyes, basically be seen as a reflection of concrete state interests and power-relations.¹⁵⁹ When international law is being created, governments will always try to avoid restraining influences, and will, as one of the most prominent representatives of the realist school of international relations, Hans Morgenthau, put it, be inclined 'to use international law instead for the promotion of their national interests, and to evade legal obligations that might be harmful to them.'¹⁶⁰

There are different theoretical approaches to international relations that do take international law more seriously, but what they have in common with realism is that they all recognize the relevance of the principle of sovereignty within the existing system, and one of the puzzles they try to solve is why states bind themselves by international law even when this might constrain their sovereignty.¹⁶¹ The concept of sovereignty has been notoriously hard to define, but usually it is associated with autonomy and independence.¹⁶² It implies, among others, a state's 'exclusive competence to make and enforce laws within its domestic jurisdiction.'¹⁶³ A state is free to choose whether it wants to accept international legal (or quasi-legal) obligations, and from a strictly legal perspective, sovereignty would thus not be affected if a state decides to commit itself to international human rights instruments.¹⁶⁴ Yet, by binding themselves to international norms or supervisory procedures, states constrain their domestic autonomy.¹⁶⁵ While a state's international status as a sovereign entity continues to exist, its freedom to exercise its sovereign rights may thus be restricted by international human rights instruments. The creation and acceptance of such instruments thus entails certain 'sovereignty costs'.¹⁶⁶ It is well-known that states often try to limit these costs by giving arrangements a non-binding character, by escape clauses, or by weakening supervisory organs or mechanisms.¹⁶⁷ The policy papers do not mention the issue of sovereignty costs, and give the impression that they were absent from the Netherlands' policy considerations, but does that mean that the Netherlands was unaffected by any concerns over its sovereign prerogatives?

159 Leurdijk, 2001, p. 63-67; Boyle, 1985, p. 7-8; Reus-Smit, 2004, p. 15-18; Morgenthau, 1967, p. 266.

160 Morgenthau, 1967, p. 268-269.

161 So-called neoliberal institutionalist, liberal and constructivist approaches answer this question differently, and each has its own way of dealing with the concept of sovereignty, but posing the question of why states bind themselves by international law even when this involves sovereignty costs, in any case means that they take sovereignty seriously as a factor in international relations. See, for example: Goldstein, Kahler, Keohane and Slaughter, 2000, p. 391-393; Smith, 2004, p. 3-14; Hawkins, 2004, p. 780; Reus-Smit, 2004, p. 15-24; Moravcsik, 2000, p. 219.

162 Steiner and Alston, 2000, p. 574; Malanczuk, 2003, p. 17-18.

163 Sikkink, 1993, p. 141.

164 Krasner, 1999, p. 16; Malanczuk, 2003, p. 18.

165 Krasner, 1999, p. 20.

166 Abbott and Snidal, 2000, p. 436-440.

167 *Ibidem*, p. 439-440.

On the one hand, the Dutch Constitution does indeed reflect a great preparedness to give preference to international law over domestic laws. A unique provision is article 90, which assigns the government with the task to promote the development of an international legal order.¹⁶⁸ Furthermore, the Netherlands' legal system is characterized by monism, a system that makes it possible for legal rules of international law to be directly applied by a national court.¹⁶⁹ Not only can provisions of international treaties that are directly applicable – that is, provisions that contain rights that can be invoked by citizens – be appealed to domestically, they also take precedence over national law.¹⁷⁰ One could, however, just as well reverse the whole argument and assume that 'sovereignty costs' are relatively high for the Netherlands exactly because of this generous general attitude towards international law.

Other interests that might possibly come into play when international human rights instruments are being developed are strategic-political considerations, such as those concerning the Cold War. According to the realist view of international relations, the main reasons a country would want to stimulate the creation of international human rights instruments are to be found in the geopolitical context, and powerful states' desire to impose their values on others.¹⁷¹ Were such considerations also relevant for the Netherlands' policy? It is known from the literature that negotiations on the UN Covenants of 1966 were, for instance, not immune to Cold War rivalries, and that there was great divergence of views between the two blocs on the concept of human rights as well as on the question of appropriate mechanisms to protect them.¹⁷² Possibly, this may also have played a role in other negotiation-processes, and this may have affected the Dutch position too. In a study on the Netherlands' human rights policies towards Eastern European countries and Yugoslavia, the Dutch historian, Floribert Baudet, has convincingly shown how human rights were used to try and undermine the communist system.¹⁷³ It would be interesting to see whether its policies towards human rights standard setting and the development of accompanying supervisory mechanisms were also influenced by such strategic considerations.

¹⁶⁸ Article 90, Constitution of the Kingdom of the Netherlands. This article was included on the initiative of parliament. See: Baehr, 1995, p. 334. An English translation of the Dutch Constitution can be found on the website of the Dutch Ministry of Home Affairs. See: www.minbzk.nl, accessed 18 September 2006.

¹⁶⁹ Two approaches towards international law can be found: monism and dualism. The monistic approach starts from the idea that domestic and international law belong to one law system. Therefore, legal rules of international law can be applied before the national court. Conversely, the dualistic premise is that national and international law are to be considered as two separate jurisdictions. This means international law has to be converted into national law before it can be invoked before a national court. See: Kooijmans, 2002, p. 82-84; Malanczuk, 2003, p. 63-64.

¹⁷⁰ See: Article 93 and 94, Constitution of the Kingdom of the Netherlands. See also: Kooijmans, 2002, p. 86-88.

¹⁷¹ Moravcsik, 2000, p. 221. See also: Morgenthau, 1967, p. 246-249.

¹⁷² See, for example: Van Genugten, 1988.

¹⁷³ Baudet, 2001a.

Finally, the factor of reputation should be considered. Human rights considerations and reputational concerns cannot always be easily separated from each other, because for a country that wants to present itself as a leading human rights country, the margins of a policy aimed at the establishment of a good reputation are by definition determined by the question of whether there are any plausible human rights arguments in favour of that policy. Oftentimes, reputational and human rights concerns indeed seem complementary rather than conflicting interests, but it does of course make a difference whether one sees the Netherlands' human rights policies as truly principled, or rather as a means to gain international prestige. The American historian James Kennedy has, for instance, taken the latter position. In his view, adaptation to the international environment has always been the Netherlands' prime concern, and the idea that the Netherlands can be a 'guiding' country should in fact be interpreted as an overzealous, yet pragmatical effort to conform to international trends.¹⁷⁴ According to the so-called constructivist approach to international relations, such adaptive behaviour should not necessarily be seen as purely instrumental to other foreign policy purposes. Constructivists believe that interests are mainly interpretations of interests, which are shaped by ideas about reality. In other words, 'identities, interests and behavior of political agents are socially constructed by collective meaning, interpretations and assumptions about the world.'¹⁷⁵ This means that states can be socialized, and even though policies may initially be pursued for more pragmatic reasons, they may later be continued on the basis of internalized values.¹⁷⁶ The fact nonetheless remains that the Netherlands' policies as pursued *at a given moment* can sometimes still be seen as based predominantly on pragmatic or principled considerations.

1.6 PARLIAMENT AND NONGOVERNMENTAL ACTORS

International human rights instruments are very important to the work of many NGOs that are active in this field. Their calls on governments to improve their human rights records carry more weight, if they are based on norms that these governments have agreed to, while monitoring procedures often offer them possibilities to spread information about violations and to increase pressure on the governments concerned.¹⁷⁷ It would thus be fair to say that human rights NGOs have a lot to gain from international human rights systems, and one might expect them to be very interested in further developing them. Several authors maintain that NGOs have indeed contributed to the creation of new international human rights instruments. Throughout the literature,

¹⁷⁴ Kennedy, 1995, p. 53-54 and 81.

¹⁷⁵ Adler, 1997, p. 324. See also: Adler, 1997, p. 322; Ruggie, 1998, p. 879; Viotti and Kaupi, 1999, p. 217.

¹⁷⁶ In a model developed to study the socialization of international human rights norms into domestic practices, the phase of tactical concessions is in fact described as a crucial part of the socialization process. See: Risse, Ropp and Sikkink, 1999.

¹⁷⁷ Cook, 1996; Martens, 2004; Keck and Sikkink, 1998, p. 24-25; Van den Berg, 2000, p. 47 and 381-382. See also interview with M.T. Kamminga, 24 May 2005.

many examples can be found. Major human rights NGOs like Amnesty International or the International Commission of Jurists (ICJ) are, for example, said to have had a great influence on the establishment of the post of a UN High Commissioner for Human Rights, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the UN Declaration on the Protection of all Persons from Enforced Disappearance of 1992, and the construction of the International Criminal Court (ICC).¹⁷⁸ As it is in the end the states that negotiate and decide on new international human rights instruments, NGOs will need to convince them to be able to exert any influence. It can thus be assumed that NGOs also tried to persuade the Netherlands to support their position, but did they also actually influence its policies?

From available literature on the Netherlands' human rights policies towards other countries, a mixed picture emerges with respect to NGO influence. In her study on the influence of domestic NGOs on Dutch human rights policy, political scientist Esther van den Berg has come to the conclusion that NGOs were definitely able to exert an influence, but she recognizes that this may not hold true for each and every human rights situation.¹⁷⁹ Indeed, the impact by NGOs differed from case to case. Whereas the Chile-movement was quite successful in influencing the Netherlands' policies, neither NGOs nor parliament had much of an impact on the Dutch attitude towards Argentina.¹⁸⁰ In his study on the policies of the Netherlands towards Eastern Europe and Yugoslavia, Dutch historian Floribert Baudet has drawn the conclusion that NGO actions had hardly any direct influence, but he presumes that their indirect influence through parliament may have been more substantial.¹⁸¹ Another historian, Stefan de Boer, has come to similar conclusions in regard to the Netherlands' policies towards South Africa. A great deal of NGO-activity was undertaken against Apartheid. Their direct influence was not great, but they did succeed in mobilizing public opinion and left-wing parliamentarians. On several occasions, this domestic anti-Apartheid atmosphere led to greater attention for human rights in the government's policy towards South Africa.¹⁸² Monique Castermans-Holleman has, however, reached totally different conclusions. According to her, NGOs usually approached the Ministry directly to influence its policies in the UN, while parliament was, on the contrary, not a very relevant actor.¹⁸³

178 See: Martens, 2004, p. 1062, 1063 and 1065; Cook, 1996, p. 189-197; Tolley, 1989, p. 563 and 582; Deitelhoff, 2004.

179 In her study, the existence of a large quantity of NGO action was one of the main criteria for the selection of her case studies, which were in principle aimed at an investigation into the conditions for influence rather than into the question of whether NGOs can have an influence. As a consequence, they may not be representative in regard to the latter question. Van den Berg, 2000, p. 365-366.

180 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 228-229. See also: Groenendijk, 1984, p. 145-160.

181 Baudet, 2001a, p. 268-269.

182 De Boer, 1999, p. 371-385. For similar conclusions, see also: Everts, 1985, p. 328 and 331.

183 Castermans-Holleman, 1992, p. 262.

It is remarkable to note that almost all of the existing studies on the Dutch human rights policies categorize the influence of nongovernmental actors as 'domestic' or 'internal' factors.¹⁸⁴ It has even been maintained that '[t]he Netherlands policy towards South Africa seems to have been almost more a matter of Dutch domestic than of foreign policy.'¹⁸⁵ Insofar as political parties in parliament used international issues for domestic party political purposes, this is an adequate analysis of the situation. One may, however, question whether nongovernmental and parliamentary involvement in foreign policies can always be fully understood as a reflection of this 'domestication' of foreign policy issues, which has been said to have occurred since the 1960s.¹⁸⁶ In a critical article, Ine Megens has pointed out that Dutch studies dealing with the peace movement and public protests against the nuclear arms race have generally approached the topic from a domestic perspective, while international or transnational aspects have largely been ignored. According to her, this is a misrepresentation of what the peace movement actually was or is, because the Dutch organisations were part of what was in fact a very international movement.¹⁸⁷ Possibly, the same can be said of human rights organisations.

Indeed, in her study on the international struggle against apartheid, political scientist Audie Klotz consciously distances herself from the tendency to isolate domestic political processes from international or transnational influences.¹⁸⁸ Consequently, the anti-apartheid movement is basically seen as a global movement.¹⁸⁹ In regard to Chile, American political scientist Darren Hawkins also speaks of a transnational network in which domestic and international organisations cooperated to try and stop human rights abuses.¹⁹⁰ Political scientists Margaret Keck and Kathryn Sikkink first launched the term 'transnational advocacy network'.¹⁹¹ In their definition of the concept, such a network 'includes those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse and dense exchanges of information and services.'¹⁹² According to Keck and Sikkink, and also others who take a constructivist approach to international relations, transnational advocacy networks can be identified as principal socializing forces in international relations. As carriers of certain causal beliefs and ideas, they play important roles in

184 See: De Boer, 1999, p. 46-58; Malcontent, 1998, p. 14; Baudet, 2001a, p. 31; Baehr, Castermans-Holleman and Grünfeld, 2002, p. 228; Van den Berg, 2000, p. 2, 4-12 and 388. See also: Everts, 1985, p. 7.

185 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 212.

186 Van Staden, 1985, p. 46. See also: De Boer, 1999, p. 50-51; Baudet, 2001a, p. 31; Malcontent and Baudet, 2003, p. 84.

187 Megens, 2004.

188 Klotz, 1995, p. 26.

189 *Ibidem*, p. 6.

190 Hawkins, 2002.

191 Keck and Sikkink, 1998.

192 *Ibidem*, p. 2. For further definitions, see also Khagram, Riker and Sikkink, 2002, p. 7-8.

the reshaping and redefinition of states' interests, which may result in the emergence of international human rights instruments.¹⁹³

The exact composition of a network may vary from case to case, but international as well as domestic NGOs are usually considered to play the most prominent roles within transnational advocacy networks.¹⁹⁴ Nonetheless, the networks may also include parliamentarians, parts of the executive branch of government or parts of intergovernmental organisations.¹⁹⁵ Apart from the question of whether NGOs have been able to influence the Netherlands' position in international negotiations on new human rights instruments, and the question whether it is a correct representation of reality to consider these NGOs domestic forces, one may thus even pose the question of whether the Dutch policy-makers participated or could be convinced to participate in transnational advocacy networks that tried to gain support for new norms or supervisory procedures.

1.7 BUREAUCRATIC INSTITUTIONS

Whereas Dutch historians seem to have had a bit of a blind spot about the possibility of domestic organisations being part of a broader transnational movement, in constructivist studies that emphasize this point insufficient attention is often paid to what happens within a state. Most of the time they treat the domestic setting as a black box, and they do not really answer the question how national preferences or interpretations of the national interest come into being.¹⁹⁶ However, international negotiations are typically 'two-level games', in which the domestic and the international interact.¹⁹⁷

Some theorists belonging to the so-called liberal approach to international relations even maintain that key determinants of foreign policy and international relations are to be found at the domestic level. In this approach, individuals and private groups are the fundamental actors; states are seen as representations of some subset of domestic society.¹⁹⁸ This does not necessarily mean that the transnational social context is irrelevant; on the contrary, domestic preferences may well be influenced by transnational cultural discourse.¹⁹⁹ What it does mean is that the actual influence of transnational coalitions and ideas is, according to this view, in the end highly dependent on

193 Ruggie, 1998, p. 868 and 876; Adler, 2003, p. 102; Schmitz and Sikkink, 2003, p. 523, 525, 529 and 532; Sikkink, 1993, p. 140; Keck and Sikkink, 1998, p. 17-18, 120 and 199; Moravcsik, 2000, p. 223. Studies that elaborate this idea in relation to the development of international human rights instruments are, for instance: Clark, 2001; Deitelhoff, 2004; Stoeva, 2004.

194 Keck and Sikkink, 1998, p. 6 and 9; Khagram, Riker and Sikkink, 2002, p. 9.

195 Keck and Sikkink, 1998, p. 9 and 80.

196 Adler, 2003, p. 110. One of the exceptions is a study dealing with the domestic impact of international human rights norms. See: Risse, Ropp and Sikkink, 1999. This study takes the existence of these norms as a starting point, and thus does not deal with the development of these norms.

197 See: Putnam, 1988; Evans, Jacobson and Putnam, 1993.

198 See: Moravcsik, 1997, p. 516-520; Schmitz and Sikkink, 2003, p. 521.

199 Moravcsik, 1997, p. 522-523.

the domestic structure of a state.²⁰⁰ In this vision, international human rights instruments result from domestic struggle in which governments, branches of government or other domestic groups seek to secure certain domestic policy outcomes by means of international human rights instruments. By binding their state to certain commitments, they try to lock in their policy preferences also for the future.²⁰¹ According to political scientist Andrew Moravcsik, this is why it was, in particular, newly established democracies trying to find ways to meet potential anti-democratic threats that pushed for a binding and effectively supervised ECHR.²⁰²

On the whole, human rights are not a very controversial issue in the Netherlands and the idea that these rights should be protected is generally favoured.²⁰³ Nonetheless, there can of course be domestic struggles over particular issues and policy questions. As was mentioned in the above, NGOs may disagree with the government if they feel the latter does not sufficiently take into account human rights values, or there may be questions in parliament, but there may also be differences of opinion among the policymakers themselves.²⁰⁴ Referring to the Netherlands' historical name of the Republic of the Seven United Provinces, insiders sometimes refer to the Netherlands as the 'Kingdom of the Thirteen Divided Ministries', to indicate the high level of compartmentalization of policy decision-making.²⁰⁵ Due to the growing interdependence of states, an increasing amount of policy areas that were previously confined to the domestic scene now have international dimensions too. Hence, foreign policy is no longer the exclusive domain of the Ministry of Foreign Affairs, but also involves many other ministries, which often have their own international departments.²⁰⁶ As each ministry is likely to interpret a situation from its own perspective, their participation in foreign policy making can influence the direction of that policy.

According to the literature, these institutional factors have also played a role in the policies of the Netherlands towards human rights violating countries. The ministries involved did not always advocate the same approach. A discussion that took place in the period between 1965 to 1967 over the question of whether the sale of submarines to South Africa should be allowed, illustrates this. The Ministry of Economic Affairs and the Ministry of Defence were in favour, but the Ministry of Foreign Affairs, whose views would eventually prevail, answered the question in the negative.²⁰⁷ Similar examples can be found in relation to the Netherlands' policies towards China. For the Ministry of Economic Affairs, trade and industry prevailed over human rights questions, and in a newspaper-interview of 1999, the State Secretary of Foreign Trade

200 See: Risse-Kappen, 1994, p. 208-212.

201 Goldstein, Kahler, Keohane and Slaughter, 2000, p. 392-393; Smith, 2004, p. 10-12; Schmitz and Sikkink, 2003, p. 522; Abbott and Snidal, 2000, p. 426 and 430.

202 Moravcsik, 2000.

203 Baehr, 2000, p. 57-61.

204 For a classical study, see: Allison, 1969.

205 Rosenthal, 1993, p. 236 and 257-258.

206 Hellema, 2001, p. 396-397; Van Staden, 1984, p. 79-80.

207 De Boer, 1999, p. 174-175.

revealed that he felt the human rights discussion was the exclusive responsibility of the Minister of Foreign Affairs.²⁰⁸ In the overview-book by Baehr, Castermans-Holleman and Grünfeld, it is concluded that the Ministry of Foreign Affairs can, on the whole, be considered as more inclined to take into account human rights than the line ministries.²⁰⁹ It is added, however, that this is generally true for certain parts of that Ministry in particular.²¹⁰

It is indeed important to realize that within the Ministry of Foreign Affairs, different divisions may have other priorities and views as well. Until 1995, the organisation of the Ministry was based on a division in three sectors: Political Affairs, European Cooperation and International Cooperation. Different authors have maintained that the sector that was led by the Director-General Political Affairs was much more focused on traditional foreign policy issues, e.g. security or good diplomatic relations, than the Directorate-General International Cooperation, which tended to give greater priority to humanitarian issues.²¹¹ During the Cold War, attitudes towards communist countries also differed. An example that illustrates this is the discussion that preceded the Netherlands' decision of 1974 to give Cuba a special status in its development policies. The Directorate-General International Cooperation sector was in favour of allocating aid to Cuba, while the Political Affairs sector did not think that communist Cuba should be granted the status of a partner country.²¹² After a reorganisation in 1995, the existing structure was abolished and officials charged with political relations and those responsible for development policy were put together in regional divisions. In addition, a number of thematic divisions were created.²¹³ Yet, it is not clear whether this new structure has resolved the coordination-problems.²¹⁴

Finally, the influence of the individual persons involved in decision-making should be noted. The political leanings and personal commitment of a Minister can sometimes make a difference.²¹⁵ To give an example, the personal feelings of sympathy of Prime Minister, Joop den Uyl and his Minister for Development Cooperation, Jan Pronk, towards the Allende-government in Chile contributed to the Netherlands' strong

208 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 166. See also: Castermans-Holleman and Baehr, 2002, p. 202.

209 Line ministries are ministries that are responsible for particular fields of policy that often require technical knowledge. Examples are the Ministry of Economic Affairs, the Ministry of Defence, the Ministry of Justice or the Ministry of Employment and Social Affairs. They are considered as distinct from, for instance, the Ministry of General Affairs or the Ministry of Foreign Affairs, which have to deal with questions of a more general political character.

210 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 230-232.

211 Van Staden, 1984, p. 84-87; Castermans-Holleman, 1992, p. 61-62 and 263.

212 Malcontent, 1998, p. 186-189. For another example that relates to the relations with Vietnam, see: Malcontent, 1998, p. 211.

213 For an overview of the organisation of the Ministry of Foreign Affairs in different periods, see: Annex 1.

214 Hellema, 2001, p. 358-359. See also: Appendices to the reports of the Second Chamber, 1994-1995, 24 337, no. 2.

215 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 230.

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reaction to the military junta that replaced the Allende-government after the coup of 1973.²¹⁶ On the other hand, it should be noted that sudden policy changes are not likely to be created by a new Minister entering office in the Netherlands, because government officials are not politically appointed.²¹⁷ Furthermore, one should be aware that a Minister cannot be personally involved in all foreign policy decision-making.²¹⁸ If a topic is considered relatively unimportant, the minister is likely to leave the matter to his civil servants, which can give them considerable influence. This can be exemplified by the Dutch human rights policies in the United Nations of the 1960s. Joseph Luns, who served as the Minister of Foreign Affairs at the time, did not concern himself with these policies, and left his officials with the opportunity to determine the course. It is for that reason that the Dutch initiative to add an individual complaints mechanism to the ICCPR can be ascribed to the role of one civil servant in particular: the well-known human rights specialist, Theo van Boven.²¹⁹

Institutional factors, like the ones mentioned above, may have played a role in the Netherlands' policies towards new international human rights instruments. Before as well as after the 1995 reorganisation of the Ministry of Foreign Affairs, the Netherlands position towards initiatives taken in the context of international organisations has been prepared in different sectors.²²⁰ And what about the involvement of other ministries? The Ministry of Foreign Affairs is charged with human rights policies insofar as they relate to the international context, but their domestic implementation is the responsibility of other ministries.²²¹ Hence, international human rights law also has repercussions for their work, especially since there has been an increase in the amount of topics covered by the human rights concept, and it seems logical that they want to have something to say about the Netherlands' position towards these instruments as well. A question that then follows, is how different parts of government bureaucracy have influenced the contents of the Netherlands' policies, and their consistency. In relation to the latter, Duco Hellema, a Dutch professor in the history of international relations, has maintained that the Ministry of Foreign Affairs can generally be said to perform its coordinating duties as it should²²², but others have questioned whether it has, or can even be expected to, make sure there is a clear direction in the foreign policy of the Netherlands.²²³

216 Malcontent, 1998, p. 177.

217 Castermans-Holleman, 1992, p. 60.

218 Rosenthal, 1993, p. 242.

219 Castermans-Holleman, 1992, p. 262-263.

220 See: Annex 1.

221 See: Appendices to the reports of the Second Chamber, 1983-1984, 18 100, chapter V, no. 2, p. 59.

222 Hellema, 2001, p. 397.

223 Van Staden, 1984, p. 84. On this issue, see also: Appendices to the reports of the Second Chamber, 2005-2006, 29362, no. 64.

1.8 SELECTIONS, METHODS AND SOURCES

1.8.1 Summary of the research questions

In the above, the topic of this research – the Netherlands’ policies towards the development of new international human rights instruments – has been put into context. Questions that might contribute to an understanding of that policy, which is this study’s main aim, have been raised in different places in the text. In this section, the main research questions are listed.

Basically, there are two general questions that need to be answered: what were the Netherlands’ policies, and what were the factors that determined these policies? The following research questions can be linked to them, and will be answered in this study:

1. What position did the Netherlands take in negotiations on international human rights instruments, and how did the Netherlands apply in practice the general guidelines that were laid down in formal foreign policy papers?
2. Did the Netherlands actually perform the role of a ‘guiding’ human rights country in these negotiations, as some would seem to presume, or did it rather follow generally prevailing preferences or international trends?
3. What role, if any, did policy interests other than the aim to promote human rights play in the determination of the Dutch position in negotiations on international human rights instruments?
4. What influence, if any, did parliament, NGOs or transnational human rights networks exert on the Dutch position in negotiations on international human rights instruments?
5. What effect, if any, did the involvement of different bureaucratic institutions have on the Dutch position in such negotiations?

1.8.2 The period and organisations dealt with

The abundance of international human rights instruments necessitates making some selections. These selections first of all concern the period to be dealt with. As was indicated in section 1.3.2, there is general consensus that one can only speak of an established human rights policy in the Netherlands from the mid-1970s. It is important to note that it is also from that period on that international human rights law started to become more consequential for the Netherlands. The Netherlands had already ratified the European Convention on Human Rights and Fundamental Freedoms in 1954, but the government then assumed that domestic law was fully in compliance with this

Convention, and that its consequences would thus be negligible.²²⁴ Indeed, it was not before the second half of the 1970s that the European Court of European Rights found a violation on the part of the Netherlands, and it was only from 1980 onwards that Dutch courts started to take the Convention seriously.²²⁵ At that time, the Netherlands had only just, namely in 1978, ratified the UN Covenants, and the greater majority of the human rights treaties to which the Netherlands is bound today did not enter into force for the Netherlands before that year, either.²²⁶ Naturally, human rights commitment made in the context of the CSCE also date only from 1975.

Apart from the fact that the importance and consequences of the development of international human rights systems became more apparent in these years, it should also be noted that policy principles in regard to their further development were also clearly defined and laid down only with the publication of the 1979 memorandum on human rights and foreign policy. Therefore, the emphasis in this study is on the period running from the late 1970s, and the main case studies are indeed chosen from that period. This demarcation has, however, not been taken so strictly as to exclude any descriptions of earlier events and developments from the study, especially if they are useful for a proper understanding of the backgrounds of the Netherlands' policies or historic developments in the human rights issue areas that are discussed. As the policy papers do not indicate any major policy changes in regard to the issue under consideration in this study, there is no logical final point to demarcate the research other than today. Yet, in order to be able to finalize the research, possible developments that may take place after August 2006, could not be taken into account.

As to the international organisations concerned, human rights instruments that have been developed within the context of the European Union, have been excluded. For this, there are two important reasons. First of all, the EU's human rights system is still not very developed insofar as internal human rights obligations – hence obligations that bind the member states rather than third countries only – are concerned, and it was even less so at the time when this research was started and when the case studies were selected. In the second place, it should be noted that some of the main human rights provisions are included in major treaties, like the Maastricht and Amsterdam treaty. The coming into being of these particular provisions cannot be separated from negotiations on other parts of the treaty-texts, and a study of their backgrounds would thus entail an examination of the drafting of basic EU law. Interesting as this might be, this huge operation might best be carried out in the context of a separate study.

It goes without saying that the human rights systems of regional organisations in Africa and the Americas, to which the Netherlands is not bound, are excluded from this research as well. The organisations that remain are the United Nations (UN), the Council of Europe and the Conference on Security and Cooperation in Europe (CSCE), or the Organisation for Security and Co-operation in Europe (OSCE) as it was later

224 Klerk and Van Poelgeest, 1991, p. 220; Alkema, 1994, p. 3.

225 See: Alkema, 1994, p. 4-6.

226 See: <http://sim.law.uu.nl/SIM/Library/RATIF.nsf/Country?OpenView>, accessed 18 September 2006.

called.²²⁷ Organisational charts of these organisations are included in a number of annexes at the end of this book.²²⁸ Insofar as it is relevant for the context and an overall picture of the Netherlands' policies, some attention will also be devoted to the ILO, but the emphasis will be on the three organisations listed above. Formal policy documents demonstrate that the Dutch government also considers these organisations the most relevant human rights forums.²²⁹

1.8.3 Selection of themes and cases

Even if one concentrates one's attention on the period from the late 1970s onwards and on the human rights instruments of a limited number of international organisations only, the number of cases in relation to which the Netherlands' policies might be studied is still too large to deal with in one study. Therefore, four themes have been selected for further elaboration. In this regard, the basic consideration has been that this study's aim is to provide for a general understanding of Dutch policies in the field of human rights standard setting and the development of international supervisory mechanisms. Hence, diverse issue areas are to be covered in this study and norms as well as supervisory mechanisms are to be dealt with. In addition to these criteria, the selected themes should provide an opportunity to further investigate and test the policy dilemmas and principles as discussed in sections 1.4.2 and 1.4.3.

A combination of issues that includes the themes of torture, social and economic rights, children's rights and minority rights meets these criteria. Different categories of rights are covered, and the coming into being of new supervisory mechanisms can be studied in each of these issue areas. Different proliferation-contexts are furthermore taken into account in the sense that the norms relating to the question of torture represent an example where existing norms were further elaborated, while the creation of children's rights and minority rights were clearly stimulated by a desire to give greater protection to particular vulnerable groups. The development of children's rights in particular also comprised the creation of new rights, and inclusion in the human rights debate of issue areas that had formerly not been treated as such. In regard to the

227 In December 1994, it was decided that the name of the Conference on Security and Cooperation in Europe (CSCE) would be changed into Organisation for Security and Co-operation in Europe (OSCE). This decision reflected the growing institutionalisation that the CSCE had gone through in the early 1990s. Since the CSCE lacks a founding treaty – the Helsinki document was a political declaration of government leaders – it is not a legal body, and even though the forum's name has been changed, strictly speaking, it is therefore incorrect to speak of an international organisation. See, for example: Bloed, 1993a, p. 11; Brett, 1996, p. 671-672; Bakker and Bomert, 2002, p. 14-16. This study nonetheless refers to the CSCE and OSCE as international organisations mainly for reasons of readability.

228 See: Annex 2, 3, and 4.

229 See, for instance: Appendices to the reports of the Second Chamber, 1988-1989, 20 800, chapter V, no. 2, p. 56; Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 2, p. 58; Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 9-18; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 8; Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1999, p. 107-153.

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issue of minority rights, it should furthermore be added that this topic involves a number of specific human rights problems, such as the question of whether collectivities can have human rights and the question of the relation between human rights and security, which make it particularly worthwhile to study.

For each theme, a number of smaller case studies and one detailed, in-depth case study are presented. In selecting the comprehensive case studies, account was taken of the aim to concentrate on the period running from the late 1970s. On the other hand, it was clear that these case studies should not be of a too recent date, because the ministries would then not be in a position to allow for examination of their records. The availability of sufficient and interesting material was also determining in other ways. The option to further investigate the Dutch attitude towards the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was, for instance, soon set aside, because of a lack of detailed information.

The comprehensive case study that was eventually chosen for further investigation of the Netherlands' policies towards the issue of torture, is the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. A first reason to select this case is that the Netherlands has often been attributed a special role in regard to this treaty, but apart from that, the fact that fundamentally different methods were discussed to make the struggle against torture more effective in these particular negotiations makes it a very interesting case to study. The Protocol Amending the European Social Charter and the Additional Protocol to the European Social Charter providing for a System of Collective Complaints were the most obvious cases to study in relation to the issue of social and economic rights. The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights could, in principle, have been another option, but as this instrument is still under consideration, the moment is not opportune for studying this case.

One could argue that the above Protocols merely deal with supervisory systems, and not with the standards as such, and that these case studies do thus not provide for an opportunity to go into the Netherlands' attitude towards the rights themselves. This has been taken into account in the selection of the children's rights case study. Various economic and social rights norms are also laid down in the UN Convention on the Rights of the Child, and often provoked considerable discussion in the Working Group that elaborated this Convention. This is one reason why this case was selected for further study. Another reason is the fact that dilemmas and doubts as to the question of whether a proliferation of human rights instruments is desirable has constantly played a role in the debates on this Convention in particular. Finally, the Cold War context in which this instrument was being negotiated, makes it noteworthy to study.

The relationship between human rights and security interests can be investigated from a very different angle when it comes to minority rights. The dilemmas following from attempts to integrate these interests become particularly clear in the negotiations concerning the establishment of a CSCE, or later OSCE, High Commissioner on National Minorities. Here, human rights and security questions became so closely intertwined that one might wonder whether this post can be considered a human rights

instrument at all. Formally speaking, the High Commissioner on National Minorities is indeed labelled a conflict prevention instrument. In practice, the High Commissioner's work does, however, contain many human rights aspects, and in spite of the fact that the post does not technically fall within the OSCE's human dimension, it has in practice often been seen as a human rights instrument.²³⁰ Academic overviews on human rights within the OSCE usually include information on the High Commissioner on National Minorities, and even in OSCE documents, it is now often categorized under the human dimension.²³¹ The Dutch policy papers on human rights and foreign policy also pay attention to the post of the High Commissioner, which proves that the Dutch government also recognizes its strong human rights component.²³² These considerations justify the selection of this case, which is all the more interesting because of the predominant role the Netherlands played in the negotiations.²³³

1.8.4 Further limitations

The above selections demarcate the substance of this study. In principle, they should however, provide for a general insight into the Netherlands' policies in regard to the development of new international human rights instruments. Even though certain topics, like freedom of religion, the rights of indigenous peoples or capital punishment, are not dealt with; after reading this study, one should at least have an idea of what considerations may have been at the basis of the Netherlands' policies in relation to these human rights questions, and what factors may have influenced the Dutch position. There are, however, also a number of limitations to this study that may need further explanation.

First of all, it must be emphasized that this study will not go into the actual influence of international human rights instruments on state behaviour. Whenever the term effectiveness is used, this only refers to the instruments' formal characteristics and not to their actual impact or contributions to improvements in human rights situations.²³⁴ Consequently, such questions as to whether there is an over-reliance on rights to overcome injustices, or whether the proliferation of international human rights

230 See, for example: Letschert, 2002, p. 331; Wright, 1996, p. 205; Brett and Eddison, 1993, p. 39-40.

231 See, for example: Brett, 1996, p. 669 and 689-692; Baehr, 2001, p. 77-78; Forsythe, 2000, p. 126. The close interlinkage with human rights also becomes clear in the mandate itself, where institutional connections with the central institution for the human dimension, the Office for Democratic Institutions and Human Rights (ODIHR) are created, while a link with the Conflict Prevention Centre is, on the other hand, not explicitly foreseen. See: CSCE Helsinki Document 1992: The Challenges of Change, Chapter II, paragraphs 10, 35, and 37. See also: Zaagman, 1994a, p. 142 and 153.

232 See: Appendices to the reports of the Second Chamber, 1996-1997, 25 300, no. 1, p. 15-16; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 25 and 33.

233 Apart from the above considerations, it should also be taken into account that it was a policy decision to label the High Commissioner as a security instrument, and that it was only in the course of the negotiations that the emphasis on the security element in the High Commissioner's mandate got shape. See chapter 9.

234 On this issue, see also section 1.4.3.

instruments should be applauded or regretted, cannot be answered either. This study may provide for some clues that might help to find an answer to these questions, but only insofar as they relate to what may be called the ‘input-side’ of international human rights instruments. As the ‘output-side’ of the story is completely left out of consideration in this study, it is clear that no scientifically sound answer can be given to the above questions.

A second limitation of this study is that it can only partially take into account the EU-factor in the Netherlands’ decision-making process. It has been agreed among the member states of the European Union (EU) that documents relating to EU policies remain classified for a period of thirty years. On the basis of other archival materials, public documents and interviews, it is sometimes possible to draw some general conclusions concerning the relevance of the EU-factor, but an insight into the details of the deliberations among EU member states is not easily gained. Whenever conclusions are drawn about the influence of other EU member states, this comment should be taken into account, and it should be realized that they may need revision once primary sources concerning possible attempts to arrive at a common EU position in regard to the negotiations on a given international human rights instrument become available.

1.8.5 Methods and sources

As political scientist Michael Freeman once observed: ‘Human rights is an interdisciplinary concept par excellence.’²³⁵ To some extent, this study attempts to integrate insights and debates from different scholarly disciplines. It is obvious from the topic of this research that international legal debates are highly relevant for this study. Without any knowledge of international law, it would be impossible to understand the negotiations on international human rights instruments and the position of the Netherlands in these talks. It must, however, be emphasized that legal aspects are taken into account only in so far as this is necessary for understanding the Netherlands’ policies. Hence, legal details that may be interesting from a lawyer’s perspective will not always be elaborated upon, and complete *travaux préparatoires* should not be expected.

In this introduction, a link has sometimes been made to the work of a number of theorists of international relations. This study’s aim is not to test and defend any particular theoretic approach, and it should primarily be seen to fit in with research on the Netherlands’ foreign policy in general and a series of studies on the Netherlands’ human rights policies in particular. One reason why more general theoretical literature has nonetheless been included is that theorists of international relations have written more about the development of international human rights standards and procedures than historians. Hence, their work provides clues and insights that would otherwise have been much more difficult to obtain. Apart from this pragmatic consideration, a genuine belief that researchers from different disciplines can learn from each other has

235 Freeman, 2002, p. 12.

inspired me to try and bring together scholarly debates that have not been connected before, and to build bridges between empirical research, based on an examination of government records, and theoretical work on the emergence and effects of international human rights law.²³⁶

A diversity of sources has been used to carry out this study. Information has partly been gathered from public sources, e.g. academic books and articles, reports of parliamentary sessions, government reports and official documents of international organisations. Even though valuable information could often be derived from these sources, the in-depth case studies are first of all based on research in the archives of the Ministry of Foreign Affairs, the Ministry of Justice and the Ministry of Social Affairs and Employment, the ministries that were most closely involved in the negotiations on the instruments considered in these chapters.²³⁷ The documents they contain are primary sources of information that give a more complete and more reliable picture than formal policy statements, which may be formulated so as to meet the wishes or expectations of the public.²³⁸ In principle, records of NGOs engaged in the process of international human rights law making have not been examined.²³⁹ It is true that this might have provided additional information, but on the other hand, NGO efforts to influence policies can usually be traced from public sources, while their actual influence is most likely to be demonstrated by material from the government records. Considering this, the additional value of research in the records of NGOs was likely to be limited.

For reasons of time, it was also not possible to carry out extensive primary source research for the smaller case studies included in the introductory chapters to each theme.²⁴⁰ In principle, this part of the study is based on public sources, but relevant

236 On the advantages of close cooperation among different disciplines, see also: Hellema, 1998; Van den Berg, 2000, p. 2; Kuitenbrouwer, 2003.

237 In the footnotes, these archives will be referred to as 'Archive MFA', 'Archive MJ', and 'Archive MSAE' respectively.

238 A plea in favour of primary-source research has also been made by others. See, for instance: Moravcsik, 2000, p. 248; Hellema, 2001, p. 399.

239 An exception was made only once. The government records included references to a letter from the Dutch branch of Defence for Children International to the Minister of Foreign Affairs, but the letter itself could not be found in these records. This was the reason why it was decided to also conduct some research in the records of the Dutch DCI-branch.

240 It should be realized that research of the records is a time-consuming business. Apart from the fact that it usually involves going through an extensive number of documents, finding the right files can already be quite a challenge. In a newspaper-article of 2003, a number of problems relating to the filing practices at the Ministry of Foreign Affairs were summed up, and as I experienced, similar difficulties can be encountered in other ministries. (See: Han Koch, 'Een organisatie zonder geheugen' [An organisation without a memory] – In: *Trouw*, Amsterdam, 26 July 2003.) An aspect that made it particularly difficult to find the right files for the topic under discussion in this book, was the fact that documents relating to the negotiations on a new international human rights instrument were not always immediately filed under the name of that particular instrument, but, for instance, only once the negotiations had been running for a number of years, or once the instrument had been adopted. In some instances, the documents needed for my research even had to be taken from parts of the archives that were still waiting to be systematically filed.

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information from the records that I came across during my research for the four main case studies, or material that was collected during the selection-phase, have of course been included. Even though the depth of these studies is not completely comparable to the major case studies, these sources provided sufficient information to put the latter into context, and to compare the Dutch stand in different negotiation processes.

Throughout the study, I have also made use of information gained through interviews. A problem with oral sources is their reliability; people do not always remember things correctly, or they may have reasons to give a twist to what actually happened. These are shortcomings a researcher always has to take into account, for instance by using this information only as an additional source, and comparing it with information from written sources or other interviews.²⁴¹ If used in a responsible way, interviews can, however, be a valuable additional source of information. A better insight into the personal motives and the networks of persons involved in policy-making can be gained through interviews.²⁴² Furthermore, information about corridor chats and the informal part of a negotiation process can also not easily be obtained from archival materials. Atmospheric descriptions and anecdotes, which people can often recall more easily than detailed facts, can provide the researcher with useful information to fill that gap.²⁴³

1.8.6 Outline of the study

The chapters that follow all concentrate on the Netherlands' policies as carried out in actual practice. Two chapters are devoted to each of the selected issue areas. Each time, the first chapter contains a general introduction into the theme, and a number of smaller case studies, while the second chapter contains an in-depth case study in which the Netherlands' policies are more thoroughly investigated. The theme that will first be dealt with in chapter 2 and 3 is the fight against torture. Chapter 4 and 5 are devoted to the issue of economic and social rights, chapter 6 and 7 cover the Netherlands' policies towards the rights of the child, and finally, chapter 8 and 9 deal with minority rights. In the last chapter, conclusions that were drawn from the case studies, are summed up, compared and elaborated into general conclusions about the Netherlands' policies in regard to the development of international human rights instruments.

241 On this issue, see also: Baudet, 2001a, p. 38-40; Van den Berg, 2000, p. 34-35.

242 See also: Kuitenbrouwer, 1999, p. 254.

243 See also: Baudet: 2001a, p. 39-40.

CHAPTER 2

THE NETHERLANDS AND THE FIGHT AGAINST TORTURE

In the introduction of this book, it was portrayed how an increasing amount of international human rights instruments have started to see the light since the end of the Second World War. A relatively large portion of these instruments deals with the issue of torture and other cruel, inhuman or degrading treatment or punishment. In the UN alone, a Declaration, a Convention and an Optional Protocol to that Convention have been developed to combat these practices. Furthermore, a Special Rapporteur on Torture has been in place since 1985, there is a Voluntary Fund for Victims of Torture, and in addition there are a great number of codes, guidelines and minimum rules that are closely related to the issue of torture and other cruel, inhuman or degrading treatment or punishment.¹ In 1987, a European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was adopted within the framework of the Council of Europe, to which two Protocols were added in 1993.

In this chapter, the Netherlands' views on the subject of torture, as well as the policies that have come about as a result of these views with respect to the creation of new instruments in this field, are investigated. After the presentation of some historical background concerning the use and abolition of torture in the first section of this chapter, section 2.2 investigates what the Dutch policy papers on human rights and foreign policy and other formal policy documents say about the international fight against torture. This is followed by a number of sections that give a description of the position of the Netherlands in the negotiations on a number of norms and mechanisms that have come into being within the UN and the Council of Europe. Because there has not been much standard setting on the issue of torture specifically in the context of the OSCE and its predecessor, the CSCE, this organisation is not dealt with here.² One of

¹ See, among others: <http://www.ohchr.org/english/law/index.htm>, accessed 8 September 2006.

² Under principle VII of the Helsinki Final Act of 1975, it was stipulated that all participating states were to act in conformity with the Universal Declaration of Human Rights, which implied a prohibition against torture or other cruel, inhuman or degrading treatment or punishment, too. However, whereas the freedom of thought, conscience, religion or belief and the non-discrimination principle were explicitly mentioned in the Helsinki document, there were no explicit references to the issue of torture. (See principle VII of the Final Act of the Conference on Security and Co-operation in Europe in Helsinki in 1975. This document can be found at: <http://www.osce.org/documents/chronological.php>, accessed 8 September 2006.) Apparently, subjects like freedom of religion, trade union rights and freedom of information were also the main fields of interest in the Netherlands CSCE-policy. (See, for example: Appendices to the reports of the Second Chamber, 1983-1984, 18 100, chapter V, no. 2, p. 63; Appendices to the reports of the Second Chamber, 1988-1989, 20 800, chapter V, no. 2, p. 14; Appendices to the reports of the Second Chamber, 1989-1990, 21 300, chapter V, no. 2, p. 58.) The concluding document of the Vienna Follow Up Meeting of 1989, and those of a number of summits

the key instruments in this area – the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – is not dealt with here either. Building on the conclusions drawn at the end of this chapter, the role of the Netherlands in the drafting of this Convention will be subjected to a more extensive examination in the next chapter.

2.1 THE HISTORY OF TORTURE AND ITS ABOLITION

The phenomena of torture and cruel, inhuman and degrading treatment or punishment can be considered to have existed throughout time. In ancient Greece and Rome, torture was applied as a part of judicial proceedings, primarily to obtain evidence. Initially, Roman law allowed only slaves to be tortured. This already concerned a large part of the population, but over time, free citizens also lost their privilege of not being subjected to torture. The Germanic tribes that invaded the Roman Empire after the fourth century brought with them a variety of indigenous legal systems. They were unfamiliar with the rules of evidence used by the Romans, and this consequently caused a diminishment in the importance of the law's use of torture. This did, however, not mean that their legal systems were particularly humane. Above all, they were self-help systems in which disputes were usually settled by blood feud, retaliation and compensation, and in which the duel and trial by fire or water – as judgments of God – were relied on to obtain evidence.³

As a consequence of a complex combination of societal and political changes, in the course of the twelfth century this early medieval system came to be seen as irrational and primitive. Under the influence of the centralization of authority, criminal prosecution became a government responsibility again, and supernatural methods of proof had to give way to human judicial competence and authority. The system that developed, and that remained in place until the eighteenth century, was based on a hierarchy of proofs. There were only two ways to achieve 'full proof', which was

and meetings after that, did contain commitments in the area of torture. (See: Concluding document of the Vienna Meeting of representatives of the participating states of the Conference on Security and Cooperation in Europe of 1989; Charter of Paris for a New Europe, 1990; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE; Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE. These documents can be found at: <http://www.osce.org/documents/chronological.php>, accessed 8 September 2006.) Yet, apart from a specific prohibition of abuse of psychiatric practices – which the Netherlands welcomed as an important achievement (see: Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 13. See also: Appendices to the reports of the Second Chamber, 1987-1988, 20 200, chapter V, no. 2, p. 56.) – the commitments did not add much to already existing instruments. This can be illustrated by the fact that, in implementation meetings on human dimension issues, the instruments of the UN and the Council of Europe were referred to rather than commitments made within the OSCE. (See, for example: Consolidated summary of the implementation meeting on human dimension issues, Warsaw, 12-28 November 1997, p. 9-11. This document can be found at: <http://www.osce.org/documents/chronological.php>, accessed 8 September 2006.)

³ Peters, 1996, p. 11-44; Ingelse, 2001, p. 24-25.

required for the condemnation and punishment of the accused; namely, by the testimony of two eyewitnesses or by a confession. If there was only one eyewitness, or no more than circumstantial evidence, it became the judge's task to try and obtain a confession. Often, torture was used to this end, and in most states of Europe, it was an ordinary and legal part of judicial proceedings.⁴

Criticism that confessions or statements made under torture are not reliable has always been expressed, but it was not until the eighteenth century that legal and moral arguments against the use of torture found fertile soil. A combination of Enlightenment humanitarianism and technical changes in the nature of legal sanctions and the rules of evidence, which resulted, among other things, in a decreased need for confessions, paved the way for the abolition of torture. In the second half of the eighteenth century and the first quarter of the nineteenth century, provisions for torture were removed from the criminal codes in Europe.⁵ In the Netherlands this was done in 1798.⁶

In practice, torture was never completely eliminated, but it was especially in the totalitarian regimes of the twentieth century that it became routinely employed again. Regimes as, for instance, those of Stalin in the Soviet Union and Hitler in Germany did not primarily use torture as a judicial technique, but mostly to intimidate the population and to remain in power. The Nazis also applied it in their prisons and concentration camps, and when the first international human rights codes were drafted after the end of the Second World War, it was therefore only logical to incorporate a prohibition against torture and cruel, inhuman and degrading treatment or punishment, too.⁷ During the drafting of the Universal Declaration, the ICCPR and the ECHR, the need to incorporate an article on this issue was virtually uncontested.⁸

2.2 THE FIGHT AGAINST TORTURE AS A PRIORITY ISSUE

Among all principled ideals that play a role in international politics, questions relating to bodily harm are said to have been particularly prominent, also in the decades that have followed the adoption of the basic human rights treaties. Keck and Sikkink have maintained that these 'resonate with the ideological traditions in Western liberal countries like the United States and Western Europe' in particular, and also with 'basic ideas of human dignity common to most cultures' in general.⁹ This is especially true

4 Peters, 1996, p. 40-73; Ingelse, 2001, p. 25-28.

5 Peters, 1996, p. 74-102; Ingelse, 2001, p. 28-29.

6 Peters, 1996, p. 90 and 135.

7 Peters, 1996, p. 103-148; Ingelse, 2001, p. 30-31; Burgers and Danelius, 1988, p. 10-11. See also: Morsink, 1999, p. 42-43.

8 Morsink, 1999, p. 42-43; Bossuyt, 1987, p. 147-160; Evans and Morgan, 2001, p. 69-73; Ingelse, 2001, p. 49; Rodley, 1999, p. 18. This is not to say that there was no discussion at all. In the UN, the main point of discussion was whether medical experimentation, as it had been practiced by Nazi Germany, should be singled out and forbidden as a form of torture. See: Morsink, 1999, p. 42-43; Bossuyt, 1987, p. 147-160.

9 Keck and Sikkink, 1998, p. 204-205. See also: Hawkins, 2004, p. 785-786.

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for those issues of bodily harm that can easily be related to deliberate actions of identifiable actors. As a consequence, the problem of torture and disappearances has generally been given more attention than other human rights questions.¹⁰ This seems to indeed be true for the Netherlands, which has always given priority attention to the fight against torture.¹¹

According to the Netherlands, the increasing amount of human rights norms has made it necessary to distinguish between regular human rights and the more essential, or 'fundamental' human rights.¹² None of its human rights and foreign policy memoranda gives a clear-cut description of the distinctive features of the rights of this latter category, but it is clear that the freedom from torture or other cruel, inhuman or degrading treatment has been labelled as a fundamental right.¹³ The emphasis on torture was undeniably visible in some of the policy papers.¹⁴ In any case, it can be concluded that torture has been one of the issues that the Netherlands was particularly focused on in its human rights policies towards other countries. As mentioned in chapter 1 of this book, the government felt that the need to single out certain rights as fundamental is particularly important when one wishes to protest against violations of human rights.¹⁵ Considering that it would be impossible to react to all human rights violations taking place in the world, the government announced that it would concentrate its actions against specific abuses in other countries, 'on cases where there are grave violations of fundamental human rights', such as the systematic use of torture.¹⁶

In interviews, officials of the Ministry of Foreign Affairs have indicated that torture has also received priority attention in the treaty making activities of the Netherlands.¹⁷ Besides, the Netherlands has also considered it very important to assist victims of torture. It was one of the initiators behind the creation of a Voluntary Fund for Victims of Torture, which was created to provide humanitarian assistance to victims of torture and members of their family by a General Assembly resolution in 1981.¹⁸ By 1987, the Netherlands had already contributed more than 850.000 guilders to this Fund, and in the 2001 policy paper, mention was made of a contribution of 1 million guilders a

10 Keck and Sikkink, 1998, p. 26-27.

11 Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 29; Ministerie van Buitenlandse Zaken, 1980b, p. 387.

12 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 25.

13 Ministerie van Buitenlandse Zaken, 1987b, p. 1-6; Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 26.

14 See: Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 22-23; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 16 and 29-30.

15 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 25.

16 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 90. See also: Ministerie van Buitenlandse Zaken, 1987b, p. 1-13.

17 Interview with J.A. Walkate, 21 April 2004; Interview with J.H. Burgers, 26 March 2003.

18 Walkate and Roels, 1984, p. 23-24; Rodley, 1999, p. 166-170; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 29-30. See also: General Assembly resolution 36/151, 16 December 1981.

year.¹⁹ An official of the Dutch Ministry of Foreign Affairs, Jaap Walkate, served as Chairman of the Board of Trustees of the Fund in the period from 1989 to 2003.²⁰ When he had to withdraw because of health reasons, a prominent Dutch human rights specialist, Theo van Boven, was temporarily appointed as a member of the Board until a general revision of its membership in 2005.²¹ From 2001 to 2004, the latter also held the post of Special Rapporteur on Torture of the UN Commission on Human Rights.²² He was the second Dutchman to be appointed to this post; from 1985 to 1993, Peter Kooijmans served as the first Special Rapporteur on Torture.²³ All in all, this means that Dutch nationals have carried out the function of Special Rapporteur on Torture for the greater period of its existence since its creation in 1985.

The Dutch presence has thus been very dominant when it comes to the occupation of international posts that were in one way or another related to the fight against torture. On the basis of that, one may assume that the Netherlands has an exceptionally good reputation in this field of policy. Hence, if there is any human rights area where the Netherlands acted as the model country that it is often said to be, it should be here. Whether the Netherlands indeed showed the kind of commitment that can, then, be expected is investigated in this and the following chapter.

2.3 The UN Declaration on Torture

On 9 December 1975, the General Assembly of the United Nations adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁴ The Declaration gave a detailed definition of torture, and formulated rules and measures contributing to the actual implementation of the ban on torture and cruel, inhuman or degrading treatment or punishment, such as providing adequate training to law enforcement personnel, inclusion of the prohibition of torture in rules of instruction of public officials or others involved in the custody or treatment of persons deprived of their liberty, or ruling out the use of evidence obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment.²⁵

19 Appendices to the reports of the Second Chamber, 1986-1987, 19 700, chapter V, no. 125, p. 7; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 30.

20 Interview with J.A. Walkate, 21 April 2004. See also: Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 12; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 30.

21 In January 2005, Van Boven's membership of the Board was mentioned on the Funds' website. See: <http://www.ohchr.org/english/about/funds/torture/>, accessed 4 January 2005. Further information was obtained from a personal communication with Theo van Boven (on 20 August 2006).

22 See: <http://www.ohchr.org/english/issues/torture/rapporteur/>, accessed 8 September 2006.

23 *Ibidem*.

24 General Assembly resolution 3452 (XXX), 9 December 1975.

25 See the text of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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The initiative to draw up this Declaration was prompted by frustration about the ongoing practice of torture in the world. In spite of the prohibiting provisions in the Universal Declaration and the ICCPR, in autocratic regimes in several parts of the world, torture was still being used on a large scale. It was Amnesty International in particular that first made the statement that there seemed to be a worldwide increase in the practice of torture. In December 1972, this organisation launched an international campaign against torture, which included the publication of a report and the organisation of a conference on the matter.²⁶ This attracted a lot of attention, especially since the conference took place in the months just after the military coup in Chile of September 1973. The general and worldwide outcry over the brutal practices of the Pinochet regime helped to raise public consciousness and to create a political will to act.²⁷

Amnesty's specific aims were to build public awareness and to enhance international legal means to fight torture. As a part of its strategy, it mobilized its own members to contact their governments to ask for their support for action by the UN against torture.²⁸ The Netherlands' support was easily gained. Here, the public as well as the left-wing government of Prime Minister Den Uyl were also filled with indignation over the events in Chile.²⁹ This may have further stimulated the Netherlands, but apparently, even without that the Netherlands was motivated to try to ban torture through UN-action, because its first step in that direction was taken in 1972, before the coup.³⁰ At that time, in reaction to a report on crime prevention and control that was discussed in the Third Committee of the General Assembly, the Dutch delegate pointed to the fact that no attention had been paid to the 'mounting evidence of a steep rise in the practice of torture', which he felt was 'a matter of international concern'.³¹ One year later, in 1973, the Netherlands acted as one of the co-sponsors of the first ever UN resolution devoted solely to the issue of torture, the aim of which was to make the question of torture and other forms of cruel, inhuman or degrading treatment or punishment a separate item in future sessions of the General Assembly.³²

In 1974, the General Assembly passed a follow-up resolution in which proposals were made for further standard setting in relation to the prohibition of torture. It requested the World Health Organisation (WHO) to assist in the drafting of a code of medical ethics for the treatment and protection of prisoners against torture, and directed the Fifth UN Congress on the Prevention of Crime and the Treatment of

26 Amnesty International, 1973. For Amnesty's role in the fight against torture, see: Clark, 2001; Cook, 1991.

27 Burgers and Danelius, 1988, p. 13; Castermans-Holleman, 1992, p. 184; Clark, 2001, p. 52; Ingelse, 2001, p. 66-68; Rodley, 1999, p. 20-21.

28 Clark, 2001, p. 44-47.

29 See: Malcontent, 1998, p. 149-151; Baehr, Castermans-Holleman and Grünfeld, 2002, p. 43-45.

30 Castermans-Holleman, 1992, p. 185.

31 Ministerie van Buitenlandse Zaken, 1973, p. 400.

32 Rodley, 1999, p. 21-23; Burgers and Danelius, 1988, p. 13-18; Castermans-Holleman, 1992, p. 184-189; Ingelse, 2001, p. 66-72.

Offenders, a forum attended mostly by specialists in the field of crime prevention, to add the prohibition of torture to the already existing Standard Minimum Rules for the Treatment of Prisoners of 1955, and to develop a code of ethics for law enforcement personnel.³³ Together with, among others, Sweden, Ireland and Austria, the Netherlands was one of the driving forces behind this resolution.³⁴

The UN Declaration on Torture was a direct result of this resolution. In view of the limited time available, the working group of the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders that was made responsible for carrying out the resolution decided to concentrate its efforts on the drafting of a declaration on torture, on which codes of conduct for specific professional groups could in a later stage be based.³⁵ In cooperation with the Netherlands, Sweden had already prepared a draft declaration, which – with some amendments – was submitted to the General Assembly for adoption.³⁶ Having played an active role in the negotiations during the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders, the Netherlands also tried its best to get the Declaration accepted by the General Assembly.³⁷ At a certain point in time, the State Secretary of Foreign Affairs, Peter Kooijmans, even intervened with the United States when that country threatened to put the Declaration's adoption into danger by linking it to a more politically sensitive proposal of its own.³⁸ As a rule, it is only rarely that Ministers or State Secretaries become involved in negotiations on human rights instruments; most of the time, these matters are dealt with at the level of government officials.³⁹ Therefore, this was a clear demonstration of the importance the Netherlands attached to the Declaration.

On the other hand, it must also be noted that the Dutch efforts in favour of a Declaration on Torture were at least partly inspired by a desire to prevent a Convention on this very issue.⁴⁰ In the period preceding the UN Congress, the Netherlands and Sweden kept in touch in order to prepare the follow-up of the General Assembly resolution of 1974, and from 1973 onwards, there had also been close contact between the Dutch Ministry of Foreign Affairs and Amnesty International on the matter of torture.⁴¹ It appeared that Amnesty intended to propose to the Fifth UN Congress on

33 Rodley, 1999, p. 23-28; Burgers and Danelius, 1988, p. 14-15; Clark, 2001, p. 56-57.

34 Castermans-Holleman, 1992, p. 186-188.

35 Burgers and Danelius, 1988, p. 15.

36 Some more information on the course of the negotiations can be found in: Rodley, 1999, p. 28-35.

37 Castermans-Holleman, 1992, p. 188-192. See also: Rodley, 1999, p. 35-37.

38 Castermans-Holleman, 1992, p. 192-193.

39 Former officials of the Ministry of Foreign Affairs as well as former Ministers of Foreign Affairs have confirmed this. See: Interview with J.A. Walkate, 21 April 2004; Interview with H.A.M. von Hebel, 21 December 2005; Interview with H. van den Broek, 1 June 2004; Interview with M. van der Stoep, 16 June 2006.

40 Summary of a meeting on the subject of the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders of 28 August 1975 from 10 a.m. to 13.30 p.m., Archive MJ, unfiled records; Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Secretary-General of the Ministry of Justice, 7 May 1975, Archive MJ, unfiled records.

41 Castermans-Holleman, 1992, p. 188 and 194; Clark, 2001, p. 56.

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the Prevention of Crime and the Treatment of Offenders its recommendation for the General Assembly to declare torture to be a crime under international law and to authorize a body to draw up a Convention against Torture.⁴² The Netherlands was not in favour of this. In a reaction to Amnesty International's headquarters in London, it wrote that these were far-reaching proposals that would lead to complicated and time-consuming negotiations that might take away the momentum that had just been created. Therefore, it did not consider this the right moment for these suggestions.⁴³ In an earlier stage, similar arguments had also been communicated to Sweden when that country had come up with the idea to draft a treaty.⁴⁴

These were of course legitimate arguments from a human rights perspective. For the Netherlands, however, there were implicit objections to the proposal aside from the explicit argument regarding the timing. It was opposed to the subject of torture entering the sphere of international criminal law.⁴⁵ Under international criminal law, individuals bear a personal criminal responsibility for commission of crimes that are considered to be of a very serious character.⁴⁶ For a long time, however, no international court was competent to deal with the prosecution of those having committed crimes under international law; therefore, states relied on the principle of universal jurisdiction. This principle enables national courts to establish jurisdiction over international crimes, even if the crimes have been committed outside their own state's territory and by persons other than their own state's nationals.⁴⁷ Although this may have changed in recent years, the Netherlands used to be very cautious to recognize the principle of universal jurisdiction.⁴⁸ As the establishment of universal jurisdiction over the crime of torture would be a logical step to take once it had been labelled a crime under international law, it can be assumed that in this case the Netherlands had objections against this, too. In the next chapter, we will come back to this issue.

Although the Netherlands obviously did not want to go so far as to draft a Convention against Torture and declare torture a crime under international law, this did not mean that it was of the opinion that the UN should leave it with the adoption of a Declaration. The Dutch government was satisfied with the adoption of the Declaration, but it also attached great importance to follow-up initiatives; and there was still some

42 Letter from the Secretary-General of Amnesty International to the Minister of Foreign Affairs, 2 December 1974, Archive MJ, unfiled records; Paper (with proposals by Amnesty International) entitled 'Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Toronto, 1-15 September 1975', Archive MJ, unfiled records. See also: Clark, 2001, p. 58.

43 Letter from the Minister of Foreign Affairs to the Secretary-General of Amnesty International, 30 June 1975, Archive MJ, unfiled records.

44 Castermans-Holleman, 1992, p. 185-186.

45 Code-message from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Permanent Representative in New York, 2 June 1975, Archive MJ, unfiled records.

46 Steiner and Alston, 2000, p. 1132; Kooijmans, 2002, p. 351-352.

47 Kooijmans, 2002, p. 352-353; Malanczuk, 2003, p. 112-113; Steiner and Alston, 2000, p. 1134.

48 Kooijmans, 2002, p. 353; Interview with J.J.E. Schutte, 23 December 2005.

unfinished business on the 1974 resolution.⁴⁹ Together with Sweden and Greece, the Netherlands prepared a resolution to that end, which passed the General Assembly, simultaneously with the Declaration, on 9 December 1975.⁵⁰ Apart from a repetition of the request for a code of conduct for law enforcement officials and a code of medical ethics, the resolution also requested the Commission on Human Rights to ensure the effective observance of the Declaration, and to formulate a 'body of principles for the protection of all persons under any form of detention or imprisonment'.⁵¹

During the drafting process, the Netherlands showed itself to be a strong proponent for this body of principles, and it hoped the principles would soon be ready for adoption.⁵² Yet, due to an overburdened drafting agenda and loss of momentum, it was not until 1988 before a Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment was finally adopted.⁵³ Still, the Netherlands was satisfied with the result; it had aimed at a consistent set of principles with a broad scope, and felt that this had indeed been achieved.⁵⁴

Work on the professional codes of conduct for medical and law enforcement personnel was finalized more quickly: the Code of Conduct for Law Enforcement Officials saw light in 1979, and in 1984, the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment were adopted.⁵⁵ The initial idea for such codes of conduct had come from Amnesty International.⁵⁶ The Netherlands encouraged the organisation to further develop its plans, which was obvious, for example, from its willingness to co-finance a law enforcement ethics conference that Amnesty International organised in The Hague in 1975, and to distribute the results at the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders.⁵⁷ When the matter was later discussed in the

49 Appendices to the reports of the Second Chamber, 1976-1977, 14 100, chapter V, no. 2, p. 37; Appendices to the reports of the Second Chamber, 1977-1978, 14 800, chapter V, no. 2, p. 41; Interview with J.H. Burgers, 26 March 2003.

50 Castermans-Holleman, 1992, p. 189-190; Burgers and Danelius, 1988, p. 18.

51 See: Rodley, 1999, p. 37-39. See also: General Assembly resolution 3453 (XXX), 9 December 1975.

52 Appendices to the reports of the Second Chamber, 1986-1987, 19 700, chapter V, no. 2, p. 56; Appendices to the reports of the Second Chamber, 1988-1989, 20 800, chapter V, no. 2, p. 57; Ministerie van Buitenlandse Zaken, 1980b, p. 388-389; Ministerie van Buitenlandse Zaken, 1981a, p. 238; Ministerie van Buitenlandse Zaken, 1983, p. 319 and 527-528; Ministerie van Buitenlandse Zaken, 1986, p. 205-206; Ministerie van Buitenlandse Zaken, 1987a, p. 344; Ministerie van Buitenlandse Zaken, 1989, p. 199-200.

53 See: General Assembly resolution 43/173, 9 December 1988. See also: Burgers and Danelius, 1988, p. 22-23; Rodley, 1999, p. 325-328.

54 Ministerie van Buitenlandse Zaken, 1989, p. 199.

55 See: General Assembly resolution 34/169, 17 December 1979; General Assembly resolution 37/194, 18 December 1982. See also: Burgers and Danelius, 1988, p. 20-22; Rodley, 1999, p. 354-357 and 371-372.

56 Burgers and Danelius, 1988, p. 19-20; Clark, 2001, p. 56-58; Lippman, 1994, p. 296.

57 Castermans-Holleman, 1992, p. 194; Clark, 2001, p. 57; Burgers and Danelius, 1988, p. 20.

UN, the Netherlands was actively engaged in the work on the construction of the Code of Conduct for Law Enforcement Officials.⁵⁸ Finally, the Netherlands also did its best to try and get the Principles of Medical Ethics adopted and, as an active participant in the drafting work and a coordinator of the final discussions in 1982, it played a leading role in that respect.⁵⁹

In 1984, continued efforts to eradicate torture would also result in the adoption of a binding Convention against Torture, the negotiation process of which is discussed in chapter 3.

2.4 THE CREATION OF A SPECIAL RAPPORTEUR ON TORTURE

Even after the adoption of a Convention devoted solely to the issue of torture, there appeared to be a desire to develop new instruments. As a Dutch delegate to the 1985 session of the UN General Assembly put it, this Convention's adoption was 'no reason for complacency'.⁶⁰ Already during the drafting of the Convention against Torture, there had been people who had said that it would be good if a separate, extra-conventional, mechanism for fact-finding were to be developed. The Sub-Commission on Prevention of Discrimination and Protection of Minorities had hinted to the Commission on Human Rights that it might be advisable to design an instrument similar to those it had developed a few years earlier in respect to the themes of disappearances and arbitrary executions; otherwise, the Sub-Commission might take action instead.⁶¹ The UN Assistant Secretary-General for Human Rights, Kurt Herndl, was also favourably disposed to the idea, and shortly after the adoption of the Convention against Torture, he made a public plea in favour of such a mechanism.⁶² Organisations like Amnesty International also applauded the idea, and argued that it would take awhile until the newly established Convention would be universally ratified. Besides, the inquiry procedure that it provided for was not obligatory, as a consequence of which it was probably not going to apply to all ratifying states.⁶³

In principle, the fact-finding instrument was something that appealed to the Netherlands. In the period from 1962 to 1967, it had made a case for the creation of

58 Ministerie van Buitenlandse Zaken, 1980a, p. 208-209; Appendices to the reports of the Second Chamber, 1980-1981, 16 400, chapter V, no. 2, p. 43.

59 Ministerie van Buitenlandse Zaken, 1980a, p. 223; Ministerie van Buitenlandse Zaken, 1980b, p. 388; Ministerie van Buitenlandse Zaken, 1981a, p. 237-238 and 477-478; Ministerie van Buitenlandse Zaken, 1982, p. 275-276 and 532-533; Ministerie van Buitenlandse Zaken, 1983, p. 244-245 and 472-474; Appendices to the reports of the Second Chamber, 1981-1982, 17 100, chapter V, no. 2, p. 41; Appendices to the reports of the Second Chamber, 1983-1984, 18 100, chapter V, no. 2, p. 60.

60 Ministerie van Buitenlandse Zaken, 1986, p. 363.

61 Rodley, 1999, p. 144; Gutter, 2006, p. 191-192. The instruments the Sub-Commission referred to were the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, established by the Commission in 1980 and 1982 respectively.

62 Castermans-Holleman, 1992, p. 223-224; Rodley, 1999, p. 145.

63 Castermans-Holleman, 1992, p. 223 and 226.

a UN fact-finding body charged with the examination of facts for, among others, the purpose of checking the observation of treaties. It had only partially succeeded in this, but during those years it certainly put a lot of energy in specifying its plans and convincing others about the importance of the mechanism of fact-finding.⁶⁴ A fact-finding instrument also seemed promising in the field of human rights. After the 1973 coup in Chile, the Netherlands tried to set up a commission of inquiry in the UN Commission on Human Rights, which in 1975, resulted in the establishment of a working group to investigate human rights in Chile.⁶⁵ In the next chapter, we shall see that the Netherlands was also among those who supported the inclusion of an inquiry mechanism in the just established UN Convention against Torture. Nevertheless, the call for yet another instrument was not immediately supported by the Ministry of Foreign Affairs. It expected resistance from other states and therefore did not consider it a realistic proposition. Furthermore, it felt that that year's termination of the Netherlands' membership of the Commission on Human Rights made it necessary for the delegation to focus on the conclusion of earlier initiatives rather than to take the lead in developing the next instrument on torture so shortly after having done so in regard to the Convention.⁶⁶

However, the delegation itself and its delegation-leader, Peter Kooijmans in particular, held other views.⁶⁷ As the outgoing Chairman of the Commission on Human Rights, Kooijmans gave an opening speech in which he drew attention to the possibility of an additional monitoring mechanism. Putting forward the argument that some states might not become a party to the Convention, or might choose not to accept its optional monitoring mechanisms, he recommended the Commission to 'consider the desirability of setting up monitoring machinery so as to be informed of the occurrence of torture and receive suggestions for dealing more effectively with that despicable practice.'⁶⁸ The Dutch delegation then took the initiative to prepare a draft resolution to appoint a Special Rapporteur on Torture.⁶⁹ Contrary to what had been expected back in The Hague, the proposal received broad support, and after some concessions had been made to the Soviet bloc, the resolution was formally submitted by Argentina and passed with thirty votes in favour to none against, with twelve abstentions.⁷⁰ It created the post of a Special Rapporteur for the period of one year. According to his mandate, the Special Rapporteur was to examine questions relevant to torture, for the purpose of which he would have to seek and receive information from governments, inter-governmental organisations and NGOs.⁷¹

64 Walraven, 1989.

65 Baehr, Castermans-Holleman, Grünfeld, 2002, p. 49-51.

66 Castermans-Holleman, 1992, p. 226.

67 In section 2.3, Kooijmans' name was also referred to as State Secretary of Foreign Affairs. In 1985, he did not fulfil this function anymore, but worked as a professor of international law in Leiden.

68 As quoted in Gutter, 2006, p. 93.

69 Castermans-Holleman, 1992, p. 224.

70 *Ibidem*, p. 224-225.

71 See Commission on Human Rights resolution 1985/33, 13 March 1985.

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The delegation's deviation from its instructions was easily accepted by the Ministry in The Hague, and after its action had proved successful, the government proudly and repeatedly reported to parliament that the Netherlands had taken the lead in the establishment of what it considered a very important function.⁷² In the period after the creation of a Special Rapporteur on Torture, the Dutch government remained satisfied with the role of this and other Rapporteurs, and it frequently announced that it would continue to put energy in the maintenance and improvement of the system of Special Rapporteurs.⁷³ In speeches at UN organs, the Dutch delegation or delegates speaking on behalf of the member states of the European Community and the later European Union, would, for example, make this clear by references to the Special Rapporteur's report or conclusions or by calls for cooperation with the Rapporteur, thereby giving him political support for his work.⁷⁴

An issue that received increasing attention was that of the coordination of the activities of the Rapporteur on the one hand, and the Convention's supervisory organ, the Committee against Torture, on the other. While negotiating the instrument, its proponents had already been confronted with some states' counterargument that a new instrument would – in the light of the Convention's machinery – be superfluous.⁷⁵ As an advocate of the creation of a Special Rapporteur on Torture, the Netherlands had emphasized how it could be seen as an additional instrument filling a gap between the legal condemnation of torture and its widespread practice that was only partially bridged by the Convention. Yet, undoubtedly, there was some overlap between the work of the Rapporteur and the Committee.⁷⁶ After both mechanisms had become operational, this was also recognized by the Netherlands and the European partners, who therefore very much supported mutual cooperation and exchanges of views between the two organs.⁷⁷ The Netherlands warned, however, that great care should be taken in making suggestions to redefine the Rapporteur's mandate; elements that should in any case be preserved were those that were action-oriented or preventive in nature.⁷⁸ Obviously, the government of the Netherlands remained convinced that the additional value of the instrument of a Rapporteur was sufficiently great to justify a renewal of his mandate: in a report on the 57th session of the UN Commission on Human Rights in 2001, the Minister of Foreign Affairs, Jozias van Aartsen, informed

72 See: Appendices to the reports of the Second Chamber, 1989-1990, 21 300, chapter V, no. 2, p. 56; Appendices to the reports of the Second Chamber, 1985-1986, 19 200, chapter V, no. 2, p. 68; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 29.

73 See, for example: Appendices to the reports of the Second Chamber, 1987-1988, 20 200, chapter V, no. 2, p. 54; Appendices to the reports of the Second Chamber, 1988-1989, 20 800, chapter V, no. 2, p. 58; Appendices to the reports of the Second Chamber, 1989-1990, 21 300, chapter V, no. 2, p. 56.

74 See, for example: Ministerie van Buitenlandse Zaken, 1989, p. 337; Ministerie van Buitenlandse Zaken, 1991, p. 420; Ministerie van Buitenlandse Zaken, 1992, p. 420-421 and 425-426.

75 Gutter, 2006, p. 93.

76 See: Ingelse, 2001, p. 394-395; Barrett, 2001, p. 14-15.

77 Ministerie van Buitenlandse Zaken, 1990, p. 354; Ministerie van Buitenlandse Zaken, 1991, p. 183; Ministerie van Buitenlandse Zaken, 1992, p. 421.

78 Ministerie van Buitenlandse Zaken, 1990, p. 354.

the Chairman of the Parliamentary Standing Committee for Foreign Affairs, that the Netherlands had, together with, in particular, Denmark, used its best endeavours to ensure that the mandate of the Special Rapporteur would be renewed.⁷⁹

2.5 THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE

As several instruments aimed at outlawing and combatting torture were being negotiated in the United Nations, activities began to spill over to the Council of Europe as well, and eventually resulted in the adoption of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1987. The Convention established no new legal norms, but provided for an independent international Committee to be set up that 'shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.'⁸⁰ According to the Convention, periodic, as well as ad hoc visits may be made, and the parties to the Convention are obliged to cooperate with the Committee, and to permit visits 'to any place within its jurisdiction where persons are deprived of their liberty by a public authority.'⁸¹ The system is based on mutual cooperation between the parties to the Convention and the Committee.⁸² Therefore, the report the Committee draws up after a visit is confidential, unless the state concerned requests its publication. Only if a state fails to cooperate or refuses to improve a situation in the light of the Committee's recommendations, there is a possibility for the Committee to make a public statement.⁸³ On 4 November 1993, two Protocols to the European Convention for the Prevention of Torture were opened for signature, which opened the Convention for accession of non-member states of the Council of Europe and made some technical changes to the election of members of the Committee established by the Convention.⁸⁴

The idea of a system as established by the European Convention for the Prevention of Torture had originally come from a Swiss lawyer and former banker, Jean-Jacques Gautier. Basing his thoughts on the Red Cross model, Gautier developed the idea of an international convention establishing a similar system of visits to places of detention to prevent torture.⁸⁵ In 1977, he founded the Swiss Committee against Torture

79 Letter from the Minister of Foreign Affairs to the Chairman of the Parliamentary Standing Committee for Foreign Affairs, 2 July 2001, non-file document ['niet-dossierstuk'] 2000-2001, buza000353, Second Chamber, p. 2. To be found in the electronic databases Parlando or OPmaat.

80 Articles 1 and 4 ECPT. Quotation from Article 1 ECPT.

81 Articles 2 and 7 ECPT. Quotation from Article 2 ECPT.

82 Article 3 ECPT.

83 Articles 10 and 11 ECPT.

84 See: Protocol No. 1 and 2 to the ECPT.

85 Evans and Morgan, 2001, p. 106-108; Burgers and Danelius, 1988, p. 26-27. It should be noted that the mandate of the International Committee of the Red Cross (ICRC) is confined to situations of armed conflict only, and that its visitation system does not therefore cover many situations in which torture may occur.

(SCT) to elaborate and realize this plan.⁸⁶ When negotiations concerning a UN Convention against Torture started at the time, the draft Convention resulting from this idea was one of the three drafts that were circulating; the other two being a draft by the Swedish government and a draft by the International Association of Penal Law that were, with respect to their supervisory mechanisms, more or less based on existing UN practices. As Gautier's plan was widely believed to be too far-reaching and unacceptable for many states, the Secretary-General of the ICJ, Niall McDermot, proposed that it be converted into a proposal for an Optional Protocol. In 1980, Costa Rica formally submitted this draft Optional Protocol, requesting that it be considered after the adoption of the Convention.⁸⁷

However, Gautier's ideas had also drawn the attention of the Parliamentary Assembly of the Council of Europe. In 1981, it adopted a number of motions and recommendations on the issue of torture. One of them included a section that suggested strengthening the procedure to safeguard respect for human rights to put an end to torture and other degrading treatment of prisoners, and instructed the Assembly's Legal Affairs Committee to report on means to achieve that aim.⁸⁸ As Dutch diplomats noted, two Dutch parliamentarians, Harry van den Bergh of the Dutch labour party, PvdA, and Jan Nico Scholten of the christian-democratic party CDA, were among the ones that signed this motion.⁸⁹ The outcome of the motion was a report by the Chairman of the Legal Affairs Committee, Noel Berrier, who recommended the adoption of a European Torture Convention. An annex with a draft text, drawn up by the ICJ and the Swiss Committee against Torture, was added to it.⁹⁰ A few months later, in September 1983, the Assembly adopted a recommendation that called on the Committee of Ministers to adopt this Convention.⁹¹ To the great satisfaction of the Dutch branch of the ICJ, the NJCM, the Dutch Assembly members, whom they had lobbied, had supported the resolution.⁹²

The Committee of Ministers responded favourably to that appeal, and instructed the Steering Committee for Human Rights (CDDH), an organ comprising of officials of national governments of Council of Europe member states, to consider the matter and present it with a text of a draft convention. The CDDH in turn delegated it to a

86 The SCT became the Association for the Prevention of Torture (APT) in 1992. See: Bolin Pennegård, 1998, p. 41.

87 Evans and Morgan, 2001, p. 110-112; Burgers and Danelius, 1988, p. 27-28. Further details will be discussed in chapter 3.

88 Recommendation no. 909 (1981), Archive MFA, RvE 1975-1984, 999.438.0, file 1093; CoE Doc. No. 4718 revised, Parliamentary Assembly and CoE doc. no. 4730, Parliamentary Assembly, Archive MFA, RvE 1975-1984, 999.434.0, file 838.

89 CoE Doc. No. 4718 revised, Parliamentary Assembly and CoE doc. no. 4730, Parliamentary Assembly, Archive MFA, RvE 1975-1984, 999.434.0, file 838. See also: Telegram from the Permanent Representative in Strasbourg to the Ministry of Foreign Affairs, 27 May 1981, Archive MFA, RvE 1975-1984, 999.434.0, file 838.

90 Evans and Morgan, 2001, p. 113-114; Tolley, 1989, p. 572.

91 Evans and Morgan, 2001, p. 114.

92 See: NJCM Year-report 1983, in: *NJCM-Bulletin*, Vol. 9, No. 2, 1984, p. 196.

subordinate body: the Committee of experts for the extension of the rights embodied in the European Convention on Human Rights (DH-EX).⁹³ Most states were in favour of a European treaty on this matter, and since the fate of the Costa Rican proposal in the UN was still uncertain, they felt that 'the Council of Europe could act as a pioneer as it had so often done in the field of human rights.'⁹⁴ Nonetheless, there was a minority of states that expressed doubts about the desirability of this Convention. Turkey openly admitted that it feared inadmissible interference in its internal affairs, and although similar feelings may also have played a role for the United Kingdom and Germany, they brought up some other arguments against the convention.⁹⁵

Among others, it was argued that this initiative might jeopardize the UN Convention against Torture, which had not yet been adopted.⁹⁶ The Legal Adviser of the Dutch Ministry of Foreign Affairs, whose staff was responsible for negotiations in the CDDH and the DH-EX, consulted with his colleague Herman Burgers of the Legal and Social Affairs Division, who was acting as Chairman-Rapporteur of the Working Group entrusted with the task of drafting the UN Convention. Burgers made it clear that he considered the argument that the UN Convention might be put at risk, invalid. ICJ Secretary-General McDermot had already asked Burgers' opinion on this matter before his organisation even started to advocate a separate European instrument. He had not considered it a problem then, and he still did not see how this initiative might endanger the work being done at the UN.⁹⁷ This point of view was also brought across in Strasbourg.⁹⁸ Another question that was raised, and that would continue to play a dominant role in the negotiations, was that of a possible overlap with the ECHR-system, and the risk of conflicting interpretations and other legal difficulties that might result from it.⁹⁹ The Netherlands was of the opinion that this should be investigated seriously, but it did not think that this should lead to the conclusion that there should not be a European Torture Convention at all. It believed other ways could be found to solve this problem.¹⁰⁰

93 Explanatory report to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, para 6. See also: Evans and Morgan, 2001, p. 117.

94 CoE Doc. CDDH (84)17, p. 14, Archive MFA, RvE 1975-1984, 999.438.0, file 1072.

95 Memorandum from the Assistant Legal Adviser at the Ministry of Foreign Affairs to the Deputy Director-General International Cooperation, 17 January 1985, Archive MFA, RvE 1985-1994, 999.434.0, file 396.

96 CoE Doc. CDDH (84)17, p. 15, Archive MFA, RvE 1975-1984, 999.438.0, file 1072.

97 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Legal Adviser of the Ministry of Foreign Affairs, 18 May 1984, Archive MFA, RvE 1975-1984, 999.434.0, file 839.

98 Memorandum from the Assistant Legal Adviser at the Ministry of Foreign Affairs to the Council of Europe Section of the Ministry of Foreign Affairs, 19 July 1984, Archive MFA, RvE 1975-1984, 999.438.0, file 1095.

99 CoE Doc. CDDH (84)17, p. 15, Archive MFA, RvE 1975-1984, 999.438.0, file 1072. See also: Evans and Morgan, 2001, p. 118-122.

100 Handwritten notes on CoE Doc. CDDH (84)17, p. 15, Archive MFA, RvE 1975-1984, 999.438.0, file 1072.

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Hence, all in all, the Netherlands was in favour of a Convention for the Prevention of Torture.¹⁰¹ This was also confirmed to a delegation of Amnesty International that had a meeting with the Minister of Justice, Frits Korthals Altes.¹⁰² It is furthermore clear that when the Convention was there, the Dutch government was satisfied with the end-result. It ratified the Convention within less than a year after its opening for signature, and later, it pointed to the instrument as one of the most important examples of innovation in the development of international supervisory mechanisms of the past decade.¹⁰³ The Netherlands' expectations of the preventive method of working that was created by this instrument ran high, and since it considered it important to benefit from new insights that might be developed, it announced that in case of a visit to the Netherlands, it would be prepared to send the Committee's report to parliament together with its own comments.¹⁰⁴ In the light of this, and the leading role of the Netherlands in UN activities in the field of torture, one might expect that it actively engaged in the drafting of a new Council of Europe instrument too.

Nonetheless, the contribution of the Netherlands to the drafting of the European Convention for the Prevention of Torture was only modest, especially if compared to its behaviour at the UN.¹⁰⁵ It is true that a draft memorandum that aimed at getting the Dutch Cabinet's approval for signature of the Convention maintained that the Netherlands had actively participated in its drafting, but this seems to have been no more than a standard phrase.¹⁰⁶ The Ministry's accounts of the meetings in which the instrument was being negotiated reported on the Convention for the Prevention of Torture in a way that makes it clear that it was only one out of several topics the negotiators had to deal with, for which there existed no particular political zeal.¹⁰⁷ This may of course

101 See also: Interview with S.H. Bloembergen, 10 February 2006.

102 Letter from the Director of the Dutch branch of Amnesty International, to the Minister of Foreign Affairs, 3 July 1984, Archive MFA, RvE 1975-1984, 999.434.0, file 839.

103 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 6. For information on the Netherlands' ratification, see: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=126&CM=8&DF=1/24/05&CL=ENG>, accessed 8 September 2006. See also: Appendices to the reports of the Second Chamber, 1988-1989, 20 800, chapter V, no. 2, p. 58.

104 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 23.

105 The Netherlands does not seem to have been an exception in this respect, at least the representative of Amnesty International cannot recall any country as particularly active. See: Interview with M.T. Kamminga, 24 May 2005.

106 Draft memorandum from the Assistant Legal Adviser at the Ministry of Foreign Affairs to the Parliamentary Affairs Section of the Treaties Department of the Ministry of Foreign Affairs, 3 November 1987, Archive MFA, DDI-DVE 1987-1988, 999.434.1, file 198.

107 The reports on these negotiations were written in a somewhat detached style. They usually contained no more than a short and factual description of events and points of discussion, and when positions taken by different countries were described, this was done in a neutral way, which makes it seem as if the Netherlands was not very much involved and did not have any preferences. See, for example: Memorandum from the Assistant Legal Adviser at the Ministry of Foreign Affairs to the Council of Europe Section of the Ministry of Foreign Affairs, 11 March 1985, Archive MFA, RvE 1985-1994, 999.434.0, file 396; Memorandum (another one) from the Assistant Legal Adviser at the Ministry of Foreign Affairs to the Council of Europe Section of the Ministry of Foreign Affairs, 11 March 1985, Archive MFA, RvE 1985-1994, 999.438.0, file 194; Memorandum from the Assistant Legal Adviser

be attributed to the personalities or writing styles of the persons involved, but an interview with Menno Kamminga, who attended the negotiations on behalf of Amnesty International, confirms the impression of the lack of any special commitment whatsoever.¹⁰⁸ It is obvious that the Netherlands' policies – and especially its fervour for instruments to combat torture – were different from those that it had carried out at the UN. How can this be explained?

The answer to this question may well be found in the fact that different sections of the Ministry of Foreign Affairs were involved; whereas human rights matters in the UN were being dealt with by the Humanitarian and Legal Affairs Section, the Legal Adviser and his staff were responsible for human rights questions in the Council of Europe. The principal task of the latter was to give advices on the legal aspects of the Ministry's policies and to draw attention to inconsistencies with existing law. Besides, it also had to represent or coordinate representation of the Netherlands before international courts or supervisory organs in the field of human rights. It would certainly go too far to state that the Legal Adviser and his assistants were not interested in the development of international human rights norms – and of course this could also differ from person to person – but by the nature of their bureaucratic missions, their focus was primarily on existing rules, and possible problems that might occur from various policy initiatives.¹⁰⁹ In this respect, there was a difference with the mandate of the Humanitarian and Legal Affairs Section, in which the promotion and protection of human rights had a central place.

Apart from this, the Legal Adviser does not seem to have welcomed NGO-input as much as the Humanitarian and Legal Affairs Section did. This can be illustrated by a serious disagreement in 1985 that concerned the question of whether the ICJ should be granted observer-status at CDDH-meetings: the Humanitarian and Legal Affairs

at the Ministry of Foreign Affairs to the Council of Europe Section of the Ministry of Foreign Affairs, 30 June 1986, Archive MFA, RvE 1985-1994, 999.434.0, file 396; Memorandum from the Assistant Legal Adviser at the Ministry of Foreign Affairs to the Council of Europe Section of the Ministry of Foreign Affairs, 31 October 1986, Archive MFA, RvE 1985-1994, 999.438.0, file 194. In addition, it should be noted that the government's explanatory memorandums to the annual budgets for the Ministry of Foreign Affairs of those years include almost no information on the Convention. Perhaps, this can also be considered an indication of a relatively limited interest in the matter. In the explanatory memorandum to the national budget for 1987, the European Convention for the Prevention of Torture only maintained that the Netherlands expected the drafting work to be finished by the end of 1986. Nothing was said about the Netherlands' feelings about it. See: Appendices to the reports of the Second Chamber, 1986-1987, 19 700, chapter V, no. 2, p. 57.

¹⁰⁸ Interview with M.T. Kamminga, 24 May 2005. In the Council of Europe, Amnesty International held a special position and was allowed to send observers to the CDDH-meetings. During the negotiations, representatives were present on behalf of this organisation. See, for example: CoE Doc. CDDH (84)17, p. 33, Archive MFA, RvE 1975-1984, 999.438.0, file 1072; CoE Doc. CDDH (86)33, p. 21, Archive MFA, RvE 1985-1994, 999.438.0, file 194; CoE Doc. CDDH (86)36, p. 15, Archive MFA, RvE 1985-1994, 999.438.0, file 195.

¹⁰⁹ Interview with S.H. Bloembergen, 10 February 2006; Interview with H.A.M. von Hebel, 21 December 2005; Interview with J.J.E. Schutte, 23 December 2005; Interview with M.T. Kamminga, 24 May 2005.

Section took a position in favour, while the Legal Adviser opposed it.¹¹⁰ Eventually the ICJ obtained the observer status, which enabled it to exert influence and get the European Convention for the Prevention of Torture adopted.¹¹¹ It should be noted though that the Council of Europe and the UN did not function in similar ways where NGO-participation was concerned. It was usually much harder for NGOs to influence decision-making in the Council of Europe, because most meetings took place behind closed doors. The observer status with the CDDH that Amnesty International and the ICJ obtained was an exception, not the rule; diplomats working in the Council of Europe were therefore less used to dealing with NGOs.¹¹²

Apparently, contacts between human rights NGOs and the Legal Adviser and his staff were indeed less automatic than between the Humanitarian and Legal Affairs Section and NGOs. Otherwise it would be hard to understand why Amnesty International and the Dutch ICJ-branch, NJCM, sent copies of letters concerning the European Convention for the Prevention of Torture to the Coordinator and Deputy-coordinator for Human Rights and the Humanitarian and Legal Affairs Section of the Ministry instead of to the Legal Adviser, who was actually responsible.¹¹³ As we have seen above, cooperation with human rights NGOs greatly stimulated the Dutch activities in the UN. Similar forms of cooperation were lacking in this case, as a consequence of which a potential incentive to participate actively was missing as well.

110 Up to then, Amnesty International was the only organisation that had obtained an observer status to the CDDH; and the ICJ had requested it, too. The Netherlands, as one of the only countries, objected to this. The Council of Europe Section had sent instructions to that end in consultation with the Legal Adviser. The Deputy-coordinator for Human Rights and the Legal and Social Affairs Division were very upset about this, and an extensive correspondence between the different parts of the Ministry involved followed. See, for example: Letter from the Deputy Head of the Legal and Humanitarian Affairs Division through the Head of the Legal and Social Affairs Division to the Council of Europe Section of the Ministry of Foreign Affairs, 30 September 1985, Archive MFA, RvE 1985-1994, 999.438.0, file 194; Memorandum from the Deputy-coordinator for Human Rights of the Ministry of Foreign Affairs to the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, 30 September 1985, Archive MFA, RvE 1985-1994, 999.438.0, file 194; Memorandum from the Council of Europe Section of the Ministry of Foreign Affairs to the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, 17 October 1985, Archive MFA, RvE 1985-1994, 999.438.0, file 194; Memorandum from the Assistant Legal Adviser at the Ministry of Foreign Affairs to the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs and the Deputy-coordinator for Human Rights of the Ministry of Foreign Affairs, 23 October 1985, Archive MFA, RvE 1985-1994, 999.438.0, file 194. Eventually, the Council of Europe decided to give the ICJ the same status as Amnesty International, which meant that it would be allowed to attend CDDH-meetings as an observer for specific items as determined by the CDDH.

111 Tolley, 1989, p. 572; Interview with M.T. Kamminga, 24 May 2005.

112 Interview with M.T. Kamminga, 24 May 2005; Interview with S.H. Bloembergen, 10 February 2006. See also: Drzemczewski, 1990, p. 102.

113 See: Letter from the Director of the Dutch branch of Amnesty International to the Minister of Foreign Affairs, 3 July 1984, Archive MFA, RvE 1975-1984, 999.434.0, file 839; Memorandum from the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Deputy Director-General International Cooperation, 11 July 1984, Archive MFA, RvE 1975-1984, 999.434.0, file 839.

2.6 THE OPTIONAL PROTOCOL TO THE UN CONVENTION AGAINST TORTURE

It did not take long for the idea of a preventive system of visits to boomerang back to the UN. In the year of the European Convention's adoption, the UN Special Rapporteur on Torture included a recommendation in his report to establish a similar system at the global level.¹¹⁴ It would, however, take until 1992 for the UN-member states to actually start work on a Protocol to supplement the organisation's Convention against Torture, and ten more years would pass before it was adopted by the General Assembly.¹¹⁵

The system established by the Protocol is comparable to that of the Council of Europe. Its objective is 'to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.'¹¹⁶ In the first place, the Protocol creates a 'Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' to carry out these functions.¹¹⁷ Secondly, states parties to the Protocol are obliged to 'set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment'.¹¹⁸ In this respect, the Protocol differs from its European counterpart, which does not provide for any national preventive mechanisms. Under the UN Protocol, the national organ is to carry out regular examinations while the international Subcommittee only makes periodic, or short follow-up visits.¹¹⁹

Following the adoption of the European Convention for the Prevention of Torture in 1987, Western European states were of the opinion that it would be better to wait and see how this instrument would work in practice, before any initiative to copy the system in the UN was taken.¹²⁰ Apparently, other states did not yet feel the need to consider a Protocol either, for in 1989, the Commission on Human Rights decided to postpone the question until its session in 1991.¹²¹ NGOs did not immediately press for a UN Protocol to be developed, either. They struggled with the question of whether it would be best to try and proceed on the road of regional systems or to make an attempt for a universal arrangement based on the proposal Costa Rica had submitted in 1980. After the establishment of regional systems for preventive visits proved extremely difficult, the NGOs finally decided to concentrate their efforts on a universal system,

114 Clark, 2001, p. 67; Bolin Pennegård, 1998, p. 45.

115 See: General Assembly Resolution A/RES/57/199, 18 December 2002.

116 Article 1 CAT-OP.

117 Article 2.1 CAT-OP.

118 Article 3 CAT-OP.

119 See articles 13 and 19 CAT-OP.

120 CoE Doc. CAHST (88) 2, Archive MJ, unfiled records; Code-message from the Ministry of Foreign Affairs to the Permanent Representatives in New York and Geneva, 28 September 1988, Archive MJ, unfiled records.

121 Bolin Pennegård, 1998, p. 45-46.

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and in November 1990, a number of experts met in Geneva to discuss and make changes to the original draft Optional Protocol, the text of which was submitted again by Costa Rica in 1991.¹²² The Commission on Human Rights decided to further consider this proposal, and in 1992, it convened an open-ended working group for that purpose, which continued to meet yearly until the Protocol's final adoption in 2002.¹²³ An official of the Regional and Global Organisations Division of the Human Rights, Good Governance and Democratisation Department of the Ministry of Foreign Affairs and a human rights specialist of the Permanent Mission in Geneva represented the Netherlands in the meetings of this Working Group.¹²⁴

Initially, the Netherlands had some serious doubts about the desirability of an Optional Protocol to the Convention against Torture. An important reason was that it would put an enormous financial and manpower burden on the UN Human Rights Office in Geneva, while it was already suffering from lack of staff and financial means.¹²⁵ Thus, unlike most of its European partners, the Netherlands did not sponsor the resolution that proposed to start negotiations in a Working Group, and it initially stayed somewhat in the background of the discussions.¹²⁶ Its hesitations did not remain unnoticed; after the Working Group's first year, the Secretary General of the Association for the Prevention of Torture (APT), François de Vargas, reported that, unlike, in particular, Switzerland and Sweden, the Netherlands was 'strangely silent'.¹²⁷ Yet, apparently the Netherlands felt uneasy about its position, because in spite of sustained worries, starting from 1993, the Netherlands became more actively involved in the work.¹²⁸ From that moment, the Netherlands obviously belonged to the protagonists of a solid Protocol, as aimed at by the Costa Rican proposal.

In the Working Group, there were, however, some major stumbling blocks that stood in the way of the adoption of an effective instrument. A number of states were radically opposed to the Protocol; they tried to obstruct or prolong the negotiation

122 De Vargas, 1993, p. 128-129; Inter-American Institute of Human Rights (IIHR) and the Association for the Prevention of Torture (APT), 2004, p. 35-38; Bolin Pennegård, 1998, p. 44-46.

123 UN Doc. E/CN.4/1993/28, para. 1-2; United Nations, 2004, p. 631.

124 Letter from the Head of the Regional and Global Organisations Division of the Human Rights, Good Governance and Democratisation Department of the Ministry of Foreign Affairs to the Legal Affairs Department of the Ministry of Foreign Affairs, 22 September 1999, Archive MFA, djz/ve / 999 (3) 1999-2001, file: djz/ve / ara / 00842.

125 Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 2 March 1993, Archive MFA, ddi-dio 1993-1996, file: dio/ara/00508.

126 Malcontent and Huijboom, 2006, p. 94.

127 De Vargas, 1993, p. 129-130.

128 See: Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 2 March 1993, Archive MFA, ddi-dio 1993-1996, file: dio/ara/00508. See also several other documents in this file. Insofar as the UN reports of the Working Groups proceedings include the names of the countries participating and the positions taken by them, this is evident from these documents. See: UN Doc. E/CN.4/1996/28; UN Doc. E/CN.4/1997/33; UN Doc. E/CN.4/1998/42; UN Doc. E/CN.4/1999/59; UN Doc. E/CN.4/2002/78. See also: Malcontent and Huijboom, 2006, p. 94.

process and to weaken the instrument in all possible ways.¹²⁹ Among them were, for instance, China, Cuba, the Syrian Arab Republic and Mexico; countries with a reputation that was not particularly good in the field of torture. They stressed the importance of ensuring full respect of a state's sovereignty, and insisted that the agreement of the state concerned would be required for each mission.¹³⁰ Apart from that, they tried to restrict the powers of the visiting mission and proposed the insertion of a clause that would bind the delegation to respect national laws and regulations.¹³¹ Another way to do that was to restrict the list of places of detention that might be visited by the Subcommittee.¹³² Some states that were opposed to a strong Protocol also tried to block the only sanction-mechanism in the draft, which opened the possibility of a public statement or publication of the Subcommittee's report in cases where the state concerned refused to cooperate or improve a situation.¹³³ Finally, they objected to the idea that reservations to the Protocol would be prohibited.¹³⁴

The Netherlands felt that if a Protocol was to be developed anyway, it should, in any case, be a very strong and effective instrument.¹³⁵ For that reason, it opposed anything that would unduly restrict the Subcommittee in the performance of its tasks and functions.¹³⁶ In the Working Group, it argued, for instance, that ratification or accession to the Protocol represented prior consent to any mission, as a consequence of which the consent of the state concerned would no longer be needed for each and every mission.¹³⁷ Reservations to the Protocol should not be permitted either.¹³⁸ Apart

129 Inter-American Institute of Human Rights (IHR) and the Association for the Prevention of Torture (APT), 2004, p. 40; De Vargas, 1993, p. 129-130.

130 See, for example: UN Doc. E/CN.4/1993/28, para. 80; UN Doc. E/CN.4/1993/WG.11/WP.1, para. 22; UN Doc. E/CN.4/1994/25, para 22-23; UN Doc. E/CN.4/1994/WG.11/WP.1, para 10-12; UN Doc. E/CN.4/1995/38, para. 25; UN Doc. E/CN.4/1997/33, para 22-48; UN Doc. E/CN.4/2000/58, para. 37-38.

131 See, for example: UN Doc. E/CN.4/1995/38, para. 46; UN Doc. E/CN.4/1995/WG.11/WP.1, para. 30; UN Doc. E/CN.4/1996/28, para. 78; UN Doc. E/CN.4/1998/42, para F; UN Doc. E/CN.4/1999/59, para. 23-49. See also: Inter-American Institute of Human Rights (IHR) and the Association for the Prevention of Torture (APT), 2004, p. 43; Barrett, 2001, p. 28-29.

132 See, for example: UN Doc. E/CN.4/2000/58, para. 27-31 and 38; UN Doc. E/CN.4/2001/67, para. 45; UN Doc. E/CN.4/2002/78, para 40 and 57. See also: Inter-American Institute of Human Rights (IHR) and the Association for the Prevention of Torture (APT), 2004, p. 42.

133 See, for example: UN Doc. E/CN.4/1996/28, para. 34-67; UN Doc. E/CN.4/2000/58, para. 46-50; UN Doc. E/CN.4/2001/67, para. 46-47.

134 See, for example: UN Doc. E/CN.4/2000/58, para. 20; UN Doc. E/CN.4/2001/67, para. 25; UN Doc. E/CN.4/2002/78, para. 60, 69, and 72. See also: Inter-American Institute of Human Rights (IHR) and the Association for the Prevention of Torture (APT), 2004, p. 42-43; Barrett, 2001, p. 28-29.

135 Memorandum from the Human Rights Division of the Human Rights and Peacebuilding Department of the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 13 February 2001, Archive MFA, records kept at the Political and Legal Affairs Division of the United Nations and International Financial Institutions Department of the Ministry of Foreign Affairs, file-description: dvf/pj/un human rights/policy – cat/convention – convention against torture (cat)/optional protocol/reservations – 2000.

136 UN Doc. E/CN.4/1998/42, para. O 7.

137 UN Doc. E/CN.4/1997/33, para. 28-29.

138 UN Doc. E/CN.4/1996/28, para. 114; UN Doc. E/CN.4/1998/42, para J 5.

from that, it considered it important for the Subcommittee to have the ability to take action if states failed to cooperate with the Subcommittee; therefore, it was in favour of preserving the possibility of publishing a report.¹³⁹ At the same time, the Netherlands also tried to facilitate the process, and when the negotiations bogged down, it tried to find solutions to keep the negotiations going.¹⁴⁰

Nonetheless, preventing a stalemate was very difficult, and by 1999, the negotiations in the Working Group reached an impasse.¹⁴¹ NGOs and a number of supportive states did, however, not stop lobbying for the Protocol. NGOs joined forces in a coalition comprised of eleven of the world's leading international human rights organisations, and Amnesty International started its third international campaign against torture in October 2000.¹⁴² The Netherlands took NGO demands very seriously, and responded positively to their encouragements to continue to fight for a strong and effective Protocol.¹⁴³ Besides, the Netherlands belonged to a group of 'Friends of the Protocol', in which it discussed ways to create a new momentum in the difficult and protracted negotiations with like-minded states.¹⁴⁴ These states were: Denmark, France, Spain, the United Kingdom, Sweden, Canada, New Zealand, and Switzerland.¹⁴⁵

Eventually, it would, however, be a Mexican proposal that broke the deadlock. With the support of other South American and Caribbean states, Mexico submitted an alternative draft to the Working Group in 2001.¹⁴⁶ Displaying its overriding concerns for sovereignty, the Mexican draft proposed to have each state party set up its own national mechanism to carry out preventive visits and to examine the situation of persons deprived of their liberty. The Subcommittee's tasks were reduced to support and supervision of the activities of these national mechanisms.¹⁴⁷ There was disagreement among the European partners on how to react to the proposal first, but eventually

139 UN Doc. E/CN.4/1996/28, para. 57; UN Doc. E/CN.4/1996/28, Annex II.

140 See, for example: UN Doc. E/CN.4/1998/42, para. D 7; and UN Doc. E/CN.4/1999/59, para. 70-79.

141 Inter-American Institute of Human Rights (IHR) and the Association for the Prevention of Torture (APT), 2004, p. 43 and 45.

142 *Ibidem*, p. 47 and 54-55. For information on Amnesty's campaign, see: Amnesty International, 2000, p. 99 and 117. See also: 'Nieuws over de Campagne tegen martelen' [News about the campaign against torture] – In: *Amnesty in Actie*, Vol. 2, No. 10, 2001, p. 8.

143 For instance, in answer to a question raised in the Parliamentary Standing Committee for Foreign Affairs, the Minister of Foreign Affairs confirmed to subscribe to the requirements that the Protocol should, according to Amnesty International, meet. See: Appendices to the reports of the Second Chamber, 2001-2002, 27 742, no. 4, p. 37. See also: Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 16 and 30; Malcontent and Huijboom, 2006, p. 95.

144 Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 30. In the Commission on Human Rights, the Netherlands also tried to stimulate the work by an appeal to all states to constructively engage in the negotiations. See: Letter from the Minister of Foreign Affairs to the Chairman of the Parliamentary Standing Committee for Foreign Affairs, 2 July 2001, non-file document ['niet-dossierstuk'] 2000-2001, buza000353, Second Chamber, p. 2. To be found in the electronic databases Parlando or Opmaat.

145 Malcontent and Huijboom, 2006, p. 97.

146 UN Doc. E/CN.4/2001/67, para. 13 and 19.

147 *Ibidem*, para. 19, and annex I.

they put forward an alternative draft.¹⁴⁸ In this draft, the Subcommittee remained the principal organ, but states parties were free to set up national mechanisms by way of an additional measure.¹⁴⁹ In the Working Group's session of 2002, a compromise-proposal by the Chairman-Rapporteur, Elizabeth Odio Benito, brought the two drafts together in a construction that was based on an independent international system as well as on independent national mechanisms, which states parties were obliged to create within one year after the entry into force of the Protocol.¹⁵⁰

The proposal received the endorsement of the Latin American as well as the European countries. With the support of NGOs, these countries now joined in a concerted effort to get the draft Protocol adopted in 2002. On the other hand, there were still countries that could not join the consensus, and that were insistent that the matter be held over to the next year.¹⁵¹ One of the most important opponents of the draft Protocol was the United States. In the course of the negotiations, its doubts about the desirability of this new instrument had increased, and after the terrorist attacks of 11 September 2001, it had come to fear demands for access to prisoners and terror detainees held at Guantanamo Bay.¹⁵² The Netherlands, and other supporters of a swift adoption, felt that further deliberations would make a consensus rather less than more likely, and did not support the United States suggestion to continue the work in the Working Group.¹⁵³ The draft Protocol was submitted to the UN Commission on Human Rights and subsequently to the General Assembly, where it was adopted on 18 December 2002.¹⁵⁴

The Netherlands considered the adoption of the Protocol as one of the most important results in the field of human rights of that year.¹⁵⁵ Even so, for a long time, it was uncertain whether the government would ratify or even sign this Protocol. As

148 *Ibidem*, annex II. See also: Malcontent and Huijboom, 2006, p. 98.

149 *Ibidem*.

150 See: UN Doc. E/CN.4/2002/78, p. 6, 12-14, and annex 1.

151 *Ibidem*, p. 14-24. See also: Inter-American Institute of Human Rights (IHR) and the Association for the Prevention of Torture (APT), 2004, p. 49-55; Letter from the Minister of Foreign Affairs to the Chairman of the Parliamentary Standing Committee for Foreign Affairs, 24 June 2002, non-file document ['niet-dossierstuk'] 2001-2002, buza020294, Second Chamber, p. 1-3. To be found in the electronic databases Parlendo or OPmaat.

152 See: 'Blokade VS van antifolterverdrag mislukt' [US attempts to block anti-torture treaty failed] – In: *NRC Handelsblad*, 25 July 2002. See also: Letter from the Minister of Foreign Affairs to the Chairman of the Parliamentary Standing Committee for Foreign Affairs, 24 June 2002, non-file document ['niet-dossierstuk'] 2001-2002, buza020294, Second Chamber, p. 1-3. To be found in the electronic databases Parlendo or OPmaat. For more information about the United States' objections, see also: Malcontent and Huijboom, 2006, p. 97.

153 Letter from the Minister of Foreign Affairs to the Chairman of the Parliamentary Standing Committee for Foreign Affairs, 24 June 2002, non-file document ['niet-dossierstuk'] 2001-2002, buza020294, Second Chamber, p. 1-3. To be found in the electronic databases Parlendo or OPmaat. See also: Inter-American Institute of Human Rights (IHR) and the Association for the Prevention of Torture (APT), 2004, p. 49-55. For the Netherlands' voting behaviour, see: Inter-American Institute of Human Rights (IHR) and the Association for the Prevention of Torture (APT), 2004, p. 213.

154 See: General Assembly Resolution A/RES/57/199, 18 December 2002.

155 Appendices to the reports of the Second Chamber, 2002-2003, 28 880, no. 10, p. 23.

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was explained to parliament, the main reason for this hesitation was that the Netherlands was already subject to a similar system under the European Convention for the Prevention of Torture. The government did not consider it desirable to be subject to both systems, among others because it was unclear how this inspection system would relate to that of the UN, and because of the increased workload that would result.¹⁵⁶

In the Working Group, this problem had also been raised, and it had been suggested that the Subcommittee should be left with the possibility to exempt a state party from its program of regular visits if it was already subject to preventive visits under a regional system.¹⁵⁷ The Netherlands had been in favour of that suggestion too, but it proved to be unacceptable to other delegations.¹⁵⁸ Later, the European partners had also indicated that they were unhappy about the mandatory character of the national mechanisms laid down in the final draft, because for them this would mean that they would become subject to no less than three supervisory organs, but they had supported it in spite of that.¹⁵⁹ It would therefore be hard indeed to explain to other countries why the Netherlands had problems ratifying a Protocol that it had itself fought for in the UN. Moreover, as was also remarked in parliament, if the Netherlands refused to become a party to the Protocol, this would harm the good international reputation that the Netherlands had in the field of human rights and international law.¹⁶⁰

Apparently, these the arguments against and in favour of ratification were weighted differently at the Ministries that were involved, because in its annual report for 2003, the Ministry of Foreign Affairs explained that there was 'a delay in interdepartmental tuning' with respect to the question of the Protocol's ratification.¹⁶¹ Among those interested in the Protocol, it is an open secret that these veiled terms referred to a difference of opinion between the Ministry of Foreign Affairs and the Ministry of Justice: the former of those Ministries was in favour of ratification, while the latter was opposed. The Ministry of Foreign Affairs could not convince the Ministry of Justice at first, but parliamentary intervention eventually tipped the scales in favour of ratification. In a meeting with the Parliamentary Standing Committee for Foreign Affairs of

156 Appendices to the reports of the Second Chamber, 2004-2005, no. 1138, p. 2413-1214; Reports of the Second Chamber, 2004-2005, no. 66, 30 March 2005, p. 4241.

157 UN Doc. E/CN.4/1994/25, para. 61-62 and 73-75. See also: De Vargas, 1993, p. 129; Barrett, 2001, p. 28-29; Inter-American Institute of Human Rights (IHR) and the Association for the Prevention of Torture (APT), 2004, p. 41. It should be noted that it was only just after the negotiations on the UN Protocol were started that a Protocol was added to the European Convention for the Prevention of Torture, which made it possible for states other than Council of Europe member states to become a party to this Convention. It cannot be excluded that this had something to do with the some European governments' fear for overlapping systems.

158 Message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 4 November 1993, Archive MFA, ddi-dio 1993-1996, file: dio/ara/00508. For some rejecting comments of other countries, see, for example: UN Doc. E/CN.4/1994/25, para. 62 and 69; UN Doc. E/CN.4/1995/38, para. 36; UN Doc. E/CN.4/1993/WG.11/WP.1, para 48.

159 UN Doc. E/CN.4/2002/78, p. 19-20.

160 Reports of the Second Chamber, 2004-2005, no. 66, 30 March 2005, p. 4239; Reports of the Second Chamber, 2005-2006, no. 26, 24 November 2005, p. 1828.

161 Appendices to the reports of the Second Chamber, 2003-2004, 29 540, no. 10, p. 24.

9 March 2005, the Minister of Foreign Affairs, Bernard Bot, implicitly hinted to parliament that he needed its support in order to get the Protocol ratified.¹⁶² Apparently, Lousewies van der Laan of the liberal-democratic party D66 and Coskun Çörüz of the christian-democratic party CDA caught his hint, and on 30 March 2005, they submitted a motion in which they called upon the government to ratify the Protocol.¹⁶³ As a result, the Netherlands gave its signature on 3 June 2005.¹⁶⁴ To guarantee that this would also be followed by an actual ratification, another motion was adopted on 24 November 2005.¹⁶⁵ It was adopted by general consent.¹⁶⁶ On 20 January 2006, the government let parliament know that it was preparing the bill of approval that was needed for its entry into force, which was expected to be completed in the spring of 2006.¹⁶⁷

However, a few months later, in June, it was announced that the procedure was again delayed because of proposed changes in the organisation of domestic supervision of the legal position and treatment of prisoners that could have consequences for the way the Netherlands would implement the Protocol, and that might result in the need for an explanatory declaration on the government's interpretation of what constitutes an 'independent national preventive mechanism'.¹⁶⁸ In the Netherlands, domestic supervision on the treatment of detainees used to be carried out by an independent organ, but since January 2005, a newly established inspection unit of the Ministry of Justice performs similar tasks as a part of its mandate to make overall assessments of the functioning of judicial institutions.¹⁶⁹ In order to avoid duplication, the Minister of Justice, Piet Hein Donner, has proposed that only the latter will in the future continue with this supervisory work.¹⁷⁰ In parliament, opposition as well as government parties have, however, asked whether the Ministry's inspection unit can fulfil this task in an independent way, as is required, for instance, by the Optional Protocol.¹⁷¹ At the time of writing, parliamentary debate has not concluded, and the question will probably be held over until after the elections of November 2006.¹⁷² As a consequence, it remains unclear whether the Dutch ratification will or will not be accompanied by an interpretative statement.

162 See: Appendices to the reports of the Second Chamber, 2004-2005, 29 800, chapter V, no. 97, p. 6.

163 Reports of the Second Chamber, 2004-2005, no. 66, 30 March 2005, p. 4239-4242; Appendices to the reports of the Second Chamber, 2004-2005, 29 800, chapter V, no. 88.

164 See also: http://www.ohchr.org/english/countries/ratification/9_b.htm, accessed 8 September 2006.

165 Appendices to the reports of the Second Chamber, 2005-2006, 30 300, chapter V, no. 60.

166 Reports of the Second Chamber, 2005-2006, no. 27, 29 November 2005, p. 1855.

167 Appendices to the reports of the Second Chamber, 2005-2006, 30 300, chapter V, no. 105.

168 Appendices to the reports of the Second Chamber, 2005-2006, 30 300, chapter V, no. 129; Appendices to the reports of the Second Chamber, 2005-2006, 30 161, no. 9, p. 3.

169 The organs referred to are the independent 'Raad voor Strafrechtstoepassing en Jeugdbescherming' and the governmental 'Inspectie voor de Sanctietoepassing'.

170 See: Appendices to the reports of the Second Chamber, 2004-2005, 30 161, no. 3.

171 See, for instance: Appendices to the reports of the Second Chamber, 2005-2006, 30 161, no. 6.

172 Reports of the First Chamber, 2005-2006, no. 35, 3 July 2006, p. 1658.

2.7 CONCLUSION

On 13 November 1990, a Dutch delegate to the General Assembly declared: 'The Netherlands has been actively involved in all United Nations efforts to outlaw and to prevent torture.'¹⁷³ Indeed, in the whole process of putting the issue of torture on the UN agenda, and especially in the genesis of the Declaration on Torture, the Netherlands, together with Sweden, played a prominent role. In respect to three other non-binding instruments, the idea of which had been conceived of in about the same period, the Netherlands also lived up to its name of a true human rights defender: it actively supported and contributed to the coming into being of the Code of Conduct for Law Enforcement Officials, the Principles of Medical Ethics, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment that came into being in the course of the 1970s and 1980s. Much of the work was done in cooperation and consultation with NGOs, in particular Amnesty International. Although it had initially not intended to, the Netherlands also became the driving force behind the creation of the post of Special Rapporteur on Torture. In sum, taking up a leading role in the further development and refinement of UN instrumentation to eradicate torture seems to have been self-evident for the Netherlands in these years.

When the Optional Protocol to the UN Convention against Torture was being negotiated in the decade between 1992 and 2002, the Netherlands also showed itself prepared to make an effort for an effective new instrument to be developed. Initially, there were some hesitations concerning the financial implications and the UN staff that would be needed to make this Protocol work, but they were soon set aside. Together with a group of other states and an NGO-coalition, the Netherlands tried to prevent states that were less inclined to accept a system of preventive visitations to erode the innovative elements in the Protocol, and to secure its eventual adoption by the General Assembly. Yet, when the Protocol was finally there, it appeared difficult for the Netherlands to actually ratify the instrument. The Ministry of Foreign Affairs had always been in favour of ratification, but the Ministry of Justice did not want to have to deal with a national, a regional *and* a global visitation mechanism.

Bureaucratic factors like this may also be an explanation for the relatively modest contributions the Netherlands made to the drafting of the European Convention for the Prevention of Torture. Although it was positive about the creation of this instrument, its level of commitment was not comparable to its engagement with new UN instrumentarium that was being developed in the same period. Whereas the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs was usually responsible in the latter case, it was the Legal Adviser and his staff that were responsible for human rights questions in the Council of Europe. Having a broader mandate than the Humanitarian and Legal Affairs Section, which was explicitly focused on humanitarian policies, and maintaining less intensive contacts with human rights

¹⁷³ Ministerie van Buitenlandse Zaken, 1991, 425.

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NGOs, obviously the Legal Adviser and his staff approached these matters slightly differently.

This does not, however, mean that the Netherlands was ready to make a case for all initiatives taken within the context of the UN. After all, one of the reasons why the Netherlands decided to make a case for a Declaration on Torture was to draw attention away from Amnesty International's idea to draft a Convention that would declare torture a crime under international law. The Netherlands was opposed, and argued that time was 'not ripe' for such an initiative. Although the work on the Declaration did indeed postpone the submission of formal proposals for a Convention against Torture, the idea was not forgotten, and it was again brought up only a few years after the adoption of the Declaration. In the next chapter, we will investigate the reactions of the Netherlands to that proposal, and the stand it took in the drafting process that followed.

CHAPTER 3

THE UN CONVENTION AGAINST TORTURE

It is clear from the previous chapter that combating torture was an important aspect of the Dutch human rights policy. It was demonstrated that, in this field, there was a close cooperation with NGOs, who generally spoke out in favour of the development of additional instruments, which they expected to be valuable in the fight against torture. Did the Netherlands also join forces with organisations like Amnesty International or the ICJ when the issue of a legally binding treaty against torture was put on the UN agenda, and was it willing to make an effort to realize this idea? Or were there institutional influences or other interests involved that limited the Netherlands' possibilities to do so? These questions are dealt with in this chapter about the Netherlands and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹

In the first section of this chapter, general information about the contents and the backgrounds of the Convention is given. The course of the negotiations and the main topics of discussion are also pointed out in this section. Section 3.2 deals with the Netherlands' general position towards the question of a Convention against Torture. A number of issues that were of particular importance in discussions about the Convention are covered in the next three sections. Finally, section 3.6 summarizes the conclusions that can be drawn from this chapter.

3.1 THE NEGOTIATIONS ON THE UN CONVENTION AGAINST TORTURE

3.1.1 Contents of the Convention

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in 1984.² According to its preamble, it was drawn up out of a desire 'to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'.³ Thus, its principal aim was not to outlaw torture, but to strengthen the already existing prohibition of

1 Officially, the Convention is entitled 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', but for reasons of readability, in this study it is also referred to as 'Convention against Torture'.

2 See: General Assembly resolution 39/46, 10 December 1984. The complete text of the Convention can also be found in annex 5 of this book.

3 Sixth pre-ambular paragraph CAT.

torture, as laid down in, among others, the ICCPR.⁴ The substantive part of the Convention gives a definition of torture, and formulates different measures to prevent acts of torture or other cruel, inhuman or degrading treatment or punishment, and to ensure the prosecution of torturers. These include some measures that were already recommended by the Declaration of 1975, but also a number of newly formulated obligations. An example is article 3, which prohibits a state party from expelling, returning ('refouler') or extraditing a person to another State if there are substantial grounds to believe that doing so would put the person in danger of being subjected to torture.⁵

With respect to the obligation to prosecute persons suspected of torture, the Convention incorporates a set of far-reaching measures. It is not only compulsory for states parties to make torture punishable under domestic criminal law as an offence of a serious nature, but they are also expected to participate in a system of universal jurisdiction. This means that whenever an alleged torturer is present in the territory of a state party, the case it is to be submitted to its competent authorities, even if the crime has been committed outside its own territory and by persons other than its own state's nationals. States parties are obliged to take measures that are necessary to establish jurisdiction in these situations, so they can never claim that their law does not allow them to prosecute. The only circumstance in which a state party does not have to submit a case to its authorities is when the alleged offender is extradited to another state.⁶ The general idea behind the system is that 'there shall be no safe-haven for torturers or for their accomplices', at least not in the countries which are parties to the Convention.⁷

As to the international supervisory mechanisms, part two of the Convention provides for the establishment of a Committee against Torture, which is composed of ten independent experts.⁸ This Committee is entrusted with the task of monitoring the implementation of the Convention through a system of periodical state reporting, an optional interstate complaints procedure and an optional individual complaints procedure.⁹ Finally, the Committee has the competence to investigate reliable and well-founded indications of the occurrence of a systematic practice of torture on the territory of a state party, but states parties that are not willing to accept this mechanism can opt out.¹⁰

4 Burgers and Danelius, 1988, p. 1.

5 See: Article 3 CAT.

6 See: Article 5, 6 and 7 CAT.

7 It should be noted that only states parties to the Convention are obliged to establish extraterritorial jurisdiction, so in practice, the system is not truly 'universal'. See: Burgers and Danelius, 1988, p. 3; Boulesbaa, 1999, p. 175-176; Hawkins, 2004, p. 782.

8 See: Article 17 and 18 CAT.

9 See: Article 19, 21 and 22 CAT.

10 See: Article 20 and 28 CAT.

3.1.2 The initiative and the first negotiating years

The work on the UN Convention against Torture started on the initiative of Sweden. Together with the Netherlands, this country had played a prominent role in the genesis of the Declaration on Torture, and for Sweden, it had always been evident that the drafting of a legally binding treaty would have to be the next step to take.¹¹ In the spring of 1977, the Swedish delegation to the Economic and Social Council (ECOSOC) of the United Nations proposed the drafting of a Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as soon as possible, and in December of that year, the General Assembly adopted a resolution which requested the Commission on Human Rights to start work on it.¹² On 7 February 1978, the Commission created a Working Group for that purpose.¹³ The Working Group was open to all members of the Commission, but in practice, other states participated on an almost equal footing.¹⁴ It is unclear whether the Netherlands was present in 1978, but in any case, it participated in the Working Group in each of the following years. Until 1982, an official of the Ministry of Justice was the main representative of the Netherlands; later the Ministry of Foreign Affairs took the lead.¹⁵ NGOs with a consultative status were allowed to participate as observers too, and some of them, notably the ICJ and Amnesty International, made use of that opportunity.¹⁶

By the time of the Working Group's first meeting, several draft texts for a Convention were circulating. Sweden submitted a draft in January 1978, but NGOs had not stood still either, and they had developed their own initiatives.¹⁷ In the previous chapter, it was already mentioned that the Swiss Committee Against Torture of Jean-Jacques Gautier prepared a draft that was based on a preventive visitation model.¹⁸ A third proposal came from the International Association of Penal Law (IAPL), a worldwide association of criminal law specialists, which had drawn up its draft after consultations with the International Commission of Jurists (ICJ), the International

11 Interview with H.C.Y. Danelius, 22 May 2005. See also: Castermans-Holleman, 1992, p. 185-186.

12 Pages 76-81 of a report of the Dutch delegation on the 36th session of the UN Commission on Human Rights, 4 February-15 March 1980, Archive MFA, VN 1975-1984, 999.232.154, file 2581. See also: General Assembly resolution 32/62, 8 December 1977.

13 UN Doc. E/CN.4/1292, p. 29.

14 Burgers, 1989, p. 46.

15 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 6 September 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Minister of Justice through the Secretary-General of the Ministry of Justice, 11 January 1982, Archive MJ, unfiled records; Interview with J.H. Burgers, 26 March 2003.

16 See, for instance: UN Doc. E/CN.4/1347, p. 36 and 37; UN Doc. E/CN.4/1408, p. 53; UN Doc. E/CN.4/1475, p. 51. See also: Clark, 2001, p. 59.

17 For the text of the Swedish draft, see: UN Doc. E/CN.4/1285. The text of this draft had come into being in close consultation with the other Nordic countries. See: UN Doc. E/CN.4/1314, p. 4.

18 See section 2.5.

Committee of the Red Cross and Amnesty International.¹⁹ The aim of all three proposals was to make the fight against torture more effective, but the methods they chose to achieve this differed. In the Swedish proposal, the crucial articles were those dealing with a system of universal jurisdiction; especially these were expected to contribute to the combat against torture.²⁰ Otherwise, it was to a large extent based on existing instruments; most substantive articles corresponded with those laid down in the Declaration of 1975, and its supervisory mechanisms were similar to those of the ICCPR and its Optional Protocol on individual complaints. In this respect, the only novelty was an inquiry procedure that could be invoked if the supervisory organ received information that torture was systematically practised in a state party. Although there were some differences between the Swedish draft and the one prepared by the IAPL, the thrust of these two proposals was the same.²¹

The proposal of the Swiss Committee Against Torture took another approach. It was based on the conviction that supervisory methods in existing human rights conventions were no sufficient safeguard against torture, and that a system of inspection through regular visits should therefore be introduced.²² However, Sweden, along with a number of other governments, did not believe this was a realistic course; they feared that this proposal would complicate and slow down the negotiations on the Convention. On the proposal of ICJ's secretary-general Niall MacDermot, this draft was therefore transformed into an Optional Protocol to be considered only after the adoption of the Convention against Torture.²³ Hence, when the Working Group started its work, there were just two proposals to take into consideration. It was decided to take the Swedish draft as a basis for its discussion.²⁴ The Working Group did, however, not get to much concrete drafting, among others because of the little time available.²⁵ Besides, a considerable amount of that time was spent on a Swedish proposal to extend the Working Group's mandate in 1979 to continue the work.²⁶

Squabbles about procedures continued until 1980.²⁷ They took place against the background of a situation in which the UN Secretariat's Division of Human Rights lacked the means to facilitate extra meetings. During the second half of the 1970s, it had assumed extensive new responsibilities, but the General Assembly had not been willing to grant sufficient additional resources.²⁸ In the Commission, Soviet bloc

19 Burgers and Danelius, 1988, p. 26. For the text of the IAPL-draft, see: UN Doc. E/CN.4/NGO/213.

20 Burgers and Danelius, 1988, p. 35-37; MacDermot, 1979, p. 32-34.

21 One difference was, for instance, that the scope of the IAPL's draft was limited to torture only, while the Swedish proposal included other cruel, inhuman or degrading punishment or treatment too. For further details, see: Burgers and Danelius, 1988, p. 37-38.

22 Burgers and Danelius, 1988, p. 26-27; MacDermot, 1979, p. 31-32. See also section 2.5 of this book.

23 Evans and Morgan, 2001, p. 109-112; Pennegård, 1998, p. 41-42; Burgers and Danelius, 1988, p. 27-28; MacDermot, 1979, p. 34-36.

24 UN Doc. E/CN.4/1292, p. 30-33. See also: Burgers and Danelius, 1988, p. 38-39.

25 UN Doc. E/CN.4/SR.1468, p. 14.

26 UN Doc. E/CN.4/1292, p. 31-33.

27 See, for instance: UN Doc. E/CN.4/1347, p. 44; UN Doc. E/CN.4/1408, p. 68.

28 Tolley, 1987, p. 97. See also: UN Doc. E/CN.4/SR. 1520, p. 10.

countries as well as Western states complained about wasteful spending, but cost-cutting measures were of course always sought in programs or initiatives that were favoured by the opposing group.²⁹ Indeed, it was the Eastern European states in particular that made objections against the re-establishment of a Working Group on the Convention against Torture. They favoured a limitation on the amount of Working Groups anyway, but if any Working Group was to be established, it should rather be on the issue of the draft Convention on the Rights of the Child, which had been proposed by Poland.³⁰

In spite of these difficulties, a Working Group was created each year, but during the first few years only limited progress was made. Several substantive articles were adopted in the period from 1979 to 1981, but some of the most important questions remained unresolved.³¹ The comments to the Swedish draft that states submitted to the Secretary-General of the UN in 1978 and 1979, made clear that there was disagreement on a number of issues in particular. The question of the definition of torture and the scope of the Convention received most attention.³² In the Working Group's deliberations, it also proved difficult to find a formulation that all could accept.³³ Some questions could be decided upon, but one important issue that remained unsettled concerned the Convention's scope. Should it be broad and also include cruel, inhuman or degrading treatment or punishment, or was it better to limit it to torture exclusively?³⁴ The draft article that aimed to prohibit a state party from expelling, returning or extraditing a person if this would put him in danger of being subjected to torture – the so-called non-refoulement article – proved to be hard to agree upon as well, and after three years of negotiations, no solution had been found on this issue either.³⁵

What was even more important was that the articles on universal jurisdiction, which Sweden considered the cornerstone of its draft, were highly controversial as well. There were states, inter alia the United States, Switzerland, and the Nordic countries, that shared the Swedish opinion that these articles were essential to make the fight against torture more effective.³⁶ In their comments on the draft, France, Portugal and the United Kingdom, on the other hand, indicated that a system of universal jurisdiction would be hard to reconcile with their criminal law systems, and in the Working

29 Tolley, 1987, p. 218.

30 Ministerie van Buitenlandse Zaken, 1980c, p. 13; UN Doc. E/CN.4/SR. 1521, p. 4-5; UN Doc. E/1979/C.2/SR.24, p. 4.

31 For details of the discussions in these years, see: UN Doc. E/CN.4/1347; UN Doc. E/CN.4/1408; UN Doc. E/CN.4/1475. See also: Burgers and Danelius, 1988, p. 39-77.

32 See: UN Doc. E/CN.4/1314, p. 5-10; UN Doc. E/CN.4/1314/Add.1, p. 2; UN Doc. E/CN.4/1314/Add.2, p. 2; UN Doc. E/CN.4/1314/Add.3, p. 2; UN Doc. E/CN.4/1314/Add.4, p. 3.

33 UN Doc. E/CN.4/1292, p. 30-31; UN Doc. E/CN.4/1347, p. 36-39; UN Doc. E/CN.4/1475, p. 52-53.

34 UN Doc. E/CN.4/1408, p. 66-67; UN Doc. E/CN.4/1475, p. 52-53 and 62-63.

35 UN Doc. E/CN.4/1347, p. 41-43; UN Doc. E/CN.4/1408, p. 54-57; UN Doc. E/CN.4/1475, p. 54-55.

36 In regard to the participation of Switzerland, it should be noted that this country was not a member of the UN, but it was allowed to participate in the sessions of the Commission on Human Rights as an observer. It did so for the first time in 1978. See: Doc. E/CN.4/SR.1468, p. 15.

Group there appeared to be other states that had problems with these articles as well. Apart from the countries mentioned above, they included, among others, Australia, the Netherlands, Brazil, Argentina and Uruguay.³⁷ By 1981, not even a beginning of consensus could be reached on this issue, and the question of international supervision, which was another crucial, but contentious issue, had hardly been discussed yet.³⁸

As the above makes clear, there were also differences of views on the Convention within the Western group. In order to be able to exchange opinions, it was decided to create a so-called 'Ad Hoc Committee of Experts to Exchange Views on the Draft Convention against Torture', within the framework of – perhaps remarkably – the Council of Europe. Apart from Council of Europe member states, other members of the so-called 'Western Europe and others' group at the UN – Australia, Canada, Finland, New Zealand, and the United States – were invited as observers.³⁹ The discussions were considered useful, but they did not lead to a general consensus among Western states, which made the Convention's rapid adoption only less likely.

3.1.3 A Dutch Chairman-Rapporteur

The lack of substantial progress and continued disagreement about the draft Convention's key provisions caused a rather pessimistic mood among those in favour of the Convention.⁴⁰ When the Working Group met again in 1982, it was clear that it would be difficult to make headway. At the same time, pressure to finalize the work on the Convention had increased. In reaction to the negative atmosphere of 1981, NGOs had started to intensify their lobbying for a speedy conclusion of the negotiations. In the Council of Europe, this led to a recommendation by the Parliamentary Assembly which called upon the governments of the member states to 'hasten the adoption and

37 UN Doc. E/CN.4/1314, p. 15; UN Doc. E/CN.4/1314/Add.1, p. 3; UN Doc. E/CN.4/1408, p. 58-62; UN Doc. E/CN.4/1475, p. 55-60. See also: Burgers and Danelius, 1988, p. 57-60, 72-73, and 78-80; Hawkins, 2004, p. 789.

38 UN Doc. E/CN.4/1475, p. 63-64. See also: Burgers and Danelius, 1988, p. 74 -77.

39 See, for instance: Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Head of the International Organisations Department of the Ministry of Foreign Affairs, the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, and the Deputy General-Director of the Ministry of Foreign Affairs, 3 December 1981, Personal Archive J.H. Burgers; Letter from the Secretary-General of the Council of Europe to the Ministers of Foreign Affairs of the member states of the Council of Europe, 14 December 1978, Archive MJ, unfiled records; CoE Doc. CM (81) 202, p. 2, Archive MFA, RvE 1975-1984, 999.434.0, file 838; CoE Doc. CM (81) 179, p. 2, Archive MFA, RvE 1975-1984, 999.434.0, file 838. It should be noted that, contrary to the consultations within this framework, the EC's European Political Cooperation (EPC) did not play any role of importance here. Probably, the main reason was that some of the most active states, for instance initiator Sweden, were no EC member states at the time. See: Report on the 36th session of the Commission on Human Rights, Geneva, 4 February-5 March 1980, Archive MJ, unfiled records; Interview with J.H. Burgers, 26 March 2003.

40 Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

implementation of the draft Convention against Torture' in the UN.⁴¹ In several countries, NGO activities took place also at a domestic level. For instance, in the Netherlands, the national ICJ-branch, NJCM, published an open letter to the Minister of Foreign Affairs together with a declaration of approval that was signed by several prominent persons.⁴²

It so happened that in this crucial year, the deputy head of the Dutch delegation to the Commission on Human Rights, Jan Herman Burgers, was chosen as the Chairman-Rapporteur of the Working Group.⁴³ The first two years, the Indian delegates, Ms. V. Pandit and Ms. Nina Sibal, had chaired the Working Group, but when the latter did not show up in 1980, and no other candidate from the G-77-group of developing countries could be found, the Greek delegate, Mr. A. Papastefanou, was elected as Chairman-Rapporteur of the Working Group.⁴⁴ He was re-elected in 1981.⁴⁵ Yet, in 1982, he resigned as a Greek representative to the Commission for domestic political reasons and the position of Chairman-Rapporteur became vacant.⁴⁶ In the Western group, which met right before the Working Group's first meeting of that year, there was a preference for a Chairman-Rapporteur from a Western country. One important reason for that was the fact that the communist bloc also delivered the Chairman-Rapporteur of a Working Group, namely the one on the draft Convention on the Rights of the Child, which was also being negotiated in those years.⁴⁷

First, it was suggested to propose the Swedish delegate, Hans Danelius. In the light of this country's initiating role, this was a natural choice, but there were two disadvantages. In the first place, Danelius was unable to attend the Working Group's sessions if these would continue after the first pre-sessional week, and, secondly, the United States feared objections from other regions, because, at that moment, Sweden was not a member of the Commission on Human Rights.⁴⁸ It seemed important to have an alternative candidate to fall back on, and several delegations suggested Jan Herman Burgers as a second possible candidate. There did not seem to be any other candidates

41 Recommendation no. 909 (1981), Archive MFA, RvE 1975-1984, 999.438.0, file 1093.

42 Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Minister of Justice through the Secretary-General of the Ministry of Justice, 11 January 1982, Archive MJ, unfiled records. The NJCM-letter's main aim was to obtain support for the Optional Protocol, but since discussions on this instrument could only start after the adoption of the Convention, this implied a call for a rapid finalization of the Convention too. For the letter and a further explanation, see: *NJCM-Bulletin*, Vol. 7, No. 1, 1982, p. 2-3 and 66-67.

43 UN Doc. E/CN.4/1982/30/Add.1, p. 2.

44 UN Doc. E/CN.4/1292, p. 30; UN Doc. E/CN.4/1347, p. 35; UN Doc. E/CN.4/1408, p. 52; Telex message, including the delegation's report no. 1, from the Permanent Representative to the UN to the Ministry of Foreign Affairs, 6 February 1979, Archive MFA, DVE 1945-1984, 999.232.154, file 4556; Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 5 February 1980, Personal Archive J.H. Burgers.

45 UN Doc. E/CN.4/1475, p. 50.

46 Interview with J.H. Burgers, 26 March 2003. See also: Baehr, 1989, p. 308-309 (endnote 7).

47 Open message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 26 January 1982, Personal Archive J.H. Burgers.

48 *Ibidem*.

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available, so Burgers agreed with the proposal. It was only when he was just about to enter the conference room that he learnt that other Western delegations had changed their minds, and would suggest him as their first choice candidate.⁴⁹ He was elected, and continued to serve as the Working Group's Chairman-Rapporteur until its last session in 1984.⁵⁰ During these years, he would also serve as the Dutch representative to the Working Group; whenever he spoke on behalf of the Netherlands, he made this explicit to the others.⁵¹

With the election of Burgers, the Working Group got a Chairman-Rapporteur who was very interested in human rights topics and the fight against torture in particular. At the Ministry of Foreign Affairs, he served as the Head of the Legal and Social Affairs Division, and he had been responsible for, among others, the drafting of the first memorandum on human rights and foreign policy of 1979.⁵² In his youth, he had become acquainted with the early, pre-war ideas about human rights through the writings of H.G. Wells, and during the Second World War and the Dutch colonial struggles in Indonesia, his conviction that human rights were important, was reinforced.⁵³ He became a member of Amnesty International when that organisation launched its first campaign against torture, and after his retirement from the Ministry of Foreign Affairs, he became a member of the board of the Dutch section of that organisation.⁵⁴ Apart from a great personal commitment to the issue at stake, the new Chairman-Rapporteur also had a very clear idea of the method of work that should be applied.

The Netherlands had been dissatisfied with the performance of Burgers' Greek predecessor. In its reports, the Dutch delegation to the Commission on Human Rights had blamed him for not showing the decisiveness or inspiration needed to lead the negotiations.⁵⁵ Progress in the work was also impeded by the fact that decisions could only be made by consensus in the Working Group. Chairman Papastefanou had concentrated his efforts on attempts to find compromise texts that all could accept, but it became increasingly clear that differences of points of view were so fundamental that it would be unrealistic to expect that a real consensus could be reached. Therefore, the new Chairman decided to change the working method of the Working Group. Instead of concentrating on a never-ending search for alternative formulations and formal adoption of texts, the Working Group should try to clearly identify the issues

49 Open message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 26 January 1982, Personal Archive J.H. Burgers; Interview with J.H. Burgers, 26 March 2003.

50 UN Doc. E/CN.4/1983/63, p. 2; UN Doc. E/CN.4/1984/72.

51 Interview with J.H. Burgers, 26 March 2003.

52 *Ibidem*.

53 *Ibidem*. H.G. Wells was one of the early promoters of the idea of a general international document of human rights referred to in section 1.1.1.

54 Interview with J.H. Burgers, 26 March 2003. See also: Baehr, 2001, p. 118.

55 Pages 76-81 of a report of the delegation of the Kingdom on the 36th session of the UN Commission on Human Rights, 4 February-15 March 1980, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

and carefully assess the support for specific solutions. Attempts could be made to isolate the countries that were opposed to certain articles, but if this proved impossible, definitive decisions on such issues would then be left to either the Commission or the General Assembly, where they could be settled by vote.⁵⁶

In the framework of the Ad Hoc Committee of Experts in the Council of Europe, the idea to pass through the draft to the Commission on Human Rights and the General Assembly had already been mentioned as a possible way out of the deadlock of 1981.⁵⁷ Once applied, Burgers' method of working was indeed welcomed as an effective approach, which contributed to more fruitful discussions in the Working Group.⁵⁸ The Working Group's meetings of 1982 and 1983 were used to discuss thoroughly all the Convention's draft provisions.⁵⁹ Chairman-Rapporteur Burgers then drew up a compilation of draft provisions as an annex to the Working Group's report of 1983 to serve as a basis for further considerations. It contained provisions that had already been adopted by the Working Group, but also some provisions that only reflected the outcome of discussions so far.⁶⁰ By combining adopted texts and undecided questions in one draft text, he was able to present a complete draft, which was likely to increase pressure on delegates to reconcile themselves with the dominant opinion in the Working Group and to join the consensus.⁶¹

When Burgers introduced the Working Group's report to the Commission on Human Rights, he hinted that he intended to round off the negotiations in 1984. In his statement, he expressed the hope that governments would study still outstanding questions before the next session, so that decisions could be taken. According to him, '[t]he Commission might then be able at its next session to discharge the task entrusted to it by the General Assembly.'⁶² In the Third Committee of the General Assembly, other delegations expressed their support for this too. To give an example, the Swedish delegate stated: '[i]f the working group could make no substantial progress, it should adopt a final report rather than defer its work for a further year; the General Assembly would then have to consider what further action was required.'⁶³ This decision was also prepared in more informal ways. In a meeting of the Ad Hoc Committee of Experts in

⁵⁶ Burgers and Danelius, 1988, p. 77; Interview with J.H. Burgers, 26 March 2003.

⁵⁷ Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Strasbourg, 3 July 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs and the Legal Adviser of the Ministry of Foreign Affairs, 28 December 1981, Personal Archive J.H. Burgers.

⁵⁸ CoE Doc. CAHTT (82) 2, p. 4, Personal Archive J.H. Burgers.

⁵⁹ For the details of the discussions, see: UN Doc. E/CN.4/1982/30/Add.1; UN Doc. E/CN.4/1983/63. See also: Burgers and Danelius, 1988, p. 77-91.

⁶⁰ UN Doc. E/CN.4/1983/63, annex, p. 1.

⁶¹ Interview with J.H. Burgers, 26 March 2003.

⁶² UN Doc. A/CN.4/1983/SR.54/Add.1, p. 3-4.

⁶³ UN Doc. A/C.3/38/SR.50, p. 3.

the Council of Europe of May 1983, the draft's possible submission to the Commission on Human Rights and the General Assembly was discussed, and in a meeting between officials of the Ministry of Foreign Affairs and a delegation of the Netherlands' branch of Amnesty International of July 1983, it was mentioned as an option to be considered too.⁶⁴

When the military junta in Argentina resigned on 17 June 1983, this only added to Burgers' conviction that 1984 would need to be the year to submit the draft Convention to the General Assembly. As one of the last countries, Argentina had remained opposed to the universal jurisdiction articles, and the regime change could mean a breakthrough in the stalemate around this topic. It was uncertain how long the new government would be able to remain in place; therefore, it was better to seize the opportunity now.⁶⁵ The main aim of the Working Group's meetings of 1984 was thus to try and remove square brackets from the draft text that Burgers had compiled in 1983, and to come to a final assessment of the extremes of all negotiation positions where this was not possible. This strategy worked out quite well, and although Burgers sometimes just about managed to reach consensus, at the end of the Working Group's session, formally, disagreement continued to exist only in relation to some aspects of the supervisory system.⁶⁶ The Soviet Union opposed a provision that gave the Committee against Torture, which would be created to supervise the implementation of the Convention, the competence to make 'comments or suggestions' on the report of individual states parties, and a draft article that contained a mandatory inquiry procedure. As a consequence, the square brackets around these articles could not be removed.⁶⁷ Nevertheless, it was decided that the draft would be forwarded for consideration by the Commission on Human Rights.⁶⁸

3.1.4 Conclusion of the work

In his introductory intervention in the Commission, Chairman-Rapporteur Burgers expressed the view that 'the working group has now reached the limits of what it could accomplish in trying to find consensus.'⁶⁹ It was now 'up to the Commission to con-

64 CoE Doc. CDDH(83)19, p. 3, Archive MFA, RvE 1975-1984, 999.438.0, file 1072; Report entitled 'Notes of a conversation with an Amnesty International delegation', Archive MFA, Contacts with NGOs on human rights issues 1980-1984, 319, file: 430.

65 Interview with J.H. Burgers, 26 March 2003.

66 For the details of the discussions, see: UN Doc. E/CN.4/1984/72. See also: Burgers and Danelius, 1988, p. 91-99.

67 See: UN Doc. E/CN.4/1984/72, p. 9-11. See also: Burgers and Danelius, 1988, p. 91-92 and 96-98.

68 Burgers and Danelius, 1988, p. 91; Open message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 13 February 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

69 Statement made on 28 February by the Chairman-Rapporteur of the Working Group on a draft Convention against Torture, in presenting the Working Group's report to the Commission on Human Rights, Archive MFA, VN 1975-1984, 999.232.154, file 2581. See also: UN Doc. E/CN.4/1984/SR.32, p. 12-13.

sider in what way the work on the draft should be further pursued.⁷⁰ Actually, he expected that the considerations in the Commission would end in a settlement of unresolved issues by voting, so that a text without any square brackets could be presented to the General Assembly.⁷¹ However, it appeared that several delegations, from developing countries in particular, did not have a clue about the issues at stake.⁷² An underrepresentation of developing countries is not uncommon in negotiations about international human rights instruments, among others because they often lack the personnel and financial resources that are needed to arrange for representation.⁷³ In this case, the problems were aggravated by the fact that the report only became available on the 28th of February, the very day on which the Commission's considerations on the item started.⁷⁴

In this situation, the Western states came to the conclusion that attempting to decide on the two square-bracketed articles by vote was too risky. The best that could be hoped for was a defeat of the Soviet Union by a small majority and with many abstentions. What was likely to happen, though, was the adoption of a proposal to postpone a decision on the matter until the next session of the Commission. The Western delegations wanted to avoid this at any price.⁷⁵ Any delay in the adoption of the Convention would lead to a re-opening of the debates on the Convention and a weakening of several of its elements, so they feared.⁷⁶ Besides, it was unclear how the situation in Argentina would develop. The torture practices that had taken place in that country had attracted worldwide attention, and therefore, the Convention's advocates thought it would be of great symbolic value if it would be adopted with the support of Argentina.⁷⁷

If no votes would be taken in the Commission on Human Rights, the alternative would be to send the draft to the General Assembly, without all square brackets being removed. In principle, this was not without any risk either, especially because the Western group commanded a proportionally smaller voting bloc in the General Assembly than in the Commission.⁷⁸ It was hoped though that if the current draft would be sent to the General Assembly, a way to get the complete Convention adopted

⁷⁰ *Ibidem*.

⁷¹ Open message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 13 February 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Code-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 2 March 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

⁷² Code-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 2 March 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

⁷³ See, for instance: LeBlanc, 1995, p. 29 and 34.

⁷⁴ The Working Group had adopted the report on 16 February 1984. See: Burgers and Danelius, 1988, p. 100; UN Doc. E/CN.4/ 1984/SR.32, p. 12.

⁷⁵ Code-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 2 March 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

⁷⁶ Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 13.

⁷⁷ Interview with J.H. Burgers, 26 March 2003.

⁷⁸ Tolley, 1987, p. 101.

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would be found in that organ. It was thus decided that efforts should be focussed on obtaining co-sponsors for a resolution that would transmit the issue to the General Assembly for consideration, and in the late morning of 28 February, the Netherlands and Finland submitted a draft resolution to that end, which was co-sponsored by Argentina, India, Senegal and Yugoslavia. Initially, the Soviet Union and a number of other delegations argued that it was essential to achieve a consensus on all provisions and that a continuation of the work in the Working Group would for that reason be preferable, but eventually, the resolution was adopted without a vote.⁷⁹

Attempts to put off final conclusions by continuation of negotiations in the Working Group were now thwarted, but it still remained to be seen whether the General Assembly would indeed adopt the Convention in 1984. As will be elaborated in section five of this chapter, the discussions in the Commission on Human Rights had revealed that it was even uncertain whether the current draft would receive the support of all Western delegations. Nonetheless, the ranks were again closed in time, and when negotiations started in New York, there was unanimity in the Western group as to the aim to get the Convention, including the contested articles, adopted at the next session of the General Assembly.⁸⁰ The Soviet Union, on its part, was faced with a dilemma. On the one hand, it favoured the adoption of human rights treaties, if only to point at the United States' refusal to ratify them. On the other hand, its objections against mandatory fact-finding and a competence of the Committee to make 'comments or suggestions' to national reports were too fundamental to make concessions on.⁸¹

After a number of informal consultation sessions, it became apparent that the Western and Latin American states were the only ones in favour of the adoption of the Convention with the retention of the articles that stood between square brackets. Only a limited number of African and Asian states took a similar stand, while many of them, on the other hand, preferred to postpone decisions or create the opportunity to make further changes to the existing draft. Islamic states advocated, for instance, guarantees that the concepts of torture and other cruel, inhuman and degrading treatment or punishment did not extend to the death penalty and other punishment prescribed by Islamic Law.⁸² This situation was advantageous to the Soviet Union and Eastern European states that made it clear that they were only prepared to give their support to the adoption of the Convention on the condition that the remaining questions were settled in accordance with their views. If no concessions were made, the Soviet Union

79 UN Doc. E/CN.4/1984/SR.33, p. 4-6 and 8-11; Code-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 2 March 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581. See also: Burgers and Danelius, 1988, p. 101. For the text of the resolution, see: Commission on Human Rights resolution 1984/21, 6 March 1984.

80 Code-message from the Permanent Representative in New York to the Ministry of Foreign Affairs, 8 June 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581. For written comments by Western and other governments, see: UN Doc. A/39/499; UN Doc. A/39/499/Add.1; UN Doc. A/39/499/Add. 2.

81 Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 12-13. See also: Baehr, 1989, p. 304.

82 Burgers and Danelius, 1988, p. 102-103.

would table a considerable number of text-proposals and insist on comprehensive consideration of the complete draft.⁸³

In principle, an attempt could be made to push the Convention through, but if successful at all, this would have the disadvantage of a number of negative votes and many abstentions, which would be a serious barrier to the aim of worldwide adherence to the future Convention. As time went by, it became more and more clear that proponents of the Convention would have to choose between making concessions to the Soviet Union or running the risk of postponement and a weakening of the text.⁸⁴ It was felt that the latter should in any case be avoided, so when the news got out that certain delegations were considering submitting a procedural draft resolution which would postpone action on the draft Convention to the General Assembly's next session, the Netherlands, Sweden and Argentina, decided to take action immediately. Together with a number of Western European and Latin American countries, and with the support of one African state, Gambia, and one small Pacific state, Samoa, they submitted a draft resolution before the Third Committee of the General Assembly, where the issue of the Convention was discussed. It proposed the adoption of the Convention against Torture with the inclusion of all draft provisions.⁸⁵ As could have been expected, this met with negative reactions from the Soviet Union and its Eastern European allies.⁸⁶ On their part, they submitted several amendments, which included of course the mandatory character of the inquiry procedure and the Committee's competence to make comments or suggestions on a state's report.⁸⁷

Before the end of the debate, an Australian statement of 28 November 1984 already made it clear that the sponsors of the draft resolution had decided to pursue consensus and to make concessions needed for that.⁸⁸ When the Netherlands' Permanent Representative to the United Nations, Max van der Stoep, formally introduced the draft resolution in the Third Committee a few days later, a similar message was brought across.⁸⁹ Eventually, the sponsors accepted a number of minor amendments in the formulation of the article that dealt with the inquiry procedure, and, be it reluctantly, they also agreed with a Byelorussian proposal to include an opt-out article that allowed states to declare that they do not recognize the Committee's competences in this

83 Code-message from the Permanent Representative in New York to the Ministry of Foreign Affairs, 17 September 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581. See also: Burgers and Danelius, 1988, p. 102-103. Actually, some of the communist countries' written comments had already foreshadowed this. See: UN Doc. A/39/499/Add.1, p. 13; UN Doc. A/39/499, p. 9.

84 Burgers and Danelius, 1988, p. 102-105.

85 UN Doc. A/39/708, p. 2 and UN Doc. A/39/708/Corr. 2. Burgers and Danelius, 1988, p. 103.

86 See, for instance, the statements of the Ukrainian Soviet Socialist Republic and the German Democratic Republic. See: UN Doc. A/C.3/39/SR.49, p. 12; UN Doc. A/C.3/39/SR.49, p. 7. For other examples, see UN Doc. A/C.3/39/SR.48; UN Doc. A/C.3/39/SR.49; UN Doc. A/C.3/39/SR.50; UN Doc. A/C.3/39/SR.51; UN Doc. A/C.3/39/SR.52.

87 Burgers and Danelius, 1988, p. 103-104. For the contents of the amendments, see also: UN Doc. A/39/708.

88 UN Doc. A/C.3/39/SR.52, p. 10.

89 UN Doc. A/C.3/39/SR.56, p. 8-9.

respect.⁹⁰ Furthermore, the Committee's competence to make 'comments or suggestions' was changed into the less far-reaching formulation of 'general comments', which, according to the Soviet bloc, excluded comments on individual state reports. All other proposed amendments were then withdrawn, and the draft resolution, as orally revised, was adopted without a vote.⁹¹ On Human Rights Day, which is celebrated on 10 December, the Convention was finally adopted without a vote in the plenary General Assembly.⁹²

3.2 THE NETHERLANDS' POINTS OF DEPARTURE

3.2.1 Objections against the idea of a Convention

Due to the pivotal role that one of its delegation members fulfilled as Chairman-Rapporteur of the Working Group, the Netherlands' name became closely attached to the Convention against Torture. Between themselves, Sweden and the Netherlands used to say that the Convention was a Swedish baby, which was eventually delivered by Dutch midwifery.⁹³ However, at the outset, the Netherlands had not been positive about the idea of a Convention against Torture. In chapter 2, it was already mentioned that the Netherlands had not been in favour of earlier suggestions in this direction either, among others because it feared that difficult and protracted negotiations would harm the momentum that had just been created around the struggle against torture. As an alternative, the Declaration on Torture of 1975 had been created. Some states, like Sweden, considered the quick adoption of the Declaration in 1975 as a stimulus to try and proceed further in the same direction, but other governments emphasized that reaching agreement on a binding Convention would be much harder. Some of them, feared that drafting a Convention so shortly after the Declaration had been adopted

⁹⁰ Although the Ukraine and Byelorussia were constituent parts of the Soviet Union, they were separately represented in the United Nations. In practice, they were not acting independently, but instead they pleaded the Soviet Union's case and introduced proposals and resolutions on its behalf. For further information on this specific issue, see: Aspaturian, 1960, p. 15-20 and 101-121. Furthermore note that, in a way the Byelorussian proposal made a concession to the proponents of a mandatory inquiry procedure, because opt-out clauses are considered to have a less harmful effect on the strength of provisions they apply to than 'opt-in' approaches. If an opt-out formula is provided for, states parties are automatically bound to the article concerned unless they make an explicit statement that they do not want to, whereas an 'opt-in' formula means that they are not covered by the article unless they make a declaration that they accept the article concerned. Furthermore, 'opt-in' declarations may be withdrawn at any time, while the option to make a statement to opt out is only available at the outset of a state's participation in the convention. See: Donnelly, 1986b, p. 8.

⁹¹ UN Doc. A/C.3/39/SR.60, p. 9-11. See also: Burgers and Danelius, 1988, p. 103-106.

⁹² General Assembly resolution 39/46, 10 December 1984.

⁹³ Interview with J.H. Burgers, 26 March 2003.

would weaken the authority and value of the latter.⁹⁴ The Netherlands belonged to that group of states.⁹⁵

In the Netherlands, it was felt that the Declaration was the maximum of what could, at that moment, be achieved in terms of universality and obligation.⁹⁶ As is the case with all instruments that lack a legally binding power, the Declaration's actual value and influence would depend on its moral-political authority. If an initiative to draw up a legally binding Convention was started, this was likely to take many years of hard work and discussions, which might diminish the idea of a worldwide commitment to the fight against torture and the norms that the Declaration laid down to that end. If the Convention would furthermore fail to attract worldwide ratification, this would even make it more difficult to present the Declaration's principles as universally shared norms. According to the Netherlands, this would be particularly harmful if only those states in which torture did not occur anyway, would become states parties. In that case, the Declaration's effects would be undermined, while stronger commitments would only have been achieved for those states that needed them least.⁹⁷ For these reasons, the Netherlands was not in favour of the Swedish initiative to draw up a Convention against Torture.

Apart from this, the Netherlands seemed to consider it more worthwhile to concentrate on measures explicitly mentioned in the resolution on the follow-up of the Declaration on Torture. These were: the elaboration of a Code of Conduct for Law Enforcement Officials, Principles of Medical Ethics, and a Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, none of which had been adopted at the time.⁹⁸ In the General Assembly, the Netherlands declared: 'our efforts should be aimed in the first place at patterns of conduct and the circumstances which give rise to torture.'⁹⁹ In order to stress the importance of the Declaration on Torture, and probably also in an attempt to steal a march on Sweden, the Netherlands furthermore prepared a proposal of its own. It drew up a draft resolution whereby the Secretary-General was requested to draw up and circulate a question-

94 Burgers and Danelius, 1988, p. 33. In an internal report of consultations with Amnesty International, the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs wrote that personally, Amnesty International's legal advisor had had similar doubts. See: Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 19 April 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

95 Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 14. See also: Baehr, 1989, p. 298-299.

96 Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Minister of Justice through the Secretary-General of the Ministry of Justice, 11 March 1980, Archive MJ, unfiled records.

97 Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Minister of Justice through the Secretary-General of the Ministry of Justice, 11 March 1980, Archive MJ, unfiled records; Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 14; Interview with J.H. Burgers, 26 March 2003. See also: Baehr, 1989, p.298-299.

98 For more information on the Netherlands' role in the creation of these instruments, see section 2.3.

99 Ministerie van Buitenlandse Zaken, 1978b, p. 309. See also: UN Doc A/C.3/32/SR. 35, p. 8.

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naire soliciting information on the steps that UN member states had taken to put the principles of the Declaration on Torture into practice.¹⁰⁰

In bilateral consultations, the director of the department responsible for UN affairs in the Swedish Ministry of Foreign Affairs, and officials of the International Organisations Department of the Dutch Ministry of Foreign Affairs discussed a number of issues that would be on the agenda of the General Assembly in 1977. The consultations took place on the initiative of the Netherlands.¹⁰¹ It is not clear whether the Swedish plans for a Convention against Torture led to this invitation, but in any case it was one of the matters that were discussed. The Netherlands used the opportunity to explain its objections. It was clear to Sweden that no support was to be expected from the Netherlands, but it hoped that the Netherlands would at least be prepared to include a reference to the desirability of a Convention in its draft resolution on the questionnaire. It refused to do this initially, but eventually, the Netherlands partly complied with the Swedish request.¹⁰² Although the text of its resolution did not include any references to the draft Convention, in its intervention of 1 November 1977, the Dutch delegation to the General Assembly, stated that the information gathered 'may guide the activities of the bodies and organs of the United Nations that are or will be involved in the campaign on the abolition of torture.'¹⁰³ The gesture would not be of much practical use though: the questionnaire did not elicit much information, and insofar as any data were received, nothing was done with it. The initiative fizzled into nothing, and after 1980, nothing was heard of it anymore.¹⁰⁴

What was probably more important to Sweden was that, despite its doubts, the Netherlands in the end co-sponsored the draft resolution in which the Commission on Human Rights was asked to initiate the work on a Convention against Torture.¹⁰⁵ In the explanatory memorandum the government delivered to parliament in 1986, in order to obtain its approval for the Convention, it is suggested that the Netherlands supported the Swedish proposal out of loyalty.¹⁰⁶ The same may have been true for Sweden,

100 Ministerie van Buitenlandse Zaken, 1978a, p. 177-178.

101 Code-message from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Embassy in Stockholm, 28 September 1977, Archive MFA, VN 1975-1984, 999.213, file 320; Code-message from the Political and International Security Affairs Division of the International Organisations Department of the Ministry of Foreign Affairs to the Embassy in Stockholm, 28 September 1977, Archive MFA, VN 1975-1984, 999.213, file 320.

102 Copy of a code-message from the Political and International Security Affairs Division of the International Organisations Department of the Ministry of Foreign Affairs to the Embassy in Stockholm, 22 August 1977, Archive MFA, VN 1975-1984, 999.213, file 320; Code-message from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Embassy in Stockholm, 28 September 1977, Archive MFA, VN 1975-1984, 999.213, file 320.

103 For the resolution, see: General Assembly resolution 32/63, 8 December 1977. For the intervention, see: Ministerie van Buitenlandse Zaken, 1978b, p. 309. See also: UN Doc A/C.3/32/SR. 35, p. 9-10. See also: Rodley, 1999, p. 42.

104 Rodley, 1999, p. 137-140.

105 Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 14. See also: Baehr, 1989, p. 298-299.

106 *Ibidem*.

which, on its part, became a co-sponsor of the Dutch resolution on the questionnaire.¹⁰⁷ To the outside world, it thus seemed as if the Netherlands was still working in tandem with Sweden. From a strategical point of view, this was of course of great importance. If Sweden and the Netherlands would not sponsor each other's initiatives, this could create the impression that they were competing proposals, and this would not do much good for the fight against torture; states that were less eager to combat this evil might try and spread discord among those that favoured further measures.

For the Netherlands, its international reputation was at stake as well. Even though a state may have valid reasons to disagree with the creation of a human rights treaty, in practice, it is hard for a state to defend this position, because its stand will easily be interpreted as opposition to the idea of human rights protection itself. It was clear from the beginning that states that were opposed to the Convention against Torture, would be treated as standing out of the community of 'civilised nations', and this made it hard to speak out against the initiative.¹⁰⁸ That the Netherlands did indeed care about this can be demonstrated by its attitude towards a third resolution that was adopted together with those of the Netherlands and Sweden. On the proposal of India, this resolution requested the UN member states to make unilateral declarations of intent to implement and comply with the principles of the Declaration on Torture.¹⁰⁹ The Netherlands did not agree with the request, because it felt that it was contrary to the assumption of universality that followed from a unanimously adopted Declaration. Yet, in view of its active participation in anti-torture initiatives that it had thus far employed in the UN, it considered it unavoidable to submit a unilateral declaration anyway.¹¹⁰

In principle, the Netherlands did thus not reveal its true feelings about the idea of a Convention against Torture.¹¹¹ Nonetheless, the half-heartedness of its support showed from its intervention in the Third Committee of the General Assembly. Its comments compared unfavourably with those of other Western sponsors. Whereas, for example, Portugal, Denmark, Italy and Spain emphasized their firm belief in the absolute need for a Convention and declared their unreserved support for the resolution, the representative of the Netherlands expressed support to the initiative only in an implicit way.¹¹² Besides, he expressed the opinion that the Commission on Human Rights could not 'be expected to carry out this delicate task overnight', while he also

¹⁰⁷ Ministerie van Buitenlandse Zaken, 1978b, p. 309.

¹⁰⁸ Stoeva, 2004, p. 17-18. In an interview with an official of the Dutch Ministry of Foreign Affairs, who has been involved in negotiations on a number of other international human rights instruments than the Convention against Torture, it was confirmed to the author that states tend to shy away from positions that may seem unengaging to others. Interview with H.A.M. von Hebel, 21 December 2005.

¹⁰⁹ See: General Assembly resolution 32/64, 8 December 1977.

¹¹⁰ Letter from the Minister of Foreign Affairs to the Minister of Justice, 16 November 1978, Archive MJ, unfiled records.

¹¹¹ Interview with J.H. Burgers, 26 March 2003.

¹¹² For the statements by Portugal, Denmark, Italy and Spain, see: UN Doc A/C.3/32/SR.34, p. 8-9; UN Doc A/C.3/32/SR. 35, p. 4-5; UN Doc A/C.3/32/SR. 36, p. 6; UN Doc A/C.3/32/SR. 36, p. 9. For the Dutch statement, see: Ministerie van Buitenlandse Zaken, 1978b, p. 310. See also: UN Doc A/C.3/32/SR. 35, p. 9-10.

warned that, once adopted, the future Convention would 'in all probability, not come into force for all states within a short period of time thereafter.'¹¹³ Had the Netherlands really wanted to attract support for the Swedish initiative, it would never have made such discouraging remarks, so therefore, its words could only be interpreted as an indication of doubts.

The draft that Sweden finally submitted in January 1978, did not lift the Dutch concerns. It was felt that it added too little to existing human rights instruments. The norms that it incorporated were almost the same as those of the 1975 Declaration, and its supervisory mechanisms did not go much further than the instruments that the Human Rights Committee could already apply if a state party did not comply with the ICCPR's article 7 on the freedom from torture or cruel, inhuman or degrading treatment or punishment. In the draft Convention, the complaints procedures were optional as well, and for an inquiry on a state's territory, permission would need to be obtained.¹¹⁴ In the Netherlands' eyes, this was insufficient to justify a new treaty.¹¹⁵ Indeed, the improvement of existing supervisory methods had not been Sweden's main aim. For Sweden, the introduction of a system of universal jurisdiction was the most crucial element of the draft Convention. Especially these provisions were expected to make the combat against torture more effective. Among the Dutch policy-makers, there were officials that shared Sweden's expectations, but for reasons that will be further explained in section 3.3, the dominant view in the Netherlands was that universal jurisdiction was not an effective instrument in the fight against torture.¹¹⁶ Therefore, serious doubts continued to exist about the use and desirability of this Convention, especially at the Ministry of Justice, which exerted a strong influence on the Dutch policies with respect to the Convention in the first years of the negotiations.

3.2.2 The Netherlands' attitude in the negotiations

In summary, the Netherlands did not want to present itself as an opponent of the draft Convention against Torture, but actually, it was not very positive about it either. What did this mean for the Netherlands' stand in the negotiations? In the light of its objections, active support was difficult. If it did not want to challenge the Swedish proposal in public, there was only one option left: to keep aloof. This is indeed what happened. Contrary to many other Western governments, the Netherlands did not react to the UN

113 Ministerie van Buitenlandse Zaken, 1978b, p. 310. See also: UN Doc A/C.3/32/SR. 35, p. 9-10.

114 Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Secretary-General of the Ministry of Justice, 24 September 1980, Archive MJ, unfiled records.

115 Letter from the Minister of Justice to the Minister of Foreign Affairs, 23 October 1978, Archive MJ, unfiled records; Letter from the Minister of Justice to the Dutch branch of Amnesty International, 17 April 1980, Archive MJ, unfiled records.

116 Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Secretary-General of the Ministry of Justice, 24 September 1980, Archive MJ, unfiled records.

Secretary-General's request to submit comments on the draft Convention.¹¹⁷ The tone of its statements also remained somewhat pessimistic. This becomes clear for instance, if we compare the statements that Spain, the United States and the Netherlands made before the Third Committee of the General Assembly on 31 October 1979. While Spain and the United States expressed the hope that the Convention would be completed during the Commission's next session, the Netherlands said: 'even *if* we would succeed in finalizing a convention against torture, we are only half way'.¹¹⁸

As was recognized in the explanatory statements to the bill of approval of the Convention that the government submitted to parliament in 1986, in the first three years, the Netherlands did not participate very actively in the Working Group's negotiations.¹¹⁹ As to the years 1978 and 1979, its limited involvement was more or less disposed of with the remark that the Netherlands was not a member of the Commission during those years.¹²⁰ In the human rights memorandum of 1979, it is indeed indicated that '[w]ithin the UN there has been most opportunity for the Netherlands to participate directly during the periods when this country has served on the Commission on Human Rights'.¹²¹ While this may be true for certain activities, it was not true for the negotiation of this draft treaty. As was mentioned before, in the Working Group, Commission members and observer states were more or less on a par with each other.¹²² It is not clear whether the Netherlands attended the Working Group in 1978, but it could have done so.¹²³ In 1979, it did participate as an observer, and in 1980 it took part as a full member.¹²⁴ Thus, if the Netherlands had really wished to, it could have played a more active role.

117 The following documents contain the comments that were received. They do not include any comments of the Dutch government. See: UN Doc. E/CN.4/1314; UN Doc. E/CN.4/1314/Add.1; UN Doc. E/CN.4/1314/Add.2; UN Doc. E/CN.4/1314/Add.3; UN Doc. E/CN.4/1314/Add.4.

118 For the Netherlands' statement, see: Ministerie van Buitenlandse Zaken, 1980b, p. 389. [Italics, HR.] See also: UN Doc. A/C.3/34/SR.31, p. 4. For the statements by Spain and the United States, see: UN Doc. A/C.3/34/SR.32, p. 3 and 4.

119 Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 15. See also: Baehr, 1989, p. 301. It should be noted that this was somewhat in contradiction with a statement the Minister of Foreign Affairs made in parliament in April 1980, but considering the fact that this statement was made in reaction to a motion that criticized the Netherlands' policies in regard to the draft Convention, it should be seen as an attempt to mitigate criticism rather than as an objective representation of the facts. See: Appendices to the reports of the Second Chamber, 1979-1980, 15 571, no. 20, p. 2.

120 Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 15.

121 Ministry of Foreign Affairs, 1979, p. 73.

122 Burgers, 1989, p. 46.

123 The Working Group's report of this year does not include a list of countries present. See: UN Doc. E/CN.4/1292. In the archives, no indications could be found on the question of whether or not the Netherlands was present.

124 For 1979, see: UN Doc. E/CN.4/1347, p. 36. In the Working Group's report of 1980, the Netherlands was mentioned as a country that could participate as a full member. See: UN Doc. E/CN.4/1408, p. 53. The Netherlands' actual presence in 1980 can be derived from the archives. See, for instance: Pages 76-81 of a report of the delegation of the Kingdom on the 36th session of the UN Commission on Human Rights, 4 February-15 March 1980, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

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It was only in 1981 that the Netherlands started to participate more actively in the Working Group. The adoption of a motion in parliament in May 1980 caused this change. It called upon the government to support the draft Convention's articles on universal jurisdiction, which it had up to then opposed.¹²⁵ Even though the motion dealt with the question of universal jurisdiction only, it implied support for the Swedish draft, and parliament was likely to remain alert on this point.¹²⁶ Apparently, the government felt that in this context, it could no longer allow itself to remain passive. The most natural alternative would then be to try and improve the draft Convention so that it would at least also have additional value from the Dutch point of view. In 1981, the Netherlands submitted proposals to that end. The amendments concerned the universal jurisdiction system and the supervisory procedures of the Convention, which will be further discussed in the sections below, and their main aim was to make the concerned provisions more effective.¹²⁷ In principle, the Dutch points of departure had thus not changed fundamentally, only their translation into policy practice did. Nonetheless, it had become an active participant in the negotiations now.

Starting in 1982, the Netherlands even got a special role to fulfil, because the deputy head of its delegation was elected as Chairman-Rapporteur of the Working Group. Formally, the position of the Chairman-Rapporteur cannot automatically be taken as representative for the views of the country of his nationality, but in practice, he is not likely to act in contradiction with his government's views. As was mentioned above, Chairman-Rapporteur Burgers continued to represent the Netherlands in the Working Group as well. He felt that what he should try to achieve as Chairman-Rapporteur of this Working Group was the same as what he was aiming at as a Dutch representative, namely as strong a Convention as possible.¹²⁸ Indeed, the method of working that he chose as Chairman-Rapporteur perfectly suited the Dutch policy towards the Convention. As we will see below, the incorporation of an innovative system of international supervision was of crucial importance for the Netherlands, but if the Group would persist in trying to reach consensus on all provisions, this aim would certainly not be reached.¹²⁹ All in all, the active contributions of Chairman Burgers, can thus also be seen as a part of the Netherlands' policies.

Apparently, other countries also saw it that way, because after the draft was forwarded to the Commission and the General Assembly, the Netherlands continued

125 See: Appendices to the reports of the Second Chamber, 1979-1980, 15 571, no. 14; Reports of the Second Chamber, 1979-1980, 6 May 1980, p. 4536. In section 3.3, some more details on the contents and backgrounds of this motion will be given.

126 In 1982, a question was indeed posed on the state of affairs of the negotiations on the Convention in the context of the parliamentary debates about the budget for the Ministry of Foreign Affairs. See: Open message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 11 February 1982, Personal Archive J.H. Burgers.

127 See: UN Doc. E/CN.4/1475, p. 59 and 63.

128 Interview with J.H. Burgers, 26 March 2003.

129 Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

to fulfil a pivotal role in the negotiations, which no one called into question. Formally, Chairman Burgers' part ended when the Working Group finalized its work in 1984. However, he remained actively engaged in the lobbying activities that took place in the Commission on Human Rights.¹³⁰ Furthermore, when the Western states met in May 1984 to deliberate upon strategies to advance the adoption of the Convention, they invited the Netherlands to co-ordinate the proceedings on the Convention in the General Assembly.¹³¹ In the background, Burgers went on collecting support for the Convention, but, in principle, the first responsibility was now with the Netherlands' Permanent Representation at the United Nations Headquarters in New York, which was led by Max van der Stoel at the time. He was known for his commitment to human rights, and in the past, he had spoken favourably about the Convention, so in principle, the matter could be considered to be in good hands.¹³²

At the Mission in New York, it was felt that it was of utmost importance to prevent the Netherlands and other active supporters of a speedy adoption from being accused of using a policy of surprise. It appeared that even Third Committee-experts of Third World countries that were in principle well disposed towards the Convention had hardly taken account of the implications of the decision to forward the draft to the General Assembly.¹³³ The Permanent Representation would bring the matter to the notice of some important delegations, but it seemed advisable to strengthen these efforts by démarches in the capitals of as many Third World states as possible.¹³⁴ At the meeting of Western delegations in New York, it was therefore agreed to start a lobby-campaign. The tasks would be shared: each of the thirteen participating states was appointed as a co-ordinator for one or more of the fifty non-aligned states that would be approached by a démarche. The main purposes would be to inform Third World governments and to win their support.¹³⁵ The Netherlands was entrusted with the co-ordination task in Argentina, Costa Rica, Brazil, Cameroon, Ivory Coast, Sudan, Indonesia, and Saudi Arabia, but apart from these countries, it made démarches in the capitals of other several other countries as well.¹³⁶

130 See, for instance: Code-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 2 March 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581. See also: Interview with J.H. Burgers, 26 March 2003.

131 Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 17.

132 See: Niels ter Hark and Tjakko Knoop Pathuis, 'Interview met Mr. M. van der Stoel' [Interview with M. van der Stoel] – In: *NJCM-Bulletin*, Vol. 5, No. 3, 1980. See also: Kuitenbrouwer, 1999, p. 243-255; Casteleijn and Krop, 1994, p. 270-314. See also: section 3.3.2.

133 The Third Committee is the Social, Humanitarian and Cultural Committee of the General Assembly, which usually prepares plenary decision-making in the field of human rights. See also: annex 2.

134 Code-message from the Permanent Representative in New York to the Ministry of Foreign Affairs, 24 April 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

135 Code-message from the Permanent Representative in New York to the Ministry of Foreign Affairs, 8 June 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

136 Code-message from the Permanent Representative in New York to the Ministry of Foreign Affairs, 8 June 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Letter from the Minister of Foreign Affairs to the ambassadors in Abidjan, Algiers, Bangkok, Rio de Janeiro, Buenos Aires, Co-

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When the Western delegations met at the beginning of the General Assembly's session of 1984, it was apparent that the situation remained quite uncertain. It was agreed that under these circumstances it would be advisable to hold informal consultations during the session of the Third Committee of the General Assembly to win support for the Western position from non-aligned states, and to gain time in order to prevent the Soviet Union and its allies from taking procedural action¹³⁷ The Dutch delegate Alphons Hamer, who had been made responsible for the matter, was assigned with the task to chair these meetings.¹³⁸ Even though concessions needed to be made, it would seem fair to say that it was, at least partially, thanks to the Netherlands' efforts that the Convention against Torture was adopted. In a way, it was somewhat remarkable that it made so many efforts. Actually, the final draft did not differ so much from the proposal Sweden had made in 1978. In the light of this, it was not surprising that the official that had represented the Netherlands in the early years of the negotiations was disappointed with the end-result, which he judged as a 'typical UN-product: ineffective and of symbolic value only'.¹³⁹ Although it is difficult to determine whether others had really forgotten about the Netherlands' initial objections, the overall impression is that the Netherlands was carried away by the leading role it got to fulfil. In the comments to the final draft of 1984 that it forwarded to the Secretary-General, the Netherlands even praised it for what it supplemented to existing international human rights instruments.¹⁴⁰ Afterwards, it would also continue to present the Convention as an example of useful additional standard setting.¹⁴¹

3.3 THE QUESTION OF UNIVERSAL JURISDICTION

3.3.1 Discussions about universal jurisdiction

In the above, it was mentioned already that the Netherlands did not respond to the Secretary-General's invitation to comment upon the draft Convention against Torture.

lombo, Dakar, Dar es Salaam, Dhaka, Jiddah, Harare, Jakarta, Cairo, Khartoum, Lusaka, Mexico, Nairobi, San Jose and Yaoundé, 27 June 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

137 Code-message from the Permanent Representative in New York to the Ministry of Foreign Affairs, 17 September 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Code-message from the Permanent Representative in New York to the Ministry of Foreign Affairs, 19 September 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

138 Burgers and Danelius, 1988, p. 102; Baehr, 1989, p. 304.

139 Handwritten remarks on a draft letter from the Minister of Justice to the Minister of Foreign Affairs, 10 January 1985, Archive MJ, unfiled records. [Translation from Dutch, HR]

140 UN Doc. A/39/499, p. 12-13. It should be noted that the elements that were mentioned to illustrate that this Convention was to be considered a step forward from existing international human rights instrument, had also been a part of the Swedish draft, which the Netherlands had at that time criticized for not being of any supplementary nature.

141 See, for instance: Appendices to the reports of the Second Chamber, 1986-1987, 19 700, chapter V, No. 125, p. 14; Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 4.

However, as a matter of fact, preliminary comments had been prepared, and had even been translated into English.¹⁴² The reason that they were not actually submitted was that there was disagreement about their contents within the Dutch bureaucracy¹⁴³ That concerned the question of universal jurisdiction in particular.

The Swedish draft obliged states parties to establish and exercise jurisdiction on the basis of four principles. The first was the so-called territorial principle. This principle is generally accepted among states, and it applies if a state claims jurisdiction over crimes committed in its own territory. The second ground of jurisdiction that was included was the nationality principle, which allows a state to prosecute its nationals for crimes committed anywhere in the world. This principle is also common under the domestic laws of many states. The third basis of jurisdiction that the draft Convention referred to was the passive personality principle, which gives a state the opportunity to establish its jurisdiction over crimes that are committed abroad that affect its own nationals. Contrary to the territorial principle and the nationality principle, this is a ground of jurisdiction that goes beyond the theories of jurisdiction that are recognized by most domestic legal systems. Finally, the draft Convention included the universality principle as a basis of jurisdiction. As has been explained, this allows – or in the case of a mandatory provision like that of the draft Convention, obliges – states to establish jurisdiction over crimes committed outside their own territory and by or against persons other than their own state's nationals.¹⁴⁴

Traditionally, universal jurisdiction was only applied to crimes of international concern with a clear cross-border character, such as, for instance, piracy, slave trade or airplane hijacking.¹⁴⁵ According to the Ministry of Justice, universal jurisdiction was functional only in regard to crimes that were clearly international by their nature.¹⁴⁶ The combat of these crimes was, in principle, equally important to all states, and therefore they were likely to cooperate and to assist each other in legal proceedings against persons alleged to have committed such crimes.¹⁴⁷ Universal jurisdiction was, however, considered an inappropriate instrument to use when a crime lacked this typical international character, among others, because cooperation between states, which was necessary to obtain evidence, was less likely to expect. The Ministry of

142 Preliminary comments on a draft convention on torture, translation of the Dutch version by the Department for Translations of the Ministry of Foreign Affairs, Archive MFA, DVE 1945-1984, 999.232.154, file 4556.

143 Interview with J.H. Burgers, 26 March 2003.

144 Malanczuk, 2003, p. 110-116; Burgers and Danelius, 1988, p. 131-132; Steiner and Alston, 2000, p. 1133; Lippman, 1994, p. 316. An extensive explanation of the legal implications of the incorporation of universal jurisdiction in the UN Convention against Torture can furthermore be found in: Boulesbaa, 1999, p. 177-235.

145 Malanczuk, 2003, p. 113; Lippman, 1994, p. 316; Hawkins, 2004, p. 781-782.

146 Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Minister of Justice through the Secretary-General of the Ministry of Justice, 11 March 1980, Archive MJ, unfiled records.

147 Letter from the Minister of Justice to the Dutch section of Amnesty International, 17 April 1980, Archive MJ, unfiled records.

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Justice felt that in these cases, the establishment of Dutch jurisdiction should therefore be restricted to situations in which a request for extradition, for instance by the state on whose territory the crime had been committed, was turned down.¹⁴⁸ The rationale behind this was that a request for extradition implied the other state's interest in the prosecution of the alleged offender, as a consequence of which its cooperation and assistance could also be expected if the Netherlands would start legal proceedings against that person.¹⁴⁹

Internationally, the Netherlands had therefore always defended the position that it could not accept treaties that dealt with crimes which lacked an obvious cross-border element and that did not make the obligation to prosecute dependent of the question whether extradition had been requested and refused. This was, for instance, why it had not ratified the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973.¹⁵⁰ For the Ministry of Justice, the question of effectiveness was so important not only for reasons of principle, but also because it felt that ineffective rules might harm the credibility of international criminal law in general, and because political conflict might penetrate the domain of law, if conflicts would rise between states over the question of who should have first jurisdiction.¹⁵¹ If other states were insistent on a more extensive use of universal jurisdiction, the Dutch Ministry of Justice could not stop them from doing so, but it was not prepared to change the domestic law system, which in principle allowed only for the establishment of jurisdiction on the basis of the territorial principle or the nationality principle.¹⁵²

For the Ministry of Justice, it was only natural to continue to follow this line of reasoning in the debate about the draft Convention against Torture. In principle, torture was an example of a crime with a national character. It was likely to take place in the territory of one state, against the citizens of that state, with the knowledge or consent of the government of that state. If that government did not prosecute torturers, it would also be unlikely to cooperate if an attempt to do so would be made in another state. Problems of evidence could thus be expected to occur, and the chances for successful

148 Letter from the Minister of Justice to the Minister of Foreign Affairs, 1 March 1979, Archive MJ, unfiled records.

149 Interview with J.J.E. Schutte, 23 December 2005.

150 Letter from the Minister of Justice to the Minister of Foreign Affairs, 1 March 1979, Archive MJ, unfiled records. In 1988, the Netherlands ratified this treaty, but it made a reservation that made clear that it accepted the obligation to exercise universal jurisdiction subject to the condition that it had received and rejected a request for extradition from another state party to the Convention. See: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty7.asp>, accessed 8 September 2006.

151 Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Minister of Justice through the Secretary-General of the Ministry of Justice, 11 March 1980, Archive MJ, unfiled records; Interview with J.J.E. Schutte, 23 December 2005.

152 Memorandum from one official of the Legislation Division for Public Law of the Ministry of Justice to another official of that same Division, 31 August 1978, Archive MJ, unfiled records; Interview with J.J.E. Schutte, 23 December 2005.

legal proceedings were very limited.¹⁵³ In other words, universal jurisdiction would be an ineffective instrument to combat torture. What was more, flimsy and failing cases might even have the opposite effect, because the *ne bis in idem principle*, according to which no one can be prosecuted twice for the same crime, would make it impossible to prosecute a torturer on the basis of the territorial principle after a regime change at a later point in time.¹⁵⁴ Hence, the Ministry of Justice proposed to follow the policy line that the Netherlands had always pursued, and to suggest the insertion of a clause that would make the obligation to prosecute an alleged torturer present in the territory of a state, and the obligation to establish jurisdiction over such offences, conditional upon the rejection of a request for extradition.¹⁵⁵

At the Ministry of Foreign Affairs, this proposal met with some objections. The Director General International Cooperation sent a letter on behalf of the Minister of Foreign Affairs, which maintained that it would be better not to make a suggestion as proposed by the Ministry of Justice. The arguments against it were twofold. In the first place, a link was made with the Netherlands' past behaviour in the UN as a protagonist of the fight against torture, and the reputation it had acquired in relation to this theme. In the light of this, a Dutch proposal for conditional clauses was considered undesirable. However, expectations about the possible impact of a system of universal jurisdiction also seemed to differ from those of the Ministry of Justice. It was argued that the Netherlands had urged Sweden to include measures in the treaty that would guarantee an effective implementation of the Convention, and, according to the letter, it was believed that universal jurisdiction was one of the measures that could be taken in this respect.¹⁵⁶

Actually, opinions on this question were divided at the Ministry of Foreign Affairs. In the previous chapter, it was mentioned already that the Legal Adviser of the Ministry and his staff tended to judge things from a broader international-legal perspective rather than from a moral or strictly human rights perspective. In this case, the Assistant Legal Adviser reasoned according to the same logic as the Ministry of Justice, and she

153 Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Minister of Justice through the Secretary-General of the Ministry of Justice, 11 March 1980, Archive MJ, unfiled records; Letter from the Minister of Justice to the Dutch section of Amnesty International, 17 April 1980, Archive MJ, unfiled records; Interview with J.J.E. Schutte, 23 December 2005. It should be noted that the Ministry of Justice foresaw comparable problems in regard to the passive personality principle, but in the Working Group that issue was settled relatively easily by taking away the obligatory character of this ground of jurisdiction. See: Letter from the Minister of Justice to the Minister of Foreign Affairs, 23 October 1978, Archive MJ, unfiled records; Interview with J.J.E. Schutte, 23 December 2005. See also: UN Doc. E/CN.4/1475, p. 56.

154 Appendices to the reports of the Second Chamber, 1979-1980, 15 571, no. 20, p. 2-3. See also: Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 15; Baehr, 1989, p. 299-300.

155 Letter from the Minister of Justice to the Minister of Foreign Affairs, 23 October 1978, Archive MJ, unfiled records; Letter from the Minister of Justice to the Minister of Foreign Affairs, 1 March 1979, Archive MJ, unfiled records.

156 Letter from the Director General International Cooperation on behalf of the Minister of Foreign Affairs to the Minister of Justice, 28 December 1978, Archive MJ, unfiled records.

fully agreed with its suggestions. The same was, however, true for the Head of the Legal and Social Affairs Division, the later Chairman-Rapporteur of the Working Group, Burgers. He saw that there were political arguments in favour of Dutch support for universal jurisdiction, but he did not believe that it would be effective at all.¹⁵⁷ Within the Ministry, the idea of universal jurisdiction received most support from the staff members of the Humanitarian and Legal Affairs Section. They attached more importance to the pros of universal jurisdiction for torture than to the legal and practical difficulties resulting from it. The proponents' basic argument was that 'there should be no safe haven for torturers'. If they were not prosecuted by their own government, other states should try and do so, and if their own government was willing to prosecute, for instance after a regime change, torturers should be denied refuge in other states as well.¹⁵⁸ Another argument supporters of universal jurisdiction used was that the draft Convention's provisions were based on a number of recent international conventions on terrorism. Torture was no less condemnable than the crimes that were addressed by these treaties, and therefore, it was justified to take similar measures.¹⁵⁹ Even if it would not always be effective, doing something would at least be better than doing nothing.¹⁶⁰

However, in criminal law questions, the opinion of the Ministry of Justice could not be ignored, especially not if it had already been concerned with similar questions in the past.¹⁶¹ Therefore, the position that the Netherlands took in the Working Group was in conformity with the objections of this Ministry. When the question of universal jurisdiction was first discussed in the Working Group of 1981, the Netherlands did not side with Sweden and other supporters of universal jurisdiction, which were, among others, the United States, Switzerland, and the Nordic countries. On the contrary, it expressed its agreement with misgivings of a number of other Western states, notably Australia, France and the United Kingdom.¹⁶² Their problems were similar to those of the Netherlands.¹⁶³ The French delegation made a proposal that was comparable to the suggestion that the Ministry of Justice had in mind. It made a proposition to either

157 Interview with J.H. Burgers, 26 March 2003.

158 UN Doc. E/CN.4/1408, p. 59 and 62; UN Doc. E/CN.4/1475, p. 57; UN Doc. E/CN.4/1982/30/Add.1, p. 7; UN Doc. E/CN.4/1983/63, p. 5; Interview with J.H. Burgers, 26 March 2003. See also: Hawkins, 2004, p. 791.

159 UN Doc. E/CN.4/1475, p. 57; UN Doc. E/CN.4/1982/30/Add.1, p. 6; UN Doc. E/CN.4/1314, p. 15. See also: Hawkins, 2004, p. 791. The draft Convention's provisions on universal jurisdiction were based on the following treaties: the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the International Convention against the Taking of Hostages. See: Burgers and Danelius, 1988, p. 131.

160 UN Doc. E/CN.4/1982/30/Add. 1, p. 7. See also: Hawkins, 2004, p. 792.

161 Interview with J.H. Burgers, 26 March 2003.

162 Burgers and Danelius, 1988, p. 57-58; Burgers, 1989, p. 47; Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 6-7.

163 See: UN Doc. E/CN.4/1314, p. 15; UN Doc. E/CN.4/1314/Add.1, p. 3. See also: Burgers and Danelius, 1988, p. 58.

delete the obligation for a state party to establish jurisdiction over offences in cases where the alleged offender is present in the territory of that state, or to amend it so as to restrict it to situations in which a request for extradition is received. The Netherlands actively supported this proposal, but except for some lukewarm support on the part of Australia and Brazil, it was not well received by many other delegations, who felt that this would open up loopholes that would help torturers to find safe-havens. It appeared impossible to find a generally acceptable formula, and the issue would keep the Working Group busy for a few more years.¹⁶⁴

3.3.2 Under domestic pressure

The Netherlands was not the only Western country that had doubts about the desirability of a system of universal jurisdiction, but it was somewhat uncomfortable that Argentina and Uruguay, which were states that were notorious for their torture-practices, were on the same side as well. The Netherlands did not like to be identified with countries that opposed universal jurisdiction because they were afraid that one day it might be used against their officials.¹⁶⁵ Taking advantage of the situation, Amnesty International tried to exert pressure on the Netherlands and often confronted it with the question: 'How can you be in the same camp as Uruguay and Argentina on this?'¹⁶⁶ Yet, while the support of Argentina and Uruguay made the Dutch arguments seem less legitimate, the opposite was true at the same time: the Netherlands' policies also legitimated the position of Argentina and Uruguay, especially because it was seen as one of the main supporters of the international fight against torture. This was one of the reasons the supporters of the adoption of a system of universal jurisdiction for torture considered it of crucial importance to try and win the Netherlands for their position.¹⁶⁷ Besides, for NGOs it was relatively easy in the Netherlands to contact policy-makers and members of parliament, and once the Dutch support had been obtained, other Western countries that still had objections might be won over too.¹⁶⁸

Contacts with policy-makers and parliament were indeed used to make the Netherlands change its position on the question of universal jurisdiction. On 20 January 1980, two representatives of the Dutch section of Amnesty International met with the leader of the Dutch delegation to the Commission on Human Rights, a parliamentarian of the

164 Pages 76-81 of a report of the delegation of the Kingdom on the 36th session of the UN Commission on Human Rights, 4 February-15 March 1980, Archive MFA, VN 1975-1984, 999.232.154, file 2581; UN Doc. E/CN.4/1408, p. 58-62. See also: Burgers and Danelius, 1988, p. 57-60.

165 Interview with J.H. Burgers, 26 March 2003.

166 This quotation was taken from: Hawkins, 2004, p. 793.

167 Interview with M.T. Kamminga, 24 May 2005; Interview with T. Kamper, 31 January 2006; Interview with H.C.Y. Danelius, 22 May 2005. It could be said that the Netherlands was what Finnemore and Sikkink have called 'a critical state'. See: Finnemore and Sikkink, 1998, p. 901.

168 Interview with M.T. Kamminga, 24 May 2005; Interview with T. Kamper, 31 January 2006.

labour party (PvdA) and former Minister of Foreign Affairs, Max van der Stoel.¹⁶⁹ An official of the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs was also present at the meeting.¹⁷⁰ One of the issues Amnesty International wanted to discuss was the question of universal jurisdiction in the draft Convention against Torture. During the conversation, the representative of the Ministry of Foreign Affairs explained that it was not his Ministry that was opposed to the incorporation of a system of universal jurisdiction, but that the Ministry of Justice was the troublemaker in this regard.¹⁷¹ For Amnesty International, this was interesting information. Eight days after the meeting, on 28 January 1980, the Minister of Foreign Affairs received a letter in which he was requested to try and convince the Minister of Justice to change position.¹⁷² On 5 February 1980, another letter was sent; this time to the Minister of Justice. It explained that Amnesty had come to know that it was his Ministry in particular that had objections against universal jurisdiction. The Minister was asked to reconsider this position.¹⁷³

On the very same day, a telex from Geneva was received at the Ministry of Foreign Affairs, in which it was announced that Amnesty International and the ICJ exerted considerable pressure, and that parliamentary involvement could be expected too.¹⁷⁴ How did they know this in Geneva? Had the NGOs announced this? Or could it be that this information came from delegation leader Van der Stoel? It is possible that he had consulted other parliamentarians to see what could be done about the Dutch position in parliament. He obtained a dual function, and it is undeniable that there was something odd about the construction of a member of parliament fulfilling the function of a representative of the Dutch government. Formally speaking, it meant that he would have to both execute and control government policies at the same time. It cannot be excluded that these two functions got mixed up now and then. What is in any case certain is that Max van der Stoel did not personally agree with the Dutch objections against universal jurisdiction. He expressed his concern about the Dutch position to the Director-General International Cooperation of the Ministry of Foreign Affairs, and in an interview in the NJCM-Bulletin, a periodical published by the Dutch ICJ-section that was published in the spring of 1980, he publicly attacked the Dutch government

169 In 1983, Van der Stoel would leave parliament to become the Netherlands' Permanent Representative to the United Nations in New York. In this function, he would later become involved in the Netherlands' efforts to secure the Convention's adoption by the General Assembly. See: section 3.2.2.

170 Letter from the Dutch section of Amnesty International to the Minister of Foreign Affairs, 28 January 1980, Archive MJ, unfiled records.

171 *Ibidem*.

172 *Ibidem*.

173 Letter from the Dutch section of Amnesty International to the Minister of Justice, 5 February 1980, Archive MJ, unfiled records.

174 Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 5 February 1980, Personal Archive J.H. Burgers.

by expressing the opinion that the arguments against the incorporation of extraterritorial jurisdiction were not convincing.¹⁷⁵

A motion that requested the government to take up a position in favour of universal jurisdiction had just been adopted when Van der Stoel made this statement. His fellow party member of the Dutch labour party, PvdA, Harry van den Bergh, had tabled the motion together with three other parliamentarians on 17 March 1980, in the context of parliamentary deliberations on the 1979 policy paper on human rights and foreign policy that was mentioned in chapter 1.¹⁷⁶ The Dutch section of Amnesty International had lobbied in favour of parliamentary action to try and influence the Dutch position on the question of universal jurisdiction, and it continued to press its case after the motion's introduction.¹⁷⁷ It was successful. The government had tried to explain its position in a letter to parliament, but obviously, its legal-technical arguments did not convince many parliamentarians.¹⁷⁸ The government's appeal not to adopt the motion and not to force it in a direction it had objections to, was ignored, and on 6 May 1980, the motion-Van den Bergh was adopted by an overwhelming majority. Only a small farmer's party, the 'Boerenpartij', which carried no weight in respect to the Netherlands' foreign policies, voted against the motion.¹⁷⁹

3.3.3 Towards a final position change

The wording of a message the Ministry sent to its Permanent Representative in Geneva some months later reveals that the number of parliamentarians that had supported the motion had made a profound impression.¹⁸⁰ In those days, quarrels over human rights matters could become heated in the Netherlands.¹⁸¹ One month after the adoption of

175 Memorandum from the Head of the International Organisations Department of the Ministry of Foreign Affairs to the Minister of Foreign Affairs through the Legal Adviser of the Ministry of Foreign Affairs, the Director-General International Cooperation of the Ministry of Foreign Affairs, and the Secretary-General of the Ministry of Foreign Affairs, 11 February 1980, Personal Archive J.H. Burgers. For the interview, see: Niels ter Hark and Tjakko Knoop Pathuis, 'Interview met Mr. M. van der Stoel' [Interview with M. van der Stoel] – in: *NJCM-Bulletin*, Vol. 5, No. 3, 1980, p. 130-131. In an interview with the author of the present study, Van der Stoel said that, personally, he does not have the slightest recollection of events with respect to his role in this matter (Interview with M. van der Stoel, 16 June 2006).

176 Appendices to the reports of the Second Chamber, 1979-1980, 15 571, no. 14. The other parliamentarians were: Hans Gualthérie van Weezel (CDA), Laurens Jan Brinkhorst (D66), and Henk Waltmans (PPR).

177 Interview with T. Kamper, 31 January 2006.

178 Appendices to the reports of the Second Chamber, 1979-1980, 15 571, no. 20, p. 2-3. See also: Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 15-16.

179 Reports of the Second Chamber, 1979-1980, 6 May 1980, p. 4536; Appendices to the reports of the Second Chamber, 1979-1980, 15 571, no. 20, p. 3.

180 Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 14 January 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

181 The centre-right Van Agt-Cabinet was based on the support of a very small majority in parliament. Seven left-wing members of the Dutch christian-democratic party, CDA, had actually preferred a coalition with the labour party, PvdA, over the existing partnership with the liberal party, VVD. They

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the motion on universal jurisdiction, this was demonstrated when the government was almost forced to resign when it refused to comply with a parliamentary motion that asked for an immediate oil embargo against South Africa.¹⁸² The question of universal jurisdiction for torture was not a matter the government would want to fight parliament over, especially not if support for its position was almost completely absent.¹⁸³ Hence, it had to meet the parliamentary wishes, at least to a certain extent. On the other hand, key policy decision-makers were still not convinced by the arguments of the proponents of universal jurisdiction for torture. This led to a somewhat ambiguous situation in which the Netherlands formally gave up its opposition against universal jurisdiction while at the same time fighting a rearguard action.

In the Working Group, the Netherlands stopped defending the position that the exercise of such jurisdiction should be made dependent on the rejection of a request for extradition.¹⁸⁴ In consultations between the Ministry of Justice and the Ministry of Foreign Affairs, it was decided, though, that the Netherlands would continue to try and explore the possibilities of attaching conditions to the exercise of universal jurisdiction.¹⁸⁵ The Netherlands tabled a proposal in the Working Group to make the exercise of universal jurisdiction dependent upon another condition, namely upon a 'complaint by any interested party', made in accordance with procedures set under the law of the state in question.¹⁸⁶ The main idea behind it was that it was unreasonable to expect governments to take the initiative for prosecuting torture when the crime was committed in another country by nationals of that country. Apart from that, the proposal would also make the exercise of universal jurisdiction more realistic from a practical point of view, because a complaint would at least give a first clue on which the case could then be based.¹⁸⁷

The Dutch amendment was welcomed only by the Australian delegation, which liked the flexibility it allowed with regard to the modalities for applying the article concerned. This was exactly what other Western delegations did not like. They strongly criticized the Dutch proposal, because they feared its vague wording would cause loose interpretations and would create loopholes.¹⁸⁸ On the other hand, other

declared that they would condone this Cabinet, but they kept trying to press the government towards a more progressive policy. See: Bosmans, 1995, p. 111-113.

182 See: Baehr, Castermans-Holleman, Grünfeld, 2002, p. 208-209; De Boer, 1999, p. 403-404; Malcontent, 1998, p. 60-63; Baudet, 2001a, p. 56.

183 Interview with J.H. Burgers, 26 March 2003.

184 Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 16. See also: Burgers and Danelius, 1988, p. 72; Baehr, 1989, p. 300.

185 Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 14 January 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

186 UN Doc. E/CN.4/1475, p. 56-57 and 59. See also: Burgers and Danelius, 1988, p. 72-73; Baehr, 1989, p. 301; Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 16.

187 Interview with J.H. Burgers, 26 March 2003; Interview with J.J.E. Schutte, 23 December 2005.

188 Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Report over the 37th session

opponents of universal jurisdiction did not agree with the Netherlands' proposals either; Argentina and Brazil made it clear, for example, that the Dutch text did not meet their objections.¹⁸⁹ In the Council of Europe's Ad Hoc Committee of Experts, the Netherlands then tried another variant in which the exercise of universal jurisdiction was made dependent on the condition that the state party had received sufficient evidence to determine *prima facie* that the person had in one way or another been involved in an act of torture, but this proved no more acceptable than its earlier proposals in the Working Group.¹⁹⁰ It was obvious that the Netherlands held an isolated position, especially in the Western group, and after extensive consultations between officials of the Ministry of Justice and the Ministry of Foreign Affairs, it was agreed to give up all resistance against the system of universal jurisdiction.¹⁹¹ Apparently, this decision was taken before the Working Group's session of 1982, because it was no longer the Ministry of Justice, but the Ministry of Foreign Affairs, that sent a representative to the Working Group's meetings. For the Ministry of Justice, the main reason not to seek a continuation of its representation was that the focus would no longer be on criminal law issues.¹⁹²

of the UN Commission on Human Rights, Geneva, 2 February-13 March 1981, Personal Archive J.H. Burgers; UN Doc. E/CN.4/1475, p. 59; Burgers and Danelius, 1988, p. 72-73.

189 Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

190 CoEDoc. CM(81)179, p. 3-4, Archive MFA, RvE 1975-1984, 999.434.0, file 838; Memorandum from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Director-General International Cooperation of the Ministry of Foreign Affairs through the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs, the Head of the International Organisations Department of the Ministry of Foreign Affairs, and the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, 30 July 1981, Personal Archive J.H. Burgers.

191 Memorandum from the Private Law Branch of the Ministry of Justice to the Secretary-General of the Ministry of Justice through the Head of the Private Law Branch of the Ministry of Justice, 6 January 1983, Archive MJ, unfiled records; Memorandum from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Director-General International Cooperation of the Ministry of Foreign Affairs through the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs, the Head of the International Organisations Department of the Ministry of Foreign Affairs and the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, 30 July 1981, Personal Archive J.H. Burgers; Interview with J.J.E. Schutte, 23 December 2005. It should be noted that starting from September 1981, Max van der Stoep was again serving as the Dutch Minister of Foreign Affairs. Knowing his personal views about universal jurisdiction for torture, this could have been a factor of influence in the Netherlands' position change as well, but no indications in that direction have been found, and it is thus unlikely that the change of government played any role of importance.

192 Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Minister of Justice through the Secretary-General of the Ministry of Justice, 11 January 1982, Archive MJ, unfiled records. Another indication is that the Netherlands did not make any more proposals at the meeting of the Ad Hoc Committee of Experts to Exchange Views on the Draft Convention against Torture that took place on 14 and 15 December 1981. See: Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs

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When the Dutch delegate Burgers was elected Chairman-Rapporteur of the Working Group, he was thus able to withdraw the proposal that the Netherlands had made the previous year.¹⁹³ As a Chairman-Rapporteur, his core duty was to try and ensure the adoption of the Convention. Its main supporters were in favour of universal jurisdiction, so it was clear that any efforts in favour of the adoption of the treaty would have to include attempts to win the support of as many delegations as possible for the provisions concerned.¹⁹⁴ In this respect, it was a fortunate coincidence that the Netherlands had just decided to accept universal jurisdiction for torture, because its announcement of unconditional support for the system of universal jurisdiction made remaining Western opponents reconsider their positions too. France followed the Dutch example first, and after consultations with its government, the Australian delegate declared that it would set aside its reservations in order not to block further progress towards a final text.¹⁹⁵ A proposition by Chairman-Rapporteur Burgers furthermore met some state's fears that universal jurisdiction might be exploited for political reasons, and that trials would take place that were based on false accusations and fabricated evidence. The proposal was to incorporate a clause that made it clear that the standards of evidence required for prosecution and conviction on the basis of universal jurisdiction would in no way be less stringent than those that applied in case of jurisdiction on a territorial or a nationality basis. After the adoption of this amendment, the only countries that continued to speak out against universal jurisdiction were Argentina and Uruguay.¹⁹⁶

The position of these two countries had become more isolated and now that all Western states had decided to back the provisions on universal jurisdiction, they were less able to conceal the true reasons for their sustained opposition. Nonetheless, they were able to block the consensus, and as a consequence, the square brackets around the universal jurisdiction articles could not be removed.¹⁹⁷ It was thanks to a regime change in Argentina at the end of 1983, that a breakthrough in the stalemate around universal jurisdiction could eventually be reached in the Working Group of 1984. At the opening of the debate, the Argentinian delegation took the floor and announced that the new government would make every effort in favour of finalizing the Conven-

Section of the Ministry of Foreign Affairs and the Legal Adviser of the Ministry of Foreign Affairs, 28 December 1981, Personal Archive J.H. Burgers.

193 UN Doc. E/CN.4/1982/30/Add.1, p. 6; Report on the 38th session of the UN Commission on Human Rights, 1 February-12 March 1982, Archive MJ, unfiled records; Open message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 2 February 1982, Personal Archive J.H. Burgers.

194 Interview with J.H. Burgers, 26 March 2003.

195 Burgers and Danelius, 1988, p. 78-79; Baehr, 1989, p. 301; Hawkins, 2004, p. 791 and 794. See also: UN Doc. E/CN.4/1982/30/Add.1, p. 6-9.

196 UN Doc. E/CN.4/1982/30/Add.1, p. 4-9; Open message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 11 February 1982, Personal Archive J.H. Burgers; Open message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 9 March 1982, Personal Archive J.H. Burgers. See also: Burgers and Danelius, 1988, p. 78-80.

197 See: UN Doc. E/CN.4/1982/30/Add.1, p. 20-21; UN Doc. E/CN.4/1983/63, p. 6-7, and annex.

tion on Torture, including its system of universal jurisdiction. In reaction, Uruguay declared that, in spite of remaining doubts, it would no longer insist on the removal of the system of universal jurisdiction.¹⁹⁸ It soon appeared though that there were some other delegations that remained silent before, but that actually did not approve of universal jurisdiction for torture. This was most of all true for China, which refused to agree with the formulation of the concerned articles to the last minute. Chairman-Rapporteur Burgers had to exert considerable pressure before the Chinese delegation finally gave in.¹⁹⁹

Eventually, the Netherlands thus not only set aside its objections against universal jurisdiction for torture, but it was prepared to fight for it too, if this was necessary for a rapid adoption of the Convention. In the Working Group, Chairman-Rapporteur Burgers made a statement against any attempt to try and rephrase the articles, not even with the aim to avoid some of the legal flaws they contained, because 'devising a text that could be considered perfect would require a time-consuming effort that would stand in the way of a rapid conclusion of the work on the Convention.'²⁰⁰ Obviously, priorities had shifted over the years; now, the main aim was to conclude the work on the draft Convention.

On the other hand, it must be noted that the Netherlands still tried to meet some of the legal problems that universal jurisdiction might cause. In 1983, it proposed the insertion of an article on the settlement of disputes, which read: 'Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.'²⁰¹ After some amendments, it was adopted in 1984.²⁰² There were precedents of similar articles in other international human rights treaties, but it is likely that the Netherlands considered it of particular importance here, because of the conflicts that might arise between states if universal jurisdiction were to be applied.

3.4 CONCENTRATION ON THE SUPERVISORY MECHANISM

3.4.1 An alternative text proposal

The pressure on the Netherlands to change its position in regard to the question of universal jurisdiction set in motion a change of attitude towards the Convention as a whole. Instead of taking a somewhat passive attitude, the Netherlands became an

198 UN Doc. E/CN.4/1984/72, p. 5. See also: Burgers and Danelius, 1988, p. 94.

199 Open message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 13 February 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581; UN Doc. E/CN.4/1984/72, p. 6-7; Interview with J.H. Burgers, 26 March 2003. See also: Burgers and Danelius, 1988, p. 95.

200 UN Doc. E/CN.4/1984/72, p. 5-6. See also: Burgers and Danelius, 1988, p. 94-95.

201 UN Doc. E/CN.4/1983/63, p. 20. See also: Burgers and Danelius, 1988, p. 90-91.

202 UN Doc. E/CN.4/1984/72, p. 11-12. See also: Burgers and Danelius, 1988, p. 98-99.

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active participant in the negotiations.²⁰³ The focal point of its activities concerned the issue of the supervisory mechanisms, on which the Convention's additional value would, according to the Netherlands, ultimately depend.²⁰⁴

The Netherlands had urged Sweden to include effective means for international supervision right from the start, and the public statements it made in the early stages of the negotiations also made clear that it attached great importance to this element.²⁰⁵ An argument that was not used initially, and which was actually somewhat in contradiction with the Netherlands' early fears of a restricted ratification by states that did not torture anyway, began to be put to the fore after a year or two. Now the dominant line of reasoning was that the draft Convention against Torture could be ratified by any state; if it was not supervised through an effective international mechanism, it would be no more than a façade behind which torture and other cruel, inhuman or degrading punishment or treatment would continue. Had experience not taught that a lack of strong and effective international supervisory procedures opened the possibility for human rights violating states to misuse their ratification of human rights conventions merely as an alibi?²⁰⁶ Although they were certainly not the only ones, the Soviet bloc countries were, for instance, notorious in this respect.²⁰⁷ In the Netherlands, this led to a widely shared feeling that there was a lot of talking about norms among states that were never actually taking the necessary steps to implement them. This was also why

203 See section 3.2.2.

204 Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Secretary-General of the Ministry of Justice, 24 September 1980, Archive MJ, unfiled records; Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 14 January 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

205 Letter from the Director-General International Cooperation on behalf of the Minister of Foreign Affairs to the Minister of Justice, 28 December 1978, Archive MJ, unfiled records; Preliminary comments on a draft convention on torture, translation of the Dutch version by the Department for Translations of the Ministry of Foreign Affairs, Archive MFA, DVE 1945-1984, 999.232.154, file 4556; Ministerie van Buitenlandse Zaken, 1978c, p. 120; Ministerie van Buitenlandse Zaken, 1980b, p. 387. See also: UN Doc. A/C.3/34/SR.31, 31 October 1979, p. 4.

206 Telex-message from the Ministry of Foreign Affairs to the Permanent Representative in Strasbourg, 20 October 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Memorandum from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Director-General International Cooperation of the Ministry of Foreign Affairs through the Head of the International Organisations Department of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs and the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, 25 September 1980, Archive MFA, RvE 1975-1984, 999.434.0, file 838; Concept of a memorandum by the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, April 1980, Personal Archive J.H. Burgers.

207 For some examples of rhetorical statements on the status of ratification of the UN Covenants by communist bloc states, see: UN Doc. A/C.3/35/SR.45, p. 6; UN Doc. A/C.3/37/SR.56, p. 5-6; UN Doc. A/C.3/37/SR.55, p. 11-12; UN Doc. A/C.3/36/SR.34, p. 10; UN Doc. A/C.3/38/SR.52, p. 11. For a long time, the communist bloc's behaviour was particularly frustrating for the Netherlands, because it used the fact that the Netherlands had not ratified the Covenants until 1978 to parry Dutch criticism or to counter Dutch proposals. See, for instance: UN Doc. A/C.3/33/SR.56, p. 18. Furthermore, note that the Eastern Bloc's preference for a short implementation debate and a stronger focus on new norms was also known from the CSCE. See: Helgesen, 1990, p. 251.

its policy memoranda on human rights and foreign policy commanded priority to implementation and supervision.²⁰⁸

The Swedish draft assigned to the Human Rights Committee, established under the ICCPR, the task of monitoring also the Convention against Torture. It would do so by a reporting procedure by which states parties would provide information on the measures taken in order to fulfil their obligations under the Convention, and by individual and interstate complaints procedures, both of which were optional. Furthermore, the Committee would be authorized to initiate an inquiry if it received information that torture was systematically practised in a state party. If the government of the state concerned would agree, such an inquiry could include a visit to the state concerned.²⁰⁹ It was agreed among officials of the Ministry of Justice and the Ministry of Foreign Affairs alike that the international supervisory mechanisms included in the Swedish draft did not constitute a relevant step forward from the system already provided for in the ICCPR. Therefore, they were considered insufficient.²¹⁰ On the other hand, it was believed that these provisions reflected the maximum of what would be achievable. It was felt, for instance, that after the 1966 Covenants, the optional character of both interstate and individual complaints procedures was inevitable.²¹¹ Perhaps this explains why the Netherlands did not immediately submit any concrete proposals for more far-reaching control instruments.

It was only in 1980 that the Netherlands started to develop an initiative for a more robust set of monitoring mechanisms. It was clear that pressure by NGOs and the imminence of parliamentary action prompted these activities, because the possibility to do so was first considered in February 1980, only shortly after Amnesty International's letters and the first notes of warning about a possible intervention by parliament.²¹² Obviously, policy makers wanted to distract attention from the Dutch rejection

208 Interview with T. Kamper, 31 January 2006; Interview with J.A. Walkate, 21 April 2004. See also section 1.4.

209 Burgers and Danelius, 1988, p. 74-75.

210 Memorandum from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Director-General International Cooperation of the Ministry of Foreign Affairs through the Head of the International Organisations Department of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs and the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, 25 September 1980, Archive MFA, RvE 1975-1984, 999.434.0, file 838; Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs, and the Ministry of Justice, 30 December 1981, Personal Archive J.H. Burgers.

211 Pages 76-81 of a report of the delegation of the Kingdom on the 36th session of the UN Commission on Human Rights, 4 February-15 March 1980, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Memorandum from the Legislation Division for Public Law of the Ministry of Justice through the Secretary-General of the Ministry of Justice, 11 March 1980, Archive MJ, unfiled records.

212 Draft reaction to the letter of Amnesty International, Archive MJ, unfiled records.

of universal jurisdiction.²¹³ A proposal for more far-reaching supervision would remove the impression that the Netherlands was opposed to international measures to combat torture and would restore its image as a human rights friendly country. And most important of all, its suggestions would of course be in conformity with the key policy makers' views on what constituted an effective treaty with a truly additional value.²¹⁴ Basically, these were that it was fruitless and inappropriate to try and prosecute individual persons for the crime of torture, and to let the state and its government get away with it.²¹⁵ Therefore, international supervision that made the government responsible for what happened in its territory, should be as strong as possible.²¹⁶ Besides, it was hoped that effective provisions for international supervision would make the system of universal jurisdiction superfluous, as a consequence of which it might after all be possible to have it removed.²¹⁷ It was realized that this element of the plan would have little chances of success, but apparently, it was felt that it was worth the effort.²¹⁸

After consultations between officials of the Ministry of Foreign Affairs and the Ministry of Justice, a set of alternative proposals was developed.²¹⁹ A first informal version was presented to some Western delegations at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which took

213 Indeed in their answers to parliament and Amnesty International, the Minister of Foreign Affairs and the Minister of Justice put great stress on the efforts they were prepared to take to make the provisions on international supervision more effective. See: Appendices to the reports of the Second Chamber, 1979-1980, 15 571, no. 20, p. 2-3; Letter from the Minister of Justice to the Dutch branch of Amnesty International, 17 April 1980, Archive MJ, unfiled records.

214 Memorandum from the Legislation Division for Public Law of the Ministry of Justice through the Secretary-General of the Ministry of Justice, 11 March 1980, Archive MJ, unfiled records.

215 Letter from the Minister of Justice to the Dutch branch of Amnesty International, 17 April 1980, Archive MJ, unfiled records; Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Secretary-General of the Ministry of Justice, 24 September 1980, Archive MJ, unfiled records.

216 Letter from the Minister of Justice to the Dutch branch of Amnesty International, 17 April 1980, Archive MJ, unfiled records.

217 Memorandum from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Council of Europe Section of the Ministry of Foreign Affairs through the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs and the Legal Adviser of the Ministry of Foreign Affairs, 15 April 1980, Personal Archive J.H. Burgers.

218 Memorandum from the Legislation Division for Public Law of the Ministry of Justice through the Secretary-General of the Ministry of Justice, 11 March 1980, Archive MJ, unfiled records.

219 Memorandum from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Director-General International Cooperation of the Ministry of Foreign Affairs through the Head of the International Organisations Department of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs and the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, 25 September 1980, Archive MFA, RvE 1975-1984, 999.434.0, file 838; Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Secretary-General of the Ministry of Justice, 24 September 1980, Archive MJ, unfiled records.

place in Caracas, Venezuela, from 25 August to 5 September 1980.²²⁰ Yet, most of the delegates present were not well informed about the negotiations on the Convention, so no in-depth discussions could take place, and it remained unclear whether the Netherlands could count on their support.²²¹ At the request of Sweden, the proposals were also discussed in a bilateral meeting in Stockholm. Sweden did not think that the Dutch proposals were very realistic, but it agreed to discuss them in the context of the Ad Hoc Committee of Experts in the Council of Europe.²²² On the basis of this country's comments, and some further considerations of its own, the Netherlands drew up a slightly revised proposal, which was submitted to the Council of Europe as an informal discussion paper.²²³ It was first dealt with in December 1980. Insofar as its proposals were discussed, it received the support of some countries only, while others stressed that 'over-ambitious proposals would raise considerable difficulties for the final acceptance of the Convention.'²²⁴

In spite of objections of some Western partners, the Netherlands formally submitted its amendments to the Working Group on 26 January 1981, the first meeting-day of that year.²²⁵ The proposal contained a number of minor amendments, such as making

220 Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 14 January 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581. For information on this Congress, see: United Nations, 1983, p. 779.

221 Memorandum from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Director-General International Cooperation of the Ministry of Foreign Affairs through the Head of the International Organisations Department of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs and the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, 25 September 1980, Archive MFA, RvE 1975-1984, 999.434.0, file 838.

222 Memorandum from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Director-General International Cooperation of the Ministry of Foreign Affairs through the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs, the Head of the International Organisations Department of the Ministry of Foreign Affairs and the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, 7 November 1980, Personal Archive J.H. Burgers; Memorandum from the Legislation Division for Public Law of the Ministry of Justice to the Secretary-General of the Ministry of Justice, 24 September 1980, Archive MJ, unfiled records.

223 Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 14 January 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

224 Quotations from: CoE Doc. CAHHT (80) 3, Personal Archive J.H. Burgers. See also: Memorandum from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Director-General International Cooperation of the Ministry of Foreign Affairs through the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs, the Head of the International Organisations Department of the Ministry of Foreign Affairs and the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, 24 December 1980, Personal Archive J.H. Burgers; Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 14 January 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

225 UN Doc. E/CN.4/1981/WG.2/WP.3; UN Doc. E/CN.4/1475, p. 51 and 63; Report over the 37th session of the UN Commission on Human Rights, Geneva, 2 February-13 March 1981, Personal Archive J.H. Burgers; Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 14 January 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Telex-message from

the interstate complaints procedure obligatory and broadening the competence of the supervisory Committee to initiate inquiries in relation to the systematic practice of torture to all situations in which violations of the Convention occurred repeatedly. Yet, the most innovative part of its proposal concerned a fact-finding mechanism that would allow the supervisory organ of the Convention to designate a commission to carry out visits to places of detention under the jurisdiction of a state party.²²⁶ In this respect, the Netherlands was clearly inspired by the approach of the Swiss Committee Against Torture, which was discussed in the beginning of this Chapter. Niall MacDermot of the ICJ had proposed to convert its ideas into an Optional Protocol, and in March 1980, Costa Rica tabled a draft text to be considered after the finalization of the work on the Convention.²²⁷

The Costa Rican draft appealed to the Netherlands; it considered the idea of a system of preventive visits a meaningful addition to the procedures that were proposed in the Swedish draft.²²⁸ However, according to the Costa Rican proposal, the instrument would not be part of the Convention itself, and would thus not directly strengthen it. The main disadvantage of this would be that states could still ratify without being forced to accept the consequences. Apart from that, the Dutch government feared that if it was decided to consider the draft Optional Protocol only after the adoption of the Convention itself, this might result in a transfer of all meaningful control mechanisms to the Protocol.²²⁹ Therefore, the Netherlands was of the opinion that the preventive fact-finding procedure entailed in the Costa Rican proposal should become an integral and mandatory part of the Convention.²³⁰

3.4.2 In the Working Group

In the Working Group, the Netherlands got the opportunity to introduce its amendments, but, during the 1981 session, they were hardly discussed. In regard to the question of supervision, the debate concentrated on the question of the most appropriate supervisory organ rather than on the instruments it should have at its disposal to carry out its tasks. It was a telegram from the UN Legal Counsel, Erik Suy that drew

the Ministry of Foreign Affairs to the Permanent Representative in Strasbourg, 20 October 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581. See also: Burgers and Danelius, 1988, p. 75.

226 UN Doc. E/CN.4/1981/WG.2/WP.3. See also: Burgers and Danelius, 1988, p. 75-76.

227 For Costa Rica's proposal, see: UN Doc. E/CN.4/1409. See also: Telex-message from the Ministry of Foreign Affairs to the Permanent Representative in Strasbourg, 20 October 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Burgers and Danelius, 1988, p. 76.

228 Pages 76-81 of a report of the delegation of the Kingdom on the 36th session of the UN Commission on Human Rights, 4 February-15 March 1980, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Telex-message from the Ministry of Foreign Affairs to the Permanent Representative in Strasbourg, 20 October 1981, Archive MFA, RvE 1975-1984, 999.434.0, file 838.

229 Telex-message from the Ministry of Foreign Affairs to the Permanent Representative in Strasbourg, 20 October 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

230 Document entitled 'Informal discussion paper on implementation machinery for the draft Convention against Torture', Personal Archive J.H. Burgers.

attention to this matter.²³¹ As was mentioned above, the Swedish draft entrusted the task of monitoring the Convention's implementation to the Human Rights Committee, which had been established under the ICCPR to supervise the observance of that treaty.²³² In their comments on the draft, France and the United States had already mentioned possible legal problems arising from this construction, and the United States had made clear that, on this issue, it 'would like to solicit the opinion of the United Nations Legal Counsel'.²³³ It now appeared that he shared these countries' concerns; in his telegram he explained that there were serious legal obstacles to making the Human Rights Committee responsible for monitoring this Convention. According to him, this Committee could not perform duties other than the ones attributed to it by the ICCPR. Widening its range of duties could be considered as a modification of the ICCPR, which could only be effected by a specific procedure provided for in that Covenant, and not by a decision taken in the context of another Convention.²³⁴

The telegram sparked off a heated debate over various alternative solutions that were now brought to the fore. Some delegations retained their preference for the Human Rights Committee as a supervisory body for this Convention, others proposed to let the Commission on Human Rights or the Sub-Commission carry out this task, while a third group of states proposed the creation of a completely new body.²³⁵ For the Netherlands, it was important that the supervisory organ's independence would be guaranteed.²³⁶ The core of the Dutch amendments involved the instruments of supervision rather than the supervisory body, but the Netherlands had also made an alternative suggestion in regard to the latter, which was to establish a new body that would, however, be composed of exactly the same members as the Human Rights Committee.²³⁷

A revised proposal that Sweden tabled in reaction to the discussions, followed the purport of this idea, but in the course of the negotiations a completely new Committee

231 Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581; UN Doc. E/CN.4/1475, p. 63-64. See also: Burgers and Danelius, 1988, p. 76.

232 Burgers and Danelius, 1988, p. 74-75.

233 UN Doc. E/CN.4/1314, p. 22.

234 UN Doc. E/CN.4/1475, p. 63-64. See also: Burgers and Danelius, 1988, p. 76. See also: Meron, 1982, p. 763-764.

235 Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581; UN Doc. E/CN.4/1475, p. 63-64. See also: Burgers and Danelius, 1988, p. 76.

236 Untitled document with a short report by an official of the Legislation Division for Public Law of the Ministry of Justice, 31 January 1981, Personal Archive J.H. Burgers.

237 UN Doc. E/CN.4/1981/WG.2/WP.3; Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs, and the Ministry of Justice, 30 December 1981, Personal Archive J.H. Burgers. See also: Burgers and Danelius, 1988, p. 75.

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against Torture would be decided upon.²³⁸ The Netherlands considered it of utmost importance to avoid the erosion of the Human Rights Committee's competences to deal with the issue of torture and other cruel, inhuman or degrading treatment or punishment. As soon as it became clear that an entirely new body would be created, it therefore defended the position that the competences of the Human Rights Committee would have to prevail over those of the Committee against Torture. However, this met with strong resistance from Sweden, and besides, the Netherlands also began to realize that this position would be hard to reconcile with its attempts to add new supervisory elements in the draft Convention against Torture. Hence, it seemed unavoidable to accept the negative consequences that the creation of a new supervisory organ might have on the position of the Human Rights Committee.²³⁹

Although no extensive deliberations had been held on the measures of supervision in the Working Group of 1981, it had already become clear that it would be a difficult topic to discuss. Some delegations, in particular Argentina and Brazil, had openly questioned the need for any international control machinery, and had expressed the view that compliance with the Convention should be guaranteed within the state parties' domestic legal systems.²⁴⁰ In two meetings that the Ad Hoc Group of Experts of the Council of Europe held in June and December 1981, it became clear that there were also differences of opinion in the Western Group. The position of the Netherlands and the United States were, for example, completely contradictory. As has been explained, the Netherlands did not have high expectations of a universal jurisdiction system and emphasized the meaning of more far-reaching supervisory mechanisms instead.²⁴¹ For the United States, the creation of universal jurisdiction for torture was, on the other hand, a *conditio sine qua non*, which would make all other monitoring

238 For details on the course of the debate on this question, see: UN Doc. E/CN.4/1475, p. 64; UN Doc. E/CN.4/1982/30/Add.1, p.12-15; UN Doc. E/CN.4/1983/63, p. 9-13; UN Doc. E/CN.4/1984/72, p. 9. See also: Burgers and Danelius, 1988, p. 77, 82- 83, 86-87, 96-97.

239 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs, and the Ministry of Justice, 30 December 1981, Personal Archive J.H. Burgers; Untitled document with a short report by an official of the Legislation Division for Public Law of the Ministry of Justice, 31 January 1981, Personal Archive J.H. Burgers.

240 Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581; UN Doc. E/CN.4/1475, p. 64. See also: Burgers and Danelius, 1988, p. 77.

241 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs and the Legal Adviser of the Ministry of Foreign Affairs, 28 December 1981, Personal Archive J.H. Burgers.

mechanisms superfluous.²⁴² Therefore, it preferred their deletion from the draft and their removal to an Optional Protocol.²⁴³

However, the Dutch amendments did not receive much support from other countries that were represented in the Ad Hoc Committee of Experts either. The idea of a mandatory interstate complaints procedure received the support of Belgium, Norway, Spain and Ireland, but a majority of nine experts preferred to retain its optional character.²⁴⁴ In regard to the suggestion to broaden the application of the enquiry procedure from situations in which torture is being systematically practiced to occurrences of repeated violations of the Convention, it was remarked that it would be difficult enough to get support for the Swedish suggestions, and that the Dutch proposals would certainly be too far-fetched.²⁴⁵ Finally, the system of preventive fact-finding that the Netherlands proposed only received support from Norway.²⁴⁶ All in all, it was felt that the Dutch proposals showed little sense of reality.²⁴⁷ As an article by two members of the Dutch ICJ-section, NJCM, demonstrates, there was criticism even among NGOs. It should be recalled that it had been a conscious decision to postpone discussion on the visitation system until after the conclusion of the work of the Convention, because it was feared that an immediate consideration of the proposal would slow down the negotiations. The Dutch proposal put this strategy in danger, and, as the NJCM-members made clear, it was feared that its attempts would ultimately lead to an unacceptable weakening of the fact-finding mechanism. Hence,

242 Report on the 38th session of the UN Commission on Human Rights, 1 February-12 March 1982, Archive MJ, unfiled records; Open message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 2 February 1982, Personal Archive J.H. Burgers. It should be noted that US Courts accepted universal jurisdiction for the crime of torture as early as 1980. See: Malanczuk, 2003, p. 114.

243 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs and the Legal Adviser of the Ministry of Foreign Affairs, 28 December 1981, Personal Archive J.H. Burgers. It would repeat this suggestion in 1983. See: Memorandum on the Ad Hoc Committee of Experts of the Council of Europe, 21 January 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

244 CoE Doc. CM (81) 179, p. 5, Archive MFA, RvE 1975-1984, 999.434.0, file 838; Memorandum from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Director-General International Cooperation of the Ministry of Foreign Affairs through the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs, the Head of the International Organisations Department of the Ministry of Foreign Affairs and the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, 30 July 1981, Personal Archive J.H. Burgers.

245 CoE Doc. CM (81) 179, p. 5, Archive MFA, RvE 1975-1984, 999.434.0, file 838.

246 CoE Doc. CM (81) 179, p. 6, Archive MFA, RvE 1975-1984, 999.434.0, file 838; Memorandum from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Director-General International Cooperation of the Ministry of Foreign Affairs through the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs, the Head of the International Organisations Department of the Ministry of Foreign Affairs and the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, 30 July 1981, Personal Archive J.H. Burgers.

247 Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Strasbourg, 3 July 1981, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

according to them, it would be better if the Netherlands would drop its plan and support the Optional Protocol instead.²⁴⁸

The Netherlands realized that its proposals would not have much chance to be adopted.²⁴⁹ This did not, however, lead to a decision to withdraw them, and in the Working Group's sessions of 1982, it reminded the other delegations of its amendments whenever this seemed relevant. The discussion in the Working Group was based on revised proposals for supervision that Sweden had submitted in December 1981.²⁵⁰ Its adjustments related to the question of the supervisory organ in particular. Basically, the monitoring mechanisms it proposed were the same as the ones contained in the original proposal and none of the Dutch amendments were taken up.²⁵¹ After a discussion in the Ad Hoc Committee of Experts, only one, relatively minor, suggestion of the Netherlands had been accepted, namely the idea to include a sentence in the individual complaints procedure that would make it possible to also lodge a petition on behalf of someone else.²⁵² Another change was the insertion of the Committee's competence to make 'suggestions or comments'.²⁵³

As was explained in section 3.1.4, the latter amendment would later become one of the major issues of contention, but in 1982, there was not much discussion about the reporting procedure. The other supervisory mechanisms caused more debate. In these discussions it became clear that any further insistence on the Dutch proposals would be pointless; they received hardly any support. The Netherlands' proposal to give the interstate complaints procedure an obligatory character was generally considered to be too far-reaching. After the delegate of the Netherlands had asked for comments on this amendment to the Swedish draft, it became clear that it was again backed only by one other state: Australia. The United Kingdom made clear it could only accept an optional procedure and other delegations gave expression to a similar preference.²⁵⁴ Its proposals concerning the inquiry procedure and a mandatory fact-finding mechanism were not accepted either. The first were not even discussed, and the idea of a mandatory

248 De Cooker and Thoolen, 1981, p. 1018. The open letter the NJCM wrote in 1982, which was referred to in section 3.1.3, should also be placed in this context.

249 Memorandum from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Director-General International Cooperation of the Ministry of Foreign Affairs through the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, the Legal Adviser of the Ministry of Foreign Affairs, the Head of the International Organisations Department of the Ministry of Foreign Affairs and the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, 30 July 1981, Personal Archive J.H. Burgers.

250 UN Doc. E/CN.4/1493; UN Doc. E/CN.4/1982/30/Add.1, p. 11-12. See also: Burgers and Danelius, 1988, p. 80-81.

251 *Ibidem*.

252 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs and the Legal Adviser of the Ministry of Foreign Affairs, 28 December 1981, Personal Archive J.H. Burgers.

253 UN Doc. E/CN.4/1493. This suggestion seems to have come from Australia. See: Report on the 39th session of the UN Commission on Human Rights, Geneva, 31 January-11 March 1983, Archive MJ, unfiled records.

254 UN Doc. E/CN.4/1982/30/Add.1, p. 15-17. See also: Burgers and Danelius, 1988, p. 81-82.

fact-finding mechanism was welcomed by Australia only.²⁵⁵ However, it is possible that the Netherlands' amendments contributed to the adoption of the Swedish proposal for an inquiry procedure, because in light of the Dutch suggestions this now seemed to be much less far-reaching.²⁵⁶ In any case, the Swedish text proposals for an inquiry procedure seemed acceptable to most delegations, and the major point of discussion was not *if* there should be such a procedure, but whether or not it should be confidential.²⁵⁷

3.4.3 A Cold War struggle?

In the next two years, the issue of the inquiry procedure's confidentiality continued to be one of the most controversial questions. In the Working Group of 1983, Australia tabled a proposal that would give the Committee the possibility to publish the results of an inquiry.²⁵⁸ As can be derived from a letter by the Australian delegate to Chairman-Rapporteur Burgers, this proposal came from Niall MacDermot of the ICJ.²⁵⁹ In the Ad Hoc Committee of Experts of the Council of Europe, some Western colleagues had already warned the Australian observer that such a proposal might be counterproductive and would possibly put consensus on an inquiry procedure at stake.²⁶⁰ They had appropriately assessed the situation, so it seems, because, in the Working Group, the proposition immediately provoked reactions by Argentina, Uruguay, Senegal and Brazil, and two days later, when it appeared that Chairman-Rapporteur Burgers had incorporated the Australian amendments in a revised draft provision, the Soviet Union tabled a proposal to give all supervisory mechanisms an optional character.²⁶¹ Argentina welcomed this idea, and India was of the opinion that at least the enquiry procedure should be optional. Some other delegations did not take a definitive stand yet. Even though the United States was not very much in favour of international supervisory mechanisms either, the Western delegations sided together in their rejection of the Soviet proposal. In their view, at least the provisions on the nature and composition of the supervisory organ, the reporting procedure and the inquiry procedure should be mandatory.²⁶²

²⁵⁵ *Ibidem*.

²⁵⁶ Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 16.

²⁵⁷ UN Doc. E/CN.4/1982/30/Add.1, p. 16-17. See also: Burgers and Danelius, 1988, p. 81-82.

²⁵⁸ UN Doc. E/CN.4/1983/63, p. 17; Report on the 39th session of the UN Commission on Human Rights, Geneva, 31 January-11 March 1983, Archive MJ, unfiled records. See also: Burgers and Danelius, 1988, p. 88.

²⁵⁹ Letter from the Australian Permanent Mission in Geneva to the Head of the Legal and Social Affairs Division of the Dutch Ministry of Foreign Affairs, 12 November 1982, Personal Archive J.H. Burgers.

²⁶⁰ Memorandum on the Ad Hoc Committee of Experts of the Council of Europe, 21 January 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

²⁶¹ Report on the 39th session of the UN Commission on Human Rights, Geneva, 31 January-11 March 1983, Archive MJ, unfiled records; UN Doc. E/CN.4/1983/63, p. 17. See also: Burgers and Danelius, 1988, p. 88.

²⁶² UN Doc. E/CN.4/1983/63, p. 8-9. See also: Burgers and Danelius, 1988, p. 88-89.

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One year later, in 1984, the Soviet Union announced in the Working Group that it would not any longer insist on giving all monitoring provisions an optional character, but that it remained opposed to a mandatory character of an inquiry procedure.²⁶³ Furthermore, a new problem arose, because the delegate of the Soviet Union also expressed his objections to the present formulation of the reporting procedure. According to the existing text, the Committee against Torture was authorized to make ‘comments or suggestions’ on the report of a state party. The Soviet Union and its allies proposed to bring the formulation in line with a similar provision in the ICCPR by deletion of the word ‘suggestions’, and replacement of the word ‘comments’ with ‘general comments’.²⁶⁴ However, among Western states the original formulation was considered an important step forward from the ICCPR’s provisions.²⁶⁵

The discussion about the Committee’s competence to submit ‘comments or suggestions’ was directly related to a debate in the Human Rights Committee. The Covenant gave the Human Rights Committee the competence to make ‘such general comments as it may consider appropriate’.²⁶⁶ Among the Committee members, there was a difference of opinion about the interpretation of this provision. The Eastern European members of the Human Rights Committee defended the position that the Committee’s primary function was to assist states and not to make pronouncements on the question of whether or not a state had implemented the provisions of the Covenant. They felt that ‘general comments’ could therefore only be addressed to all states parties together, and could never focus attention on violations in a particular country.²⁶⁷ Other members of the Human Rights Committee, in particular those from Western countries, opposed this point of view, and argued that the Committee did have the authority to comment on the report of an individual country, and some even felt that it was in fact obliged to do so.²⁶⁸

As was set forth in section 3.1.4, neither the question of the inquiry procedure nor the issue of the Committee against Torture’s competences to make ‘comments or suggestions’ was resolved in the Working Group. The Western group, and a number of other, mostly Latin American countries, wanted to retain the mandatory character of the inquiry procedure and the ‘comments or suggestions’ formula. The Netherlands also attached great importance to their inclusion, and it tried to preserve the disputed articles to the last moment. When some other Western countries proposed to formulate a fallback position in October 1984, this was firmly rejected by the Netherlands.²⁶⁹ The reason for this was that it felt that these were the only provisions that supplemented

263 UN Doc. E/CN.4/1984/72, p. 9. See also: Burgers and Danelius, 1988, p. 96.

264 UN Doc. E/CN.4/1984/72, p. 9-10. See also: Burgers and Danelius, 1988, p. 97.

265 CoE Doc. CAHTT (82) 2, p. 5, Personal Archive J.H. Burgers.

266 See: Article 4.4 ICCPR.

267 Boerefijn, 2001, p. 302; Boulesbaa, 1999, p. 112.

268 Boerefijn, 2001, p. 302-303; Boulesbaa, 1999, p. 111.

269 Code-message from the Permanent Representative in New York to the Ministry of Foreign Affairs, 22 October 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2582. See also: UN Doc. A/39/499, p. 13.

existing procedures with something that was new.²⁷⁰ In the end, it did not have any choice but to give in, although the disappointment about it was great, especially back in The Hague, where the course of the negotiations could be followed only from a distance.²⁷¹

In the General Assembly, many non-aligned states interpreted the discussions about the supervisory procedures as a controversy between East and West.²⁷² It was indeed true that the Cold War rivals dominated the debate. The question whether the Netherlands' policies were perhaps driven by Cold War considerations thus seems legitimate. Nevertheless, there are no indications that this was the case. It should be realized that the pure fact that there *was* a clash between East and West does not necessarily mean that it was the states' primary purpose to actually cause this conflict. The Soviet point of view was that international control mechanisms were an unjustified infringement of a state's sovereignty, and therefore it rejected anything that went beyond the control of the state.²⁷³ Hence, any state that aimed at more intrusive forms of international supervision was likely to meet the Soviet Union on its way, no matter what its reasons for taking this position were. Without a doubt, the Netherlands realized that an emphasis on more effective supervision would meet with objections from the Soviet bloc, but its arguments for this approach should be traced to its ideas about the international human rights system in the first place.

In this respect, it should also be realized that the Dutch policies were in contradiction with the preferences of the United States, too. The United States was in favour of universal jurisdiction for torture, but it rejected any instruments for international supervision, let alone really effective ones. Besides, if the Netherlands had really sought Cold War confrontation, it would probably have been more eager to engage in the debate about the article that dealt with the matter of expulsion, extradition and return to a country where the person in question would run the risk of being tortured. In 1979, the Soviet Union tabled an amendment to this article with a clear political slant. It included a list of situations that were to be considered as 'substantial evidence' that a person would indeed run a risk of being subjected to torture. Situations referred to were those 'characterized by flagrant and massive violations of human rights brought about when apartheid, racial discrimination or genocide, the suppression of national liberation movements, aggression or the occupation of foreign territory are made State policy'.²⁷⁴ The Soviet suggestion was full of communist rhetoric and almost

270 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Head of the International Organisations Department of the Ministry of Foreign Affairs and the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, 26 March 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

271 Interview with J.H. Burgers, 26 March 2003.

272 Appendices to the reports of the Second Chamber, 1985-1986, 19 617 (R1312), no. 3, p. 13-14.

273 Hence, it opposed, for instance, the creation of independent supervisory organs, or the establishment of complaints procedures. See: Van Genugten, 1988, p. 43-48.

274 UN Doc. E/CN.4/1347, p. 41-43; UN Doc. E/CN.4/1408, p. 54-57. See also: Burgers and Danelius, 1988, p. 49-52 and 54-56. For the quotation, see: UN Doc. E/CN.4/1347, p. 42.

asked for a counterproposal by the United States. Referring to a number of weaknesses in the Soviet's policies, the United States expressed the view that if there were specific situations to be referred to, religious persecution, denial of free speech, suppression of political dissent and the free flow of information, and armed intervention in the affairs of a sovereign state could by no means remain unlisted.²⁷⁵ It would take until 1984 before the issue would be solved, so, in principle, there was an opportunity to try and attack the Soviet Union each year, but the Netherlands was not interested in that. On the contrary, as the Dutch delegate to the Working Group of 1981 wrote, the Netherlands left the fighting to the delegates of the two super-powers; it would just wait and see what the outcome would be.²⁷⁶

3.5 DEFINITION AND SCOPE

After the conclusion of the negotiations in the Working Group, the question of the supervisory mechanisms was clearly the most crucial issue to be settled before the Convention's adoption. However, in the background there was a second problem that needed to be solved. It concerned the question of the definition of torture and the scope of the Convention. In the draft that the Working Group submitted to the Commission on Human Rights, torture was defined as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. However, '[p]ain or suffering arising only from, inherent in or incidental to lawful sanctions' was not held to be torture.²⁷⁷

In the Commission on Human Rights, it appeared that the United Kingdom was not satisfied with this definition. On 29 February, its representative expressed the view that the definition needed improvement in four respects.²⁷⁸ One comment was that, contrary to the Declaration of 1975 and the draft Sweden had submitted in 1978, the definition of the draft Convention lacked a sentence that made it clear that '[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'.²⁷⁹ Another concern was the inclusion of the clause that excluded pain and

275 UN Doc. E/CN.4/1408, p. 56. See also: Burgers and Danelius, 1988, p. 56.

276 Untitled document with a short report by an official of the Legislation Division for Public Law of the Ministry of Justice, 31 January 1981, Personal Archive J.H. Burgers.

277 UN Doc. E/CN.4/1984/72, Annex. This formulation was retained in the final text of the Convention. See: Article 1.1 CAT.

278 UN Doc. E/CN.4/1984/SR.33, p. 7-8.

279 *Ibidem*. See also: UN Doc. E/CN.4/1285; UN Doc. E/CN.4/1984/72, Annex. Its purpose seemed to be to bring the definition into line with the jurisprudence of the European Court of Human Rights. In a case between Ireland and the United Kingdom, the Court had defined 'torture' in a restrictive manner

suffering deriving from the use of lawful sanctions from the definition of torture.²⁸⁰ During the Commission's session, it was not clarified what motives had incited the United Kingdom to make this statement.²⁸¹ At the time, it was presumed though, that some of the British comments had been made on the recommendation of Amnesty International.²⁸² Although the organisation had initially favoured the idea of a binding treaty against torture, it had become somewhat disappointed in the course of the negotiations. It felt that the text of the Convention, especially the parts that dealt with definitions and scope, were so weakened that one might wonder whether it was in fact desirable to adopt it.²⁸³

In the first place, Amnesty considered the deletion of the exclusion of lawful sanctions from the definition of torture essential, if the Convention was to be a truly effective weapon against torture. Otherwise, this might imply that corporal punishments would, for instance, be allowed if they were in conformity with national law.²⁸⁴ The principal aim of the lawful sanctions clause was to draw a line between torture and acceptable elements of punishment inherent in any legal system, but initially, it had been formulated in a different way that did not have this disadvantage.²⁸⁵ Similar to the definition of the Declaration of 1975, the Swedish text proposal included a sentence that read: 'It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum

that had been advantageous to the United Kingdom. See: Speaking note attached to a memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 6 September 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581. See also: Burgers and Danelius, 1988, p. 115-116; Ingelse, 2001, p. 60.

280 UN Doc. E/CN.4/1984/SR.33, p. 7-8. The other comments the United Kingdom made were that mention should be made of gratuitous torture and that the essentially subjective concept of mental pain would create difficulties, especially if it were linked to motives based on discrimination.

281 Later, it appeared that the United Kingdom had never been satisfied with the definition in the draft Convention, but had expected there to be a second reading or another opportunity to come back to its concerns. Furthermore, there also seemed to be some disagreement between the Foreign and Commonwealth Office and the Home Office. See: Memorandum from the Head of the Legal and Social Affairs Division of the (Dutch) Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the (Dutch) Ministry of Foreign Affairs, 19 April 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Memorandum from the Head of the Legal and Social Affairs Division of the (Dutch) Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the (Dutch) Ministry of Foreign Affairs, 6 September 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581. See also: UN Doc. E/CN.4/1314/Add.1, p. 2.

282 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Head of the International Organisations Department of the Ministry of Foreign Affairs and the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, 26 March 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

283 Interview with M.T. Kamminga, 24 May 2005.

284 Letter from the Director of the Dutch section of Amnesty International to the Minister of Foreign Affairs, 30 December 1983, Archive MFA, Contacts with NGOs on human rights issues 1980-1984, 319, file: 430. See also: Amnesty International, 1984, p. 3; Interview with M.T. Kamminga, 24 May 2005.

285 Ingelse, 2001, p. 78 and 212; Burgers and Danelius, 1988, p. 46.

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Rules for the Treatment of Prisoners.²⁸⁶ However, a question that several countries posed was whether a legally binding treaty could refer to an instrument that did not have that same status, and that could, as a consequence, be amended quite easily by a resolution of the General Assembly.²⁸⁷ The matter was discussed in the Working Group of 1979. Several alternatives were tabled, but since it was widely considered that there were no generally accepted international standards that could be referred to instead of the Standard Minimum Rules, it was decided simply to determine that torture did not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.²⁸⁸ The representative of Amnesty International was not present when this decision was made. When he arrived later that week, he made objections to this phrase, but this led to an angry reaction by Niall MacDermot of the ICJ. He defended the clause because he felt it would be unreasonable to prosecute an official who had carried out corporal punishments that were prescribed by the law of his state, if he were in the territory of another state.²⁸⁹ Amnesty patched up the quarrel, but it continued to have difficulties with the text that the Working Group had adopted.²⁹⁰

In addition, Amnesty International was displeased with the fact that most of the Convention's articles applied only to torture, and not to other cruel, inhuman or degrading treatment or punishment.²⁹¹ The first Swedish draft dealt with torture as well as other forms of ill-treatment, and in article 1, the two were related by a sentence that described torture as an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.²⁹² Some states agreed that the Convention should cover both, but there were also states that were of the opinion that its scope should be limited exclusively to torture.²⁹³ The main objection to the inclusion of cruel, inhuman or degrading treatment or punishment was that it would be extremely difficult to define in terms acceptable to all countries and legal systems. At the same time, it was not

286 See: UN Doc. E/CN.4/1285.

287 UN Doc. E/CN.4/1314, p. 9-10; UN Doc. E/CN.4/1314/Add.2, p. 2; UN Doc. E/CN.4/1347, p. 38. See also: Burgers and Danelius, 1988, p. 46; Ingelse, 2001, p. 78 and 212-213.

288 UN. Doc. E/CN.4/1347, p. 36-39. See also: Burgers and Danelius, 1988, p. 41-47; Ingelse, 2001, p. 78-79 and 211-213.

289 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 19 April 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

290 Note that this point of concern was brought to the attention of government delegations well before 1984. See: Letter from the Dutch section of Amnesty International to the Minister of Foreign Affairs, 28 January 1980, Archive MJ, unfiled records.

291 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 19 April 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581. For an overview of substantive provisions relating to all forms of cruel, inhuman or degrading treatment or punishment and those relating to torture only, see: Burgers and Danelius, 1988, p. 2-3.

292 See: UN Doc. E/CN.4/1285.

293 UN Doc. E/CN.4/1314, p. 5-10; UN Doc. E/CN.4/1314/Add.1, p. 2; UN Doc. E/CN.4/1292, p. 30-31; UN Doc. E/CN.4/1347, p. 40. See also: Burgers and Danelius, 1988, p. 47; Boulesbaa, 1999, p. 5-6.

acceptable to attach the obligations that the Convention imposed on the states parties to a vague and imprecisely described concept.²⁹⁴

It soon appeared that most states wanted the Convention to deal primarily with torture. The reference to cruel, inhuman or degrading treatment or punishment was also deleted from the definition article.²⁹⁵ It was suggested instead to insert a new article to deal with other forms of ill-treatment. It would specify which parts of the Convention applied to these forms of treatment and punishment too.²⁹⁶ However, as the negotiations went on, the obligations that states would accept in this regard became fewer and fewer.²⁹⁷ Amnesty International was very disappointed. There were three articles in particular that it wanted to bring into the area of application of other cruel, inhuman or degrading treatment or punishment; namely, the ones dealing with the obligation of non-refoulement, the right to compensation, and the ban on using statements made under torture.²⁹⁸ It was of the opinion that the Convention would otherwise be a step backward from the Declaration, whose principles were applicable to torture and other cruel, inhuman or degrading treatment or punishment alike.²⁹⁹

Because of these doubts, Amnesty International did not lobby for the adoption of the Convention.³⁰⁰ It had just relaunched its campaign for the abolition of torture, but the accompanying '12-point program for the prevention of torture' made no mention of the draft Convention.³⁰¹ This did not remain unnoticed. At the Dutch Ministry of Foreign Affairs, it was feared that Amnesty's attitude might undermine the Convention's adoption.³⁰² As was explained in the beginning of this chapter, the Netherlands wanted to reach agreement on the matter in 1984. It was clear that there were still some major hurdles to take before that goal could be reached, and it was anticipated, for instance, that the Soviet bloc would again steer towards delay in the General Assembly by trying to re-open the debate on as many articles as possible. In the light of this, Amnesty's attitude was very disadvantageous, and the same was true for the comments that the United Kingdom had made in the Commission on Human Rights. The intervention had come unexpectedly, and while it was an unwelcome surprise for Burgers,

294 UN Doc. E/CN.4/1314, p. 5-10; UN Doc. E/CN.4/1292, p. 31; UN Doc. E/CN.4/1347, p. 40. See also: Boulesbaa, 1999, p. 8; Burgers and Danelius, 1988, p. 149.

295 UN Doc. E/CN.4/1982/30/Add.1, p. 3. See also: Burgers and Danelius, 1988, p. 80; Boulesbaa, 1999, p. 8.

296 UN Doc. E/CN.4/1408, p. 66-67. See also: Burgers and Danelius, 1988, p. 70-71, and 149.

297 Ingelse, 2001, p. 77-78. For details of these discussions, see: UN Doc. E/CN.4/1475, p. 62-63; UN Doc. E/CN.4/1982/30/Add.1, p. 10-11; UN Doc. E/CN.4/1983/63, p. 7; UN Doc. E/CN.4/1984/72, p. 7-8. See also: Burgers and Danelius, 1988, p. 74, 80, 85 and 95-96.

298 Letter from the Director of the Dutch section of Amnesty International to the Minister of Foreign Affairs, 30 December 1983, Archive MFA, Contacts with NGOs on human rights issues 1980-1984, 319, file: 430.

299 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 19 April 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

300 Interview with M.T. Kamminga, 24 May 2005.

301 Amnesty International, 1984, p. 3-4 and 249-251; Cook, 1991, p. 177-178.

302 Interview with J.H. Burgers, 26 March 2003; Interview with M.T. Kamminga, 24 May 2005.

communist bloc states could hardly conceal their joy over this split in the Western camp.³⁰³

In the Netherlands, it was considered of great importance to close the Western ranks. Hence, some weeks after the Commission's session, Burgers went on an official journey to London to talk with representatives of the British Ministry of Foreign Affairs.³⁰⁴ It appeared to be a useful visit. The officials of the Foreign and Commonwealth Office with whom Burgers met, were of the opinion that the United Kingdom could not withdraw its objections, but they also made a promise to avoid a negative tone and not to stress their concerns too much.³⁰⁵ In its formal comment on the final draft, the United Kingdom did indeed express its willingness to accept the text as adopted by the Working Group.³⁰⁶

In the Netherlands, Amnesty International's support was, however, considered at least as important as that of the United Kingdom. Therefore, a visit was also paid to Amnesty International's headquarters in London.³⁰⁷ Considering the usual run of things, according to which an NGO would rather be expected to lobby government officials than the other way around, this Dutch initiative can certainly be considered remarkable. However, it was by no means an isolated event. Burgers tried to mobilise all support that he could think of, and he did not, for instance, shy away from addressing a meeting of the consultative body of Dutch human rights organisations (BMO) to draw attention to the draft Convention.³⁰⁸ He also contacted the ICJ with an explicit request for its support. The ICJ reacted favourably and sent out a request to its national sections to promote the Convention with their governments.³⁰⁹ At the International Secretariat of Amnesty International, Burgers succeeded in gaining commitment to the draft Convention as well. He explained to the organisation that the Netherlands did not agree with the organisation's comment that more articles should apply to cruel, inhuman or degrading treatment or punishment, but that it shared its concern about the

303 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Head of the International Organisations Department of the Ministry of Foreign Affairs and the Deputy Director-General International Cooperation of the Ministry of Foreign Affairs, 26 March 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Code-message from the Ministry of Foreign Affairs to the Permanent Representative in New York, 18 September 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Interview with J.H. Burgers, 26 March 2003.

304 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 19 April 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

305 *Ibidem*.

306 UN Doc. A/39/499, p. 19.

307 Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 19 April 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581.

308 See: 'Martelen' [Torture] – In: *NJCM-Bulletin*, Vol. 9, No. 4, 1984, p. 410.

309 *Ibidem*. See also: Interview with J.H. Burgers, 26 March 2003.

lawful sanctions clause.³¹⁰ Prevention of a re-opening of the debate was still its main concern, but it was agreed that the Netherlands would make it clear to other states that the word 'lawful' should be understood to refer not only to national law, but also to international law.³¹¹

Once it had become clear that the visit to London had paid off, the Netherlands must have breathed a sigh of relief; with the support of major international human rights NGOs and all Western governments, the Convention ran a greater chance of being adopted, which, indeed, was what finally happened.

3.6 CONCLUSION

According to the formal policy principles the Netherlands government laid down in the memoranda on human rights and foreign policy, it held the opinion that the codification process could be regarded as more or less finalized. On the other hand, it indicated that it would actively participate in further standard setting of a supplementary nature. For the Netherlands, the question whether the proposed Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment could be considered to be of additional value was indeed crucial. Initially, it answered this question in the negative: the norms that it included were the same as the principles of the Declaration of 1975, while its supervisory mechanisms did not go much further than those of the ICCPR either. It was felt that the protracted negotiations that could be expected to start when this initiative was pursued could harm the value and possible impact of the Declaration on Torture that had been adopted only a few years before.

Contrary to many other states, the Netherlands' position was that universal jurisdiction could not be expected to make the fight against torture more effective. It was the Ministry of Justice in particular that determined the Dutch standpoint in this respect. Arguing from a purely legal perspective, this Ministry was of the opinion that universal jurisdiction for torture was inappropriate and ineffective. Within the Ministry of

310 The Netherlands had objections to Amnesty's wish to let more articles apply to cruel, inhuman or degrading treatment partly because it thought that other countries would never accept this, and partly because it could not accept domestic implications itself. For instance, it feared that asylum procedures would become too complicated if the article on non-refoulement would be applicable in case of all forms of ill-treatment. Furthermore, it was concerned that a prohibition to use statements made under degrading treatment, would make it impossible to carry out any legal proceedings, because, in principle, all interrogation could be considered degrading. See: Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 19 April 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2581; Interview with J.H. Burgers, 26 March 2003.

311 Interview with M.T. Kamminga, 24 May 2005. The Netherlands kept its promise, and included this interpretation in the comments it submitted to the UN Secretary-General. See also: UN Doc. A/39/499, p. 12-13. When it ratified the Convention in 1988, the Netherlands made a similar statement. See: <http://www.ohchr.org/english/countries/ratification/9.htm#N9>, accessed 8 September 2006.

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Foreign Affairs, there were officials that agreed with this point of view, but officials of the Humanitarian and Legal Affairs Section of this Ministry did not agree, and wanted the Netherlands to support universal jurisdiction. One reason for this was that it wanted to uphold the Dutch reputation as an active participant in the international fight against torture. Because the universal jurisdiction system was linked to the catch phrase of ‘no safe haven for torturers’, a climate was created in which states that opposed universal jurisdiction were implicitly associated with suspect intentions. The fact that Argentina and Uruguay belonged to the group of opponents only strengthened that impression.

NGOs and other proponents of universal jurisdiction for torture considered it of crucial importance to get the Netherlands on their side, and eventually, they succeeded. In the course of 1980, the pressure on the Dutch government increased considerably. Amnesty International sent letters to the Ministry of Foreign Affairs and the Ministry of Justice that made clear that it had been informed about the differences of opinion within the Dutch bureaucracy, and a motion was adopted in parliament. In the background, delegation leader Van der Stoel and the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs supported these attempts. The Netherlands was forced to change its position now, and after some further attempts to bring the universal jurisdiction articles into line with its main concerns, it gave up its resistance. Remarkably enough, the Netherlands would, twenty years after its adoption, appear to be the first country to actually convict a torturer on the basis of the obligatory universal jurisdiction established by the Convention against Torture.³¹²

In principle, the motion and NGO requests had focused on the question of universal jurisdiction, but they also caused a general change of attitude towards the Convention. While the Netherlands had kept aloof in the first negotiation years, it started to participate more actively now. Its activities focused on the Convention’s monitoring mechanisms in the first place, and in this regard its policies were completely in line with the policy principles that had been laid down in the memoranda on human rights and foreign policy. The Netherlands had always felt that the international supervisory mechanisms in the Swedish draft were too weak, but it had never come up with a concrete proposal to improve them. One reason to make such proposals now was to try and silence criticism, but on the other hand, it cannot be denied that the Netherlands seemed very principled in this regard. Its suggestions could not count on much international support, especially not from the two superpowers and other countries that opposed international supervision anyway. Nonetheless, the Netherlands had become actively involved in the negotiations now, and starting from 1981, its delegate Burgers would even play an important role as the Chairman-Rapporteur of the Working Group that dealt with the issue of the Convention against Torture.

³¹² Kamminga, 2004, p. 439-444; Ryngaert, 2005, p. 576-577. It should be noted though, that there have also been instances in which the principle of universal jurisdiction was not applied. This was the case, for instance, in 1994 when the former Chilean president Pinochet was present on the territory of the Netherlands. See: Kamminga and Tijssen, 1995.

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After the conclusion of the activities of the Working Group, the Netherlands continued to play a leading role. It certainly used its best endeavours to ensure that the Convention would be accepted by the General Assembly in 1984. Without a doubt, one of the most remarkable steps it took to secure the Convention's adoption were the requests for support it addressed to human rights NGOs, and its visit to Amnesty International's headquarters in London in particular. The latter organisation had come to doubt the value of the Convention, because of its limited scope and an escape clause in the definition article. In a way, this organisation had thus gone through a development that was contrary to that of the Netherlands. While the Netherlands had had some doubts about the additional value of the Convention in the beginning of the negotiation process, it gradually forgot about these once it had grown into its leadership role.

CHAPTER 4

THE NETHERLANDS AND SOCIAL AND ECONOMIC RIGHTS

In chapter 2 and 3, it was demonstrated that the Netherlands gave considerable attention to the fight against torture. In this regard, it attached particular importance to the development of effective international supervisory mechanisms. In the following two chapters, the extent to which this was also true for its policies in the field of social and economic rights will be investigated.¹ What were the Netherlands' basic points of departure in negotiations on social and economic rights instruments? Furthermore, what were the considerations that determined its policies? Were human rights considerations the only determining factor, or were there also other policy interests involved? And to what extent did nongovernmental organisations or different bureaucratic actors influence its policies?

In this chapter, a first attempt to answer these questions is made. Its structure is similar to that of chapter 2: the first section provides some historical background, the next gives an overview of the Netherlands' general policy principles, while the following sections deal with a number of case studies in which these principles were to be applied. Universal instruments are studied first, and regional initiatives are dealt with afterwards. In respect to the latter, the focus is on the Council of Europe, because the CSCE and its successor OSCE have not developed any norms or procedures of importance in the field of social and economic rights.²

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- ¹ It should be noted that cultural rights are sometimes bracketed together with social and economic rights, but this seems to be the consequence of the fact that these rights happen to be incorporated in the same UN Covenant rather than because they should be seen as a similar type of rights. In practice, cultural rights questions are more often dealt with in relation to the non-discrimination or minorities' provision of the ICCPR than in the context of the ICESCR. (See: Steiner and Alston, 2000, p. 248) In the context of the Council of Europe, there is no specific link between economic and social rights and cultural rights either. For these reasons, cultural rights are not dealt with in this chapter. They will, however, be shortly referred to in chapter 8.
 - ² The Helsinki Final Act of 1975 includes a reference to economic and social rights, but it is of a very general character only. It reads: 'They [the participating states] will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.' The Concluding Document of Madrid of 1983 mentions the right of workers to freely establish and join trade unions in particular, and the Concluding Document of Vienna of 1989, emphasizes the need to continue efforts with a view to progressively achieving the full realization of economic and social rights, but in principle these phrases repeat existing norms; they do not create new standards, nor do they refine existing ones. In the Concluding Document of the Vienna Follow-Up Meeting of 1989, the document of the Copenhagen meeting of the Conference of the human dimension of the CSCE of 1990, the Charter of Paris of 1990, and later documents that include human rights principles, hardly any reference is made to social and economic rights. The same is true for the reports

4.1 TOWARDS INTERNATIONAL RECOGNITION OF SOCIAL AND ECONOMIC RIGHTS

Whereas the historical development of civil and political rights is usually associated with the French and the American Revolution, the Industrial Revolution of the late eighteenth and nineteenth century, can be seen as the starting point of a development that would ultimately lead to an international recognition of social and economic rights.³ A negative consequence of the industrialisation was the emergence of a large class of exploited workers. The misery and egregious working conditions of the have-nots of the urban proletariat provoked criticism, and also new human rights questions. Civil and political rights, and ideals of freedom and equality did not mean much for poor workers if they were at the mercy of their employers, and had no food, no home, no clothing, no medical care and no education.⁴

The socialist ideals of the nineteenth century first gave rise to domestic regulations concerning the worst forms of exploitation, like the employment of young children or extreme working hours for teenagers, but gradually, legislation was also developed in relation to other labour issues and further social questions, such as sanitation, poor relief and education.⁵ In the Netherlands, the so-called Van Houten Act on child labour of 1874 is generally considered as the starting point for the advancing process of social legislation, though references to what would now be considered social rights, such as relief for the indigent and care for orphans, were already incorporated in its constitution as early as 1798.⁶ At the international level, two treaties on labour conditions were adopted in 1906; they prohibited night work for women in industrial employment, and the use of phosphorus in the manufacture of matches, respectively.⁷ With the creation of the International Labour Organisation (ILO) in 1919, labour issues had definitely reached the international stage, and although the questions that it dealt with were at that time not yet framed as human rights matters, this organisation's conventions are usually seen as crucial predecessors to modern instruments for economic and social rights protection.⁸

of OSCE implementation meetings on human dimension issues, as held, for instance, in Warsaw from 27 September to 15 October 1993, and from 2 to 19 October 1995. This demonstrates that these rights have never been a priority issue in this organisation. (The documents referred to can all be found at: <http://www.osce.org/documents/chronological.php>, accessed 8 September 2006).

3 Lauren, 2003, p. 54-55; Craven, 1995, p. 8.

4 Lauren, 2003, p. 54-55; Van Genugten, 1988, p. 115-119; Arambulo, 1999, p. 10-11.

5 Lauren, 2003, p. 54-55 and 79-80.

6 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 94; Kuitenbrouwer, 1996, p. 158; Boonstra, 1996, p. 220-221; Heringa, 1989, p. 9.

7 Lauren, 2003, p. 74; Betten, 1993, p. 4; Valticos and Von Potobsky, 1995, p. 18.

8 Lauren, 2003, p. 94-95; Van Genugten, 1988, p. 11-12; Steiner and Alston, 2000, p. 242; Van Hoof, 1996, p. 66; Arambulo, 1999, p. 11. It should be noted that the establishment of the ILO did not only stem from protests against bad labour conditions by workers and trade unions, or Western governments' fear that the precedent set by the Russian Revolution of 1917 might be followed in their countries as well. Employers also had an interest in international regulations to avoid distortion of competition in international trade. See: Betten, 1993, p. 1-11; Valticos and Von Protobsky, 1995, p. 17-18.

After the Second World War, social and economic rights were incorporated in the Universal Declaration of Human Rights. In his famous 'Four Freedoms' speech of 1941, the President of the United States, Franklin Roosevelt, also made reference to a freedom from want.⁹ Nonetheless, in the drafting process of the Universal Declaration, it was the socialist governments of Latin American countries in particular that advocated the inclusion of provisions on social and economic rights. They received support from communist countries, but Western states proved more reluctant to agree.¹⁰ The text of the Declaration that was eventually adopted in 1948, laid down several social and economic rights, such as the right to social security, the right to work, the right to an adequate standard of living, and the right to education.¹¹ Their inclusion in the Universal Declaration has given these rights the status of human rights, and formally all states agree with the principle that all categories of rights – hence, civil and political rights on the one hand, and social, economic and cultural rights on the other hand – are indivisible, interdependent and interrelated. However, in practice, opinions on the proper status of economic and social rights have always been very divided. Whereas some states – communist and developing states in particular – have considered them superior to civil and political rights, other states have taken the opposite position; and some states, most notably the United States, have openly denied that they should actually be treated as rights at all.¹²

4.2 THE NETHERLANDS' VIEWS ON SOCIAL AND ECONOMIC RIGHTS

In principle, the government of the Netherlands holds the view that the categories of economic and social rights and civil and political rights are indivisible, interdependent, and of equal importance. Official statements by the Dutch government constantly underline these principles as basic points of departure.¹³ The fact that the Netherlands signed and ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) on the very same date indicates that this was more than just a statement.¹⁴ Since 1983, the classic and social rights have also been brought together in one chapter

9 Steiner and Alston, 2000, p. 243; Lauren, 2003, p. 137; Baehr, 2001, p. 32.

10 Morsink, 1999, p. 157 and 192; Lauren, 2003, p. 213.

11 See articles 22-26 UDHR.

12 Steiner and Alston, 2000, p. 237.

13 See, for example: Ministerie van Buitenlandse Zaken, 1979b, p. 308; Ministerie van Buitenlandse Zaken, 1986, p. 366; Appendices to the reports of the Second Chamber, 1982-1983, 17 600, chapter V, no. 2, p. 51; Appendices to the reports of the Second Chamber, 1997-1998, 25 600, chapter V, no. 2, p. 42.

14 See: <http://www.ohchr.org/english/law/ccpr.htm> and <http://www.ohchr.org/english/law/cescr.htm>, accessed 11 September 2006.

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of the Dutch Constitution, thus giving expression to the indivisible character of classic and social rights.¹⁵

As compared to many other countries, the Netherlands has a relatively favourable record when it comes to actually protecting social and economic rights domestically. It goes without saying that its relatively prosperous economy partly accounts for this, and it should also be recognized that there are still issues for which the Netherlands can be criticized.¹⁶ Nonetheless, in Europe, the Dutch social security system belongs to the most generous ones, and although it was only in April 1980 that the Netherlands ratified the European Social Charter, its rate of compliance with the Charter's provisions has, for instance, been relatively high as compared to that of other contracting parties.¹⁷ Insofar as the international aspect was concerned, the Netherlands considered its development policies as an attempt to realize economic and social rights elsewhere in the world. Therefore, its policies were not just aimed solely at economic growth, but also at poverty reduction and social justice.¹⁸

The above paragraphs make clear that the Netherlands recognized the relevance of social and economic rights. However, this does not necessarily mean that its policy practice was always in full conformity with the principle of indivisibility, interdependence, and equal importance of all categories of rights. First of all, it should be noted that 'the definition of what counts as human rights depends on the circumstances', for only persons that have left their country for violations of certain civil and political rights can claim refugee status, while those trying to escape a situation in which their economic and social rights are not fulfilled, cannot.¹⁹ What is of particular importance in the context of this study is that an emphasis on civil and political rights also becomes clear from the Dutch policy papers on human rights and foreign policy. In the 1979 policy paper, for instance, it is indicated that the government established a direct link between human rights and democracy, and for this reason gave an essential place to political liberties in the totality of human rights.²⁰ A similar order of priorities can be derived from the follow-up memoranda and the policy paper of 2001, which have therefore been criticized for paying only scant attention to social and economic rights.²¹ According to a former official of the Humanitarian and Legal Affairs Section

15 Van Genugten, 1988, p. 169-172. See also: Heringa, 1989, p. 22-29. In its first chapter, which deals with basic rights, the articles 19 to 23 contain provisions on such matters as employment, social security, education, public health and housing. According to Van Hoof, the practical meaning of these articles has, however, been very limited, because they do not seem to have greatly influenced the government's policy considerations. See: Van Hoof, 1998, p. 11-14.

16 For a critical analysis of the Dutch performance, see, for instance: Baehr, 2006.

17 Jaspers and Betten, 1988b, p. 131; Gomien, Harris, and Zwaak, 1996, p. 410. For more information on the delay in the Dutch ratification process, see: Jaspers and Betten, 1988b.

18 Ministry of Foreign Affairs, 1979, p. 102-104; Appendices to the reports of the Second Chamber, 1982-1983, 17 600, chapter V, no. 2, p. 51; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 11-12 and 35; UN Doc. E/CN.4/1998/SR.8, p. 3.

19 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 6.

20 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 10.

21 See, for example: NJCM, 1992, p. 112; Castermans-Holleman, 1997a, p. 646; Baehr, 2006, p. 190.

of the Ministry of Foreign Affairs issues like torture, disappearances and the right to life were indeed in practice considered to be the most serious violations, to which priority attention needed to be given.²²

In their overview on Dutch human rights policy, Baehr, Castermans-Holleman and Grünfeld concluded that insofar as reactions to violations in other states were concerned, the emphasis was undeniably on civil and political rights, and foreign governments were only very rarely criticized because of violations of economic and social rights.²³ Perhaps the government was struggling with similar difficulties as the executive director of Human Rights Watch, Kenneth Roth. Contrary to what is usually the case in the realm of civil and political rights, the observation that a social or economic right has been violated often does not necessarily lead to clarity about the violator or the remedy. Who should, for example, be held accountable for an unsatisfactory health system or insufficient food supplies: the government of the state in question or the 'international community'; and what would be the appropriate remedy?²⁴ It is understandable that this makes it extremely difficult not only for NGOs but also for a government to react to social and economic rights questions in other countries. On the other hand, there are economic and social rights issues for which the above considerations do not hold. The Turkish practice to tear down the houses of Kurds is a clear case in point. The Netherlands could have called on Turkey to respect the people's right to adequate housing, but it did not do so.²⁵

Without a doubt, hesitancy to address violations of social and economic rights has much to do with the uncertainty about the nature of these rights. In the legal debate, two important questions stand out in this respect: the question of their justiciability (which determines whether an individual can invoke these rights before a court), and the question of the obligations ensuing from them.²⁶ As to the latter question, it has often been said that there is a distinction between the categories of civil and political rights on the one hand, and social and economic rights on the other, mainly because the first entail negative obligations, implying only abstention on the part of the state,

22 Interview with J.A. Walkate, 21 April 2004.

23 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 219-220. During the Cold War, the Netherlands also concentrated on civil and political rights violations in the communist bloc. According to Baudet, this was done for tactical reasons; as communist countries claimed to have realized economic and social rights, they could not serve the Dutch main policy purpose of regime change in these countries. This line of reasoning can be criticized, because an inability to meet basic social and economic needs appeared to be one of the main causes of the breakdown of the communist system, but Baudet's observation that civil and political rights were given most attention is correct. See: Baudet, 2001a, p. 257.

24 Roth, 2004, p. 68-69. Note that the article by Kenneth Roth was followed by a number of articles by others who did not agree with this analysis. For a comment on the issue of clarity about the violator or the remedy, see, for instance: Rubenstein, 2004, p. 861-864.

25 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 102 and 118-119. Another comparable example was that of the deliberate destruction of houses of Tibetan people in China, about which the Netherlands also remained silent. See: Baehr, Castermans-Holleman and Grünfeld, 2002, p. 150-151 and 169-170.

26 Vandenhole, 2003, p. 430.

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whereas the latter require positive action. The human rights policy paper of 1979 recognized that, according to the Dutch government, there was some truth in that statement, while at the same time, it warned against taking this distinction too absolutely.²⁷ In a 1984 speech before the Third Committee of the General Assembly, the above theory was put into perspective even more when the delegate of the Netherlands opined that '[s]uch a clear-cut distinction does not reflect present-day societies where political and civil rights are being implemented in an affirmative manner, also claiming an impressive portion of the budget of national and local authorities' and that, at the same time, 'sometimes social rights require "negative actions"'.²⁸ To illustrate, an economic right, like the right to join and form trade unions, is primarily a right of non-interference, while a civil right, like the right to a fair trial, assumes positive action to guarantee the existence and maintainance of a system of courts.

In spite of this conviction, the Dutch government did not think that the two sets of rights were fully similar in nature. As it explained in its policy paper of 1979, '[w]ith regard to implementation of course there remains an essential difference in that the classic rights lend themselves by their nature to immediate application, granting direct entitlements to the individuals concerned, whereas on the other hand the realization of social rights generally takes a considerable time.'²⁹ Or, as it was put at another place in that same memorandum, provisions such as those of the ICESCR 'do not contain directly enforceable obligations but are rather to be seen as policy objectives.'³⁰ In other words: social and economic rights were not considered justiciable. More recently, this point of view was repeated in an official response to a UN request to comment on the nature of states parties' obligations under the ICESCR.³¹

For the Netherlands, the question of the nature of internationally recognized social and economic rights was of particular importance because of its monistic system. According to article 93 of the Dutch Constitution, provisions of international law that are by their nature binding on everyone are directly applicable, and can thus be invoked and applied in Dutch courts.³² At the time of the ratification of the ICESCR, the Netherlands' government stated that the rights included in it did not, in principle, have the character of directly applicable provisions, and it has repeated this position on several occasions since.³³ The government's position has not generally been

27 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 93.

28 Ministerie van Buitenlandse Zaken, 1985, p. 236.

29 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 96.

30 *Ibidem*, p. 35-36.

31 UN Doc. E/CN.4/2004/WG.23/2, p. 5.

32 Article 93 of the Constitution of the Kingdom of the Netherlands.

33 Coomans, 2003, p. 24-25. For example, in a speech in 1989 by the Dutch Minister for Social Affairs and Employment, Jan de Koning, it was maintained in reaction to a scholar's complaint that there was no need for international social rights of a directly applicable character, because 'non-selfexecuting provisions of international law certainly ha[d] an important impact on national law and practice too'. See: De Koning, 1989, p. 2. In the context of the assessment of the Netherlands' second national report under the ICESCR in 1998, it was once again confirmed that the Dutch government felt that its imple-

challenged by the judicial branch, which in the Netherlands is to make final decisions in questions concerning direct applicability, and in a number of matters involving alleged violations of the ICESCR that were taken to court, the judges denied the self-executing character of the provisions concerned.³⁴ The same holds true for the provisions of the European Social Charter; direct applicability has not been easily assigned to them.³⁵ On the other hand, as the Deputy Director of Social and Economic Affairs of the Council of Europe stated in 1988, it must also be recognized that the Netherlands was one of only few countries where there was any judicial application of the Charter at all.³⁶ Still, as pointed out by Coomans: as long as international jurisprudence is lacking, it is only less likely for national lawyers to apply these norms.³⁷ The extent to which such jurisprudence can be developed is, however, very much dependent upon the kind of international instruments states allow in the field of social and economic rights. In the following sections, the Netherlands' attitude and views regarding the development of such instruments will be explored. Clearly, the above perceptions of the nature of social and economic rights are likely to have marked the Dutch efforts in this respect, but on the other hand, the Netherlands probably also had to take into account its proclaimed devotion to the idea that all human rights are indivisible, interdependent, and of equal importance.

4.3 THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Within the UN, the key instrument in the field of social and economic rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. After the acceptance of the Universal Declaration of Human Rights in 1948, the original intention had been to draft one legally binding convention, but it did not take long until this point of departure became a subject of debate.³⁸ The Soviet Union and other communist countries were in favour of one treaty, covering all categories of rights. According to these states, the realization of civil and political rights was an illusion when economic, social and cultural rights were not guaranteed as well. The unity of the two groups of rights should therefore not be harmed.³⁹ Another group of states, in particular the United States and other Western states, opposed this view and

mentation was a political matter, in which the judiciary must not interfere. See: Coomans, 2003, p. 24-25.

³⁴ Coomans, 2003, p. 22 and 24-25; Van Hoof, 1998, p. 14-19. In recent years, there are examples of other, more indirect ways to apply the ICESCR's provisions in Dutch courts. See: Coomans, 2003, p. 25; Coomans, 1998a, p. 5. It should be noted also that domestic courts in other countries have also been reluctant to recognize the justiciability of social and economic rights. See: Craven, 1995, p. 10.

³⁵ Jaspers and Betten, 1988b, p. 133-135.

³⁶ Wiebringhaus, 1988, p. 22-23.

³⁷ Coomans, 2003, p. 27.

³⁸ Arambulo, 1999, p. 15; Van Genugten, 1988, p. 39-40.

³⁹ Van Genugten, 1988, p. 38 and 184-189.

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were of the opinion that two separate Covenants should be drafted, which was what happened eventually. Their main argument was that the two categories of rights were very different in nature, and required dissimilar means of implementation. Whereas classic rights were considered legally enforceable and justiciable, social and economic rights were not. Their implementation would be dependent on economic and social circumstances and would require political interference rather than involvement on the part of the judiciary.⁴⁰

Like most Western states, the Netherlands had not demonstrated much support for the inclusion of social and economic rights at the time of the drafting of the Universal Declaration.⁴¹ Now that negotiations on legally binding human rights norms had started in the UN, the Netherlands clearly belonged to the group of states that resisted the plan to have one convention comprising all categories of human rights.⁴² It preferred to concentrate on civil and political rights only, and if economic and social rights were to be codified anyway, they should at least be incorporated in a separate treaty.⁴³ Apart from the argument that the two categories of rights were of too different a nature to be incorporated in one and the same legal text, it expressed the opinion that the creation of one instrument with different types of rights would eventually be at the expense of the number of ratifications. If two Covenants were drafted, it explained, 'all States who deem it possible to accept the obligations of both conventions are free to do so, whereas other States may limit themselves for the time being to sign only one. In this way real progress would be possible and we may be assured that at least one category of important human rights will find almost universal acceptance, and be legally protected in the far greater part of the world.'⁴⁴

Opinions diverged not only with respect to the question of whether there should be one or two treaties, but also on the subject of supervision. As was also pointed to in chapter 3, the Soviet Union considered international control mechanisms an unacceptable intrusion of state sovereignty, and therefore, it was opposed to the creation of independent supervisory organs and individual petition procedures.⁴⁵ Besides, it felt that there should be one supervisory procedure for both Covenants, namely a reporting system.⁴⁶ As becomes apparent from the Netherlands' reaction to that suggestion in the Third Committee of the General Assembly in 1963, the Dutch position was quite different. It argued that on the basis of the UN Charter, one could not come to any

40 Van Genugten, 1988, p. 39; Arambulo, 1999, p. 17.

41 The drafting history of the Declaration's economic and social rights articles can be found in: Morsink, 1999, p. 157-238. The Netherlands made a case for the freedom of education, but otherwise it did not play a great part in the debate on these articles. It did not make any particular effort to secure their incorporation, and it openly declared itself opposed to a provision on the right to strike and the right to rest and leisure time. See: Morsink, 1999, p. 179-181 and 185-190; Ministerie van Buitenlandse Zaken, 1949, p. 61-68 and 104-109.

42 Van Genugten, 1988, p. 39; Ministerie van Buitenlandse Zaken, 1952, p. 291-292.

43 Ministerie van Buitenlandse Zaken, 1951, p. 21-22; Ministerie van Buitenlandse Zaken, 1952, p. 132.

44 Ministerie van Buitenlandse Zaken, 1952, p. 292.

45 Van Genugten, 1988, p. 43-44.

46 *Ibidem*, p. 46.

other conclusion than that human rights were an international matter, and that 'since the establishment of the UN, it is no longer allowed to hide ourselves behind the walls of national sovereignty.'⁴⁷ In the light of this, reporting procedures were not considered sufficient, and it was argued that 'a uniform implementation procedure by way of periodic reports for both civil and political rights as well as economic, social and cultural rights, would hardly mean any progress in the field of human rights', and would thus not be sufficient.⁴⁸ However, what it meant was not that reporting procedures were unsatisfactory for the supervision of all human rights, but only for civil and political rights. Unlike the communist countries, it felt that it would be justified to provide each Covenant with a monitoring system of their own, and whereas it was determined to supplement the ICCPR with an individual complaints mechanism, it opposed anything similar under the ICESCR.⁴⁹ In this respect it did, however, not differ much from the majority of states; the option of having such a procedure was never a serious subject of negotiation at all.⁵⁰

In regard to the question of what kind of body should be made responsible for supervision, the approach of the Netherlands was more consistent with ideas that it expressed in relation to the ICCPR. Under the ICCPR, a body of independent experts – the Human Rights Committee – was created to monitor its implementation, and the Netherlands had been in favour of that.⁵¹ In the negotiations on its economic and social rights counterpart, proposals to set up an independent supervisory body had also been submitted on a few occasions.⁵² The last attempt to that end was made in 1966, the year of the Covenants' adoption. Inspired by the example of the International Convention on the Elimination of All Forms of Racial Discrimination, which had been adopted one year before, both the Italian and the United States delegations submitted proposals to establish an independent supervisory organ also under the ICESCR.⁵³ The main difference between the two proposals was that the proposal of the United States provided for a completely independent Committee, while the Italian merely aimed at the establishment of an expert committee to *advise* ECOSOC. Accordingly, this intergovernmental body would still have an important role to play.⁵⁴

The United States proposals received hardly any support, but together with a number of other countries, among whom were Canada and the Scandinavian countries, the Netherlands supported the suggestions Italy had tabled.⁵⁵ As was explained in a statement in the Third Committee of the General Assembly, in studying and consider-

47 Ministerie van Buitenlandse Zaken, 1964, p. 507-509, quotation: p. 509.

48 *Ibidem*, p. 509.

49 Ministerie van Buitenlandse Zaken, 1964, p. 506; Ministerie van Buitenlandse Zaken, 1967, p. 271; Castermans-Holleman, 1992, p. 213-221; Van Genugten, 1988, p. 44-47.

50 Arambulo, 1999, p. 22.

51 Van Genugten, 1988, p. 44-45.

52 Arambulo, 1999, p. 24-28; Craven, 1995, p. 21-22.

53 Arambulo, 1999, p. 26-27; Craven, 1995, p. 21.

54 Arambulo, 1999, p. 26-27; Ministerie van Buitenlandse Zaken, 1967, p. 99.

55 Ministerie van Buitenlandse Zaken, 1967, p. 100.

ing the proposals, the Netherlands was guided by two criteria. The first criterium was 'that the reports submitted under the covenant receive a proper treatment' and that 'adequate attention is paid to them'.⁵⁶ The second was 'that the study of these reports may lead to meaningful recommendations, so that they may become an incentive to international development co-operation and to national action in the economic, social and cultural field.'⁵⁷ As the Netherlands did not expect that ECOSOC would be able to pay due attention to the reports, it was in favour of the establishment of an expert committee. On the other hand, it believed that full implementation of social and economic rights was mainly dependent on the economic situation in a given country and the growth of international development cooperation. In this light, it believed that, being the central UN body in respect to economic, social and cultural questions, and the main link between the UN and the specialised agencies, ECOSOC would be better equipped to provide for the necessary follow-up than an independent supervisory body. Therefore, it supported the Italian proposal, and not that of the United States.⁵⁸

Even though the reasons for approving the creation of an independent body were practical rather than principled, the Netherlands was prepared to accept a more far-reaching supervisory system than most others. Both the Italian and the United States proposals met with strong resistance from a majority of the states, including the Soviet Union, and eventually they were withdrawn.⁵⁹ All in all, the end result was that the ICESCR not only lacked complaints mechanisms as included in the ICCPR and its Optional Protocol, but also ended up with a weaker supervisory organ. Whereas the implementation of the ICCPR would be monitored by a committee of independent experts, in the case of the ICESCR, the consideration of states' reports was left with ECOSOC.

4.4 THE CREATION OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

After the ICESCR came into force on 3 January 1976, ECOSOC adopted a resolution that laid down the procedures regarding the reporting system and established a Sessional Working Group to assist ECOSOC in its supervisory duties. A later resolution determined that this Working Group was to consist of fifteen governmental experts of states that would be selected from the ECOSOC-members as well as from the states parties to the Covenant.⁶⁰ However, within a few years time, there appeared to be general dissatisfaction with the functioning of the Sessional Working Group.⁶¹ For that reason, the issue of creating a more independent supervisory organ was taken up again

⁵⁶ *Ibidem*, p. 271.

⁵⁷ *Ibidem*.

⁵⁸ *Ibidem*, p. 271-272.

⁵⁹ Arambulo, 1999, p. 27-28; Craven, 1995, p. 21-22.

⁶⁰ Arambulo, 1999, p. 28-29; Craven, 1995, p. 39-40.

⁶¹ Craven, 1995, p. 40-41; Arambulo, 1999, p. 29-30.

in the period between 1980 and 1985.⁶² In 1980, ECOSOC adopted a resolution by which it decided 'to review at its organizational session for 1981...the composition, organization and administrative arrangements for the Sessional Working Group on the Implementation of the International Covenant on Economic, Social and Cultural Rights'⁶³

The Netherlands was in favour of a review of the ICESCR's monitoring mechanism. In a speech in the Third Committee of the General Assembly of 3 November 1980, its delegate explained the Dutch position. He said the first problem with the existing system lay in the composition of the Sessional Working Group. Since it was made up of representatives of countries rather than of experts in their individual capacity, 'there is no clear guarantee that delegates in the group possess the expertise necessary for an adequate evaluation of the reports submitted by the States Parties.'⁶⁴ In combination with the fact that delegates participating in the Working Group often had to perform other duties as well, this led to an undesirable situation in which 'States Parties sending experts to have their country reports explained before the Working Group, may well find that the level at which their reports are being scrutinized is not paramount to the level at which these reports were drafted, and also that the quality of the procedure followed is hardly comparable to that established by the Working Group's opposite number, the Human Rights Committee.'⁶⁵ The Netherlands opined that '[i]t might, therefore, be worthwhile for ECOSOC to consider an alternative procedure', and making some concrete suggestions, it continued: '[a] body of, say, eighteen independent experts might be appointed by the Council from among candidates put forward by States Parties to the Covenant. That body of experts would then be charged with the mandate of examining reports, and advising the Council accordingly. It might be modelled to an appropriate extent after the Human Rights Committee as regards working methods, terms of office etc., meeting also in between sessions of the Council.'⁶⁶ The Netherlands made clear, however, that '[t]he idea would not detract from the independent responsibility entrusted to ECOSOC under the Covenant, as it would always be for the Council to decide whether or not it would act on and in conformity with the Committee of Experts' advice.'⁶⁷

When the matter was discussed in ECOSOC in 1981, the Netherlands still showed itself a strong supporter of reform. However, there were also states that were opposed. Whereas the Western bloc considered the existing procedures insufficient, the Soviet Union and its partner states were quite satisfied with the system as it was. Moscow had not changed its opinion about the creation of international supervision since the Covenant was first drafted, and in ECOSOC it maintained that 'the existing monitoring method was the best because the Group could analyse each State's legislation and

62 Arambulo, 1999, p. 30.

63 ECOSOC resolution 1980/24, 2 May 1980.

64 Ministerie van Buitenlandse Zaken, 1981a, p. 476.

65 *Ibidem*.

66 *Ibidem*.

67 *Ibidem*, p. 477.

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compare the relative progress made in the implementation of the provisions of the Covenant without questioning the economic and social structure of individual States.⁶⁸ Due to these differences of opinion the discussion on the composition, organisation and administrative arrangements resulted in only minor adjustments: a change of name into 'Sessional Working Group of *Governmental Experts* on the Implementation of the International Covenant on Economic, Social and Cultural Rights', emphasizing the need for special expertise, was the most important modification agreed upon.⁶⁹

The Netherlands was not satisfied with this result and it introduced a draft decision that aimed at a reconsideration of the matter during the 1982 session of ECOSOC. From the Eastern Bloc there were appeals to withdraw this proposal, but after an oral amendment by Cyprus to omit the Working Group's method of work from the review and to concentrate on its composition and organisation, it was eventually adopted without a vote.⁷⁰ In 1982, again, results were meagre. Only minor adaptations to the composition of the Working Group could be agreed upon, but at least the decision also included a paragraph that read: 'The Economic and Social Council shall review the composition, organization and administrative arrangements of the Group of Experts at its first regular session of 1985, and subsequently every three years, taking into account the principle of equitable geographical distribution and the increase of the number of States parties to the Covenant.'⁷¹ The Netherlands sponsored the ECOSOC decision together with nine other states, and it was adopted by a roll-call vote. The Soviet Union, Bulgaria, and the Byelorussian Republic voted against, and seven other countries abstained.⁷²

In 1985, the supervisory system of the ICESCR finally saw some real reforms. A resolution was adopted by ECOSOC that changed the name of the Sessional Working Group into 'Committee on Economic, Social and Cultural Rights', raised the membership from fifteen to eighteen, and stipulated that the Committee's members 'shall be experts with recognized competence in the field of human rights, serving in their personal capacity'.⁷³ Hence, an independent supervisory body was finally established. Most remarkably, the Soviet bloc states had changed their minds, and now favoured this development.⁷⁴ The only state to vote against the body was the United States, which, to the contrary, voted in favour of the minor reform steps of 1982. The Netherlands was one of the co-sponsors of this 1985 resolution, as well as a 1984 resolution

68 United Nations, 1985, p. 916.

69 United Nations, 1985, p. 917; Arambulo, 1999, p. 30. For the text of the decision, see: ECOSOC decision 1981/158, 8 May 1981.

70 United Nations, 1985, p. 917-918. For the text of the decision, see: ECOSOC decision 1981/162, 8 May 1981.

71 See: ECOSOC decision 1982/33, 6 May 1982. The main change that was decided upon now concerned the composition of the Working Group: instead of one-year appointments by the President of the Council, members would now be elected for a three-year term by ECOSOC from among the states parties to the Covenant. See: United Nations, 1986, p. 1089; Arambulo, 1999, p. 30.

72 United Nations, 1986, p. 1090-1091.

73 See: ECOSOC resolution 1985/17, 28 May 1985.

74 United Nations, 1989, p. 879. See also: Arambulo, 1999, p. 31-32.

that aimed, among other things, to prepare the 1985 decision-making.⁷⁵ As the official statements make clear, it considered itself as the initiator of the resolution of 1985.⁷⁶

Perhaps there was a Cold War element in the Netherlands' efforts to establish an independent supervisory organ for the ICESCR, because it brought the Soviet Union in a difficult position. The Warsaw Pact countries usually blamed the West for concentrating on civil and political rights exclusively, and disregarding and violating social and economic rights.⁷⁷ As self-proclaimed champions of social and economic rights, the communist countries might thus be expected to support any effort to strengthen the protection of these rights, but its general objections against independent international supervision, and the prospect of being criticized in respect to social and economic rights matters, made this option unattractive for them. This may explain why the United States supported reform proposals initially, and it cannot be excluded that it stimulated the Netherlands' policies as well. On the other hand, it should be noted that the Dutch position was different from that of the United States. While the latter withdrew its support when it appeared possible to actually realize the creation of an independent supervisory organ, the Netherlands continued its efforts, so apparently, the Netherlands aimed at more than discrediting the Soviet Union only and really wanted the monitoring procedure to become more meaningful. Nevertheless, the question is: how far did it want to go? Was it also prepared to accept international complaints procedures for economic and social rights?

4.5 AN OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The creation of the Committee on Economic, Social and Cultural Rights gave the ICESCR a great boost. The Committee started a process of normative development and restructured the Covenant's reporting system into a more enforcing variant.⁷⁸ In this context, the question of complementing the ICESCR with a complaints procedure began to be discussed, too.⁷⁹ In the first few years, these deliberations mainly took

⁷⁵ United Nations, 1989, p. 879; United Nations, 1986, p. 1091. See also: Arambulo, 1999, p. 32.

⁷⁶ UN Doc. A/C.3/42/SR.39, p. 10; Ministerie van Buitenlandse Zaken, 1986, p. 142.

⁷⁷ See, for instance: Helgesen, 1990, p. 252; Baudet, 2001a, p. 257.

⁷⁸ Craven, 1995, p. 1; Coomans, 1997, p. 553.

⁷⁹ After the adoption of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women in 1999, which will be discussed in the next section, the ICESCR and the Convention on the Rights of the Child (CRC) were the only two principal UN human rights conventions that lacked a procedure for individual petitions (See, for instance: Vandenhoe, 2003, p. 423-424). Although the question of whether such a procedure should be included in the CRC was raised during its negotiation process, so far no serious attempts to add a complaints mechanism have been made, and according to the Chairman of the Committee on the Rights of the Child, Jaap Doek, at the moment such attempts are neither desirable nor needed. (Interview J.E. Doek, 28 October 2003. See also: Ineke Boerefijn and Martin Kuijer, 'Nederlandse kruideniersmentaliteit niet bevorderlijk voor optimale interpretatie IVRK, een interview met Jaap Doek, voorzitter van het VN Kinderrechtencomité' [Dutch petit bourgeois mentality not good for optimum interpretation of ICRC, an interview with Jaap

place in the Committee on Economic, Social and Cultural Rights, and in 1996, they resulted in a draft Optional Protocol to the ICESCR, providing for a procedure for individuals and groups to submit petitions concerning alleged violations of the rights in the ICESCR.⁸⁰ The draft was submitted to the Commission on Human Rights but was met with considerable political opposition, and until 2001, the Commission confined itself merely to the adoption of decisions and resolutions in which repeated requests for comments from states, UN institutions and other intergovernmental organisations and NGOs were made.⁸¹ Finally, in 2001, a first, but still modest step to move the matter forward was taken with the appointment of an independent expert. He was to 'examine the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights...and to submit a report to the Commission at its fifty-eighth session with a view to its consideration of possible follow-up and future actions, including the establishment of an open-ended working group'.⁸² The mandate of the independent expert was renewed for one more year in 2002, but in April 2003, the Commission on Human Rights adopted a resolution in which an open-ended Working Group was established to consider options regarding the elaboration of a Protocol to the ICESCR.⁸³ In 2004, the mandate of the Working Group was extended for another two years.⁸⁴

For several states, the establishment of a Working Group may have been a way to try and shelve the matter rather than a way to give real impetus to the development of a petition procedure.⁸⁵ In any case, serious political resistance against the principle of having a complaints mechanism has continued to exist. For a long time a consensus could not even be reached to begin the drafting process.⁸⁶ Objections against the Protocol have in particular come from a number of Western states, including the United States and Australia as the Protocol's most vocal opponents.⁸⁷ On the other hand, a growing number of states have expressed their approval with the elaboration of an Optional Protocol. In the Working Group's meeting of 2005, statements of support for an Optional Protocol were already made on behalf of the Group of Latin American and Caribbean States (GRULAC) and the African Group, and several

Doek, chairman of the UN Committee on the Rights of the Child] – In: *NJCM-Bulletin*, Vol. 30, No. 6, 2005, pp. 692-699. See page 695.) The Committee suggests advocates to bring complaints about children's human rights under other available complaints procedures. See: Mertus, 2005, p. 109.

80 Vandenhoele, 2003, p. 425; Coomans, 1997, p. 563-565; Coomans, 2003, p. 23. The draft protocol can be found in: UN Doc. E/CN.4/1997/105, 18 December 1996.

81 Vandenhoele, 2003, p. 425; Arambulo, 2002, p. 72-73.

82 UN Doc. E/CN.4/RES/2001/30, as quoted in Vandenhoele, 2003, p. 427. See also: Arambulo, 2002, p. 73.

83 Vandenhoele, 2003, p. 428-429; Coomans, 2003, p. 23-24.

84 Thiele and Gómez, 2004, p. 491.

85 Interview with A.P.M. Coomans, 7 July 2004.

86 UN Doc. E/CN.4/2004/44, p. 20; UN Doc. E/CN.4/2005/52, p. 21-23; UN Doc. E/CN.4/2006/47, p. 21.

87 UN Doc. E/CN.4/2005/52, p. 21; UN Doc. E/CN.4/2006/47, p. 21; Appendices to the reports of the Second Chamber, 2005-2006, 26 150, no. 39, p. 2; Coomans, 2003, p. 22; Thiele and Gómez, 2002, p. 376, footnote 121; Interview with A.P.M. Coomans, 7 July 2004.

individual countries, including some Western European states, gave their support as well.⁸⁸ One year later, the group of proponents of a Protocol increased even further, and there appeared to be a majority in favour of a Protocol.⁸⁹ Besides, there is great enthusiasm for an Optional Protocol among NGOs. Although initially the amount of NGO-activity around the Protocol was limited – especially as compared to that around the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of 1999 – NGOs have now organised themselves in a network on the ICESCR and a coalition for the Protocol to this Covenant.⁹⁰

In June 2006, the mandate of the Working Group was once again extended for a period of two years to elaborate a Protocol, and its Chairperson was requested to draw up a first draft that would take into account all views expressed on, inter alia, the scope and application of an Optional Protocol.⁹¹ It was expressly stated that various approaches should be taken into account, because opinions on how a Protocol should be designed differed considerably.⁹² Should it, for instance, be limited to the 'core content', which is the minimum level of protection ensuing from the ICESCR's obligations, or should it also apply to smaller shortcomings in the implementation of social and economic rights? Another option that has been tabled is to adopt an 'à la carte' approach, which would allow states to accept complaints only for those rights that it considers justiciable in its domestic law. However, others have maintained that a comprehensive approach should be taken.⁹³ Another question is: Who should be allowed to submit complaints? Should the procedure be open to individuals, or to collective entities such as trade unions or NGOs, or both? On behalf of the African group, Ethiopia has even suggested to allow interstate complaints concerning international assistance and cooperation to realize a worldwide fulfilment of social and economic rights, but several other states have rejected this idea.⁹⁴

The Dutch government has been reluctant to support the Optional Protocol. It has never expressed itself in favour of this supervisory instrument; to the contrary, it has, since the start of the debate in the early 1990s, repeatedly expressed its reservations.⁹⁵

88 UN Doc. E/CN.4/2005/52, p. 20-21.

89 UN Doc. E/CN.4/2006/47, p. 21.

90 Vandenhole, 2003, p. 425 and 460; Coomans, 2003, p. 22-23; Boerefijn, 1998, p. 46. See also: Thiele and Gómez, 2002, p. 376; UN Doc. E/CN.4/2005/52, p. 21; UN Doc. E/CN.4/2006/47, p. 6.

91 See: Human Rights Council resolution 2006/3.

92 Appendices to the reports of the Second Chamber, 2005-2006, 30 300, chapter V, no. 142, p. 3; Appendices to the reports of the Second Chamber, 2005-2006, 26 150, no. 39, p. 2. See also: UN Doc. E/CN.4/2006/47, p. 21-23.

93 UN Doc. E/CN.4/2005/52, p. 16-19 and 21-22; UN Doc. E/CN.4/2006/47, p. 6-8; Coomans, 2005, p. 875-876.

94 UN Doc. E/CN.4/2005/52, p. 4 and 21-22. See also: UN Doc. E/CN.4/2006/47, p. 13-15.

95 Examples that can be mentioned are the government's reaction to a 1994 advice of the Dutch Advisory Committee on Human Rights and Foreign Policy to actively engage in the work towards an individual and collective complaints procedure to the ICESCR, a statement against a Protocol in its policy paper on human rights and foreign policy of 2001, and a reaction of the Minister of Foreign Affairs, Bernard Bot, to a question by the social-democratic parliamentarian, Bert Koenders, in 2004. See: Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 35-36; Van Hoof, 1998, p. 10;

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The Netherlands' main objections were related to the questions of the nature and justiciability of social and economic rights, which were discussed in section two of this chapter. As the Ministers of Foreign Affairs and for Development Cooperation, Jozias van Aartsen and Eveline Herfkens, explained in a discussion on the 2001 policy paper in the Parliamentary Standing Committee on Foreign Affairs, before a complaints mechanism could be adopted, more clarity would be needed about the legal possibilities and limitations of giving the rights included in the ICESCR a directly applicable character, and the way violations could be measured.⁹⁶ In a speech, Renée Jones-Bos, the Dutch Ambassador-at-Large for Human Rights held on 5 October 2000, the relevance of these types of questions was made more concrete. She wondered: '[i]s it possible to establish a causal link between an alleged violation and actions or failure to act of the government? For instance, if someone is not able to get hospitalised because there is not enough staff (which actually is the case in the Netherlands now).'⁹⁷ Moreover, she frankly admitted that '[p]olitically it is difficult to get States to take on obligations, which may involve considerable financial commitments.'⁹⁸

Although the Netherlands did not actively oppose the idea of an Optional Protocol to the ICESCR at the international scene, it did make clear that it was far from enthusiastic about the idea. In its formal reply to the Secretary-General of the United Nations, which was published in November 2003, the Netherlands wrote that it had 'not reached any conclusion with regard to the desirability of a complaint mechanism under ICESCR.'⁹⁹ Until 2005, the Netherlands also remained aloof in the Working Group of the UN Commission on Human Rights. It was present, but it did not take a very active part in the discussions.¹⁰⁰ In a discussion with representatives of NJCM and Amnesty International in January 2006, the Dutch Ambassador-at-Large for Human Rights promised that the Netherlands would engage itself more constructively with the negotiations in the Working Group's next session of February 2006.¹⁰¹ This promise was kept, and in a letter to parliament of June 2006, the government declared that it

Arambulo and Toebes, 1996, p. 406-407; Appendices to the reports of the Second Chamber, 2003-2004, 29 200, chapter V, no. 69, p. 4 and 9. For comparable examples, see: Appendices to the reports of the Second Chamber, 2004-2005, 29 800, chapter V, no. 50, p. 18; Coomans, 2005, p. 878-879. For the Advisory Committee's advice, see: Advisory Committee on Human Rights and Foreign Policy, 1994, p. 15-16.

⁹⁶ Appendices to the reports of the Second Chamber, 2001-2002, 27 742, no. 4, p. 5. See also: Appendices to the reports of the Second Chamber, 2001-2002, 27 742, no. 6, p. 5-6; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 35-36.

⁹⁷ Jones-Bos, 2001, p. 85. See also: Coomans, 2003, p. 24.

⁹⁸ *Ibidem*.

⁹⁹ UN Doc. E/CN.4/2004/WG.23/2, p. 12.

¹⁰⁰ None of the reports on the Working Group's session make mention of Dutch interventions or opinions, although it must be noted that only one of them makes references to any state positions at all. See: UN Doc. E/CN.4/2004/44; UN Doc. E/CN.4/2005/52.

¹⁰¹ Interview with A.P.M. Coomans, 14 June 2006.

intended to continue to participate in the negotiations in order to be able to exert influence on the outcomes and the quality of a possible Protocol.¹⁰²

This does, however, not mean that it has set its objections aside. Unlike, for instance, Portugal, Austria, Spain and Finland, and the majority of African and Latin American states, the Netherlands is, in any case, not in favour of a comprehensive complaints procedure that applies to all the Covenant's articles and that can be invoked by individuals as well as collective entities.¹⁰³ The Netherlands has indicated that it agrees with the position of another group of states, which consists of, among others, the United Kingdom, Sweden, Germany, India, Canada and Japan. It wants to leave the option open not to create any Protocol at all, but it is prepared to discuss alternatives that are less far-reaching.¹⁰⁴ Perhaps, it would, for instance, be able to accept a Protocol if it were to apply to the core content of the ICESCR's provisions only, or if an 'à la carte' approach were to be taken.¹⁰⁵ The main reason for this is of course that a concentration on the core contents or the possibility of accepting complaints for some provisions only would diminish the likelihood of complaints and undesirable restrictions in autonomous decision-making on the allocation of the public budget.¹⁰⁶ From a principled point of view, this would, however, imply a denial of the principle of the interdependence, interrelatedness and indivisibility of all rights.¹⁰⁷

The appraisal of the dilemma between this moral argument on the one hand, and the question of possible financial consequences on the other hand, has been made differently at the Dutch ministries. This became apparent, for instance, during a dialogue at a meeting between government representatives and NGOs that took place in 2000.¹⁰⁸ At the meeting, academic and NJCM experts who had been lobbying for a Protocol for several years, got the opportunity to discuss the question of a complaints mechanism under the ICESCR with officials of the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Social Affairs and Employment and the Ministry of Home Affairs.¹⁰⁹ It is remarkable that more than half of the officials present were

102 In the report of the Working Group of 2006, the Netherlands is mentioned on several places. See: UN Doc. E/CN.4/2006/47, p. 8, 11, 12, 14-15 and 22. For the letter to parliament, see: Appendices to the reports of the Second Chamber, 2005-2006, 26 150, no. 39, p. 3.

103 Appendices to the reports of the Second Chamber, 2005-2006, 26 150, no. 39, p. 2. For the details of the discussion on these matters, see: UN Doc. E/CN.4/2006/47, p. 6-10.

104 Appendices to the reports of the Second Chamber, 2005-2006, 26 150, no. 39, p. 3. See also: UN Doc. E/CN.4/2006/47, p. 6.

105 Appendices to the reports of the Second Chamber, 2005-2006, 26 150, no. 39, p. 2; UN Doc. E/CN.4/2004/WG.23/2, p. 12.

106 Coomans, 2005, p. 876.

107 *Ibidem*.

108 Interview with A.P.M. Coomans, 7 July 2004. For further references to that meeting, see: Appendices to the reports of the Second Chamber, 2001-2002, 27 742, no. 4, p. 5; Castermans-Holleman, 2001, p. 1055-1056.

109 Interview with A.P.M. Coomans, 7 July 2004. According to Coomans, this dialogue was an indirect result of the appointment of Renée Jones-Bos as the first Ambassador-at-Large for Human Rights late 1999. She showed herself very much open to NGOs, and after the NCJM had raised the issue of the complaints protocol in an introductory talk with her, she appeared prepared to discuss it further. The

also either NJCM-members or former NJCM-members, but of course they had to represent their Ministry's point of view.¹¹⁰ For the representatives of the Ministries of Social Affairs and Employment and Home Affairs, this meant that they had to take position against the idea of an Optional Protocol.¹¹¹ According to these Ministries, social and economic rights were not justiciable, and they wanted to avoid the risk of complaints being lodged against the Netherlands, mostly because they might lead to budgetary problems.¹¹² Besides, the experience that the Ministry of Social Affairs and Employment had with the Committee on Economic, Social and Cultural Rights was not very positive; it was considered an amateurish Committee that made arbitrary decisions. As compared to, for instance, the ILO institutions, it functioned as a kangaroo court.¹¹³ It goes without saying that this did not stimulate a favourable attitude towards an Optional Protocol.

The Ministry of Foreign Affairs, on the other hand, gave the impression that it might be prepared to take a positive stand.¹¹⁴ It should be noted that the initiative to create an independent supervisory organ for the ICESCR had also come from the

NJCM attached great value to the development and adoption of a Protocol providing for a complaints mechanism to the ICESCR, which was one of the central themes on which it focused in the field of social and economic rights. See: Interview with A.P.M. Coomans, 7 July 2004; Arambulo and Toebes, 1996, p. 407. The NJCM has published several articles and reports on the issue to try and influence government policies. See, for example, NJCM, 1994; Arambulo and Toebes, 1996; NJCM, 1998; Coomans, 2005. It should be noted that at that time, Amnesty International was not yet involved in the lobby for the Protocol; it would start to support NJCM's efforts a few years later. (Interview with A.P.M. Coomans, 14 June 2006).

110 Interview with A.P.M. Coomans, 7 July 2004. In the Netherlands, government officials are permitted to participate in networks and non-governmental organisations on the basis of their personal or political preferences, as long as the person in question does not express himself in a manner that might hamper his functioning as an official. Hence, an NJCM member who is working as a government official will always have to represent the Ministry's policy (See: *NRC Handelsblad* (Rotterdam), 21 July 2004). It should be noted that the NJCM has several active members that have a job as an official at one of the Ministries at the same time. As a rule, those members do not participate in the NJCM-activities in case of incompatibility of duties. (Interview with A.P.M. Coomans, 7 July 2004).

111 Interview with J.R. van Blankenstein, 24 December 2004; Interview with A.P.M. Coomans, 7 July 2004. Later it appeared that the Ministry of Justice was opposed to the Protocol as well. (Interview with A.P.M. Coomans, 14 June 2006).

112 Interview with J.R. van Blankenstein, 24 December 2004; Coomans, 2003, p. 27. Coomans rightly remarks that from a legal perspective the complaints procedure does not lead to any new obligations, because the standards are already there. However, from a political point of view this does not necessarily need to be true; as long as there is no international jurisprudence, the norms remain vague as a consequence of which policy freedom is greater. Moreover, domestic courts may adopt the views of the Committee on Economic, Social and Cultural Rights, which may also result in judgments that challenge the government's policies.

113 Interview with J.R. van Blankenstein, 24 December 2004. It should be noted that Coomans also recognized that there are problems with the quality of the Committee-members (Interview with A.P.M. Coomans, 7 July 2004).

114 Interview with A.P.M. Coomans, 7 July 2004; Interview with J.R. van Blankenstein, 24 December 2004.

Ministry of Foreign Affairs.¹¹⁵ Moreover, in the 1980s and 1990s, this Ministry had also been involved in the organisation of two expert meetings that aimed at further clarifying the content and meaning of social and economic rights. The first meeting took place in 1986. The ICJ organised it together with Maastricht University and the Urban Morgan Institute of Human Rights in Cincinnati (Ohio), but it was financed by a grant from the Dutch Ministry of Foreign Affairs.¹¹⁶ The meeting resulted in a document that gave an interpretation of the obligations ensuing from the ICESCR's articles, the so-called 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights'.¹¹⁷ The Dutch government introduced the Limburg Principles in the UN, and they were published as an official UN document. The Principles were also picked up in other scholarly studies, and are considered important for the thinking about economic, social and cultural rights.¹¹⁸ The meeting was considered such a success that another expert meeting was organised early 1997 to celebrate the tenth anniversary of the Limburg Principles, which was also made possible by a financial grant from the Dutch Ministry of Foreign Affairs. It resulted in another set of principles, which seek to make clear when one can actually speak of a 'violation' of rights under the ICESCR. These are the so-called 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights'.¹¹⁹

In the past, the Ministry of Foreign Affairs, and in particular officials of the Humanitarian and Legal Affairs Section, had thus been positively disposed towards a further development of legal theories that aimed to stimulate the application of social and economic rights as justiciable rights. Unlike other Ministries, the Ministry of Foreign Affairs was represented at both expert meetings, and one of its officials had even played a leading role.¹²⁰ At the Ministry of Foreign Affairs, the idea of an individual complaints system concerning social and economic rights also met with doubts and questions, and it was thought that applying such a procedure for these kinds of rights was much more complicated than it was when civil and political rights were concerned.¹²¹ Yet, in the light of the above, it is not surprising that it showed itself more open to the arguments in favour of a complaints procedure than other Ministries. At the same time, it should not be overlooked that the Ministry of Foreign Affairs was in a better position to do so than, for instance, the Ministry of Social Affairs and

115 Interview with J.R. van Blankenstein, 24 December 2004.

116 Tolley, 1994, p. 175-176; Tolley, 1989 p. 581; Interview with A.P.M. Coomans, 7 July 2004.

117 The Limburg Principles have been published in: *Human Rights Quarterly*, Vol. 9, no. 2, 1987, pp. 122-135.

118 Martin, 1998, p. 191-201; Tolley, 1994, p. 176; Interview with A.P.M. Coomans, 7 July 2004. For the UN document, see: UN Doc. E/CN.4/1987/17, 8 January 1987.

119 Van Boven, Flinterman and Westendorp, 1998, p.viii.

120 Tolley, 1994, p. 176, Interview with A.P.M. Coomans, 7 July 2004. For the list of participants of the Limburg Conference of 1986, see: *Human Rights Quarterly*, Vol. 9, No. 2, 1987, pp. 285-286. For the list of participants of the Maastricht Conference of 1997, see: *Human Rights Quarterly*, Vol. 20, No. 3, 1998, pp. 702-704.

121 Interview with J.A. Walkate, 21 April 2004.

Employment, because, unlike the latter, it would not have to deal with the financial consequences that might follow from a Protocol.¹²²

4.6 OTHER COMPLAINTS PROCEDURES FOR SOCIAL AND ECONOMIC RIGHTS' PROTECTION

A question that can be posed is whether the Netherlands has always been disinclined to accept complaints mechanisms for social and economic rights. The answer is no. At a worldwide level, there are at least three examples that can illustrate this. A first case in point is that of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) of 1965. This Convention obliges states to take measures to prohibit and eliminate racial discrimination, among others by guaranteeing everyone's civil and political as well as social and economic rights¹²³ During the Convention's negotiations, the Netherlands showed itself strongly in favour of an individual petitions procedure.¹²⁴ It was successful, and the text that was adopted included the possibility for a state party to declare that it would recognize the competence of the Convention's supervisory body 'to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention.'¹²⁵ When it ratified the instrument in 1971, the Netherlands appeared to be prepared to make a declaration of acceptance, as a consequence of which petitions concerning discrimination in the enjoyment of social and economic rights can be lodged as well.¹²⁶

Another UN Convention that deals with both categories of rights is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979.¹²⁷ Initially, this Convention only provided for a periodical reporting procedure, but in 1999, an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women was adopted, which provided for a complaints mechanism for individuals and groups of individuals and an optional inquiry proce-

122 Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005.

123 Article 5 CERD.

124 Ministerie van Buitenlandse Zaken, 1966, p. 276-277, 280-281 and 600-602. See also: Castermans-Holleman, 1992, p. 118. See also: Appendices to the reports of the Second Chamber, 1981-1982, 17 100, chapter V, no. 2, p. 41.

125 Article 14.1 CERD.

126 Appendices to the reports of the Second Chamber, 1983-1984, 18 100, chapter V, no. 2, p. 60.

127 This follows, for instance, from article 1 CEDAW, which reads: 'For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.' Some articles are devoted to a particular right in either of the two categories. For instance, article 7 includes a number of civil rights that aim to eliminate discrimination against women in the political and public life, while article 11 lists several economic rights, such as the right to work and the right to social security.

dure.¹²⁸ At the time of the Convention's drafting, the Netherlands had already recommended serious consideration of provisions for interstate as well as individual complaints.¹²⁹ Hence, it was not surprising that it also showed itself an active contributor to the creation of the Protocol when that matter appeared on the agenda in the early 1990s.¹³⁰ In its follow-up memorandum on human rights and foreign policy of September 1991, the government made clear that it was in favour of a possibility for women to submit individual complaints concerning violations of their rights.¹³¹ In its 2001 policy paper, it even maintained that it had itself produced the first draft.¹³² This claim was somewhat exaggerated, but it is true that it had helped to facilitate an initial drafting attempt. Together with the Australian government it funded an international expert meeting on the issue, which was organised by the International Human Rights Law Group in Washington and the Maastricht Centre for Human Rights of the University of Limburg in September 1994.¹³³ The text of the draft Optional Protocol that was produced at this meeting, served as the first basis for the negotiations at the UN.¹³⁴

As becomes clear from the Dutch reply to the Secretary-General's invitation to governments to submit comments on the question of an Optional Protocol to the Women's Convention, the Netherlands 'was convinced that the Committee on the Elimination of Discrimination against Women should be empowered to receive and investigate complaints', and it supported the proposal drawn up in Maastricht.¹³⁵ As is the case with the rights protected by the ICESCR, the question of justiciability also played a prominent role in the discussions about the CEDAW-Protocol.¹³⁶ Apparently, the Netherlands did not have any concerns in relation to the justiciability of the rights in the Women's Convention; at least, unlike some other countries' comments on the

128 See article 18, CEDAW and articles 1-7 and 8-9 CEDAW-OP respectively.

129 Department of Social and Economic Affairs of the UN Division for the Advancement of Women, 2000, p. 2; Byrnes and Connors, 1996, p. 688. The question of adding a complaints procedure was also brought up by, among others, Sweden, Canada and Belgium, but concrete text-proposals had not been produced. See: Byrnes and Connors, 1996, p. 684-688; Department of Social and Economic Affairs of the UN Division for the Advancement of Women, 2000, p. 1-2; Flinterman, 1995, p. 5.

130 In the first years after the entry into force of the Women's Convention, the issue of a complaints procedure faded into the background, but as of the early 1990s, interest in it increased, and NGOs started to lobby for the creation of such a procedure. Eventually, in the final document of the 1993 World Conference on Human Rights in Vienna, an appeal was made to the Commission on the Status of the Women and the Committee on the Elimination of Discrimination against Women to quickly examine the possibilities in this respect. See: Byrnes and Connors, 1996, p. 689-692; Flinterman, 1995, p. 5; Department of Social and Economic Affairs of the UN Division for the Advancement of Women, 2000, p. 2.

131 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 21.

132 See: Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 37.

133 Byrnes and Connors, 1996, p. 693; Flinterman, 1995, p. 6.

134 Byrnes and Connors, 1996, p. 693-695.

135 UN Doc. E/CN.4/1996/10, in: Department of Social and Economic Affairs of the UN Division for the Advancement of Women, 2000, p. 97.

136 Byrnes and Connors, 1996, p. 708-734; Flinterman, 1995, p. 6

Protocol, the Dutch comments did not touch upon this issue.¹³⁷ From its approval of the Maastricht draft – which recognizes the competence of the Committee to receive and examine communications concerning violations of any of the rights, or failures to give effect to any of its obligations under the Convention¹³⁸ – it may be derived that it recognized the justiciability of all provisions of the Women's Convention right from the start, including those on social and economic rights, or other rights that were less precisely circumscribed.¹³⁹ The Netherlands ratified the Protocol on 22 May 2002, which proves that it did not change its mind afterwards in this respect.¹⁴⁰

Apart from these two UN Conventions, the ILO-system also provides for procedures under which complaints can be lodged. Since its founding in 1919, 185 conventions have been adopted.¹⁴¹ Initially, the ILO aimed at setting minimum standards regarding clearly defined but limited demands of workers. It continued to do so, but after the Second World War, its scope of activity broadened. Influenced by a wave of international human rights standard setting, it also started to develop a human rights based approach and, to a certain extent, the ILO also got involved in social rights that do not only concern the individual as a worker in the strict sense of the word.¹⁴² The ILO Constitution provides for a number of supervisory mechanisms that apply to all ILO Conventions. These are: a reporting procedure, a representation procedure and a complaints procedure.¹⁴³ It would go too far to give a detailed description of each of those procedures here, but what is important in the context of this section is that the representation procedure gives associations of workers or employers the right to make a representation alleging the failure of a given state to ensure the effective observance of an ILO Convention to which it is bound. Workers' and employers' organisations that participate as delegates to the ILO's 'legislative' body, the tri-partite International

137 See: UN Doc. E/CN.6/1996/10, in: Department of Social and Economic Affairs of the UN Division for the Advancement of Women, 2000, p. 98-100; UN Doc. E/CN.6/1997/5, in: Department of Social and Economic Affairs of the UN Division for the Advancement of Women, 2000, p. 74-77.

138 See article 2 (1) of the Maastricht draft, in: Byrnes and Connors, 1996, p. 786-787.

139 An example of an article that includes rights that are less clearly described is, for instance, article 8, which reads as follows: 'States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organisations.' Another example is article 12.1, which reads: 'States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.' The formulation 'shall take all appropriate measures to' makes it harder to judge whether a state has lived up to its obligations. Besides, it will sometimes be difficult to determine whether inequalities can be attributed to (a lack of) government policies; other factors may play a role as well.

140 See: <http://www.un.org/womenwatch/daw/cedaw/sigop.htm>, accessed 11 September 2006.

141 See: <http://www.ilo.org/ilolex/english/convdisp2.htm>, accessed 11 September 2006.

142 Valticos and Von Potobsky, 1995, p. 19-20 and 47; Boonstra, 1996, p. 14-17, 218-219, 230, 252.

143 For the different procedures, see the articles 22-23, 24-25, and 26-34 ILO Constitution respectively. For a description and analysis of each of these procedures, see: Samson and Schindler, 1999, p. 196-208; Betten, 1988b, p. 32-36; Betten, 1993, p. 394-414; Valticos and Von Potobsky, 1995, p. 284-309.

Labour Conference, can also initiate the more far-reaching complaints procedure.¹⁴⁴ Apart from this, there is a special Freedom of Association complaints procedure, which governments as well as employers' and workers' organisations can invoke in cases of alleged breaches of the freedom of association, and a system of direct contacts, under which a direct contact mission can be sent to a country in cases of prolonged controversies.¹⁴⁵

The ILO-system has been said to function better than that of the ICESCR and the ESC.¹⁴⁶ The Dutch government was also very positive about its working, and its appreciation seems to have been constant over the years. In a statement made before the Third Committee of the UN General Assembly in 1966, it expressed the opinion that the Committee of Experts on the Application of Conventions and Recommendations of the ILO was an example of an 'expert bod[y] dealing with human rights matters [that is] performing an excellent job.'¹⁴⁷ Whereas the 1979 policy paper mentioned the ECHR-procedures as the most far-reaching regional system, it was maintained that '[a]mong the worldwide systems, the body of provisions operating within the framework of the ILO is not only the oldest but undoubtedly the most effective.'¹⁴⁸ And in a speech by the Dutch Ambassador-at-Large for Human Rights of 5 October 2000, the organisation was called a classic example of a UN Specialised Agency that is doing a great deal in the field of realising economic and social rights.¹⁴⁹

Generally speaking, the Netherlands can be considered a loyal, interested and cooperative ILO-member.¹⁵⁰ Apparently, in the eyes of the Dutch Advisory Committee on Human Rights and Foreign Policy, in spite of the fact that it had not yet ratified certain ILO Conventions, the Netherlands had a better reputation in the ILO than other EU countries, for it warned that in case of coordination of points of view of EU member states, the Netherlands might 'forfeit 'the profile' it has built up over the years in this area'.¹⁵¹ And as Van der Ven and Betten stated in 1986 and 1993 respectively,

144 The complaints procedure involves a much more thorough investigation than the representation procedure. Another difference is that the complaints procedure results in an extensive report with conclusions and recommendations that a state will either have to accept or refer to the International Court of Justice in The Hague. If a state does not solve the matter raised in a representation, the only consequence is that the representation may be published together with possible statements by the state concerned. These are some of the reasons why the complaints procedure can be considered more far-reaching than the representation procedure. See: Samson and Schindler, 1999, p. 204 and 206; Betten, 1988b, p. 34-35; Betten, 1993, p. 406-411; Valticos and Von Potobsky, 1995, p. 290-294.

145 Samson and Schindler, 1999, p. 209-211, 200 and 207; Betten, 1988b, p. 36-38; Betten, 1993, p. 411-414; Valticos and Von Potobsky, 1995, p. 295-299.

146 Betten, 1988b, p. 38.

147 Ministerie van Buitenlandse Zaken, 1967, p. 271.

148 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 76.

149 Jones-Bos, 2001, p. 84.

150 Van der Ven, 1986, p. 325-330.

151 Advisory Committee on Human Rights and Foreign Policy, 1994, p. 8, 19 and 32.

within ILO, the Netherlands in fact belongs to the group of states with the highest number of ratifications.¹⁵²

As the representation and complaints procedures apply to all ILO Conventions, this means that the Netherlands has also accepted the right of workers' and employers' organisations to complain about many subjects in the field of economic and social rights. They have in fact already been applied against the Netherlands. In the late 1970s and early 1980s, the Netherlands continuously interfered in the collective bargaining process between employers' and workers' organisations by means of wage measures. Trade unions as well as employers' organisations then turned to the ILO and complained that the Dutch government did not respect the right to free collective bargaining. Eventually, this even led to the sending of a Direct Contact Mission, and the Netherlands adapted its policies and legislation to bring them in line with ILO standards.¹⁵³

All in all, it can be concluded that the question of a complaints procedure for social and economic rights was judged differently from case to case. Why did the Netherlands accept and even promote such a procedure in the cases of the Convention on the Elimination of Racial Discrimination and the Women's Convention, while it is reluctant to do so in the case of the ICESCR? The formal position of the Dutch government is that non-discrimination rights are absolute, and therefore justiciable, also in respect to the fulfilment of social and economic rights.¹⁵⁴ As has been made clear earlier in this chapter, the Netherlands does not, however, recognize the justiciability of other aspects of social and economic rights. This explains why the supervision of the anti-discrimination treaties was approached differently than in the case of the ICESCR. However, it should be noted that the difference in approach cannot be explained only from a purely legal point of view; the government's views on justiciability also depend on political considerations.¹⁵⁵ In this respect, it is important to pay attention to one important difference between the ICESCR and the other two UN Conventions: the former contains obligations for states to meet certain

152 Van der Ven, 1986, p. 329; Betten, 1993, p. 26. See also: Appendices to the reports of the Second Chamber, 1994-1995, 23 900, chapter XV, no. 44, p. 3.

153 Boonstra, 1996, p. 191-216; Betten, 1993, p. 99-100.

154 UN Doc. E/CN.4/2004/WG.23/2, p. 5.

155 This can be demonstrated by the case of the Protocol to the CEDAW-Convention. The question of justiciability also played a prominent role in the discussions on whether this Protocol should be adopted. From an article on the – then draft – CEDAW Protocol by Byrnes and Connors, it follows that in this respect the legal problem area was, in the final analysis, more or less similar to that of the justiciability of the rights contained in the ICESCR, and it is therefore not surprising that the arguments against legal objections regarding the justiciability of the rights guaranteed by the Women's Convention do not differ much from those used by proponents of an ICESCR Protocol. Nonetheless, it appeared easier for the Netherlands (and other countries) to accept legal arguments in favour of justiciability in the case of the CEDAW Protocol than in the case of the discussion on an Optional Protocol to the ICESCR. For the discussions on the CEDAW Protocol, see: Byrnes and Connors, 1996, p. 708-734; Flinterman, 1995, p. 6. For a comparison with the arguments used in the case of the ICESCR Protocol, see for example: Coomans, 2003, p. 25-27; Vandenhole, 2003, p. 430-447.

standards, while the latter only bind states to guarantee that there is no discrimination in the enjoyment of human rights and are not concerned with setting minimum norms as such. This is an essential difference, because in case of a non-discrimination obligation, it is possible to bring domestic policies and law into line with international treaty obligations not only by raising the level of protection for women or racial groups, but also by adjustments that lead to a lower level of protection for all. As the rights in the ICESCR have to be achieved progressively, the same kind of measures would not be possible under this Covenant. In the latter case, financial implications are thus likely to be more extensive.

The above line of reasoning, however, does not apply to the ILO Conventions, for which the Netherlands has also accepted petition mechanisms. There are two possible explanations for the difference in treatment between the ICESCR and the ILO Conventions. One possible explanation for this might be that, contrary to the ICESCR, the ILO Conventions deal with problems one by one, and therefore provide for standards that are much more precise than those of the ICESCR. Consequently, it is easier for states to assess what measures it has to take to comply with these Conventions, while in the case of the ICESCR it is less clear what they have actually committed themselves to.¹⁵⁶ A second possible explanation could be that the character of the ILO complaints procedures is somewhat different from the ones known in the UN-context. They are not open to individuals claiming to be victims of violations, and they are aimed at examining and securing solutions for general rather than individual situations, as a consequence of which the question of justiciability may be less relevant.¹⁵⁷ In this respect, the ILO complaints system is comparable to the collective complaints mechanism under the European Social Charter. This mechanism will be discussed in the next chapter.

4.7 THE EUROPEAN SOCIAL CHARTER

Turning now to the Council of Europe, it can be remarked that there are significant similarities between the history of social and economic rights protection in this organisation and in the UN. As was the case in the UN, the Council of Europe decided to draft two separate treaties: one for civil and political rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and one for economic and social rights, the European Social Charter (ESC). The ECHR's drafters did not want to incorporate economic and social rights for several reasons. It was not denied that these required protection too, but so shortly after World War II, and impressed by the communist take-over in Czechoslovakia in February 1948, the Council of Europe's member states felt that the immediate need was most of all to guarantee those values that were essential for a democratic way of life in Europe. Inclusion of economic and social rights would have made the text more controversial

¹⁵⁶ Samsom, 1991, p. 125-126 and 136.

¹⁵⁷ Samson and Schindler, 1999, p. 203-204; Samson, 1991, p. 132 and 137.

and might have delayed its acceptance. Besides, it was obvious that in these years, not many European countries would be in a position to actually fully observe economic and social rights.¹⁵⁸

In the Netherlands, the project of drawing up a European human rights convention was also seen as a consequence of a post-war desire to try and prevent flagrant infringements of the human rights and freedoms Europe had experienced before and during the Second World War.¹⁵⁹ There is no reason to assume that the Netherlands' position concerning the incorporation of social and economic rights was any different from the position that it took in the case of the UN Covenants. At least, the description of the drafting history of the ECHR in the Yearbook of the Dutch Ministry of Foreign Affairs does not contain any indication that it regretted the absence of economic and social rights.¹⁶⁰ Moreover, during the drafting of the UN Covenants, the way in which the Council of Europe had dealt with both categories of rights was used as a justification for making a distinction in the UN as well.¹⁶¹ Many years later, the Netherlands still approved the exclusion of social and economic rights from the ECHR. It argued that one of the most innovative aspects of this Convention lay in its far-reaching system of international supervision, which could eventually result in a legally binding decision of the ECHR's organs, and that this was made possible precisely because it concentrated on classic civil and political rights only.¹⁶²

At the time, this can hardly have been the argument on which the Netherlands based its position, because it had then been opposed to the establishment of a Court that could make binding decisions and a procedure for individual petitions.¹⁶³ However, it did determine the Dutch stand when in the late 1970s the idea of extending the ECHR with certain social, economic and cultural rights was being studied in the Council of Europe. There were several pros and cons one could think of in this regard, but eventually, not many states were in favour of adding economic and social rights to the ECHR.¹⁶⁴ The Netherlands rejected it too. In considering the possible addition of any new rights to the ECHR, the Dutch government deemed it crucial to guarantee that the inclusion of new rights would not put into danger the Convention's functioning as a generally accepted minimum standard of fundamental rights with an imperative judicial enforcement system. Therefore, the only rights eligible for incorporation in the ECHR-system should be those that were universal and justiciable and of a

158 Harris and Darcy, 2001, p. 2-3; Gomien, Harris, and Zwaak, 1996, p. 14 and 377-378; Jaspers and Betten, 1988a, p. 1-2; Klerk, 1990, p. 4 and 6; Flinterman, 1994, p. 169-170.

159 Castermans-Holleman, 1992, p. 103.

160 Ministerie van Buitenlandse Zaken, 1950, p. 66-68.

161 Ministerie van Buitenlandse Zaken, 1964, p. 506.

162 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 24.

163 Klerk and Van Poelgeest, 1991, p. 223-227; Klerk, 1990, p. 10-11; Castermans-Holleman, 1992, p. 103-104.

164 Berchtold, 1991. See also: Appendices to the reports of the Second Chamber, 1982-1983, 17 600, chapter V, no. 2, p. 57. For more information on the discussion about possible inclusion of economic, social and cultural rights in the ECHR, see: Jacobs, 1978.

fundamental character.¹⁶⁵ According to the Netherlands, social and economic rights did not meet these criteria. It was feared that extending such rights to the ECHR would injure its functioning, and, according to the Netherlands, improvements in the protection of social and economic rights should thus preferably be confined to the context of the European Social Charter.¹⁶⁶

This Charter was adopted in 1961. Work on its drafting started a few years after the adoption of the European Convention on Human Rights; on 20 May 1954, the Committee of Ministers instructed its newly established Social Committee to 'endeavour to elaborate a European Social Charter'.¹⁶⁷ Compared to the drafting of its civil and political rights counterpart, this treaty-making process was much more difficult. In general, the member states' interest in the Council of Europe diminished, and especially, they did not particularly warm to the idea of an economic and social rights treaty.¹⁶⁸ The Council of Ministers had given the Social Committee a mandate to try and draw up the Charter only after considerable discussion, and once the Social Committee started its deliberations, hesitations and doubts that several states had already brought to the fore in the Council were reiterated by their representatives in the Social Committee.¹⁶⁹

There were proponents of a legally binding Charter, but other states preferred not to go any further than a declaration of principles and objectives. In the end, this resulted in a compromise-formula that divided the Charter into two substantive parts.¹⁷⁰ Part I contained a list of policy objectives that contracting parties were to consider 'as a declaration of the aims which it will pursue by all appropriate means'.¹⁷¹ They were to accept this part in its entirety. Part II, on the other hand, consisted of obligations that were binding in law. It covered such rights as the right to work, the right to bargain collectively, the right to social security, and the right to social and medical assistance. The drafters never seriously considered a requirement for contracting parties to accept all of the provisions in this part. This was not believed to be realistic. There were great differences in the social and economic progress in the Council of Europe's member states, and if any meaningful standards were set, substantial resources would be needed for a country to actually meet them all. This would be problematic, especially for the poorer countries in the Council of Europe. Another difficulty was that the idea of considering economic and social aspirations as human rights was not generally

165 Appendices to the reports of the Second Chamber, 1982-1983, 17 600, chapter V, no. 2, p. 57.

166 Memorandum from the Assistant Legal Adviser at the Ministry of Foreign Affairs to the Council of Europe and Scientific Cooperation Department of the Ministry of Foreign Affairs, 26 November 1984, Archive MFA, RvE 1975-1984, 999.438.0, file 1072; Appendices to the reports of the Second Chamber, 1983-1984, 18 100, chapter V, no. 2, p. 62; Appendices to the reports of the Second Chamber, 1984-1985, 18 600, chapter V, no. 2, p. 62-63.

167 Quoted in: Harris and Darcy, 2001, p. 4.

168 Harris, 1984, p. xiv.

169 Harris and Darcy, 2001, p. 3-4.

170 *Ibidem*, p. 4-5 and 8-9. See also: Ministerie van Buitenlandse Zaken, 1957, p. 37.

171 Article 20 (1a), ESC.

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accepted among the Council of Europe's member states.¹⁷² Apparently, in the Netherlands this idea was not yet internalized either; in the yearbooks of the Ministry of Foreign Affairs, negotiations on the Charter were consistently being dealt with under the heading of 'social affairs', while relevant developments concerning the ECHR were described in a section entitled 'human rights'.¹⁷³

Hence, it was decided that in order to become a party to the Charter, a state had to declare itself bound only by a prescribed minimum of these obligations. It had to accept at least five out of seven specified articles, and in addition, it had to consider itself bound by a total number of provisions that were not less than ten articles or forty-five numbered paragraphs.¹⁷⁴ The Consultative Assembly, as the Parliamentary Assembly of the Council of Europe was then called, rejected this 'à la carte' approach', and a Tripartite Conference of government, employers' and workers' delegates, which was convened in December 1958 to comment upon the Social Committee's first draft, expressed the opinion that there should at least be a common core of obligations accepted by all of the contracting parties.¹⁷⁵ The Netherlands agreed with the idea of a fixed set of obligatory provisions, but like most other suggestions in favour of a stronger Charter, a less flexible approach proved to be unacceptable to most of the Council of Europe's member states.¹⁷⁶

When the ESC was finally adopted in 1961, reactions from the academic world and the Consultative Assembly were generally characterized by disappointment and scepticism. It was, among others, felt that the standards that were set could have been more ambitious, and that the minimum number of obligations states had to accept upon ratification was too low.¹⁷⁷ And there were imperfections in the Charter's procedure for supervision too. In the next chapter, the working of the system and its flaws will be discussed more extensively; here we will confine ourselves to the observation that, similar to the situation in the UN, in terms of the effectiveness of their respective means for enforcement, the ECHR was clearly the stronger infant of the Council of Europe's basic human rights documents. With a European Court of Human Rights making legally binding decisions, the ECHR is generally known as having the most effective existing supervisory procedure in the world.¹⁷⁸ However, no such court was established for supervising the implementation of the ESC; the implementation of the

172 Gomien, Harris, and Zwaak, 1996, p. 379; Harris and Darcy, 2001, p. 37.

173 See: Ministerie van Buitenlandse Zaken, 1959, p. 40-43; Ministerie van Buitenlandse Zaken, 1960b, p. 38-42; Ministerie van Buitenlandse Zaken, 1961, p. 37-42; Ministerie van Buitenlandse Zaken, 1962a, p. 39-43. It must be noted, however, that in this respect, the Netherlands seemed to follow the institutional structure and the practice of the Council of Europe publications. See: Harris, 1991, p. 27-28.

174 See: Article 20 (1c) ESC. It should be noted that this minimum has been raised under the Revised European Social Charter of 1996. See: Harris and Darcy, 2001, p. 19.

175 Harris and Darcy, 2001, p. 5-6.

176 *Ibidem*, 2001, p 5-6. For the Netherlands' point of view, see: Appendices to the reports of the Second Chamber, 1965-1966, 8606 (R 533), no. 3, p. 1.

177 Harris, 1984, p. 7-8.

178 See, for example: Baehr, 2001, p. 73; Forsythe, 2000, p. 111.

Social Charter was monitored only by a reporting procedure that did not result in any legally binding decisions. Although in their details they worked differently, until 1985 the supervisory procedures of the ESC and ICESCR procedures had one other important characteristic in common, namely that it involved supervisory organs that did not consist of independent experts, as a consequence of which the governments were, to a large extent, acting as their own judges.¹⁷⁹

Contrary to the rights covered by the ECHR, those of the European Social Charter were never 'intended to be legal rights in the sense that an individual resident of a European country could invoke them in a court of law, either domestically or internationally.'¹⁸⁰ They were rather seen as obligations and undertakings of States, or 'instruction-norms', the protection of which contracting parties were to ensure progressively.¹⁸¹ The Dutch government's point of view did not deviate much from these beliefs.¹⁸² As the Committee on Social and Health Questions of the Parliamentary Assembly concluded in 1985, the authors of the Charter had wanted to avoid a system under which contracting parties could be required by a compulsory decision to modify its legislation or to pay compensation to a successful complainant.¹⁸³ The question of whether this was the right approach came up for discussion again in a reform debate of the early 1990s that will be dealt with in the next chapter.

4.8 CONCLUSION

According to the official policy of the Netherlands, all human rights are indivisible, interdependent, and of equal importance. In practice, civil and political rights and economic and social rights were, however, not considered of equal importance. It would be difficult to say that the Netherlands considered economic and social rights unimportant, but priority attention was usually given to civil and political rights. Moreover, it is important to note that, in the eyes of the Netherlands, this basic policy principle should not be understood to mean that the categories of civil and political rights and economic and social rights are of an equal character. On the contrary, the Netherlands held the view that the first group of rights were rights that could be applied immediately and were therefore suitable for judicial or semi-judicial review,

179 Harris, 1984, p. xv and 263; CoE Doc. Charte/Rel (90)2, p. 12.

180 Gomien, Harris, and Zwaak, 1996, p. 14.

181 Jaspers and Betten, 1988a, p. 2. This means, for example, that there is an obligation for contracting parties to aim for full employment, while at the same time this cannot be regarded as a directly enforceable right for the individual. Example derived from: Jacobs, 1978, p. 173.

182 Jaspers and Betten, 1988b, p. 131-133; Appendices to the reports of the Second Chamber, 1965-1966, 8606 (R 533), no. 3, p. 1. For more recent statements, see also: Appendices to the reports of the Second Chamber, 2004-2005, 29 941, no. 3, p. 4; Appendices to the reports of the Second Chamber, 2005-2006, 29 941, no. 6, p. 1 and 16. It should be noted though that eventually the government recognized the direct applicability of one specific provision of the Charter, which dealt with the right to collective action.

183 Jaspers and Betten, 1988a, p. 3.

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while the implementation of the latter was considered to take considerable time and could not be legally granted to the individual.

This way of thinking had important implications for the Dutch attitude towards international codification of economic and social rights. When the first basic human rights treaties were drafted in the United Nations, the Netherlands sided with the group of states that was in favour of separating these rights from civil and political rights in two conventions with different supervisory procedures. In the context of the Council of Europe, it approved of a similar drafting policy. Although this obviously resulted in weaker supervisory mechanisms for economic and social rights, it cannot be maintained that the Netherlands was indifferent to their effectiveness. Its attempts to get the ICESCR's Sessional Working Group of government representatives replaced by an independent organ demonstrate this. One could argue that, in spite of the principled arguments it brought to the fore, the Netherlands actually had a political-strategical interest in this, because the question of a stronger supervisory system brought the communist bloc into a difficult position. It cannot be excluded that this consideration played a role. On the other hand, it must be recognized that, at the end of the day, the Dutch position was not influenced by the position of the two super-powers; it advocated reform, no matter whether it was the Soviet Union or the United States that made objections.

By making a case for the creation of a Committee on Economic, Social and Cultural Rights, the Netherlands indirectly contributed to a boosting process of the ICESCR, which eventually led to the debate on an Optional Protocol to the ICESCR. In some way, the Ministry of Foreign Affairs also stimulated the debate about this Protocol through its financial contributions to two expert meetings that helped develop legal thinking about social and economic rights. It was also this Ministry in particular that was prepared to consider the possibility of a complaints system under the ICESCR. Nonetheless, there were other Ministries, in particular the Ministry of Social Affairs and Employment, which were opposed to that idea and denied the justiciability of social and economic rights. Apart from legal arguments, there is one important reason why the Netherlands found it difficult to accept a complaints mechanism under the ICESCR that was not always mentioned explicitly. The government wanted to maintain control over public expenditure, and like many other countries, it feared the financial consequences that might indirectly result from a complaints procedure. Up to now, the Dutch position in this matter has therefore been characterized by hesitation and disapproval. The NJCM, and more recently Amnesty International, tried to convince the Netherlands' government of the opposite position, but so far without success.

In spite of its objections to an ICESCR Protocol, the Netherlands supported the creation of complaints mechanisms for social and economic rights under a number of other treaties, namely CEDAW, CERD and the ILO Conventions. In respect to the anti-discrimination Conventions of the UN, the difference in attitude can be explained if one realizes that they deal with the protection of social and economic rights only in an indirect way. As a consequence, an escape route of lowering the standards for all

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can avoid unwanted financial consequences. However, this line of reasoning cannot explain why the Netherlands was prepared to accept complaints mechanisms under the ILO Conventions. Two possible explanations have been given instead. Perhaps the Netherlands was prepared to allow complaints about the implementation of ILO Conventions because the norms were more detailed and clear. Another feature that might account for the difference is the fact that the ILO only allows collective complaints. In the next chapter, the relevance of the latter of these characteristics in particular is further investigated.

CHAPTER 5

THE EUROPEAN SOCIAL CHARTER'S AMENDING PROTOCOL AND THE COLLECTIVE COMPLAINTS PROTOCOL

In chapter 4, it was demonstrated that the Netherlands did not treat economic and social rights in the same way as civil and political rights. The main difficulties appeared to exist with respect to the question of supervision. Whereas the general policy principles on effective international control machinery were applied in the case of, for instance, the UN Convention against Torture, this was not always true when social and economic rights were concerned. A legal argument used to explain this difference was that social and economic rights were not justiciable, unless the rights were related to non-discrimination. Yet, the heart of the matter seemed to be related to the Netherlands' sovereign prerogatives in the field of government expenditure.

In this chapter, the extent to which the Netherlands was prepared to give up state control and to facilitate effective international supervision in the realm of social and economic rights is further investigated. This is done by analysing the Dutch role in the negotiations on the reform of the European Social Charter (ESC). The so-called process of 'revitalisation' included changes in the Charter's supervisory mechanism as well as a revision of its substantive provisions. Considering that the subject of international control usually caused the most problems for the Netherlands, it was decided to deal with the reform of the ESC's supervisory procedures only.¹

In the first section of this chapter, the background of the 'revitalisation' process is explained. This section also presents a summary of the measures that were taken to strengthen and reform the ESC's supervisory procedures and describes the course and organisation of the negotiations and the main topics of discussion. In section 5.2, the Netherlands' views on the reform of the ESC in general are discussed, while the next few sections give more detailed information on its position on a number of issues that were particularly important in the negotiations. Naturally, the role of NGOs and different bureaucratic actors is also studied in this context. In the last section, the conclusions that can be drawn from this chapter are summed up.

¹ As was indicated in section 1.8.3, the Dutch attitude towards the formulation of social rights norms will also be dealt with in the context of the negotiations on the UN Convention on the Rights of the Child. See section 7.3.3.

5.1 NEGOTIATIONS ON THE REFORM OF THE CHARTER'S SUPERVISORY PROCEDURES

5.1.1 Contents of the two Protocols

The reform of the ESC's supervisory procedures was laid down in two Protocols: the Protocol Amending the European Social Charter of 1991 and the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints of 1995.² The latter provides for a completely new mechanism that allows certain trade unions, employers' organisations, and NGOs to submit collective complaints alleging unsatisfactory application of the Social Charter.³ International organisations having the right to lodge such a complaint consist of those international employers' organisations and trade unions that hold a consultative status with the Governmental Committee of the European Social Charter, and other international NGOs 'which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee.'⁴ '[R]epresentative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint' are also allowed to bring a complaint, and finally, there is a possibility for a contracting party to 'declare that it recognises the right of any other representative national non-governmental organisation within its jurisdiction which has particular competence in the matters governed by the Charter, to lodge complaints against it.'⁵ The Complaints Protocol entered into force on 1 July 1998, and the first complaint was lodged on 12 October of that same year.⁶

The main aim of the Amending Protocol was not to supplement the ESC with new supervisory mechanisms, but rather to improve the existing reporting procedure.⁷ The reason for this was that the Charter's original supervisory mechanism did not function properly. The ESC's reporting procedure required biennial reports from the contracting parties concerning the application of the provisions they had accepted.⁸ Apart from

2 Hereafter, the 'Protocol Amending the European Social Charter' will just be referred to as the 'Amending Protocol'. The 'Additional Protocol to the European Social Charter Providing for a System of Collective Complaints' will be referred to as the 'Collective Complaints Protocol' or just the 'Complaints Protocol'. The complete text of these two Protocols can be found in annex 6 and 7 of this book.

3 Comments and analyses of the value of the Collective Complaints Protocol can be found in, among others: Harris and Darcy, 2001, p. 16-17, and 354-370; Birk, 1998; Cullen, 2000; Churchill and Khaliq, 2004; Gomien, Harris, and Zwaak, 1996, p. 426-429.

4 Article 1a and 1b Collective Complaints Protocol.

5 Article 1c and 2.1 Collective Complaints Protocol.

6 The ICJ submitted a complaint against Portugal, which concerned article 7 on the minimum age for employment. See: Harris and Darcy, 2001, p. 355; Cullen, 2000, p. 18; Churchill and Khaliq, 2004, p. 441. For an overview of complaints, see: http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/, accessed 11 September 2006.

7 Comments and analyses of the value of the Amending Protocol can be found in, among others: Harris and Darcy, 2001, p. 14-16, and 293-354; Harris, 1992; Mohr, 1992; Gomien, Harris, and Zwaak, 1996, p. 415-426.

8 Article 21 ESC.

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that, the Committee of Ministers could request them to submit reports relating to the provisions they had not accepted.⁹ The basic features of the reporting procedure were inspired by the example of the ILO, but the procedure that followed the submission of reports was more complicated and did not work out very well.¹⁰ According to the Charter, the reports of the contracting parties would first be 'examined' by the Committee of Independent Experts.¹¹ As its name indicates, it was composed of independent experts.¹² The conclusions of the Committee of Independent Experts and the states' reports were to 'be submitted for examination' to the Governmental Committee of the Social Charter.¹³ Like the Committee of Independent Experts, the Governmental Committee was created especially for the purpose of supervising the implementation of the ESC, but its members were civil servants representing the contracting parties.¹⁴ Two of the Council of Europe's main institutions had to fulfil a role in the reporting procedure as well. The Parliamentary Assembly of the Council of Europe had to 'communicate its views' on 'the conclusions of the Committee of Experts', and finally, the Committee of Ministers had the competence to 'make to each Contracting Party any necessary recommendations.'¹⁵

The most serious problem in the procedure was that the Committee of Independent Experts and the Governmental Committee each gave their own interpretation to the Charter text, as a consequence of which problems concerning the demarcation of competences occurred. The Committee of Independent Experts was of the opinion that its role was to interpret the Charter's provisions and to determine, in a legal sense, whether the legislation and practice of the contracting states were in conformity with

9 Article 22 ESC.

10 The ILO Constitution requires states to submit periodic reports on the application of the treaties that they have ratified. A Committee of Independent Experts makes a technical and objective examination of the reports. The second stage consists of a public discussion of a selected number of cases by the tripartite Conference Committee on the Application of Conventions and Recommendations. The Conference Committee does not seek to modify the experts' conclusions, but rather aims to explore how problems may be overcome. Cases of particular gravity or very long-standing cases of non-compliance can be highlighted by special mention in the Conference Committee's report. See: Betten, 1993, p. 396-404; Valticos and Potobsky, 1995, p. 284-287; Samson, 1991, p. 128-131.

11 Article 24 ESC.

12 The Committee of Independent Experts changed its name in 1998 in order to reflect its human rights character; it is now called the 'European Committee of Social Rights'. See: Harris and Darcy, 2001, p. 293. As the Committee's new name was not yet used during the period of the negotiations under discussion in this Chapter, its former name, 'Committee of Independent Experts', will be used here. For information on the membership of this Committee, see: Harris, 1984, p. 216-222. A second and revised edition of Harris' standard was published in 2001. Since the first edition contains more information about the situation before the start of the negotiations dealt with in this chapter, it has sometimes been more useful to use that edition. For the second and revised edition, see: Harris and Darcy, 2001.

13 Article 27 ESC.

14 In the Charter's text the Governmental Committee is referred to as a 'Sub-committee of the Governmental Social Committee of the Council of Europe', but in practice it has functioned independently, which was intended to be expressed by a change of name. See: Harris, 1984, p. 235.

15 Article 28 and 29 ESC.

the undertakings accepted, and that it should, in principle, be the only organ to do so.¹⁶ Other organs had different responsibilities and should focus on the political aspects of the supervisory process – that is on the reasons for non-compliance and steps to be taken in order to rectify the situation – and not on the question of whether there had been breaches.¹⁷ However, the Governmental Committee disagreed with this, and to the contrary, maintained that it was equally competent to interpret and rule upon the application of the Charter.¹⁸ As a body composed of government representatives who were often involved in drafting the national reports themselves, it obviously took a different approach. As a consequence, its interpretations and conclusions were often at odds with those of the Committee of Independent Experts and different views were taken as to the question of whether a contracting party had infringed its provisions.¹⁹ The lack of authoritative views and interpretations discredited the Charter in general, and this was especially harmful because the success of a reporting procedure essentially depends on persuasion.²⁰ The Amending Protocol tried to solve this problem by a further clarification of the powers of the Committee of Independent Experts and the Governmental Committee.²¹

Another important problem that the Amending Protocol sought to resolve was the inability of the Committee of Ministers to make recommendations to individual contracting parties in breach of their obligations under the Charter. It tried to do this by means of a change in the voting rules and a formulation that made it clearer than before that the Committee of Ministers was expected to adopt resolutions 'covering the entire supervision cycle' as well as resolutions 'containing individual recommendations'.²² Moreover, changes were made as to the composition of the Committee of Independent Experts and the election of its members; the number of Committee-members was raised and measures were taken to guarantee their independence.²³ Other amendments introduced by the Protocol aimed, among others, at providing the Committee of Independent Experts with additional tools to gather information and stimulate the involvement of employers' and workers' organisations and other NGOs in the

16 Harris, 1984, p. 229.

17 Harris, 1984, p. 128-130. See also: CoE Doc. Charte/Rel (90) 2 Add, p. 41-42 and 46-47.

18 Harris, 1984, p. 231, 239-240. See also: CoE Doc. Charte/Rel (90) 2 Add, p. 109, 110-111 and 115.

19 Harris, 1984, p. 241-243, 245-246 and 249; Boerefijn, Heringa and Schokkenbroek, 1991, p. 43-44; Mohr, 1992, p. 364; Harris, 1992, p. 662; Betten, 1988a, p. 18; CoE Doc. Charte/Rel (90) 2, p. 12-13; CoE Doc. Charte/Rel (90) 2 Add, p. 118.

20 Harris, 1984, p. 263.

21 See: Articles 2 and 4 Amending Protocol.

22 See: Article 5 Amending Protocol; Explanatory report to the Protocol amending the European Social Charter, para 41-44. For further information on the problems that occurred in this respect, see, for instance: Harris, 1992, p. 668; CoE Doc. Charte/Rel (90) 2, p. 18; Boerefijn, Heringa and Schokkenbroek, 1991, p. 43; Jaspers and Betten, 1988a, p. 3-4; Harris, 1984, p. 253-261; Wiebringhaus, 1988, p. 12-13.

23 Article 3 Amending Protocol; Explanatory report to Protocol amending the European Social Charter, para 26-28 and 32.

ESC's reporting procedure, which had, up to then, been very limited.²⁴ Finally, the Amending Protocol eliminated the role of the Parliamentary Assembly as a supervisory body of the Charter, the main advantage of which was a reduction in the length of the supervisory cycles.²⁵ Further measures to shorten the proceedings would be taken about one year after the adoption of the Amending Protocol: in September 1992, the Committee of Ministers decided to further change the reporting procedure for a trial period of four years.²⁶ These measures receive further attention in section 5.3.3.

The Amending Protocol has not yet formally entered into force. As is evident from its name, it amends the original ESC, and therefore, ratification by all contracting parties to the ESC is required.²⁷ There are still states that have not ratified the Protocol, though twenty-two states have expressed their consent to be bound by it.²⁸ However, the Ministers' Deputies, which carry out the day-to-day work of the Committee of Ministers, have requested the contracting parties and the supervisory bodies to apply certain measures provided for in the Protocol before its entry into force.²⁹ Although decisions to start following the new rules in anticipation of the Protocol's adoption have met with opposition from certain states, most of the changes have indeed been implemented in practice.³⁰

5.1.2 The start of the revitalisation process

The Amending Protocol and the Collective Complaints Protocol can both be considered the result of a series of protracted negotiations. Each of them was a product of a so-called process of revitalisation of the ESC that started in the early 1990s. Those feeling sympathetic towards the Charter had been awaiting reforms for a long time. Over the years, several proposals had been made to reinforce the Social Charter and to reform its supervisory mechanism, but they had failed to materialize.³¹ Immediately after the entry into force of the Charter, the Parliamentary Assembly started to adopt opinions in which its major problems were identified, and in December 1977 it

24 For further information on the problems that occurred in this respect, see, for instance: Harris, 1984, p. 214-216, 237-239, 262; Harris, 1992, p. 470 and 671; CoE Doc. Charte/Rel (90) 2, p. 10, 12, 16, 17 and 26; Wiebringhaus, 1988, p. 24.

25 Article 6 Amending Protocol; Explanatory report to the Protocol amending the European Social Charter, para 47-48. See also: Harris, 1992, p. 667.

26 Explanatory report to Protocol amending the European Social Charter, para 4.

27 Article 8 Amending Protocol. On this issue, see also: Polakiewicz, 1999, p. 161-162.

28 See: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>, accessed 11 September 2006.

29 CoE Doc. Charte-Rel (91) 28, p. 2, Archive MSAE, temporary file 401.

30 Harris and Darcy, 2001, p. 17 and 334-335; Polakiewicz, 1999, p. 130-131; Staal, 1997, p. 350. Note that it cannot be excluded that the Amending Protocol will never enter into force at all. At a round table of the Committee of Ministers' Deputies of May 1993, Germany announced, for instance, that it did not intend to ratify the Amending Protocol. See: Charte/Rel (93) 15, p. 18 and 38, Archive MSAE, temporary file 402.

31 Jaspers and Betten, 1988a, p. 3; Harris, 1984, p. 238; Betten, 1988a, p. 10-11.

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organised a three-day ‘Symposium on the European Social Charter and Social Policy Today’, which some nine months later resulted in a report and a recommendation that included proposals for improvement of the Charter.³² The debate about the possibility of adding some economic and social rights to the ECHR to bring them under the jurisdiction of the European Court of Human Rights, which was referred to in section 4.7, resulted from this initiative.³³ This option was not proceeded by, nor was anything done with suggestions to improve the supervision of the Charter either.³⁴ After many years of discussion, the only concrete result was the Additional Protocol to the European Social Charter of 1988, which added a number of new rights to the existing ESC-system.³⁵

Although those in favour of strong protection of economic and social rights may have welcomed the 1988 Additional Protocol, generally speaking it was mostly perceived as a disappointing outcome of ‘nearly a decade of slow and uninspired drafting and debate’.³⁶ Everyone knew that the Charter’s main problems lay in its supervisory mechanism, and the 1988 Protocol did not solve these.³⁷ It was in the light of this that Dutch expert Lammy Betten remarked: ‘As long as the problems of the weak functioning of the supervisory machinery of the Charter are not solved, any perfection of the content of the treaty will remain without much consequence.’³⁸ However, the Council of Europe’s member states lacked the political will to tackle the real problems, and therefore, the gap between statements of intent and the actual situation was not bridged.³⁹ Obviously, the time was not yet ripe for real reforms, but this changed in the early 1990s.

One important incentive for reform of the ESC came from the transitions in Central and Eastern Europe. In light of the developments in this part of Europe, a new role was envisaged for the Council of Europe. Western European countries wanted to embed the former communist countries in their own European systems. In the short term, it would, however, not be possible to allow these states to become member states of the

32 CoE Doc. Charte/Rel (90) 2, p. 3.

33 Harris, 1984, p. 198 and 266.

34 The suggestions for improvement included, among others, the idea to change the Governmental Committee into a tripartite organ and to supplement the Social Charter’s reporting system with a right of petition. See: Betten, 1988a, p. 10; Harris, 1984, p. 266; Wiebringhaus, 1988, p. 13. See: Recommendation no. 839, 1978. Quoted in CoE Doc. Charte/Rel (90) 2 Add., p. 350.

35 The Netherlands was one of the first states to ratify this Protocol, but it excluded the article on social protection for elderly people from this ratification, because it did not consider the consequences following from these obligations sufficiently clear. See: Gomien, Harris, and Zwaak, 1996, p. 406, footnote 160; Letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

36 Harris and Darcy, 2001, p. 11.

37 Gomien, Harris, and Zwaak, 1996, p. 435; Boerefijn, Heringa and Schokkenbroek, 1991, p. 42-43; Harris, 1992, p. 660.

38 Betten, 1988a, p. 17.

39 Worrell, 1991, p. 44; Harris, 1992, p. 659.

European Community (EC). Therefore, the idea was launched, among others by the Netherlands, to use the Council of Europe as a gate to the EC. Within the framework of the Council of Europe, the former communist countries could be steered towards democracy, constitutional order and social stability and thus be prepared for a possible entry into the EC.⁴⁰ In this context, it was worthwhile to strengthen the ESC, not only because the Eastern European countries' conception of social and economic rights might be more demanding, but also because protection of these rights could be crucial for a successful transformation from a socialist system to a market economy. As the Council of Europe's Secretariat explained, it was 'imperative to incorporate these countries into an effective system for the protection of fundamental social rights...in order to protect them from social upheavals which would be painful for their populations and dangerous for these still fragile democracies.'⁴¹

Apart from that, the development of a 'single market' within the EC created a momentum for reform as well.⁴² According to the European Single Act, which entered into force as of 1 July 1987, existing obstacles to trade within the EC-area were to be removed before the end of 1992.⁴³ This could have important social repercussions. For example, when economic and financial regulations, such as taxations and tariffs, were removed or harmonized, the 'labour costs' factor would automatically become a more decisive element in the total picture of a country's or an enterprise's competitiveness. Therefore, there was a danger of what was called 'social dumping', or a consequent weakening of the legal position of employees, resulting from attempts to improve competitive positions.⁴⁴ According to the Secretariat of the Council of Europe, in this context an adequate protection of social rights was very much needed.⁴⁵ Besides, developments in the EC might in the long run undermine the position of the Council of Europe. Although the EC's actual achievements in the social field were still limited, the adoption of the European Single Act certainly got the discussion about an EC social policy going, and had brought about some modest results, such as the Community Charter of Fundamental Social Rights of 1989.⁴⁶ In the UN and the Organisation of American States, a tendency to improve the protection of economic and social rights

40 Link, 1990, p. 113. See also: Appendices to the reports of the Second Chamber, 1989-1990, 21 300, chapter V, no. 2, p. 7 and 22.

41 CoE Doc. Charte/Rel (90) 2, p. 4-5. See also: Harris, 1992, p. 660-661; Mohr, 1992, p. 363; CoE Doc. CIM-DH (90) 3, p. 5-6, Archive MSAE, temporary file 384.

42 CoE Doc. Charte/Rel (90) 2, p. 4.

43 Jaspers, 1991, p. 51; Betten, 1991, p. 113-118.

44 Jaspers, 1991, p. 55-56. See also: CoE Doc. Charte/Rel (90) 2, p. 4.

45 CoE Doc. Charte/Rel (90) 2, p. 4.

46 The Community Charter was a non-binding declaration of eleven EC member states – the United Kingdom had not signed it – and it covered a smaller amount of rights than the ESC, so that the latter instrument was in principle still considered the more important of the two, but it could, of course, not be excluded that the EC might take further measures in the future. See: Betten, 1991, p. 132-136 and 150-158; Jaspers, 1991, p. 53.

was visible as well.⁴⁷ This put pressure on the Council of Europe to prove the value of its own instrument.⁴⁸ Considering their plan to let the organisation function as a framework for the integration of Eastern European states, it was also in the interest of the Council or Europe's member states to guarantee its authority and the credibility of its instruments.

Renewed attempts to reform the ESC thus met with more willingness than before. When the Secretary-General of the Council of Europe made an appeal in favour of 'a fresh impetus for the European Social Charter' and to let it 'become the true counterpart to the European Convention on Human Rights' at a two-day informal Ministerial Conference on Human Rights that was organised in Rome in November 1990, this received support.⁴⁹ The Ministers present at the Conference invited the Committee of Ministers of the Council of Europe to 'take the necessary measures so that a detailed study of the role, contents and operation of the European Social Charter may be undertaken as soon as possible.'⁵⁰ And it was stipulated that '[t]his work should be carried out resolutely and diligently so that it can be completed in October 1991 on the occasion of the 30th anniversary of the signing of the European Social Charter.'⁵¹ In response to this, the Ministers' Deputies established an ad hoc Committee on the European Social Charter, which came to be known as the 'Charte-Rel Committee' and which was 'instructed to make proposals for improving the effectiveness of the European Social Charter, and particularly the functioning of its supervisory machinery'.⁵² These formulations, and especially the setting of a deadline, suggested that this time the problems would be dealt with seriously.

5.1.3 The course and organisation of the negotiations

The decision of the Committee of Ministers' Deputies set in motion an extensive reform process, which would eventually result not only in the two Protocols studied in this chapter, but also in the revised European Social Charter of 1996, which updated the original treaty's substantive provisions.⁵³ The greater part of the negotiations took place in the Charte-Rel Committee. This Committee was comprised of 'experts designated by each member State'.⁵⁴ Nearly all of the Council of Europe members that

47 Mohr, 1992, p. 363; Coomans, 2003, p. 23; CoE Doc. CIM-DH (90) 3, p. 5, Archive MSAE, temporary file 384; Harris, 1991, p. 33.

48 Harris, 1992, p. 661; Mohr, 1992, p. 363. On the effects of the European Community's interference in social rights and social policy on the position of the European Social Charter, and the latter's possible survival-techniques, see: Betten, 1991, p. 136-150.

49 CoE Doc. CIM-DH (90) 3, p. 6, Archive MSAE, temporary file 384.

50 CoE Doc. Charte/Rel (91) 2 rev, p. 3, Archive MSAE, temporary file 384.

51 *Ibidem*.

52 CoE Doc. Charte/Rel (91) 1 rev, Archive MSAE, temporary file 384. For the terms of reference of this Committee, see: Decision no. CM/498/051290.

53 For more information on its contents and the revisions made, see for instance: Harris and Darcy, 2001, p. 254-292; Staal, 1997.

54 Terms of reference of the Committee on the European Social Charter: Decision no. CM/498/051290.

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were parties to the Charter, appointed their representative on the Governmental Committee as their expert in the Charte-Rel Committee.⁵⁵ Starting from 1992, a growing number of Eastern European states began to participate in its meetings as well, but they did not play a very important role.⁵⁶ According to the terms of reference of the Charte-Rel Committee, representatives of the Parliamentary Assembly and the ILO, the European Trade Union Confederation (ETUC) and the Union of Industrial and Employers' Confederations of Europe (UNICE) were allowed to send an observer.⁵⁷

Initially, ETUC and UNICE were not very eager to participate in the negotiations, and they were only willing to send an observer if the talks would produce concrete results.⁵⁸ Obviously, they did not put great trust in the reform process. Generally speaking, these organisations' interest in the Charter was not very great anyway. Their resources were not unlimited, and they preferred to concentrate their efforts on the ILO-system, whose tripartite structure provided them with better opportunities to exert influence, and on the EC, which they considered a more relevant organisation than the Council of Europe.⁵⁹ Nonetheless, eventually ETUC as well as UNICE sent an observer to the meetings of the Charte-Rel Committee.⁶⁰ Apparently, their contributions were appreciated, because when they complained in 1993 that their representation imposed too great a burden on their budgets, the Charte-Rel Committee decided that it would ask the Secretariat to take measures to cover these organisations' mission

55 Harris, 1992, p. 664, footnote 11; Interview with J.R. van Blankenstein, 24 December 2004. See also: CoE Doc. Charte/Rel (91) 15, p. 2, Archive MSAE, temporary file 384.

56 In 1992, Czechoslovakia and Poland started to participate, and in 1993, a Bulgarian representative joined the Charte-Rel Committee. Estonia, Lithuania, Romania, and Slovenia had a place in the Committee from November 1993 onwards, and the Russian Federation started to participate as an observer. See: CoE Doc. Charte/Rel (92) 6 prov. rev., p. 10 and 13, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel (93) 10 def., p. 15, Archive MSAE, temporary file 402; CoE Doc. Charte/Rel (93) 38 prov., p. 17-24, Archive MSAE, temporary file 402. None of the persons interviewed could remember anything about their contributions or position. See: Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005; Interview with R. Kuggeleijn, 7 January 2005; Interview with C. Hak, 8 December 2004.

57 Terms of reference of the Committee on the European Social Charter: Decision no. CM/498/051290.

58 Document with general impressions of the first meeting of the Committee on the European Social Charter of 5 to 7 February 1991, annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a list of persons involved in the ESC, 11 February 1991, Archive MSAE, temporary file 384.

59 See: Harris, 1984, p. 295; Harris, 1991, p. 4; CoE Doc. Charte/Rel (90) 2, p. 16 and 17; CoE doc. Charte/Rel (91) 8, p. 7, Archive MSAE, temporary file 384; Document entitled 'Colloquium of the University of Granada on the European Social Charter, 26 and 27 October 1987. The role of employers' organisations in the drafting, implementation and revision of the European Social Charter', June 1987, p. 2, Archive MSAE, temporary file 384; Interview with C. Hak, 8 December 2004.

60 See, for instance: CoE Doc. CM (91) 159, p. 22, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; CoE Doc. Charte/Rel (92) 6 prov. rev., p. 16, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel (92) 33 def., p. 17, Archive MSAE, temporary file 402; CoE Doc. Charte/Rel (93) 10 def., p. 20, Archive MSAE, temporary file 402; Charte/Rel (93) 15, p. 26, Archive MSAE, temporary file 402; CoE Doc. Charte/Rel (93) 38 prov., p. 23, Archive MSAE, temporary file 402.

expenses.⁶¹ The mandate of the Charte-Rel Committee did not provide for an observatory status for other interest groups than the international trade unions and employers' organisations. The Charte-Rel Committee could, by a unanimous decision, have allowed other organisations to participate as observers, but it did not do so.⁶²

On their part, NGOs did not show much interest in the revitalisation process either. In recent years, human rights NGOs have started to pay more attention to social and economic rights, but in general, it has not been their main theme of interest.⁶³ Until August 2001, for instance, Amnesty International's mandate did not include economic and social rights, and even after a change in its mandate, the inclusion of these rights in the work of the organisation has not been undisputed.⁶⁴ Whereas NGOs' interest in economic and social rights was already comparatively limited, this was specifically true for the ESC. Most NGOs were unfamiliar with this instrument, among others because its supervisory procedure did not allow for any NGO-input.⁶⁵ Hence, it was not surprising that the ESC's reform process did not evoke much reaction from NGOs. Although the interest of NGOs seemed to increase somewhat when the substantive revision began to be discussed, initially the ICJ was the only organisation that prepared a paper with recommendations. It did not, however, provide any new insights, and there are no indications that it exerted any influence whatsoever.⁶⁶

The driving force behind the negotiations was the Secretariat of the Council of Europe. It was more actively involved in the negotiation process than was common in, for instance, the UN.⁶⁷ When a new instrument was being drafted, the Secretariat prepared meetings, wrote reports, drafted texts, and although at the end of the day, it had to follow the instructions of the Committee of Ministers, it often acted quite independently and also took initiatives on its own.⁶⁸ In the case of the ESC's revitalisation process, the Secretariat also took a very pro-active attitude and, listing problems and possible solutions, making overviews of the state of affairs and drawing up draft

61 CoE Doc. Charte/Rel (93) 10 def., p. 2, Archive MSAE, temporary file 402.

62 Polakiewicz, 1999, p. 21.

63 Mohr, 1992, p. 367; Brems, 2002, p. 25; Baehr, Castermans-Holleman and Grünfeld, 2002, p. 220; NJCM, 1994, p. 286; Flinterman, 2001, p. vii-viii. For a discussion on how to integrate economic and social rights in the work of human rights NGOs, see, for instance: Roth, 2004; Rubenstein, 2004, p. 861-864.

64 See: 'Amnesty pakt meer schendingen aan' [Amnesty deals with more violations] – In: *Wordt Vervolgd*, Vol. 34, No. 10, 2001, p. 28; Daan Bronkhorst, 'Een wispelturig joch' [A fickle lad] – In: *Wordt Vervolgd*, Vol. 34, No. 10, 2001, p. 24; Marjolijn van Anken, 'Eindelijk volwassen' [Finally mature] – In: *Wordt Vervolgd*, Vol. 34, No. 10, 2001, p. 25.

65 Harris, 1992, p. 670; CoE Doc. Charte/Rel (91) 12, p. 5, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (90) 2, p. 16 and 17.

66 CoE Doc. Charte/Rel (91) 12, p. 3, Archive MSAE, temporary file 384. See, for example: CoE Doc. Charte/Rel (93) 32 rev., p. 3, Archive MSAE, temporary file 402.

67 This general impression was confirmed in a number of interviews. See: Interview with I. Jansen, 6 October 2003; Interview with C. Hak, 8 December 2004.

68 Vorbeck, 1990, p. 48-51.

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proposals, it did a great deal of preparatory work.⁶⁹ Most importantly, it prepared a working paper that formed the basis of the negotiations. It was clearly in favour of serious reforms.⁷⁰ According to the Secretariat, 'a high priority must clearly be given to the supervisory system in the immediate future', and therefore the document's focus was on an analysis of the principal shortcomings of this system and proposals to improve it rather than on questions relating to the Charter's substantive provisions.⁷¹

In the Charte-Rel Committee, it was agreed that it was the monitoring machinery in particular that needed overhauling, and it was decided to concentrate its efforts on that matter first.⁷² The essence of the negotiations was the question of the extent to which governments were prepared to give up political control in the supervision of the Charter. In an article on what they call 'legalized dispute resolution', the political scientists Keohane, Moravcsik and Slaughter have argued that independence and access are two important elements that determine the degree of state control over international supervision of treaties.⁷³ The first of these factors relates to the question of the extent to which adjudication can be rendered impartially with respect to concrete state interests.⁷⁴ Access refers to the ease with which parties other than states can influence the agenda in the supervisory process.⁷⁵ In the debate over the reform of the supervisory procedures of the ESC, the elements of independence and access played a crucial role.

In the negotiations on the Amending Protocol, the main issue concerned the independence of the reporting procedure. In the existing situation, the governmental

69 See, for example: Document with general impressions of the first meeting of the Committee on the European Social Charter of 5 to 7 February 1991, annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a list of persons involved in the ESC, 11 February 1991, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 6, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) Misc 4, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) Misc 5, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel-GT-1 (91) 2 def., p. 2, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel-GT (92) 1, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

70 CoE Doc. Charte/Rel (90) 2. As confirmed by Van Blankenstein, Van Amersfoort and Kuggeleijn, the Secretariat did not take a neutral position. See: Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005; Interview with R. Kuggeleijn, 7 January 2005. In this respect, it should be noted that Keck and Sikkink have also remarked that international institutions can also be a part of a human rights network. See: Keck en Sikkink, p. 80, en 95-97.

71 CoE Doc. Charte/Rel (90) 2, p. 1; Report of the meeting of the Ad Hoc Committee on the European Social Charter on 5-7 February 1991 in Strasbourg, Archive MSAE, temporary file 384.

72 See: CoE Doc. CM (91) 159, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

73 Apart from independence and access, they distinguish a third dimension that can be relevant in this respect, but that did not play any role in the negotiations under discussion here. This is the factor of 'embeddedness', which 'denotes the extent to which dispute resolution decisions can be implemented without governments having to take action to do so'. See: Keohane, Moravcsik and Slaughter, 2000, p. 458.

74 Keohane, Moravcsik and Slaughter, 2000, p. 458-462.

75 *Ibidem*, p. 458 and 462-466.

element in the supervisory procedure was very strong. In fact, the contracting parties were represented twice: in the Governmental Committee and in the Committee of Ministers. The procedure could be made more independent if the Governmental Committee were abolished or changed into a tripartite organ in which organisations of management and labour were represented as well.⁷⁶ However, these solutions did not receive support in the Charte-Rel Committee.⁷⁷ A less far-reaching measure to increase the independence of the procedure would be to make sure that the conclusions and interpretations of the Committee of Independent Experts would no longer be challenged by the Governmental Committee. In practice, the latter Committee was repeating the former's work, and it acted more or less as an 'an 'appeal body' for decisions taken by the Committee of Independent Experts'.⁷⁸ Much of the debate about the Amending Protocol focused on that particular problem and the question of how to divide the tasks between the two Committees. For the Netherlands, the other two important issues were those relating to the failure of the Committee of Ministers to make recommendations to individual countries and the question of the workload involved with drawing up state reports.

To a limited degree, the question of access was also dealt with in the negotiations on the Amending Protocol. It was discussed how employers' and workers' organisations as well as other NGOs could become more involved in the supervisory procedure, and some measures were taken to stimulate this involvement. Nonetheless, it is obvious that the issue of access was mainly addressed by the Complaints Protocol. Subjects that were relevant in that respect were, firstly, the question whether a complaints procedure was desirable, and if so, who should be allowed to lodge complaints and what were the conditions for admissibility to be? Another important question was which supervisory organs should be involved in the procedure. With respect to this issue, the question of the independence of the procedure was at stake again. Would the Committee of Independent Experts be the only organ dealing with complaints, or should states also keep some control over judicial outcomes through the Governmental Committee?

During the whole revitalisation process, it appeared there were states that were resistant to the idea of giving up control over the supervision of the Charter. Most of the Council of Europe member states were willing to finally realize some real reforms, but there were also states whose support still had to be won.⁷⁹ The United Kingdom, Turkey, Iceland, Denmark, and, in particular, Germany and Austria pursued the maintenance of the existing situation.⁸⁰ Because of this, and the fact that the total

⁷⁶ CoE Doc. Charte/Rel (90) 2, p. 12.

⁷⁷ CoE Doc. Charte/Rel (91) 6, p. 6, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 5, p. 4, Archive MSAE, temporary file 384.

⁷⁸ CoE Doc. Charte/Rel (90) 2, p. 16.

⁷⁹ Harris, 1992, p. 661.

⁸⁰ Document with general impressions on the first meeting of the Committee on the European Social Charter of 5 to 7 February 1991, annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a list of persons involved in the ESC, 11 February 1991, Archive

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amount of suggestions in the Secretariat's working paper was quite large, it soon proved impossible to meet the deadline for completion of the reform work. The Charte-Rel Committee succeeded in finalizing the work on the Amending Protocol before the Ministerial Conference in Turin that took place from 21 to 22 October 1991 to celebrate the thirtieth anniversary of the Charter. At the last moment, Germany threatened to block the Protocol's opening for signature, but eventually it gave up its resistance, and the Protocol could be adopted at the Turin conference.⁸¹

Although the first batch of proposals was adopted in 1991, there still remained a set of items on which no final agreement had yet been reached. Some of these also related to the supervisory procedure; the question of a complaints mechanism had not been settled and no final decisions had been taken with respect to a number of proposals that concerned the improvement of the supervisory machinery without amending the text of the Charter. Suggestions concerning the regularity of reporting and the reduction of the workload were among these proposals.⁸² Apart from that, the improvement of the substantive contents of the Charter still needed to be discussed.⁸³ The mandate of the Charte-Rel Committee was extended twice to finalize the work.⁸⁴ It concluded its deliberations on the Complaints Protocol and forwarded the draft to the Committee of Ministers in May 1992.⁸⁵ After that, the Charte-Rel Committee focused

MSAE, temporary file 384. See also: CoE Doc. Charte/Rel (91) 5, p. 3, Archive MSAE, temporary file 384; Annex to a letter from the Deputy Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Ministry of Foreign Affairs, the Ministry of Welfare, Health and Cultural Affairs, and the Ministry of Justice, 28 September 1992, Archive MSAE, temporary file 401; Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005. Note that Churchill and Khaliq also mention most of these states as those having poor ratification or compliance records in respect to the Charter and its Protocols. See: Churchill and Khaliq, 2004, p. 452.

81 Telex-message from the Permanent Representative in Strasbourg to the International Affairs Division of the Ministry of Social Affairs and Employment, 16 October 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; Document entitled 'Most recent progress report with regard to procedural aspects of the 'relance' of the European Social Charter', Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin. In principle, Germany had the power to block. Although a two-thirds majority is sufficient to adopt the texts of draft treaties in the Council of Europe, before May 1993, decisions on their opening for signature were taken by a so-called 'reversed unanimity' rule, which meant that it was presumed that if a convention's text received the support of a two-thirds majority, there was an unanimous agreement in favour of its opening for signature, unless any representative in the Committee of Ministers expressly objected. See: Lappenküper, 1990, p. 83; Polakiewicz, 1999, p. 20 and 25.

82 CoE Doc. CM (91) 188, p. 2-3, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

83 *Ibidem*.

84 CoE Doc. Charte/Rel (91) 28, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel (92) 33 def., p. 9, Archive MSAE, temporary file 402; Fax from one official of the International Affairs Division of the Ministry of Social Affairs and Employment to two other officials of that same Division, 19 October 1992, Archive MSAE, temporary file 402; Charte/Rel (93) 10 def., p. 1-2 and 13, Archive MSAE, temporary file 402.

85 CoE Doc. Charte/Rel (92) 20 prov., p. 9, Archive MSAE, temporary file 401.

almost entirely on the revision of the substantive part of the Charter, which is not dealt with in this chapter. In the meantime, the negotiations on the Complaints Protocol continued in other organs. It had not been possible to reach agreement at the level of government officials, so it was hoped that the matter could be settled at a political level, by the member states' Ministers or their Deputies.⁸⁶ However, this proved difficult too. There appeared to be too much divergence of opinion on the Charte-Rel Committee's draft to make a decision. The Committee of Ministers' Deputies decided to set up an open-ended ad hoc group among themselves to examine the outstanding questions. Experts, who were usually the same persons as those attending the meetings of the Charte-Rel Committee, were allowed to participate as well.⁸⁷ When this did not lead to a solution either, the matter was finally submitted to the Committee of Ministers' Rapporteur Group on Human Rights, which consisted of a number of Deputies that prepared its decisions on human rights matters.⁸⁸ For a long time, it was feared the project would founder, but eventually agreement was reached, and the Complaints Protocol was opened for signature in November 1995.⁸⁹

5.2 THE NETHERLANDS' POINTS OF DEPARTURE

In section 5.1.2, it was explained that developments in the broader European context set the revitalisation process of the ESC in motion. Like other Western European countries, the Netherlands was of the opinion that Western European countries had a special responsibility to guide and support Eastern European countries in their transformation-process towards democracy and market economy. It agreed that the Council of Europe was a useful organisation in the framework of which cooperation with these countries could be strengthened, and through which essential values and norms could be spread.⁹⁰ In light of this, it can be concluded that the Netherlands also had a political interest in the reform of the ESC. The reforms were in line with the Dutch policies towards EC developments as well, because the government considered

⁸⁶ Interview with R. Kuggeleijn, 7 January 2005.

⁸⁷ Document entitled 'Report 497th meeting Deputies CoE', Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; CoE Doc. No. 93/66, Committee of Ministers, Ministers' Deputies, notes on the agenda, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Interview with R. Kuggeleijn, 7 January 2005.

⁸⁸ Document entitled '516th meeting – September 1994, Item 4.1, Draft Additional Protocol to the European Social Charter providing for a system of collective complaints', faxed by the Permanent Representative in Strasbourg to the Council of Europe Section of the Ministry of Foreign Affairs on 8 September 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; CoE Doc. No. 94/528, Committee of Ministers, Ministers' Deputies, notes on the agenda, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997. For general information on Rapporteur Groups, see: Polakiewicz, 1999, p. 24.

⁸⁹ Harris and Darcy, 2001, p. 17.

⁹⁰ Appendices to the reports of the Second Chamber, 1989-1990, 21 300, chapter V, no. 2, p. 7 and 22.

it important for the realization of the Internal Market not to lead to a lowering of social standards in the EC member states, and felt, on the contrary, that this achievement should instead be regarded as a stimulus to try and achieve even higher social standards for all.⁹¹

It is likely that these considerations influenced the Netherlands when the political decision to launch a revitalisation process was taken during the Ministerial Conference on Human Rights and in the Committee of Ministers' Deputies, but for the negotiators in the Charte-Rel Committee, they did not play a role.⁹² In this Committee, the Netherlands was represented by officials of the International Affairs Division of the Ministry of Social Affairs and Employment. It delegated its representatives to the Governmental Committee to participate in the negotiations on the Amending Protocol. One of them also served as the Chairman of the Governmental Committee at the time.⁹³ The deliberations on the Complaints Protocol were attended by other officials of the International Affairs Division of the Ministry of Social Affairs and Employment.⁹⁴ While it was usually the Ministry of Foreign Affairs that took the lead in human rights discussions in the UN, by tradition it was the Ministry of Social Affairs and Employment that was responsible for ESC matters.⁹⁵ The Ministry of Social Affairs and Employment kept other Ministries informed throughout the whole process, but in principle, it had a predominant role in the determination of the Dutch policies in the

91 Appendices to the reports of the Second Chamber, 1988-1989, 20 800, chapter V, no. 2, p. 6.

92 Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005; Interview with R. Kuggeleijn, 7 January 2005.

93 CoE Doc. Charte/Rel (91) 5, p. 9, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 15, p. 2 and 12, Archive MSAE, temporary file 384; List of participants to the third meeting of the Committee on the European Social Charter, dated: 4 September 1991, p. 1-5, Archive MSAE, temporary file 401; Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005.

94 CoE Doc. Charte/Rel (92) 6 prov. rev., p. 13, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel (92) 33 def., p. 14, Archive MSAE, temporary file 402; Charte/Rel (93) 10 def., p. 18, Archive MSAE, temporary file 402; Charte/Rel (93) 15, p. 23, Archive MSAE, temporary file 402; CoE Doc. Charte/Rel (93) 38 prov., p. 20, Archive MSAE, temporary file 402; Interview with J.R. van Blankenstein, 24 December 2004; Interview with R. Kuggeleijn, 7 January 2005.

95 Officials of the Ministry of Social Affairs and Employment had also negotiated the original text of the Charter and they were participating in the Governmental Committee, so it was only natural that this Ministry would also take the lead in the reform process. See: Interview with J.R. van Blankenstein, 24 December 2004; Interview with R. Kuggeleijn, 7 January 2005. At the Ministry of Foreign Affairs, there was a Council of Europe Section, which was responsible for dealing with Council of Europe matters. This included preparation of the sessions of the Committee of Ministers, drawing up instructions for the Permanent Representative to the Council of Europe and interdepartmental coordination. However, where treaty-making activities were concerned, in practice this Section was usually concerned with coordination only. Most of the time, the actual policy making took place at the line ministries and if the Ministry of Foreign Affairs took the lead with respect to human rights matters in the Council of Europe, it was instead the Legal Adviser and not the Council of Europe Section that carried out these tasks. See: Interview with Mr. J.A. Walkate, 21 April 2004; Rijksarchiefdienst/PIVOT and Ministerie van Buitenlandse Zaken, 2000, p. 134 and 144.

revitalisation process.⁹⁶ Contrary to, for instance, the diplomats representing their states in the Committee of Ministers, the delegates that participated in the Governmental Committee and the Charte-Rel Committee approached matters mainly from a legal-technical point of view.⁹⁷ To illustrate, in an interview with the author, Dutch representative Jan van Blankenstein indicated that his views on the matter were in the first place shaped by his personal experiences with the ESC and a series of conferences with experts and members of the Committee of Independent Experts and the Governmental Committee, and not by the revolutions in Eastern Europe or any other political events.⁹⁸

In the past, the Netherlands had not shown itself to be in favour of far-reaching reforms of the ESC's control machinery, but it made some initiatives to try and improve the working of the existing reporting procedure. Among others, it proposed a method of working in the Governmental Committee that stimulated the adoption of negative conclusions on a contracting party's compliance with the Charter that had previously been lacking.⁹⁹ It had also tried to get the Committee of Ministers to adopt recommendations to individual countries, but these attempts had not been successful.¹⁰⁰ As could be expected from its past performance, the Netherlands was, in principle,

96 See, for example: Mailinglist attached to the report of the second meeting of the Ad Hoc Committee ESC in Strasbourg on 22-24 May 1991, Archive MSAE, temporary file 384; Letter from the Deputy Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Council of Europe Section of the Ministry of Foreign Affairs, the Ministry of Welfare, Health and Cultural Affairs, and the Ministry of Justice, 24 March 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Concise report of the ministerial consultations on the Netherlands' contributions in the ad hoc Committee on the European Social Charter of 14 May 1991, Archive MSAE, temporary file 384; Note for the purpose of the ministerial consultations on the Netherlands' contributions in the ad hoc Committee on the European Social Charter, Archive MSAE, temporary file 384; Mailing list annexed to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment of 20 August 1991, Archive MSAE, temporary file 384.

97 Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005; Interview with C. Hak, 8 December 2004.

98 Interview with J.R. van Blankenstein, 24 December 2004. Important conferences were, for instance, a Granada colloquium of 1987 and a Utrecht conference of April 1989.

99 Memorandum on the practice and problems of the procedures concerning the implementation of the European Social Charter, 30 November 1990, Archive MSAE, file: RvE-1.83/ 07.76, description: European Social Charter, Governmental Committee, 59th meeting, 3-7 December 1990; Document entitled 'Control on the implementation of the European Social Charter', annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a professor of Utrecht University, 11 February 1991, Archive MSAE, temporary file 384. The Governmental Committee adopted negative conclusions for the first time in the ninth supervisory cycle of 1985-1986. See: Betten, 1988c, p. 443.

100 Memorandum on the practice and problems of the procedures concerning the implementation of the European Social Charter, 30 November 1990, Archive MSAE, file: RvE-1.83/ 07.76, description: European Social Charter, Governmental Committee, 59th meeting, 3-7 December 1990; Document entitled 'Control on the implementation of the European Social Charter', annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a professor of Utrecht University, 11 February 1991, Archive MSAE, temporary file 384.

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positively disposed towards the revitalisation process.¹⁰¹ According to the experts at the Ministry of Social Affairs and Employment, the main argument in favour was that the ESC was losing its credibility, because the reporting procedure never concluded with a formal observation that a contracting party had not observed its treaty obligations. This way, any state could ratify the Charter without having to face the consequences.¹⁰² The Netherlands had always been of the opinion that reform attempts should in the first place be directed at the ESC's system of supervision, so when the Secretariat proposed to start with a revision of the control machinery, the Netherlands fully agreed.¹⁰³ The Netherlands gave priority to the improvement of the reporting procedure over the creation of a complaints system.¹⁰⁴ In fact, it had objections to the latter idea, which were, among others, related to the question of justiciability and the financial aspects that it might involve. However, for reasons that are explained later in this chapter, the Netherlands changed its position in the course of the negotiations and joined the majority of states that were in favour of a Complaints Protocol. Recently, it has become a party to the Protocol as well; its instrument of ratification was deposited on 3 May 2006.¹⁰⁵ Undeniably, there has been some delay in the ratification of the Complaints Protocol, but this seemed to be caused by the combination of the

101 Memorandum on the practice and problems of the procedures concerning the implementation of the European Social Charter, 30 November 1990, Archive MSAE, file: RvE-1.83/ 07.76, description: European Social Charter, Governmental Committee, 59th meeting, 3-7 December 1990; Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005; Interview with C. Hak, 8 December 2004.

102 Memorandum on the practice and problems of the procedures concerning the implementation of the European Social Charter, 30 November 1990, Archive MSAE, file: RvE-1.83/ 07.76, description: European Social Charter, Governmental Committee, 59th meeting, 3-7 December 1990; Interview with J.R. van Blankenstein, 24 December 2004.

103 Appendices to the reports of the Second Chamber, 1980-1981, 16 400, chapter V, no. 2, p. 45; CoE Doc. Charte/Rel (90) 2, p. 1; Report of the meeting of the Ad Hoc Committee on the European Social Charter on 5-7 February 1991 in Strasbourg, Archive MSAE, temporary file 384; Memorandum on the proposal of the Ad Hoc Committee ESC concerning a collective complaints procedure, handwritten date: 26 July 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

104 Note for the purpose of the ministerial consultations on the Netherlands' contributions in the ad hoc Committee on the European Social Charter, Archive MSAE, temporary file 384; Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; Report of interdepartmental consultations of 26 August 1991, held in preparation of the third meeting of the Ad Hoc Committee ESC, Archive MSAE, temporary file 384.

105 See: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>, accessed 11 September 2006. Like most other countries, the Netherlands has not made a declaration that it accepts complaints from national NGOs. Originally, it intended to do so, but it apparently abandoned the idea. The reasons that the Dutch government gave to explain why national NGOs were not given the right to submit petitions were that it was unnecessary and that acceptance of complaints by national NGOs might lead to an increasing number of complaints and too much pressure on the procedure. See: Draft explanatory memorandum to the bill of approval, 22 July 1998, p. 2, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol of collective complaints 1999; Appendices to the reports of the Second Chamber, 2004-2005, 29 941, no. 3, p. 40. See also: Cullen, 2000, p. 63; Churchill and Khaliq, 2004, p. 426.

ratification of the Revised Charter, to which it would eventually apply as well, rather than to the contents of the Protocol itself.¹⁰⁶

In the debate over the reform of the ESC's reporting procedure, the Netherlands attached particular importance to the question of recommendations at the end of the procedure.¹⁰⁷ In a statement of 1989, the Dutch Minister for Social Affairs and Employment, Jan de Koning, already expressed the opinion that '[t]he greatest bottleneck seems to be the Committee of Ministers which seems to be unable to translate the view of the majority of the Governmental Committee into decisions', and this continued to be one of the Netherlands' main concerns.¹⁰⁸ Another issue that it considered essential was the workload involved in drawing up the reports. It wanted to make changes to the organisation of the reporting procedure that would shift the emphasis from the quantity of the reports to their quality, and it also wanted to make it easier to compare between state policies.¹⁰⁹ The question of the overlap in the work of the Committee of Independent Experts and the Governmental Committee was not immediately recognized as a priority by the Netherlands.¹¹⁰ Nonetheless, it agreed that it was impractical and problematic if the two Committees carried out the same tasks, and it was prepared to put the issue on the agenda. Initially, it did, however, not have a very precise idea of the changes that could be made. It determined its position in the discussion with other delegations.¹¹¹ Apparently, the Netherlands was satisfied with the end result, because on 1 June 1993, it was one of the first states to ratify the Amending Protocol.¹¹²

The Netherlands evaluated its own role in the negotiations on the Amending Protocol as 'fairly active', and felt that it had played a 'constructive' role in the

¹⁰⁶ See: Article D (1) Revised Charter. The ratification of the Revised Charter was time consuming, because the Revised Charter obliged states to accept all provisions they had accepted under the original Charter. As the Netherlands has accepted all provisions, and also three out of four articles of the 1988 Protocol, it had to investigate the implications of the changes in the formulation and scope of all these articles before it could give its consent to be bound. The ratification of the Protocol did, on the other hand, not seem to encounter many problems. See: Annex to a letter from the Deputy Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Ministry of Foreign Affairs, the Ministry of Welfare, Health and Cultural Affairs, and the Ministry of Justice, 28 September 1992, Archive MSAE, temporary file 401; Reports of the Second Chamber, 1999-2000, 2 December 1999, no. 30, p. 2319; Letter from the Minister of Social Affairs and Employment to the Chairman of the General Federation of Military Employees, 1 July 1999, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol of collective complaints 1999.

¹⁰⁷ Interview with J.R. van Blankenstein, 24 December 2004.

¹⁰⁸ De Koning, 1989, p. 3.

¹⁰⁹ Note for the purpose of the ministerial consultations on the Netherlands' contributions in the ad hoc Committee on the European Social Charter, Archive MSAE, temporary file 384.

¹¹⁰ *Ibidem*.

¹¹¹ Memorandum on the practice and problems of the procedures concerning the implementation of the European Social Charter, 30 November 1990, Archive MSAE, file: RvE-1.83/07.76, description: European Social Charter, Governmental Committee, 59th meeting, 3-7 December 1990; Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005.

¹¹² See: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>, accessed 11 September 2006.

negotiations on the Complaints Protocol.¹¹³ In interviews, the Dutch position was described as active and aimed at practical and realistic solutions.¹¹⁴ Although the Council of Europe reports on meetings and negotiations do not give much detail about the involvement and position of the individual countries, this qualification seems justified. The Netherlands sent representatives to participate in the negotiations, and in his function as Chairman of the Governmental Committee, Dutch delegate Van Blankenstein tried, for instance, to convince other members of that Committee of the need for reform and their constructive participation in the revitalisation process.¹¹⁵ In general, it can be said that the Netherlands aimed to act as a mediator between those countries that wanted far-reaching reforms and those that were opposed to making any amendments at all.¹¹⁶ In this respect, much of the activity took place outside the formal meetings, for instance, at dinners with government delegates and representatives of ETUC and UNICE.¹¹⁷ When needed, the Netherlands also tried to facilitate the process.¹¹⁸

Nonetheless, it should be noted that during the whole process, the Netherlands submitted only one text proposal, which concerned the regularity of reporting. It is possible that this had something to do with the active involvement of the Secretariat, which was referred to above. In such a situation, the outcome and success of negotiations are less dependent on the initiatives of the states. Yet, it was also clear that the reform of the ESC was not considered to be a political priority by the Netherlands. The

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- 113 Letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; Fax from the International Affairs Division of the Ministry of Social Affairs and Employment to the Council of Europe Section of the Ministry of Foreign Affairs, 13 October 1993, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.
- 114 Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005; Interview with R. Kuggeleijn, 7 January 2005; Interview with C. Hak, 8 December 2004.
- 115 CoE Doc. T-SG (90) Misc 6, Archive MSAE, file: RvE-1.83/07.76, description: European Social Charter, Governmental Committee, 59th meeting, 3-7 December 1990; Interview with J.R. van Blankenstein, 24 December 2004.
- 116 Letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.
- 117 Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005; Interview with C. Hak, 8 December 2004.
- 118 See, for instance: Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; Fax from the Ministry of Foreign Affairs to the Permanent Representative in Strasbourg, 11 September 1991, Archive MSAE, temporary file 384; Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; Memorandum from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the State Secretary for Social Affairs and Employment, 26 September 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

officials that happened to be responsible for ESC matters could act almost completely independently, and neither high level officials nor political leaders were interested in the negotiations whatsoever.¹¹⁹ The Minister and the State Secretary of Social Affairs and Employment were only informed halfway through the process, when the final dates for the Turin Conference were confirmed by the Secretariat of the Council of Europe.¹²⁰ In this respect, there was a contrast with the reform of the supervisory procedures of the European Convention for Human Rights and Fundamental Freedoms (ECHR), which was discussed in the same period as the ones concerning a revitalisation of the ESC.¹²¹ In this case, the Dutch government requested the Advisory Committee on Human Rights and Foreign Policy to issue a report on the different options that could be considered, and it submitted the report to the Council of Europe as a contribution to the discussion.¹²² Comparable initiatives were never taken in the ESC's revitalisation process, so the government apparently considered it less important.

5.3 THE IMPROVEMENT OF THE REPORTING PROCEDURE

5.3.1 The question of the division of competences

As was explained above, the crucial question in the negotiations on the reform of the ESC's reporting mechanism soon appeared to be that of the division of competences between the Committee of Independent Experts and the Governmental Committee. The Netherlands was prepared to talk about this problem, but it had no clear-cut idea of how the problem could be solved. However, solutions that it rejected were those that the Secretariat of the Council of Europe had presented as the more radical options: a complete abolition or a replacement of the Governmental Committee by a tripartite organ based on the ILO-model.¹²³ Both were disposed of as unrealistic and not practicable.¹²⁴ Among other delegations, there was hardly any support for these solutions either, so the Secretariat's third alternative was the only proposal that was seriously

119 Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005; Interview with R. Kuggeleijn, 7 January 2005.

120 Letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

121 In 1994, these negotiations resulted in the adoption of the Eleventh Protocol to the ECHR, which was shortly referred to in section 1.1.3 of this book.

122 Klerk, 1996, p. 37.

123 CoE Doc. Charte/Rel (90) 2, p. 30-31.

124 Handwritten note in the margin of CoE Doc. Charte/Rel (90) 2, p. 31, Archive MSAE, temporary file 384; Document entitled 'Control on the implementation of the European Social Charter', annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a professor of Utrecht University, 11 February 1991, Archive MSAE, temporary file 384.

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discussed in the Charte-Rel Committee.¹²⁵ According to this alternative, the Committee of Independent Experts would be recognized as the organ with the exclusive competence to interpret the provisions of the Charter and to adopt conclusions on compliance or non-compliance of national situations with these provisions. The Governmental Committee should take up a political rather than a legal role. In other words: it should make political observations on the conclusions of the Committee of Independent Experts, and try to find reasons for non-compliance, indicate solutions, act as a forum for dialogue between governments and employers' and workers' organisations, and make social policy proposals.¹²⁶ Hence, in essence, this alternative followed the interpretation the Committee of Independent Experts had always given the existing supervisory provisions.¹²⁷

The proposal met with basically three kinds of reactions. Some states, most notably France, gave it their full support, while another group of states completely rejected it. In particular Germany and Austria were unwilling to give up any state control at all, and argued that the Governmental Committee was the organ that should give final interpretations.¹²⁸ The majority of states took a position somewhere in the middle; they were willing to consider reforms, but they had difficulty accepting the idea of giving the Committee of Independent Experts the exclusive right to interpret the Charter.¹²⁹ The Netherlands belonged to this group of states. It did not want to circumvent the difficult discussion on the division of tasks of the two Committees, but it considered it too far-reaching to give the Committee of Independent Experts the authority to make final legal interpretations.¹³⁰ In the first place, it did not seem right from a purely legal perspective – after all, this Committee was not a court – and in the second place, it did not think that the Committee of Independent Experts had a reputation that could justify such an important role either.¹³¹

125 CoE Doc. Charte/Rel (91) 5, p. 4, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 6, p. 6, Archive MSAE, temporary file 384.

126 CoE Doc. Charte/Rel (90) 2, p. 22, 24, and 27-29.

127 See section 5.1.1.

128 Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; Report of the meeting of the Ad Hoc Committee on the European Social Charter on 5-7 February 1991 in Strasbourg, Archive MSAE, temporary file 384; CoE Charte/Rel (91) 6, p. 3, Archive MSAE, temporary file 384.

129 Document with general impressions of the first meeting of the Committee on the European Social Charter of 5 to 7 February 1991, annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a list of persons involved in the ESC, 11 February 1991, Archive MSAE, temporary file 384.

130 Memorandum on the practice and problems of the procedures concerning the implementation of the European Social Charter, 30 November 1990, Archive MSAE, file: RvE-1.83/ 07.76, description: European Social Charter, Governmental Committee, 59th meeting, 3-7 December 1990.

131 Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years,

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It was clear that a lack of financial means and staff resources negatively influenced the work of the Committee of Independent Experts, but according to the Dutch opinion, its lack of authority was not only due to these difficulties.¹³² It felt that the quality of the members of the Committee of Independent Experts was part of the problem too; many of them did not deserve to be designated as experts.¹³³ Moreover, like many countries, the Netherlands believed that the Committee of Independent Experts tended to give too extensive interpretations to the Charter, and placed them too much at the forefront of its work. It could understand that the experts needed to interpret the provisions of the Charter, which were relatively vague, in order to be able to draw any conclusions, but according to the Netherlands, their approach was too legalistic and their interpretations were too detailed.¹³⁴ The norms that the contracting parties had agreed upon were formulated in qualitative terms, but the Committee of Independent Experts translated them into strict and quantitative minimum standards. This met with the opposition of many governments, who felt that they were called to account for failing to meet obligations that they had never intended to be bound to.¹³⁵ In reaction, reinterpretation-sessions were held in the Governmental Committee. The Netherlands agreed that these sessions tended to result in interpretations that were advantageous to the governments concerned, and felt that, as a rule, they should no longer be held. On the other hand, it thought that the Governmental Committee should retain the possibility to reflect on interpretations of the Committee of Independent Experts that were clearly unreasonable.¹³⁶ It was obvious that past experience with the latter Committee inspired this position, but for the Netherlands, it was also a matter of

21-22 October 1991, Turin; Handwritten note in the margin of CoE Doc. Charte/Rel (90) 2, p. 27, Archive MSAE, temporary file 384; Document entitled 'Control on the implementation of the European Social Charter', annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a professor of Utrecht University, 11 February 1991, Archive MSAE, temporary file 384; Interview with L.J.A. van Amersfoort, 13 January 2005; Interview with R. Kuggeleijn, 7 January 2005.

132 For information on the problems concerning resources, see, for instance: CoE Doc. Charte/Rel (90) 2, p. 11-12 and 14-15; Mohr, 1992, p. 368; Boerefijn, Heringa and Schokkenbroek, 1991, p. 44 and 48; Harris, 1992, p. 664-665.

133 Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384.

134 Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

135 Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384; Interview with R. Kuggeleijn, 7 January 2005. See also: Betten, 1988c, p. 441.

136 Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384; Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

principle that there would be a possibility to appeal to a second institution whenever legally binding interpretations were made.¹³⁷

Notwithstanding its position on the matter of interpretations, the Netherlands agreed with the Secretariat that there should be a more clear-cut division of work between the supervisory bodies. A fax-message of April 1990 shows that it was ready to consider leaving the legal aspects to the Committee of Independent Experts and let the Governmental Committee concentrate on political issues at a quite early stage in the negotiations.¹³⁸ At the same time, it found it hard to imagine how exactly this should be done; it was not easy to distinguish between legal and political duties, especially not if one wanted to avoid the Committee of Independent Experts operating like a court.¹³⁹ In a first reaction to the Secretariat's proposals, the question was raised at the Ministry of Social Affairs and Employment whether it would not be best to let the terms 'legal' and 'political' refer to *what* was assessed, and to let the Committee of Independent Experts concentrate their work on the contracting parties' legislations, whereas the Governmental Committee would go into the *de facto* situations in these states.¹⁴⁰

The Netherlands, however, had not determined its final position yet, and especially at the beginning of the debate, it was still open to differing views.¹⁴¹ Hence, when Cyprus and France, two countries that were strongly in favour of the ESC's reform, drew up a compromise proposal in which the terms 'legal' and 'political' were applied in a different way, the Netherlands was ready to support it.¹⁴² The 'French-Cypriot proposal' tried to reconcile the majority-view that the Committee of Independent Experts should not be given the exclusive right to interpret the Charter on the one

137 Handwritten notes in the margin of CoE Doc. Charte/Rel (90) 2, p. 22, 24, and 27, Archive MSAE, temporary file 384. In the debate of the reform of the ECHR of those years, the Netherlands took a comparable position, and proposed a system that would make it possible to analyze important cases twice. See: Klerk, 1996, p. 37 and 44.

138 Fax-message from the Ministry of Social Affairs and Employment to the Council of Europe's Secretariat, 12 April 1990, Archive MSAE, file: RvE-1.83/07.76, description: European Social Charter, Governmental Committee, 57th meeting, 26-30 March 1990. See also: CoE Doc. Charte/Rel (90) 2 Add., p. 130.

139 Memorandum on the practice and problems of the procedures concerning the implementation of the European Social Charter, 30 November 1990, Archive MSAE, file: RvE-1.83/ 07.76, description: European Social Charter, Governmental Committee, 59th meeting, 3-7 December 1990; Handwritten notes in the margin of CoE Doc. Charte/Rel (90) 2, p. 22, Archive MSAE, temporary file 384.

140 Document entitled 'Control on the implementation of the European Social Charter', annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a professor of Utrecht University, 11 February 1991, Archive MSAE, temporary file 384.

141 Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005.

142 *Ibidem*. The main difference with the initial Dutch interpretation of the terms 'legal' and 'political' seemed to be that in the French-Cypriot proposal, these terms referred to the methods used rather than to the subject-matter that was to be assessed.

hand, and the need to change the existing situation on the other hand.¹⁴³ There were only small distinctions between the Secretariat's proposal and the French-Cypriot alternative, which may perhaps seem relatively insignificant, but in a debate that took place on the verge of what states were willing to accept, they appeared to be of decisive importance.

The main difference with the Secretariat's proposal was that it avoided an explicit statement on which supervisory organ would be competent to interpret the Charter.¹⁴⁴ It was clear that the term 'interpretation' caused misunderstandings and difficulties, because strictly speaking, quasi-judicial bodies cannot make legally binding interpretations, and therefore, for most states, the terms 'legal assessment' or 'opinion' were more acceptable terms to use.¹⁴⁵ Another, more subtle, difference was that it embedded the Governmental Committee more clearly in the supervisory procedure. Whereas the Secretariat's proposal was somewhat vague about how the Governmental Committee's work would relate to that of the other supervisory organs, the French-Cypriot proposal was to let the Governmental Committee function 'as a guide assisting the Committee of Ministers in reaching its decisions.'¹⁴⁶ In principle, it would confine itself to conclusions based on a policy assessment, and two of its main tasks would be to advise contracting parties that were having difficulties to meet their obligations under the Charter, and to report cases of serious infringements of the Charter on the basis of fixed criteria to the Committee of Ministers for the purpose of an individual recommendation.¹⁴⁷

After long deliberations, at the second meeting of the Charte-Rel Committee in May 1991, the roles of the two respective Committees were formulated as follows. The Committee of Independent Experts would 'assess from a legal and technical point of view whether national situations, including de facto situations, were in compliance

143 Document with general impressions of the first meeting of the Committee on the European Social Charter of 5 to 7 February 1991, annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a list of persons involved in the ESC, 11 February 1991, Archive MSAE, temporary file 384; Report of the meeting of the Ad Hoc Committee on the European Social Charter on 5-7 February 1991 in Strasbourg, Archive MSAE, temporary file 384.

144 Document with general impressions of the first meeting of the Committee on the European Social Charter of 5 to 7 February 1991, annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a list of persons involved in the ESC, 11 February 1991, Archive MSAE, temporary file 384.

145 CoE Doc. Charte/Rel (91) 15, p. 5, Archive MSAE, temporary file 384; Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

146 CoE Doc. Charte/Rel (91) 6, p. 3, Archive MSAE, temporary file 384.

147 Document with general impressions of the first meeting of the Committee on the European Social Charter of 5 to 7 February 1991, annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a list of persons involved in the ESC, 11 February 1991, Archive MSAE, temporary file 384; Report of the meeting of the Ad Hoc Committee on the European Social Charter on 5-7 February 1991 in Strasbourg, Archive MSAE, temporary file 384.

with the Charter obligations of the Contracting Parties concerned.¹⁴⁸ The Governmental Committee's tasks would, on the other hand, be fourfold. It would, on the basis of the reasoned conclusions of the Committee of Independent Experts, 'prepare the decisions of the Committee of Ministers; identify the situations which would be the subject of recommendations to each Government concerned; submit a report to the Committee of Ministers', and 'based on the implementation of the Charter, undertake regular examinations of the social situations in the Contracting Parties [general studies] and submit proposals to the Committee of Ministers.'¹⁴⁹

The Netherlands fully agreed with the approach that was chosen.¹⁵⁰ It felt that it would indeed be best to say as little as possible about the status of the conclusions of the Committee of Independent Experts. This way, the Governmental Committee would not be tempted to make legal interpretations either. After all, this Committee was no more authorized to make final legal interpretations than the Committee of Independent Experts.¹⁵¹ The Netherlands also supported the way the responsibilities of the two supervisory Committees were divided now, and apart from one aspect, it was satisfied with the formulations chosen. What it considered problematic was the use of the term 'de facto situations' in the provision that described the competences of the Committee of Independent Experts. It agreed that it was important for this Committee to investigate not only what was regulated by law, but also how this was implemented through further regulations and other measures, such as collective labour agreements. However, the word 'practice' seemed a more appropriate term to use in that case, probably because it referred more clearly to state behaviour, while the term 'de facto situations' seemed to refer also to factual situations that persisted in spite of government action.¹⁵²

Apart from this terminology-issue, the proposal on the two Committees' competences received full support from the Netherlands. This became clear when a number

148 CoE Doc. Charte/Rel (91) 15, p. 5, Archive MSAE, temporary file 384. See also: Report of the second meeting of the Ad Hoc Committee ESC in Strasbourg on 22-24 May 1991, Archive MSAE, temporary file 384; Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384.

149 CoE Doc. Charte/Rel (91) 15, p. 6, Archive MSAE, temporary file 384. See also: Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; Report of the second meeting of the Ad Hoc Committee ESC in Strasbourg on 22-24 May 1991, Archive MSAE, temporary file 384; Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384.

150 Handwritten notes on a document with a draft statement of the Governmental Committee dated 22 March 1991, Archive MSAE, temporary file 384.

151 Document entitled 'What do we do with the European Social Charter?', Archive MSAE, temporary file 384.

152 Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; Document entitled 'Preparation Ad Hoc Committee ESC', handwritten date: 20 August 1991, Archive MSAE, temporary file 384. Under the Charter, states are normally not held accountable for persistent factual situations if they have done all that can reasonably be expected of them. See: Harris and Darcy, 2001, p. 25-26. See also: article 33 ESC.

of states tried to re-open the negotiations on the compromise-text at the Charte-Rel Committee's third meeting in the beginning of September 1991. At the second meeting a few months earlier, only Germany and Austria had been completely open about their doubts in relation to the solution that began to take shape. However, it now appeared that Denmark, Iceland, and the United Kingdom also had objections.¹⁵³ They proposed amendments that would once again blur the distinction between the supervisory Committees' duties, and that would, in particular give the Governmental Committee an explicit competency to make legal assessments too.¹⁵⁴ The Netherlands was in favour of formulations that contributed the most to a clearer division of tasks between the Committee of Independent Experts and the Governmental Committee. Like the majority of the Charte-Rel Committee, it rejected any proposal to change the draft provision on the competencies of the Governmental Committee so as to allow it to base its decisions on legal considerations, but Austria, Germany, Denmark, Turkey, the United Kingdom and Iceland stuck to their position in favour of such an amendment.¹⁵⁵

In this deadlocked situation, the Netherlands considered it of crucial importance to maintain the pressure in regard to the revitalisation process, and to make sure that the overlap in the work of the two Committees would be prevented in the future.¹⁵⁶ Fearing that the current course of the discussion would lead to a continuation of the interpretation disputes and hoping to be able to play a mediating role with respect to this particular question, the Netherlands began to advocate for the introduction of a separate organ that could, on the request of a contracting party, rule on the interpretation of the Charter.¹⁵⁷ The question of whether there should be an appeal procedure against the decisions of the Committee of Independent Experts had been pending since the beginning of the work of the Charte-Rel Committee.¹⁵⁸ Initially, the Netherlands had not been in favour, among others because it did not fit in with the existing, non-

153 Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401.

154 Copy of a fax from the Department of Employment in London to the Administrator of the Social Charter Section of the Directorate of Human Rights of the Council of Europe, 22 August 1991, Archive MSAE, temporary file 384.

155 Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; Document entitled 'Instruction concerning the draft protocol to the European Social Charter', Archive MSAE, temporary file 401; CoE Doc. CM (91) 159, p. 9-10, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

156 Document entitled 'Instruction concerning the draft protocol to the European Social Charter', Archive MSAE, temporary file 401.

157 Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; Letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

158 CoE Doc. Charte/Rel (91) 15, p. 6, Archive MSAE, temporary file 384; Report of the second meeting of the Ad Hoc Committee ESC in Strasbourg on 22-24 May 1991, Archive MSAE, temporary file 384.

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judicial reporting system.¹⁵⁹ However, it felt that if no more clarity would be reached with respect to the demarcation of the Committees' duties, such a procedure would become imperative.¹⁶⁰ It also hoped that governments that opposed a division of competences would change their position if they were given the opportunity to apply to another authority, if they did not agree with the legal assessment of the Committee of Independent Experts.¹⁶¹

It soon appeared that Austria, Germany and the United Kingdom also resisted the idea of an appeals procedure, but most other delegations sympathised with the Netherlands. This majority started to break down, however, as soon as the question of the most appropriate organ to deal with such complaints started to be discussed.¹⁶² Analogous to the system under the ILO, this authority could, for example, be the International Court of Justice, or alternatively, a 'social chamber' of the European Court of Human Rights, a Council of Europe tribunal specifically created for the purpose of solving disputes or questions relating to the interpretation of the Charter, or, as some states suggested, the Committee of Ministers.¹⁶³ The Dutch delegation wanted to consult with other Ministries before it would take a final stand with regard to the question of which organ should be entrusted with the task to settle interpretation disputes, but in any case, it did not consider the Committee of Ministers a suitable organ. Like most states, it was in favour of an independent organ of appeal, such as the International Court of Justice, the European Court of Human Rights or an Ad Hoc

159 Document entitled 'Preparation Ad Hoc Committee ESC', handwritten date: 20 August 1991, Archive MSAE, temporary file 384.

160 Document entitled 'Instruction concerning the draft protocol to the European Social Charter', Archive MSAE, temporary file 401; Memorandum from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the State Secretary for Social Affairs and Employment, 26 September 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

161 Interview with J.R. van Blankenstein, 24 December 2004.

162 Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; Memorandum from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the State Secretary for Social Affairs and Employment, 26 September 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; CoE Doc. CM (91) 159, p. 11, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

163 Document with general impressions of the first meeting of the Committee on the European Social Charter of 5 to 7 February 1991, annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a list of persons involved in the ESC, 11 February 1991, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 8, p. 2 and 6, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 15, p. 5, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 16, p. 6, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 19, p. 5, Archive MSAE, temporary file 384; CoE Doc. CM (91) 159, p. 11, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

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Tribunal.¹⁶⁴ Later it would come to the conclusion that members of such an organ might best be recruited from the ranks of the European Court of Human Rights.¹⁶⁵

In the end, an appeals procedure would no longer be considered necessary, though. In a combined meeting of experts and Ministers' Deputies of 8 October 1991, the question of the Committees' respective responsibilities was solved to the complete satisfaction of the Netherlands. It is hard to determine why states that had previously opposed the idea of a clear division of responsibilities between the supervisory organs gave up their resistance, but in any case, the draft text that was agreed upon made it very clear that the Committee of Independent Experts would assess reports from a legal standpoint, whereas the Governmental Committee would select situations that might qualify for a recommendation by the Committee of Ministers on the basis of social, economic, and other policy considerations.¹⁶⁶ In this situation, the Netherlands no longer considered it necessary to create an appeals procedure. Besides, there was no agreement on the issue, so under the changed circumstances further deliberations on the matter were an undesirable complication.¹⁶⁷ Indeed, the situation was complex enough as it was. Even after an agreement had, in principle, been reached on 8 October, it remained uncertain whether at the end of the day all governments would be willing to accept the end-result; as was mentioned already in 5.1.3, Germany gave up its resistance to a redefinition of duties of the Committee of Independent Experts and the Governmental Committee only at the very last moment.¹⁶⁸

¹⁶⁴ Document entitled 'Instruction concerning the draft protocol to the European Social Charter', Archive MSAE, temporary file 401; Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; Memorandum from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the State Secretary for Social Affairs and Employment, 26 September 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; CoE Doc. CM (91) 159, p. 11, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

¹⁶⁵ Document entitled 'Ministerial Meeting Council of Europe concerning the European Social Charter (ESC)', Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

¹⁶⁶ Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)' with a handwritten date: 9 October 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin. See also: CoE Doc. CM (91) 173, p. 3-4, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

¹⁶⁷ Fax from the International Affairs Division of the Ministry of Social Affairs and Employment to the Permanent Representative in Strasbourg, 15 October 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; Document entitled 'Ministerial Meeting Council of Europe concerning the European Social Charter (ESC)', Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

¹⁶⁸ Telex-message from the Permanent Representative in Strasbourg to the International Affairs Division of the Ministry of Social Affairs and Employment, 16 October 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

5.3.2 Other questions relating to the Amending Protocol

For the Netherlands, another important problem of the reporting procedure was that of the Committee of Minister's failure to adopt recommendations concerning individual states. According to the Dutch view, the fact that there was no organ that could make binding legal decisions made it imperative for the conclusions of the supervisory organs to be confirmed by the Committee of Ministers, so that they at least received political authority.¹⁶⁹ In the second half of the 1980s, several attempts were made to translate negative conclusions of the Governmental Committee into the adoption of recommendations to individual states by the Committee of Ministers. In an utmost attempt to set a precedent, the Netherlands' representative had on one occasion even lobbied in favour of a resolution that included a recommendation to his own government on a relatively minor issue. However, due to opposition from the United Kingdom and Denmark, and the insistence of states that were not contracting parties to abstain in the vote, these attempts had failed.¹⁷⁰

The voting rules were the main problem that stood in the way of the adoption of recommendations to individual countries. A two-thirds majority of the members of the Committee of Ministers was needed to adopt such a recommendation, but about one-third of the Council of Europe's member states had not become a party to the Charter. These states considered it inappropriate to collaborate in the condemnation of another state for not implementing a treaty that they had themselves not ratified.¹⁷¹ This made it extremely difficult to adopt individual recommendations, and therefore, the Secretariat advised a modification of the voting rules: the two-thirds majority requirement would have to be changed into a simple majority rule of members entitled to sit on the Committee of Ministers.¹⁷² In the Charte-Rel Committee, the absence of individual recommendations by the Committee of Ministers was widely regretted. There was only a small minority, consisting of among others Turkey that wanted the existing rules to remain in force, but among most other states, the idea to change them was well received. It goes without saying that the Netherlands was in favour as well.¹⁷³

169 Document entitled 'What do we do with the European Social Charter?', Archive MSAE, temporary file 384; Interview with J.R. van Blankenstein, 24 December 2004.

170 Memorandum on the practice and problems of the procedures concerning the implementation of the European Social Charter, 30 November 1990, Archive MSAE, file: RvE-1.83/ 07.76, description: European Social Charter, Governmental Committee, 59th meeting, 3-7 December 1990; Document entitled 'Control on the implementation of the European Social Charter', annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a professor of Utrecht University, 11 February 1991, Archive MSAE, temporary file 384; Interview with J.R. van Blankenstein, 24 December 2004.

171 Betten, 1988c, p. 444.

172 CoE Doc. Charte/Rel (90) 2, p. 30.

173 Document with general impressions of the first meeting of the Committee on the European Social Charter of 5 to 7 February 1991, annex to a letter of the International Affairs Division of the Ministry of Social Affairs and Employment to a list of persons involved in the ESC, 11 February 1991, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 5, p. 3, Archive MSAE, temporary file 384; CoE

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The Secretariat had advised in favour of a simple majority rule of members entitled to sit on the Committee of Ministers, but in the Charte-Rel Committee, other alternatives were discussed as well.¹⁷⁴ Apart from the option that was proposed by the Secretariat, another possibility that received a lot of support was voting by a two-thirds majority of the contracting parties. With the existing state of ratification, there was not much of a difference between the two options from an arithmetical perspective, but one group of states considered it a matter of principle that non-contracting parties did not have the moral right to speak out about other states' compliance with the Charter, whereas another group of states, which was supported by the Secretariat, considered it important to keep non-contracting parties involved too.¹⁷⁵ Initially, the Netherlands preferred to leave decision-making to the contracting parties only.¹⁷⁶ However, in interdepartmental consultations, the Ministries of Justice and Foreign Affairs suggested to follow the example of the ECHR. In January 1991, it had just been decided that decision-making in the Committee of Ministers, which was at that time still fulfilling a judicial role in the ECHR's supervision, would take place by a regular majority plus one instead of a two-thirds majority.¹⁷⁷ It was in light of this that the Netherlands changed its position and began to advocate a simple majority rule of all member states.¹⁷⁸ Nonetheless, the alternative of a two-thirds majority of the contracting parties was eventually adopted in the Amending Protocol.¹⁷⁹

Doc. Charte/Rel (91) 6, p. 6, Archive MSAE, temporary file 384; Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; Report of the meeting of the Ad Hoc Committee on the European Social Charter on 5-7 February 1991 in Strasbourg, Archive MSAE, temporary file 384.

174 CoE Doc. Charte/Rel (90) 2, p. 30; CoE Doc. Charte/Rel (91) 15, p. 8-9, Archive MSAE, temporary file 384.

175 CoE Doc. Charte/Rel (91) 15, p. 7, Archive MSAE, temporary file 384; Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384; Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

176 Document entitled 'Control on the implementation of the European Social Charter', annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a professor of Utrecht University, 11 February 1991, Archive MSAE, temporary file 384; Document entitled 'Preparation Ad Hoc Committee ESC', handwritten date: 20 August 1991, Archive MSAE, temporary file 384.

177 Report of interdepartmental consultations of 26 August 1991, held in preparation of the third meeting of the Ad Hoc Committee ESC, Archive MSAE, temporary file 384. See: Protocol No. 10 to the ECHR and its Explanatory Report.

178 Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; Document entitled 'Instruction concerning the draft protocol to the European Social Charter', Archive MSAE, temporary file 401.

179 See article 5 Amending Protocol.

The questions of the division of duties between the Committee of Independent Experts and the Governmental Committee and the functioning of the Committee of Ministers in the procedure clearly received priority attention in the Netherlands. In respect to other measures that were discussed to improve the reporting procedure, the Netherlands did not usually hold a very strong opinion. It did, for instance, not seem to have objections against the suggestion to remove the Parliamentary Assembly from the supervisory process to reduce the time needed to complete a reporting cycle.¹⁸⁰ It was not in favour of an increase in the number of members of the Committee of Independent Experts, but when a majority appeared to support it, it adapted its position.¹⁸¹ In principle, the Netherlands could agree with suggestions of the Secretariat to improve the flow of information to the Committee of Independent Experts by means of requests for additional information or hearings with the contracting parties concerned, although it stressed that these should be set up with care, and should not become too complex and time-consuming.¹⁸²

In respect to reform proposals that aimed to stimulate the involvement of the organisations of management and labour, and other NGOs in the reporting procedure, the Dutch attitude was, on the whole, somewhat hesitant. The idea to make government reports and comments on these reports public as an incentive to create greater publicity and interest in the ESC, for instance, was not supported. At the Ministry of Social Affairs and Employment, it was thought that it would only discourage states to be completely open in their reports.¹⁸³ The Ministries of Justice and Foreign Affairs did not agree with this point of view, and pointed to the fact that reports to other international organisations were public too, but other states appeared not to be too keen on

180 CoE Doc. Charte/Rel (91) 5, p. 4, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 15, p. 7, Archive MSAE, temporary file 384.

181 Letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a professor of Utrecht University, 31 July 1991, Archive MSAE, temporary file 384; Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; Document entitled 'Instruction concerning the draft protocol to the European Social Charter', Archive MSAE, temporary file 401; CoE Doc. Charte/Rel (91) Misc 8, p. 4, footnote 1, Archive MSAE, temporary file 401.

182 Note for the purpose of the ministerial consultations on the Netherlands' contributions in the ad hoc Committee on the European Social Charter, Archive MSAE, temporary file 384; Document entitled 'Control on the implementation of the European Social Charter', annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a professor of Utrecht University, 11 February 1991, Archive MSAE, temporary file 384; Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384; Handwritten note in the margin of CoE Doc. Charte/Rel (90) 2, p. 28, Archive MSAE, temporary file 384.

183 Document entitled 'Preparation Ad Hoc Committee ESC', handwritten date: 20 August 1991, Archive MSAE, temporary file 384.

the publication of these documents either, and it was decided to make reports and comments available on request only.¹⁸⁴

The Ministry of Social Affairs and Employment was also cautious in respect to the involvement of NGOs other than those representing employers and workers in the reporting procedure. The main reason for this was that it regarded the latter as the primary partners in respect to social questions.¹⁸⁵ Therefore, it felt that a selection of NGOs should be made if the Governmental Committee were to be stimulated to make more use of the possibility to invite NGOs with consultative status with the Council of Europe to give their views, and if the Secretariat would send copies of national reports to these organisations.¹⁸⁶ In 1999, there were more than 350 NGOs that had consultative status with the Council of Europe, and many of them were active in areas covered by the ESC.¹⁸⁷ Although the amount of organisations may have been smaller in 1991, at that time they were also quite numerous.¹⁸⁸ Other Ministries recognized the problem of the wide variety of international NGOs, but in interdepartmental consultations, the question was posed whether it could not be left to the Secretary-General to make this selection.¹⁸⁹ Nonetheless, the Dutch representatives raised the problem in the Charte-Rel Committee, and they put their doubts aside only after the Secretariat had ensured them that, in practice, only a limited number of NGOs were actually involved with the Charter.¹⁹⁰

5.3.3 The regularity of reporting

A Dutch priority that had not yet been dealt with in the Amending Protocol was the heavy burden that the two-yearly reporting procedure placed on the contracting parties. The Netherlands considered it of utmost importance to do something about this.¹⁹¹ The Charter imposed duties on states that covered large areas of public life, which were all the time affected by new developments, and often, information had to be gathered from different ministries and regional governments. For these reasons, drawing up the

184 Report of interdepartmental consultations of 26 August 1991, held in preparation of the third meeting of the Ad Hoc Committee ESC, Archive MSAE, temporary file 384; Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401. See also: CoE Doc. Charte/Rel (91) Misc 8, p. 2, Archive MSAE, temporary file 401.

185 Interview with J.R. van Blankenstein, 24 December 2004.

186 Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384.

187 Polakiewicz, 1999, p. 21; Harris and Darcy, 2001, p. 356; Churchill and Khaliq, 2004, p. 424.

188 Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384.

189 Report of interdepartmental consultations of 26 August 1991, held in preparation of the third meeting of the Ad Hoc Committee ESC, Archive MSAE, temporary file 384.

190 Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401.

191 Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005.

reports was a very labour-intensive job.¹⁹² In the past, a small adjustment had already been made to the reporting cycle. In order to spread the workload of the supervisory organs and to expedite the process, in 1984, the Committee of Ministers decided to divide the contracting parties to the ESC in two reporting groups, initially for a trial period of six years. From then on, the supervisory bodies received reports from each of these groups in alternate years instead of having all contracting parties submitting their reports in the same year. As of 1989, this system was permanently adopted.¹⁹³ Although the system made it easier for the supervisory organs to deal with all the reports, it did not have any effect on the workload of the national bureaucracies. As early as 1974, the Governmental Committee came with the proposal to let contracting parties submit a detailed report on only one-third of the articles in each two-year cycle, but the proposal was met with strong opposition by the Committee of Independent Experts, and it was finally rejected by the Committee of Ministers on the ground that it would be contrary to the terms of the Charter.¹⁹⁴

The Netherlands was dissatisfied with the situation that resulted from these decisions. At the Ministry of Social Affairs and Employment, there were doubts about the existing division in two groups of reporting states, and it preferred to change the system so that all contracting parties would report at the same time on a limited amount of articles only. It expected that this would improve the quality of the reports, and that it would also make possible more in-depth investigations and comparisons of social policies, in which the contracting parties could learn from each other.¹⁹⁵ In a comment of April 1991, a similar plea had also been made by the employers' organisation, UNICE.¹⁹⁶ It is likely that the Dutch representative, Jan van Blankenstein, and the Dutch UNICE-representative, Cornelia Hak, had exchanged ideas in this respect. They had a good personal relationship, and usually, they travelled together when they went to Strasbourg, and discussed most of the topics dealt with in the negotiations.¹⁹⁷ Nonetheless, it would probably go too far to suggest that the Dutch ideas could be traced to UNICE's suggestion only; after all, it was in its own interest to lighten the work ensuing from the reporting obligations. Having ratified all the Charter's provisions, the burden on the Dutch administration was of course relatively great. Apart from that, it argued that the workload was especially problematic for smaller countries. For a country like Luxembourg, which had at that point in time not yet ratified the

192 Report of the meeting of the Ad Hoc Committee on the European Social Charter on 5-7 February 1991 in Strasbourg, Archive MSAE, temporary file 384. See also: Harris and Darcy, 2001, p. 310; Advisory Committee on Human Rights and Foreign Policy, 1988, p. 12.

193 Harris, 1991, p. 1; CoE Doc (90) 2, p. 8, footnote 1.

194 Harris, 1984, p. 210-211.

195 Note for the purpose of the ministerial consultations on the Netherlands' contributions in the ad hoc Committee on the European Social Charter, Archive MSAE, temporary file 384; Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384.

196 CoE Doc. Charte/Rel (91) 8, p. 3, Archive MSAE, temporary file 384.

197 Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005; Interview with C. Hak, 8 December 2004.

Charter, the extensiveness of the reporting obligations was even said to be a reason to refrain from actually doing so.¹⁹⁸

When a fundamental discussion on the issue of the workload had still not taken place during the second meeting of the Committee of Independent Experts in May 1991, the Netherlands made an agreement with Portugal and Belgium, to prepare a proposal on the frequency of reporting and a separation in groups of articles, to be introduced on behalf of the three of them.¹⁹⁹ The Secretariat had also proposed adaptations to the reporting procedure to relieve the pressure of work, but in comparison with the Dutch ideas, the reporting obligations would still be considerable.²⁰⁰ The basic points of departure for the proposal of the Netherlands were the following: all contracting parties would have to report on the Charter's most important, or so-called 'hard-core' articles once every two years; all other articles would be divided into four groups, and similar to the ILO's practice, contracting parties would have to report on each of these groups once every four years. Reporting on the Additional Protocol of 1988 would take place in years in which there were no reporting obligations for the hard-core articles.²⁰¹ What was remarkable about this proposal was that a few years earlier, in 1988, a similar system of 'partial' reporting under the ICESCR had been abandoned and replaced by a schedule under which states parties were to submit reports on the entire Covenant once every five years.²⁰² There were two important reasons for this. In the first place, it was felt that it was unsatisfactory and artificial to separate the Covenants' rights in discrete categories, and in the second place, it was considered too burdensome for the states parties.²⁰³ As becomes clear from a report of an interdepartmental meeting in August 1991, it was realized in the Netherlands that

198 Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384; Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin. Luxembourg would ratify the Charter on 10 October 1991. See: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>, accessed 11 September 2006.

199 Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384; Report of the second meeting of the Ad Hoc Committee ESC in Strasbourg on 22-24 May 1991, Archive MSAE, temporary file 384.

200 For the Secretariat's proposals, see: CoE Doc. Charte/Rel (90) 2, p. 21.

201 Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384; Document entitled 'Article 21 Reports concerning accepted provisions', Archive MSAE, temporary file 384; Document entitled 'What do we do with the European Social Charter?', Archive MSAE, temporary file 384; Memorandum from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the State Secretary for Social Affairs and Employment, 26 September 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin. For the 'hard-core' articles, see article 20.1 (b) ESC.

202 Craven, 1995, p. 62; Arambulo, 1999, p. 37.

203 *Ibidem*.

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the ICESCR's procedure had just been changed.²⁰⁴ However, especially at the Ministry of Social Affairs and Employment, the ILO procedures were taken as a point of reference rather than those of the ICESCR.²⁰⁵

Other Ministries in the Netherlands approved of the proposal that the Ministry of Social Affairs and Employment had drawn up.²⁰⁶ Apart from Austria, which did not want to change anything in the ESC, other states' reactions were generally positive, especially with respect to the possibility to deal with all contracting parties simultaneously.²⁰⁷ As the Dutch suggestion was based on a division of the Charter's articles into clusters, it could, for practical reasons, only be decided upon after the finalizing of the negotiations on the amendments to the substantive articles of the Charter, and they could thus not be included in the Amending Protocol.²⁰⁸ Probably, this is why the Netherlands did not formally present its proposals before the Turin Conference.²⁰⁹ By that time, however, others had made some alternative suggestions. Domestically, the Ministry of Welfare, Health and Cultural Affairs had come up with another suggestion, which was simply to extend the reporting intervals from two to four years. It recognized that reporting on clusters of articles on a yearly basis had the advantage of spreading the workload, but on the other hand, it would mean that reporting – with all the red tape involved in it – would become a yearly returning duty for the Ministries.²¹⁰ Apart from easing the work, this reporting method would also have the benefit of providing for an overall social picture of the contracting parties.²¹¹ Although the original proposal was adhered to, in her speech at the Turin Conference, the Dutch State Secretary of Social Affairs and Employment, Elske ter Veld, made clear that the suggestions of the Netherlands were not written in stone, and that her country was

204 Report of interdepartmental consultations of 26 August 1991, held in preparation of the third meeting of the Ad Hoc Committee ESC, Archive MSAE, temporary file 384.

205 Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005.

206 Report of interdepartmental consultations of 26 August 1991, held in preparation of the third meeting of the Ad Hoc Committee ESC, Archive MSAE, temporary file 384.

207 Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; Memorandum from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the State Secretary for Social Affairs and Employment, 26 September 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

208 Document entitled 'Comments of the Netherlands concerning document Misc 91 (49) on the work of the Committee on the European Social Charter (Charte-Rel)', Archive MSAE, temporary file 401.

209 Document entitled 'Decisions resulting from the meeting of Friday 2 August', Archive MSAE, temporary file 384; Document entitled 'Speech Dutch Secretary of State Elske ter Veld' (a handwritten note in the margins makes it clear that this was the speech actually delivered), Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

210 Fax from the International Welfare Sector of the Ministry of Welfare, Health and Cultural Affairs to the International Affairs Division of the Ministry of Social Affairs and Employment, 11 October 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

211 *Ibidem*.

open to other proposals that aimed to relieve the reporting duties of the contracting parties.²¹²

The Charte-Rel Committee started its deliberations on the question of the regularity of reporting in February 1992, at its first meeting after the conference in Turin. It was agreed that the main aim was to enhance its effectiveness and to improve the quality of work, and that reducing the workload was thus not in itself a decisive factor. In this context, the members of the Charte-Rel Committee agreed that the basic points of departure should be the following: a more evenly distribution of work; a greater emphasis on 'hard-core' provisions, cases of non-compliance and postponement, and requests for further information; comparability between contracting parties; and more regular reporting.²¹³ Several variants were discussed, none of them was exactly the same as the Dutch proposal, but all had some elements in common with it. The alternative that received most support and that was adopted by the Charte-Rel Committee was to establish an obligation to report each year on half of the hard core, and one-fourth of the other articles. In addition, reports would always have to cover provisions that had given rise to negative conclusions, adjournments and additional information during the previous reporting cycle.²¹⁴

The proposal was disapproved of by the Committee of Independent Experts. Initially, its representatives had recommended against longer intervals between national reports altogether, but they had reluctantly accepted the need for some relaxation in the existing arrangements.²¹⁵ The Committee of Independent Experts was opposed to the reporting scheme of the Charte-Rel Committee, because it was based on false premises. It asserted: '[T]he primary purpose of the supervisory process is not to conduct a comparative exercise in the protection afforded to particular rights in Europe', as the proposals and considerations in the Charte-Rel Committee seemed to imply, 'but to determine whether states are complying with their treaty obligations.'²¹⁶ Because it felt that it was often necessary to appreciate the general picture in a state to determine its compliance with a particular provision, the Committee of Independent Experts was in favour of a regular submission of full reports.²¹⁷

Because the alternative that the Committee of Independent Experts proposed was more demanding for states, it was decided in the Charte-Rel Committee to ignore the opinion of the Committee of Independent Experts and to transmit its original proposal

212 Document entitled 'Speech Dutch Secretary of State Elske ter Veld' (a handwritten note in the margins makes it clear that this was the speech actually delivered), Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

213 CoE Doc. Charte/Rel (92) 6 prov. rev., p. 6, Archive MSAE, temporary file 401.

214 CoE Doc. Charte/Rel (92) 6 prov. rev., p. 6, 8 and 22, Archive MSAE, temporary file 401.

215 CoE Doc. Charte/Rel (91) 15, p. 3, Archive MSAE, temporary file 384; Document entitled 'Opinion of the Committee of Independent Experts on the Committee on the European Social Charter's Proposal concerning the Periodicity of Reports', Archive MSAE, temporary file 401.

216 Document entitled 'Opinion of the Committee of Independent Experts on the Committee on the European Social Charter's Proposal concerning the Periodicity of Reports', Archive MSAE, temporary file 401.

217 *Ibidem*.

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to the Committee of Ministers with the request to let it come into force immediately.²¹⁸ The Committee of Ministers approved a proposal to adopt the modifications for a trial period of four years.²¹⁹ In the long run, it would, nevertheless, be better to initiate the amendment procedure of article 36 of the Charter to create more clarity and legal security.²²⁰ The Netherlands and Cyprus were willing to take that responsibility, and submitted a proposal.²²¹ This resulted in a final decision in 1996; apart from some minor changes, it was comparable to the temporary proposal adopted in 1992.²²²

5.4 THE COLLECTIVE COMPLAINTS PROTOCOL

5.4.1 The desirability of a complaints mechanism

Apart from an improvement of the reporting procedure, another measure that was proposed to bring new life into the Charter was the introduction of a complaints system. In section 5.1.2, it was mentioned that the Parliamentary Assembly had already tried to convince the member states of the Council of Europe of the need to improve the ESC in the late 1970s. Its proposals had also included the suggestion of a complaints procedure for individuals and groups that was similar to the ECHR-system, but

218 CoE Doc. Charte/Rel (92) 20 prov., p. 10, Archive MSAE, temporary file 401. The Committee of Independent Experts' proposal was to retain a division in groups of states, which would all report quadrennially on the complete Charter, and once every two years on the hard core articles, negative conclusions, adjournments and additional information. See: CoE Doc. Charte/Rel (91) 26, p. 6, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel (91) 26 Addendum, p. 3, Archive MSAE, temporary file 401; Document entitled 'Opinion of the Committee of Independent Experts on the Committee on the European Social Charter's Proposal concerning the Periodicity of Reports', Archive MSAE, temporary file 401.

219 CoE Doc. No. 9272, Committee of Ministers, Ministers' Deputies, notes on the agenda, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel (92) 33 def., p. 10, Archive MSAE, temporary file 402. See also: Harris and Darcy, 2001, p. 307.

220 CoE Doc. Charte/Rel (92) 33 def., p. 10, Archive MSAE, temporary file 402. Article 36 ESC read: 'Any member of the Council of Europe may propose amendments to this Charter in a communication addressed to the Secretary General of the Council of Europe. The Secretary General shall transmit to the other members of the Council of Europe any amendments so proposed, which shall then be considered by the Committee of Ministers and submitted to the Consultative Assembly for opinion. Any amendments approved by the Committee of Ministers shall enter into force as from the thirtieth day after all the Contracting Parties have informed the Secretary General of their acceptance. The Secretary General shall notify all the members of the Council of Europe and the Director General of the International Labour Office of the entry into force of such amendments.'

221 CoE Doc. Charte/Rel (93) 10 def., p. 13, Archive MSAE, temporary file 402; Document entitled 'Council of Europe, European Social Charter', 1 December 1993, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

222 The main change was that the reporting obligations were divided differently than under the temporary system of 1992; instead of annual reports on half of the 'hard core', and one-fourth of the other provisions, under the system that was adopted in 1996, in uneven years, contracting states have to report on all 'hard core' provisions, while they report on half of the other provisions in even years. See: Harris and Darcy, 2001, p. 307-308.

among governments, there was no support for this idea.²²³ The proposal that the Secretariat put forward in the context of the revitalisation process differed from these earlier recommendations in one important respect: this plan was modelled on the ILO's complaints system, which was described in the previous chapter, rather than on the ECHR procedures.²²⁴ This meant that the procedure would not be open to individuals, but only to representative organisations.²²⁵

As was described in chapter 1, the policy memoranda on human rights and foreign policy of the Dutch government contained the statement that complaints procedures were, in principle, needed for effective supervision of human rights treaties. This did not, however, seem to affect the determination of the Netherlands' position in the negotiations on the reform of the ESC. At the Ministry of Social Affairs and Employment, officials were not familiar with the contents of the policy papers, and they presumed that these documents were primarily aimed at matters that were dealt with at the Ministry of Foreign Affairs.²²⁶ At the Ministry of Social Affairs and Employment, there were strong doubts about the idea to add a complaints system to the ESC's reporting mechanism, and in a memorandum that was drawn up in preparation of ministerial consultations, it communicated to the other Ministries that it felt that petition procedures were not appropriate in the realm of social and economic rights.²²⁷ During the meeting, this position was commented upon and the view was brought to the fore that classic rights and social and economic rights could not be regarded as totally different from each other and that, depending on its exact contents, a right of the latter category might also be legally enforceable. Hence, the question was not so much whether a complaints procedure was possible, but rather whether it was considered desirable.²²⁸

At the Ministry of Social Affairs and Employment, a complaints system was, in principle, regarded as an unattractive reform measure. There were two reasons for this. In the first place, the Netherlands gave priority to the improvement of the reporting procedures over the creation of a complaints system.²²⁹ It was of the opinion that a

223 Betten, 1988a, p. 10; Harris, 1984, p. 266; Wiebringhaus, 1988, p. 13. See: Recommendation no. 839, 1978. Quoted in CoE Doc. Charte/Rel (90) 2 Add., p. 350. See also: Recommendation no. 839, 1978. Quoted in CoE Doc. Charte/Rel (90) 2 Add., p. 350-351.

224 Harris and Darcy, 2001, p. 16-17, and 355; Birk, 1998, p. 262.

225 CoE Doc. Charte/Rel (90) 2, p. 32. For a short explanation of the ILO-system, see section 4.6.

226 Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005; Interview with R. Kuggeleijn, 7 January 2005.

227 Document entitled 'Control on the implementation of the European Social Charter', annex to a letter from the International Affairs Division of the Ministry of Social Affairs and Employment to a professor of Utrecht University, 11 February 1991, Archive MSAE, temporary file 384; Note for the purpose of the ministerial consultations on the Netherlands' contributions in the ad hoc Committee on the European Social Charter, Archive MSAE, temporary file 384.

228 Concise report of the ministerial consultations on the Netherlands' contributions in the ad hoc Committee on the European Social Charter of 14 May 1991, Archive MSAE, temporary file 384.

229 Note for the purpose of the ministerial consultations on the Netherlands' contributions in the ad hoc Committee on the European Social Charter, Archive MSAE, temporary file 384; Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file

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petitions procedure could not make up for a failing reporting system, and what it wanted to prevent in any case was that talks about a possible complaints procedure would distract from the reforms that were needed under the regular system, and would diminish pressure on governments to come to results in this regard. As long as there was no agreement on a division of responsibilities between the supervisory organs involved in the reporting procedure, the introduction of a system of petitions was considered undesirable, and actually, the Netherlands also preferred to wait and see first how reforms in the reporting procedure would work out in practice.²³⁰ Therefore, it expressed a general reservation over the introduction of an application system in the Charte-Rel Committee.²³¹

In the background, there was another reason the Netherlands was resistant to the creation of a complaints procedure. A few years earlier, the government had been startled by a number of judgments that had important implications for its legislation in the field of social security. In April 1987, the supervisory organ of the ICCPR, the Human Rights Committee, had determined that the Dutch Unemployment Act was in violation of article 26 of the Covenant. It argued that this non-discrimination article was not only restricted to civil and political rights, but applied to social and economic rights as well. Because the Dutch Unemployment Act stipulated that married women could receive social security benefits only on the condition that they were the breadwinner in their family, while it did not contain such a precondition for married men, the Committee concluded that the Act was in violation of article 26.²³² This article was considered directly applicable, and if the Dutch courts would follow the Committee's conclusions, this meant that individual citizens could challenge discriminatory aspects of domestic laws in the field of social security and claim their rights before a Dutch court. When this actually happened in May 1987 and February 1988, the government was so shocked that it seriously considered revoking the ICCPR and reaccessing with a reservation on article 26.²³³

The main reason for this strong reaction was that the financial repercussions of the verdict of February 1988 in particular were considerable. To the great relief of human

401; Report of interdepartmental consultations of 26 August 1991, held in preparation of the third meeting of the Ad Hoc Committee ESC, Archive MSAE, temporary file 384.

230 Document entitled 'Instruction concerning the draft protocol to the European Social Charter', Archive MSAE, temporary file 401; Memorandum from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the State Secretary for Social Affairs and Employment, 26 September 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; Interview with J.R. van Blankenstein, 24 December 2004.

231 Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; CoE Doc. CM (91) 159, p. 14, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin. See also: Mohr, 1992, p. 368.

232 Heringa, 1988, p. 19-20; Baehr, 2006, p. 191-192.

233 Riphagen and Smitskam, 1990, p. 401-404 and 408-412; Heringa, 1988, p. 22-23; Alkema, 1994, p. 6-8. See also: 'Draft annual report of NJCM', In: *NJCM-Bulletin*, Vol. 14, No. 2, 1989, p. 266 and 270.

rights activists and officials of the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, the government did not denounce the ICCPR, and tried to reduce the costs involved by an amendment that introduced further restrictions for all.²³⁴ Nonetheless, the whole experience made a profound impression on many government officials, in particular at the Ministry of Social Affairs and Employment, which had to deal with the direct consequences of the case. Perhaps, the 'article 26 trauma' can even be considered a turning point in Dutch human rights policies; more than ever before, the Netherlands would be aware of financial consequences that might follow from international human rights obligations.²³⁵ What the article 26 jurisprudence had in any case taught was that direct appeals in the field of social and economic rights could have tremendous and unexpected cost aspects. With these experiences fresh in their minds, the representatives of the Netherlands were somewhat concerned about the idea of a petition procedure, even if it was only open to representative organisations.²³⁶

What they did consider acceptable was a procedure modelled on the 1503-procedure of the UN.²³⁷ This procedure was established by an ECOSOC resolution of May 1970 and authorized the UN Commission on Human Rights to deal with communications on consistent patterns of gross human rights violations.²³⁸ The names of the states that had been discussed under the 1503-procedure were made public, but otherwise it was completely confidential.²³⁹ Furthermore, the fact that the eventual discussion took place in a political organ could sometimes make the procedure quite meaningless.²⁴⁰ Hence, it was a risk-free alternative, and probably, this was exactly what made it attractive for the Netherlands. However, in the Charte-Rel Committee, the Dutch suggestions were not supported by anyone.²⁴¹ The Secretariat's proposal for a collec-

234 Riphagen and Smitskam, 1990, p. 410-411; Interview J.A. Walkate, 21 April 2004.

235 Interview with H.A.M. von Hebel, 21 December 2005. See also: Interview with J.R. van Blankenstein, 24 December 2004.

236 Interview with J.R. van Blankenstein, 24 December 2004; Interview with L.J.A. van Amersfoort, 13 January 2005; Interview with R. Kuggeleijn, 7 January 2005. See also: Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

237 See: Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384; Handwritten note on the back of page 4 of CoE Doc. Charte/Rel (91) 6, Archive MSAE, temporary file 384.

238 See: ECOSOC resolution 1503, 27 May 1970.

239 Baehr, 2001, p. 58.

240 See: Steiner and Alston, 2000, p. 615-618. The evident weaknesses of the procedure were exactly why the Advisory Committee on Human Rights and Foreign Policy expressed the opinion that the aim to strengthen the protection of social and economic rights in the UN would not be served by making more use of this procedure, as the Dutch government proposed a few years later, in 1994. See: Advisory Committee on Human Rights and Foreign Policy, 1994, p. 14. See also: Castermans-Holleman and Flinterman, 1994, p. 439.

241 Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384.

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tive complaints mechanism, on the other hand, received broad support and was welcomed by the Parliamentary Assembly, the Committee of Independent Experts, the ETUC, and the ICJ.²⁴² The employers' side of industry was a bit more reserved, but under certain conditions, it could support it, and what was most important, the majority of the states appeared to be positive about the proposal, too.²⁴³

The Charte-Rel Committee decided to establish a Working Party of five representatives to further examine the possibilities for a collective complaints system and to draw up proposals on the details of the procedure in May 1991.²⁴⁴ The Netherlands did not participate in this Working Party.²⁴⁵ The outcomes of the discussions were presented to the Charte-Rel Committee at its third meeting in the first week of September 1991.²⁴⁶ Apart from the Netherlands, there were three other states that expressed general reservations to the introduction of a complaints system at this meeting, namely: Germany, the United Kingdom, and Turkey.²⁴⁷ Besides, opinions were still divided about the organisation of the procedure, and the draft that eventually received the majority of the votes of the members of the Charte-Rel Committee was heavily criticized by the representatives of ETUC, UNICE and the ILO. At a meeting of senior officials that was held right before the Conference in Turin, it was therefore decided that the matter could not yet be decided upon.²⁴⁸

When negotiations on the Complaints Protocol continued after the Conference, the Netherlands first maintained its general reservations, but it became increasingly aware

242 CoE Doc. Charte/Rel (91) 9, Archive MSAE, temporary file 384; CoE Parliamentary Assembly Doc. 6440, p. 2 and 5, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 6, p. 4, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 12, p. 7, Archive MSAE, temporary file 384.

243 CoE Doc. Charte/Rel (91) 6, p. 4, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 15, p. 9, Archive MSAE, temporary file 384; CoE doc. Charte/Rel (91) 8, p. 6, Archive MSAE, temporary file 384; Letter from the Federation of Netherlands Industry to the Adjunct Director Human Rights of the Council of Europe, 27 July 1992, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Interview with C. Hak, 8 December 2004.

244 CoE Doc. Charte/Rel (91) 15, p. 9, Archive MSAE, temporary file 384; Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384.

245 CoE Doc. Charte/Rel (91) 15, p. 9, Archive MSAE, temporary file 384.

246 CoE Doc. CM (91) 159, p. 14, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

247 Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September '91 in Strasbourg, Archive MSAE, temporary file 401; CoE Doc. CM (91) 159, p. 14, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin. See also: Mohr, 1992, p. 368.

248 CoE Doc. CM (91) 159, p. 12-15, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; CoE Doc. CM (91) 188, p. 2 and 6, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; Document entitled 'Most recent progress report with regard to procedural aspects of the 'relance' of the European Social Charter', Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

that it held a rather isolated position.²⁴⁹ Moreover, the three other countries that had raised objections to a complaints procedure were not exactly known for their positive attitude towards the reform process in general.²⁵⁰ The Netherlands tried to distinguish its own position by a more cooperative attitude; in spite of its doubts, it would not block decision-making if other countries were in favour.²⁵¹ Its position was also different from that of the other opposing countries because it took a different stand in the debate over the involvement of the Governmental Committee, which is dealt with in the next section. Finally, one of the Dutch arguments against a complaints procedure was that the reform of the reporting procedure should be secured first. Because the United Kingdom, Turkey and Germany were also opposed to these reform measures, this clearly distinguished the Netherlands from the other opponents to the Complaints Protocol.

However, once it had been decided to apply the main provisions of the Amending Protocol in advance of its formal entering into force, rejection of a complaints procedure for reasons of principle was no longer needed by the Netherlands, and at the fifth meeting of the Charte-Rel Committee it withdrew its reservations.²⁵² The Netherlands had not made up its mind about whether it would be willing to ratify a Collective Complaints Protocol in the future, but from a political point of view it seemed recommendable to stop withholding support, and to instead participate in the work to try and help draft as good and acceptable a text as possible.²⁵³ While the Netherlands started to support the Complaints Protocol, Germany, the United Kingdom and Turkey continued their opposition, and together with Iceland and Austria they submitted negative comments to the Committee of Ministers, which made it impossible to adopt the Protocol that the Charte-Rel Committee had forwarded.²⁵⁴ As was described in

249 CoE Doc. Charte/Rel (92) 6 prov. rev., p. 2, Archive MSAE, temporary file 401; Memorandum from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the State Secretary for Social Affairs and Employment, 26 September 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

250 Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to a list of persons involved in the ESC, 15 April 1992, Archive MSAE, temporary file 401.

251 Document entitled 'Ministerial Meeting Council of Europe concerning the European Social Charter (ESC)', Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; Document entitled 'Most recent progress report with regard to procedural aspects of the 'relance' of the European Social Charter', Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

252 Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to a list of persons involved in the ESC, 15 April 1992, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel (92) 20 prov, p. 2, Archive MSAE, temporary file 401.

253 Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to a list of persons involved in the ESC, 15 April 1992, Archive MSAE, temporary file 401; Interview with R. Kuggeleijn, 7 January 2005.

254 See: CoE Doc. CM (93) 32, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; CoE Doc. CM (93) 32 revised, addendum, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; CoE Doc. CM (93) 32 revised, addendum 2, Archive

section 5.1.3, negotiations then continued in the ad hoc group of Deputies, which involved both experts and Permanent Representatives of the Council of Europe's member states. By this time, the Netherlands had come to the conclusion that the coming into being of a Complaints Protocol was an important part of the revitalisation process, and it tried to make a positive contribution to the work of the group, and to secure the Protocol's adoption.²⁵⁵

5.4.2 The question of the involvement of the Governmental Committee

As had been the case with the negotiations on the Amending Protocol, one of the most controversial issues in the deliberations on a complaints mechanism concerned the question of the measure of state control on the procedure. In spite of its initial reservations, the Netherlands participated in this debate right from the start. The Working Party that was set up to prepare the discussion in the Charte-Rel Committee of September 1991, proposed three alternatives in respect to the question of which supervisory organs should be involved. One option was to make the Committee of Independent Experts responsible for the whole procedure. Another possibility was to let this Committee give its opinion on whether or not there had been a violation of obligations under the ESC, but to leave the formulation of recommendations to the contracting party to the Committee of Ministers. The third alternative was to include an intermediate stage in this procedure and to give the Governmental Committee the competence to make proposals for recommendations to the Committee of Ministers.²⁵⁶

The Netherlands preferred to keep the procedure as similar to the reporting procedure as possible, and in this respect, it also kept an eye on the terminology used. From this perspective, the first option was attractive for the Netherlands, because this draft article used the familiar term 'conclusions', while the other two drafts contained the term 'violations', which implied a judicial element that was absent in the reporting procedure and which the Netherlands considered inappropriate, because the members of the Committee of Independent Experts were experts and not judges. If the matter was approached from the perspective of the organs involved, it would, however, prefer to keep the Governmental Committee included in the procedure, because leaving it out would be contrary to the regular reporting procedure.²⁵⁷ All in all, the Netherlands was

MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

²⁵⁵ Fax from the International Affairs Division of the Ministry of Social Affairs and Employment to the Council of Europe Section of the Ministry of Foreign Affairs, 13 October 1993, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Memorandum on the proposal of the Ad Hoc Committee ESC concerning a collective complaints procedure, handwritten date: 26 July 1993, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

²⁵⁶ CoE Doc. Charte/Rel-GT-1 (91) 2 def., p. 4 and 8-9, Archive MSAE, temporary file 384.

²⁵⁷ Document entitled 'Preparation Ad Hoc Committee ESC', Archive MSAE, temporary file 384; Document entitled 'Discussion document of the Working Party possibility to appeal', Archive MSAE, temporary file 384.

thus wary of novelties in this phase of the negotiations. Most other states were anxious to give up state control as well, because at the third meeting of the Charte-Rel Committee in September 1991, none of them supported the exclusion of the Committee of Ministers from the procedure, and there were only four states, France, Cyprus, Italy and Belgium, that were in favour of the variant that left out the Governmental Committee.²⁵⁸ The three-stage proposal that involved not only the Committee of Independent Experts, but also the Governmental Committee and the Committee of Ministers, clearly got the most support with eleven votes in favour, three against and five abstentions.²⁵⁹ Therefore, it was decided to retain this alternative.²⁶⁰

The representatives of ETUC, UNICE and the ILO deeply regretted this. They had been in favour of the alternative that excluded all governmental organs from the procedure and that allowed the Committee of Independent Experts to deal with all stages of the complaints procedure. According to them, ‘the system opted for no longer presented much practical interest to the organisations liable to make complaints’, because it was too lengthy and insufficiently independent, and because they did not see how polemics between the different supervisory committees would be avoided from reoccurring, if this option was chosen.²⁶¹ These words of criticism had a considerable impact on the negotiation process. They created doubts among certain countries, like some of the Scandinavian states, about whether the decision in favour of the variant chosen for in the Charte-Rel Committee should be reconsidered, and changed for a more independent alternative.²⁶²

The statements by ETUC, UNICE and the ILO also had an appreciable effect on the Dutch perception of the question. At first it had expressed the opinion that the Governmental Committee should not be excluded because the complaints procedure should not deviate from the regular supervisory system, but pointing to the comments

258 CoE Doc. Charte/Rel (91) Misc 9, p. 4, Archive MSAE, temporary file 401; CoE Doc. CM (91) 159, p. 14-15, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; Document entitled ‘Most recent progress report with regard to procedural aspects of the ‘relance’ of the European Social Charter’, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

259 CoE Doc. CM (91) 159, p. 14, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

260 CoE Doc. Charte/Rel (91) Misc 9, p. 3, Archive MSAE, temporary file 401.

261 CoE Doc. Charte/Rel (91) Misc 9, p. 4, Archive MSAE, temporary file 401; Harris, 1992, p. 673; CoE Doc. CM (91) 159, p. 14, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin. See also: Report of the meeting of the Ad Hoc Committee ESC, 3 to 6 September ’91 in Strasbourg, Archive MSAE, temporary file 401; Document entitled ‘Instruction concerning the draft protocol to the European Social Charter’, Archive MSAE, temporary file 401; Memorandum from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the State Secretary for Social Affairs and Employment, 26 September 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

262 Document entitled ‘Most recent progress report with regard to procedural aspects of the ‘relance’ of the European Social Charter’, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

of the employers' and workers' organisations, the Netherlands turned the argument around now, and maintained that the proposal of the Charte-Rel Committee was nothing more than a pressure cooker version of the reporting procedure, which could not be expected to add anything to the existing system.²⁶³ In addition, the Netherlands had come to the conclusion that the involvement of the Governmental Committee might be contrary to its new role under the reporting procedure. The Amending Protocol determined that this role would mainly be to judge the seriousness of a situation on the basis of social, economic, and political considerations. This followed logically from its principal duty to select situations which should be the subject of recommendations by the Committee of Ministers. It was thought that the complaints procedure would by its collective nature relate only to very serious infringements of the Charter. Therefore, these kinds of assessments would be redundant in this procedure and complaints would only need to be considered from a legal point of view, which was the responsibility of the Committee of Independent Experts.²⁶⁴

When the Charte-Rel Committee met again after the Turin Conference, it appeared that several states had changed their position. There were still no delegations in favour of excluding the Committee of Ministers, because this was considered contrary to one of the Protocol's aims to give the Charter a greater political impact.²⁶⁵ The Netherlands shared this opinion.²⁶⁶ The group of countries in favour of leaving out the intermediate stage with the Governmental Committee had increased, though. Whereas this alternative had not attracted more than four votes during the third meeting of the Charte-Rel Committee, there were now ten states in favour: Belgium, Cyprus, Finland, France, Greece, Malta, Norway, Sweden, Switzerland, and, allowing for its general reservations, the Netherlands.²⁶⁷ The countries still opposed to that alternative were: Austria, Denmark, Iceland, Portugal, Turkey, Germany and the United Kingdom.²⁶⁸ It appeared impossible to come any closer to a consensus at the Charte-Rel Committee's next meeting in May 1992, and eventually, the Committee decided against the involvement

263 Document entitled 'Comments of the Netherlands concerning document Misc 91 (49) on the work of the Committee on the European Social Charter (Charte-Rel)', Archive MSAE, temporary file 401; Document entitled 'Instruction concerning the draft protocol to the European Social Charter', Archive MSAE, temporary file 401.

264 Letter from the Deputy Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Ministry of Foreign Affairs, the Ministry of Welfare, Health and Cultural Affairs, and the Ministry of Justice, 28 September 1992, Archive MSAE, temporary file 401.

265 CoE Doc. Charte/Rel (92) 6 prov. rev., p. 4, Archive MSAE, temporary file 401.

266 Annex to a letter from the Deputy Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Ministry of Foreign Affairs, the Ministry of Welfare, Health and Cultural Affairs, and the Ministry of Justice, 28 September 1992, Archive MSAE, temporary file 401.

267 CoE Doc. Charte/Rel (92) 6 prov. rev., p. 4, Archive MSAE, temporary file 401. See also: Document entitled 'Most recent progress report with regard to procedural aspects of the 'relance' of the European Social Charter', Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin.

268 CoE Doc. Charte/Rel (92) 6 prov. rev., p. 5, Archive MSAE, temporary file 401.

of the Governmental Committee by a vote of fourteen to seven with three abstentions, and forwarded its proposal to the Committee of Ministers.²⁶⁹

As was mentioned, states that did not agree with this decision continued their opposition here. For Germany, there was, in principle, ‘no scope for negotiation’ in respect to the question of the involvement of the Governmental Committee.²⁷⁰ Iceland and the United Kingdom made reservations to the exclusion of the Governmental Committee as well.²⁷¹ The Netherlands agreed that it was necessary to re-open the negotiations, because the success and effectiveness of the Complaints Protocol would to a large extent depend on a wide ratification by the ESC’s contracting parties.²⁷² On the other hand, it did not want to introduce the Protocol at any cost; its device was that it would be better not to have any Protocol at all than to have one that was meaningless or ineffective. Apart from sufficient ratifications, support from the organisations that were supposed to make use of the procedure would certainly be needed for a successful Protocol.²⁷³ This meant that the Netherlands was prepared to make concessions to secure wider support from governments, but only within certain boundaries. For instance, an acceptable gesture of compromise towards states that preferred participation of the Governmental Committee would be to allow states to take part in the vote on resolutions in relation to complaints that were lodged against them.²⁷⁴ It did, however, not want to turn back the decision that the Charte-Rel Committee had made

269 CoE Doc. Charte/Rel (92) 20 prov, p. 6, Archive MSAE, temporary file 401.

270 CoE Doc. Charte/Rel (92) 12, p. 3, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel (92) 20 prov, p. 6, Archive MSAE, temporary file 401; CoE Doc. CM (93) 32, p. 6, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

271 CoE Doc. CM (93) 32, p. 10, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; CoE Doc. CM (93) 32 revised, addendum, p. 3, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

272 Memorandum on the proposal of the Ad Hoc Committee ESC concerning a collective complaints procedure, handwritten date: 26 July 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Fax from the International Affairs Division of the Ministry of Social Affairs and Employment to the Council of Europe Section of the Ministry of Foreign Affairs, 13 October 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

273 Document entitled ‘Council of Europe, Protocol to the European Social Charter concerning a collective complaints procedure’, 10 December 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

274 Document entitled ‘Council of Europe, Protocol to the European Social Charter concerning a collective complaints procedure’, 10 December 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Document entitled ‘CoE/ESC/additional protocol: collective complaints procedure, instruction’, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Report of the meeting of 17 December 1993, 14 January 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

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with respect to the Governmental Committee.²⁷⁵ This would be unacceptable for the employers' and workers' organisations, and if they would not make use of the complaints procedure, this would remove the rationale of having it at all.²⁷⁶ In principle, the Netherlands therefore intended to withhold support from the Protocol if the majority of states would finally agree with the participation of the Governmental Committee. Only when the Governmental Committee could be provided with a role that was not predominant and that would not negatively affect the objectiveness and swiftness of the procedure, might the Netherlands consider accepting it.²⁷⁷

In the ad hoc group that the Committee of Ministers' Deputies established in September 1993 to solve the outstanding problems, a solution was indeed sought in this direction. Finland introduced a compromise proposal to let the Committee of Ministers decide on a case-by-case basis on the involvement of the Governmental Committee.²⁷⁸ The Netherlands did not immediately reject this proposal, but warned against the risk of the exception becoming the rule. It felt that the modalities for an intervention by the Governmental Committee should therefore be specified. Italy, Belgium and France endorsed this point of view.²⁷⁹ The Netherlands also considered it problematic if the Governmental Committee would base its preparatory work on social, economic and other policy considerations, because it actually preferred a

275 Memorandum on the proposal of the Ad Hoc Committee ESC concerning a collective complaints procedure, handwritten date: 26 July 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

276 Document entitled 'Council of Europe, European Social Charter', 1 December 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Document entitled 'Council of Europe, Protocol to the European Social Charter concerning a collective complaints procedure', 10 December 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

277 Document entitled 'CoE/ESC/additional protocol: collective complaints procedure, instruction', Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Document entitled 'Council of Europe, Protocol to the European Social Charter concerning a collective complaints procedure', 10 December 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

278 Document entitled 'Conclusions of the Chair at the close of the first meeting of the open-ended ad hoc group of Ministers' Deputies to examine the draft Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (17 December 1993)', 20 January 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

279 Report of the meeting of 17 December 1993, 14 January 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997. See also: Handwritten overview of the positions taken in the meeting of the ad hoc group on 17 December 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Fax from the International Affairs Division of the Ministry of Social Affairs and Employment to the Permanent Representative in Strasbourg, 4 March 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

procedure that was based on legal assessments only.²⁸⁰ Yet, after some further discussion, in March 1994, a solution seemed to be reached that all states could accept that gave governments the possibility to avert incorrect – or undesirable – interpretations of the Charter. According to this proposal the following text would be inserted into the text of the Protocol: ‘Where the report [with the conclusions of the Committee of Independent Experts] raises new issues, the member state concerned may ask the Committee of Ministers to refer the report to the Governmental Committee for opinion. This decision shall be taken by the Committee of Ministers by a simple majority of those voting, with entitlement to voting limited to the Contracting Parties to this Protocol.’²⁸¹ The Netherlands helped formulate this compromise, and did not seem to have major objections to it.²⁸²

However, to the great annoyance of countries like Germany, Denmark and Austria, the Netherlands appeared to have changed its position at the last meeting of the ad hoc group of Deputies two weeks later.²⁸³ Together with, among others, France, Sweden and Cyprus, the Netherlands turned against the compromise that had just seemed to be reached, because it had become convinced that it would be unacceptable to ETUC and UNICE. After an appraisal of the pros and cons of either a Protocol that would be acceptable for the states, but not for the organisations of management and labour, or a Protocol that would have the approval of the latter, but not of all states, a choice was made in favour of the second option.²⁸⁴ Nonetheless, in the ad hoc group, the attempt to return to the draft of the Charte-Rel Committee resulted in nothing more than yet another deadlock, and the ad hoc group reported back to the Committee of Ministers’ Deputies that it had not been able to reach agreement.²⁸⁵

In the meantime, the outside world started to wonder why it took the Council of Europe’s member states so long to conclude the negotiations on the Collective Complaints Protocol. In the Parliamentary Assembly, questions were, for instance, posed about the delay in the Protocol’s adoption, which did not pass unnoticed in the Com-

280 Fax from the International Affairs Division of the Ministry of Social Affairs and Employment to the Permanent Representative in Strasbourg, 4 March 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

281 Report of the meeting of 7 March 1994, 11 March 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

282 *Ibidem*.

283 Fax with a handwritten version of the report of the meeting of the ad hoc Group of 18 March 1994 from one official of the International Affairs Division of the Ministry of Social Affairs and Employment (sent from Strasbourg) to another official of that Division, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

284 Report of the meeting of 18 March 1994, 22 March 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

285 CoE Doc. No. 94/212, Committee of Ministers, Ministers’ Deputies, notes on the agenda, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Report of the meeting of 18 March 1994, 22 March 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

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mittee of Ministers' Deputies.²⁸⁶ Moreover, on the domestic front, the Dutch Advisory Committee on Human Rights and Foreign Policy had also made a plea for a swift adoption of the Collective Complaints Protocol.²⁸⁷ The Netherlands realized that it would need to take a less uncompromising stand to enable a final decision; in the instructions for the Netherlands' Deputy in Strasbourg, it could be read that it was ready to make compromises, and would, if necessary, also be prepared again to accept a limited role for the Governmental Committee in the complaints procedure.²⁸⁸ Hence, it was able to support the solution that was proposed by the Committee of Minister's Rapporteur Group on Human Rights, which was instructed to make another attempt to reach agreement on the text of the Protocol.²⁸⁹ Its proposal was built on the earlier compromise text of the ad hoc group, but differed from it, because it made it explicit that the Committee of Ministers would consult the Governmental Committee in exceptional cases only, and because a two-thirds majority would be needed to take that decision instead of a simple majority.²⁹⁰ Actually, the Netherlands still preferred the original text of the Charte-Rel Committee, but if this was what was needed to get the proposal through, it accepted this alternative.²⁹¹ The text received the majority 'of two-thirds of the votes cast and the simple majority of member States' required for its adoption in the Committee of Ministers' Deputies on 22 June 1995.²⁹²

286 CoE Doc. No. 95/558, Committee of Ministers, Ministers' Deputies, notes on the agenda, p. 2, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

287 Advisory Committee on Human Rights and Foreign Policy, 1994, p. 25 and 34.

288 Fax from the International Affairs Division of the Ministry of Social Affairs and Employment to the Council of Europe Section of the Ministry of Foreign Affairs, 18 May 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

289 Handwritten notes on CoE Doc. No. 95/558, Committee of Ministers, Ministers' Deputies, notes on the agenda, p. 1, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

290 CoE Doc. GR-H(95)1, p. 2, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; CoE Doc. GR-H(95)3, p. 2, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; CoE Doc. 95/812, Committee of Ministers, Ministers' Deputies, notes on the agenda, p. 8, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

291 Handwritten notes on CoE Doc. No. 95/558, Committee of Ministers, Ministers' Deputies, notes on the agenda, p. 1, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

292 CoE Doc. 95/812, Committee of Ministers, Ministers' Deputies, notes on the agenda, p. 2, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Document entitled '541st meeting – 19-22 June 1995, Item 4.7, Draft Additional Protocol to the European Social Charter providing for a system of collective complaints', faxed by the Permanent Representative in Strasbourg to the Council of Europe Section of the Ministry of Foreign Affairs on 27 June 1995, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

5.4.3 The questions of access and admissibility

Apart from the problem of who should examine and deal with complaints, another important matter was the question of who should be allowed to lodge a complaint. What the Secretariat proposed was a collective complaints procedure, which would be open for petitions from national or European organisations of management and labour as well as other representative NGOs.²⁹³ Possibilities that were not mentioned were those of an interstate or individual complaints procedure. The former option was shortly considered in the Charte-Rel Committee on the proposal of Malta, but it did not receive support from any country except Sweden.²⁹⁴ Right from the start, it was evident that a mechanism for individual petitions would not be acceptable either. It was generally agreed that a complaints procedure should, in the first place, be confined to serious cases only, and should, in the second place, take into account that the ESC-provisions were intended to entail duties for governments to provide for social goods rather than rights that could be claimed on an individual basis.²⁹⁵

For the Netherlands, there was no doubt about this either, especially not after what had happened with article 26 of the ICCPR.²⁹⁶ The reason a collective complaints mechanism was easier to accept than an individual complaints procedure was that the latter's main aim would be to ensure the general conformity of national law and practice with the ESC's provisions, and not to remedy an individual victim. Therefore it did, in principle, not undermine the idea that economic and social rights are not justiciable.²⁹⁷ From the perspective of the government, this was a crucial difference, because if concrete and individual victims could be pointed to, this might result in claims for benefits from the government, with all the costs involved. As the Netherlands had experienced, this could result in considerable and unexpected expenses from

²⁹³ CoE Doc. Charte/Rel (90) 2, p. 32.

²⁹⁴ CoE Doc. Charte/Rel (91) 27, p. 3-4, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel (91) Misc 9, p. 5, Archive MSAE, temporary file 401; CoE Doc. CM (91) 159, p. 15, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; CoE Doc. Charte/Rel (92) 6 prov. rev., p. 4, Archive MSAE, temporary file 401.

²⁹⁵ Document entitled 'Progress report 'relance' European Social Charter of the Council of Europe (ESC)', Archive MSAE, temporary file 384; Report of the second meeting of the Ad Hoc Committee ESC in Strasbourg on 22-24 May 1991, Archive MSAE, temporary file 384; Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; CoE Doc. Charte/Rel (91) 6, p. 4, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 15, p. 9, Archive MSAE, temporary file 384.

²⁹⁶ Annex to a letter from the Director of the International Affairs Division of the Ministry of Social Affairs and Employment to the Minister and State Secretary for Social Affairs and Employment, 25 June 1991, Archive MSAE, file: RvE-1.83/07.76, description: Ministerial Conference ESC 30 years, 21-22 October 1991, Turin; Interview with J.R. van Blankenstein, 24 December 2004; Interview with R. Kuggeleijn, 7 January 2005

²⁹⁷ Cullen, 2000, p. 24, 27 and 29.

the government's budget, which it was unwilling to accept.²⁹⁸ How cautious it was in this regard can be illustrated by a question that was posed at an interdepartmental meeting of 29 March 1994. It was wondered whether decisions on collective complaints could in any way be used as a starting point for individual claims, and it was considered that retroactive effects should in any case be avoided, if necessary by a special declaration on the occasion of a Dutch ratification.²⁹⁹

As other states made similar calculations, it was clear that if there were to be any complaints procedure at all, it would be open to collective petitions only. That, however, did not immediately clarify which organisations would have standing. The Working Party of the Charte-Rel Committee more or less followed the suggestions of the Secretariat, and proposed that international organisations of workers and employers should be allowed to lodge a complaint on a mandatory basis, while it would be optional for states to give national trade unions and employers' organisations the same right. In addition, international NGOs having consultative status with the Council of Europe and particularly qualified in the matters regulated by the Charter should also be given the right to complain.³⁰⁰ At the Dutch Ministry of Social Affairs and Employment, there were doubts about the idea of allowing international NGOs to submit complaints too. It was felt that more clarity was needed about which NGOs were considered 'particularly qualified', and it intended to propose to list these NGOs in an annex.³⁰¹ Apparently, other Ministries did not share these concerns, because in an interdepartmental meeting the question was raised why it could not be left to the Committee of Independent Experts to decide on that.³⁰²

In the Charte-Rel Committee, opinions were divided on the question of access for international NGOs. Some delegations were in favour, because it did not seem right to restrict complaints to those rights that applied directly to employers and workers only and to ignore the other provisions of the Charter. On the other hand, Austria and a number of other countries did not want to allow such NGOs to bring complaints at

298 Interview with J.R. van Blankenstein, 24 December 2004; Interview with R. Kuggeleijn, 7 January 2005. In the late 1990s, the suggestion of creating a possibility for individuals to claim their social rights was once again raised by the Parliamentary Assembly, but up to now, it has not led to any concrete results. See: Staal, 1998, p. 933-938; Harris and Darcy, 2001, p. 349, footnote 332, and p. 374; Birk, 1998, p. 262.

299 Report of an interdepartmental meeting held at the Ministry of Social Affairs and Employment on 29 March 1994, 20 April 1994, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

300 CoE Doc. Charte/Rel-GT-1 (91) 2 def., p. 3, Archive MSAE, temporary file 384.

301 Document entitled 'Discussion document of the Working Party possibility to appeal', Archive MSAE, temporary file 384; Document entitled 'Preparation Ad Hoc Committee ESC', Archive MSAE, temporary file 384.

302 Report of interdepartmental consultations of 26 August 1991, held in preparation of the third meeting of the Ad Hoc Committee ESC, Archive MSAE, temporary file 384. Some years later, the Dutch Advisory Committee on Human Rights and Foreign Policy would come back to this issue in its advice on economic, social and cultural rights of 1994. It considered the regulations that had been drawn up in relation to the examination of NGOs' qualifications, unnecessarily complicated. See: Advisory Committee on Human Rights and Foreign Policy, 1994, p. 24.

all, because they were of the opinion that a consultative status with the Council of Europe was not sufficient to prevent an excessive number of complaints.³⁰³ An additional fear, which was also shared by the Netherlands, was that an imbalance might develop as a consequence of the fact that the number of NGOs was relatively large as compared to the number of employers' and workers' organisations.³⁰⁴ For that reason, ETUC and UNICE were not in favour of giving other specialized NGOs the status of possible applicants either.³⁰⁵ Nonetheless, at the Charte-Rel Committee meeting of February 1992, the large majority of the Committee appeared to be in favour of giving international NGOs with consultative status the right to complain, provided some way of verifying their particular competence were found.³⁰⁶ A Working Party that was convened to prepare the Charte-Rel Committee's next meeting in May further developed that idea. The Netherlands was one of the six countries participating in this Working Party, so perhaps it was no coincidence that the outcome of the Working Party's deliberations resembled thoughts that had in an earlier stage been expressed at the Dutch Ministry of Social Affairs and Employment.³⁰⁷

What the Working Party proposed was to retain the possibility for international NGOs, but to limit it to those organisations that had been put on a special list to that end. The NGOs would have to apply to be put on the list for a certain period of time, but the Governmental Committee would be authorized to reject them, with a two-thirds majority.³⁰⁸ In the Charte-Rel Committee, the proposal was well received. There was some discussion on the question whether the Governmental Committee was the right organ to select international NGOs for inclusion in the list, but eventually, there were no states that disagreed with this solution.³⁰⁹ The Netherlands belonged to the countries that strongly supported the proposal to give this role to the Governmental Committee, and it was very satisfied with the decision.³¹⁰ However, for some states, the involvement of international NGOs was still a problem. For instance, Turkey and Germany submitted comments to the Committee of Ministers in which they communicated the view that international NGOs should not attain the possibility to lodge complaints, and

303 CoE Doc. Charte/Rel (92) 6 prov. rev., p. 2, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel (91) 27, p. 3, Archive MSAE, temporary file 401.

304 CoE Doc. Charte/Rel (92) 6 prov. rev., p. 2, Archive MSAE, temporary file 401; Interview with J.R. van Blankenstein, 24 December 2004.

305 In their comments, ETUC and UNICE never made mention of the possibility to give other NGOs this status, and the latter openly rejected it. See: CoE doc. Charte/Rel (91) 8, p. 6-7, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 20, p. 2, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (91) 19, p. 8, Archive MSAE, temporary file 384; Interview with C. Hak, 8 December 2004.

306 CoE Doc. Charte/Rel (92) 6 prov. rev., p. 3, Archive MSAE, temporary file 401.

307 CoE Doc. Charte/Rel (92) 6 prov. rev., p. 5, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel-GT (92) 3 def, p. 5-6, Archive MSAE, temporary file 401.

308 CoE Doc. Charte/Rel-GT (92) 3 def, p. 2, 7 and 8, Archive MSAE, temporary file 401.

309 CoE Doc. Charte/Rel (92) 20 prov, p. 3, Archive MSAE, temporary file 401.

310 Memorandum on the proposal of the Ad Hoc Committee ESC concerning a collective complaints procedure, handwritten date: 26 July 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

that their entitlement to do so should at least be bound to further restrictions.³¹¹ The Netherlands was of the opinion that the selection procedure provided sufficient guarantees, but on the other hand, it would not resist the deletion of the article that entitled NGOs with the right to complain, or its change into an optional provision, if a majority of states so desired.³¹²

There were some other questions discussed that related to different organisations' access to the procedure as well. For instance, whether there should be an optional provision to allow national NGOs specialized in the area of social protection the right to submit complaints, and whether it would be desirable to give national trade unions and employers' organisations an automatic, instead of optional, right to complain.³¹³ However, on these issues, the Netherlands did not hold particularly strong views. A matter that the Netherlands did, on the other hand, consider of crucial importance was that of the general criteria for admissibility. In the beginning of the drafting process, this topic received only limited attention.³¹⁴ It was not until February 1992 that some representatives raised the question of whether there should not be a requirement of exhaustion of domestic remedies. However, pointing also to the example of the ILO, which did not have such a criteria, other delegations maintained that this ran counter to the basic idea of the Protocol, which was to deal with general situations and not with individual cases.³¹⁵ Yet, in its comments to the Committee of Ministers, Germany in particular insisted on the need for additional admissibility criteria.³¹⁶ UNICE also made clear that it could not support a complaints procedure if criteria that would prevent

311 CoE Doc. CM (93) 32, p. 6, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; CoE Doc. CM (93) 32 revised, addendum 2, p. 3, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

312 Document entitled 'Council of Europe, Protocol to the European Social Charter concerning a collective complaints procedure', 10 December 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Report of the meeting of 17 December 1993, 14 January 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997. See also: Handwritten overview of the positions taken in the meeting of the ad hoc group on 17 December 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

313 CoE Doc. Charte/Rel (91) 21, p. 3, Archive MSAE, temporary file 384; CoE Doc. Charte/Rel (92) 6 prov. rev., p. 4, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel-GT (92) 3 def, p. 2 and 8, Archive MSAE, temporary file 401; CoE Doc. Charte/Rel (92) 20 prov, p. 4, Archive MSAE, temporary file 401.

314 In the Working Party that prepared the Charte-Rel Committee's discussion of September 1991, the admissibility criteria were shortly discussed, but otherwise, not much attention was given to the matter. For the Working Party's conclusions, see: CoE Doc. Charte/Rel-GT-1 (91) 2 def., p. 3, Archive MSAE, temporary file 384.

315 CoE Doc. Charte/Rel (92) 6 prov. rev., p. 3, Archive MSAE, temporary file 401.

316 CoE Doc. Charte/Rel (92) 12, p. 3, Archive MSAE, temporary file 401; CoE Doc. CM (93) 32, p. 6, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

duplication or conflict with existing national or international procedures, were not inserted.³¹⁷

Initially, the Netherlands did not seem to consider it a very important topic; it had ‘no objections’ to the kind of criteria that UNICE and Germany proposed.³¹⁸ However, one day before the meeting of the ad hoc group of the Committee of Ministers’ Deputies, the Ministry of Welfare, Health and Cultural Affairs sent a fax to the Dutch Permanent Representative in Strasbourg and the Ministry of Social Affairs and Employment, in which it requested them to either support or make proposals for two closely related admissibility criteria, namely a requirement for exhaustion of domestic remedies and a requirement for a complaint to be filed within the period of six months after the final domestic judgement. Similar criteria could also be found in other human rights treaties, and it was considered appropriate that a state would first have the opportunity to right an alleged wrong by its own institutions and procedures before it would be subjected to an international supervisory process. After a certain period of time, such national judgments should become indisputable, and in this case it would have the additional advantage of limitation of financial risks.³¹⁹ As the Charter’s articles on policy areas for which the Ministry of Welfare, Health and Cultural Affairs was responsible were less clearly formulated than most other articles, generally speaking, this Ministry was even more afraid of unexpected financial consequences than the Ministry of Social Affairs and Employment, so it considered this a very important matter.³²⁰

Even though its remarks arrived quite late, they were taken up by the representatives to the meeting of the ad hoc group of 17 December 1993.³²¹ They tabled a proposal to incorporate a criteria for the exhaustion of domestic remedies, and a six months time limit, which received support from Turkey, Germany, the United Kingdom, and Sweden.³²² However, Belgium and France argued that these criteria were not

317 Letter from the Federation of Netherlands Industry to the Deputy Director Human Rights of the Council of Europe, 27 July 1992, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Interview with C. Hak, 8 December 2004.

318 Document entitled ‘Council of Europe, Protocol to the European Social Charter concerning a collective complaints procedure’, 10 December 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

319 Fax from the Ministry of Welfare, Health and Cultural Affairs to the Permanent Representative in Strasbourg and the International Affairs Division of the Ministry of Social Affairs and Employment, 16 December 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

320 Interview with J.R. van Blankenstein, 24 December 2004.

321 Handwritten overview of the positions taken in the meeting of the ad hoc group on 17 December 1993, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

322 Report of the meeting of 17 December 1993, 14 January 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997. See also: Handwritten overview of the positions taken in the meeting of the ad hoc group on 17 December

relevant because it was unlikely that a domestic procedure for the kinds of complaints that could be lodged under the Collective Complaints Protocol would exist.³²³ After all, petitions would be submitted by employers' and workers' organisations or NGOs, and not by individual victims. It followed logically from the character of the Charter's provisions, which were in general not considered directly applicable, that there would not be a victim requirement for the organisations that lodged a collective complaint. In most states, private institutions or associations only have the right to bring a complaint against the state in cases where the institution or association is alleging to have been violated in its own rights, or is proceeding on behalf of individual victims. So in most situations, the requirement of exhaustion of domestic remedies would indeed not be relevant.³²⁴

However, the Netherlands happened to be in an exceptional position. Various laws already included a right to take legal action for interest groups on certain specific topics, such as equal treatment or registration of personal data.³²⁵ Moreover, a bill was about to be adopted in parliament that would, under certain conditions, extend the possibilities for NGOs to make legal claims to protect the interests of other persons to all fields of law.³²⁶ The main aim behind this collective right to take legal action – or so-called 'class action' – was to respond to situations in which each individual victim is affected only to a limited extent, but in which the interests of a certain group or society as a whole are considerable.³²⁷ One could, for example think of infringements of environmental law, but also of violations of laws in the areas covered by the ESC.³²⁸ The Netherlands understood that its own situation was the exception rather than the

1993, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

323 CoE Doc. CM (93) 32 revised, addendum 4, p. 4, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Report of the meeting of 17 December 1993, 14 January 1994, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997. See also: Handwritten overview of the positions taken in the meeting of the ad hoc group on 17 December 1993, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

324 Birk, 1998, p. 271; Churchill and Khaliq, 2004, p. 433-434; Cullen, 2000, p. 24.

325 Appendices to the reports of the Second Chamber, 1991-1992, 22 486, no. 3, p. 8-12. See also: List with an overview of domestic statutory regulations concerning legal action for interest groups, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

326 See: Appendices to the reports of the Second Chamber, 1991-1992, 22 486, no. 1-3. For the relationship between this draft bill and the negotiations in Strasbourg, see: Fax from the Ministry of Welfare, Health and Cultural Affairs to the Permanent Representative in Strasbourg and the International Affairs Division of the Ministry of Social Affairs and Employment, 16 December 1993, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; List with an overview of domestic statutory regulations concerning legal action for interest groups, Archive MSAE, file: RvE-1.83/07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

327 Appendices to the reports of the Second Chamber, 1991-1992, 22 486, no. 3, p. 2.

328 Interview with R. Kuggeleijn, 7 January 2005.

rule, but it felt that this was no reason not to incorporate the criteria; if there were no domestic remedies, the criteria would just not be applicable.³²⁹ Initially, the Netherlands seemed to win the support of the majority of other states, but in the Rapporteur Group on Human Rights, it was eventually decided to leave the criteria out.³³⁰ In the Netherlands, this unexpected outcome was regretted, and an opportunity was sought to try and still get criteria included, but the majority of states, including France, the United Kingdom and Germany, were in favour of a speedy conclusion of the negotiations.³³¹ In the end, the Netherlands had to accept a Protocol without the admissibility criteria that it desired.³³²

5.5 CONCLUSION

The negotiations on the reform of the ESC's supervisory mechanism basically focused on two important issues: its independence and the extent to which the organisations of employers, trade unions and other NGOs would gain access to the procedures. According to the Dutch policy memoranda on human rights and foreign policy, these were crucial elements in a policy aimed at effective international supervision of human rights treaties. In the negotiations on the Amending Protocol and the Collective Complaints Protocol, however, the Netherlands did not fully comply with the princi-

329 Internal message concerning the right to collective complaints of the Ministry of Welfare, Health and Cultural Affairs, 8 February 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

330 Report of the meeting of 7 March 1994, 11 March 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997. See also: Handwritten overview of the positions taken in the meeting of the ad hoc group on 7 March 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Report of the meeting of 18 March 1994, 22 March 1994, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; CoE Doc. GR-H(95)1, p. 2, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; CoE Doc. GR-H(95)3, p. 2-3, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

331 Document of the Ministry of Welfare, Health and Cultural Affairs, entitled 'Draft Protocol to ESC concerning collective complaints system', 30 May 1995, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Fax from the International Affairs Division of the Ministry of Social Affairs and Employment to the Council of Europe Section of the Ministry of Foreign Affairs, 1 June 1995, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Report of the 538th meeting of Ministers' Deputies, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997; Document of the Ministry of Welfare, Health and Cultural Affairs, entitled 'Draft Protocol to ESC concerning collective complaints system', 30 May 1995, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

332 Report of consultations between the Ministry of Social Affairs and Employment and the Ministry of Welfare, Health and Cultural Affairs held on 19 December 1995, 21 December 1995, Archive MSAE, file: RvE-1.83/ 07.76, description: Additional Protocol collective complaints to the European Social Charter 1992-1997.

ples that were laid down in these documents. Nonetheless, it should also be recognized that the Netherlands was willing to go further than a number of other countries that were opposed to any improvement of the Charter's control machinery.

In principle, the Netherlands was positively disposed towards a reform of the ESC's supervisory system. At the beginning of the process, it did not have a very clear view of all the aspects involved, which explains why its position sometimes fluctuated when an issue just began to be discussed. What it did know was that something had to be changed about the Committee of Ministers' failure to adopt recommendations to individual countries. With respect to the crucial question of the independence of the reporting procedure, the Netherlands had not immediately made up its mind, but it could easily be convinced to support proponents of a clearer division of duties between the supervisory Committees, although it was evident that it did not favour a completely independent reporting procedure, and wanted to retain a role for the Committee of Ministers and the Governmental Committee. In so far as the legal assessment of the contracting parties' reports was concerned, the Netherlands was, however, prepared to give up state control, and as long as the impression that the Committee of Independent Experts could act as a court was avoided, it was prepared to give full support to attempts that aimed to make an end to the Governmental Committee's practice to challenge the conclusions of the Committee of Independent Experts. In the case of the Collective Complaints Protocol, the Netherlands would, after initial hesitations, even defend the position that the Governmental Committee should be excluded from the procedure.

In respect to the question of access, the Netherlands proved to be more cautious. This was true, for instance, where the involvement of international NGOs in the supervisory procedures was involved; the Netherlands did not seem to attach great importance to their role, and it was anxious to allow their unrestricted access to the procedures. Of course, its hesitation to allow parties other than state governments to influence the agenda in the supervisory process was particularly evident in regard to the question of a complaints mechanism. Initially, the Netherlands was not very comfortable with the suggestion of such a procedure. When it finally gave up its reservations, it was only prepared to do so to the extent that the procedure would not affect the assumption that the Charter's provisions were not directly applicable and could not be invoked by individuals. It was very clear that infringements to its sovereign control over public expenditure were unacceptable. Other governments took the same position, but due to the 'article 26 trauma' of the late 1980s, the Netherlands seemed to be even more hesitant than other Council of Europe member states.

Obviously, the Netherlands was also driven by self-interest when it submitted a proposal with respect to the regularity of reporting. From a perspective of maximum protection of human rights, these proposals had some clear disadvantages; after all, '[a] conscience that speaks every two years is less easily ignored than one that will not come again for four years.'³³³ However, to draw up the reports was a huge operation,

333 Harris and Darcy, 2001, p. 308.

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and like many other countries, the Netherlands really wanted to reduce the burden of work ensuing from the reporting procedure. While it is evident that other policy interests prevailed over human rights considerations in respect to the question of the reporting intervals, it is more difficult to determine what inspired the Netherlands' contributions to the reform of the ESC. The political decision to start a reform process was surely encouraged by political events in the EU and the Eastern half of Europe, but in the *Charte-Rel* Committee, the broader international political context did not seem to play any role. The debate was of a highly legal-technical character, and the Dutch representatives' approach was mostly based on their knowledge of the ESC and other comparable international treaties.

The fact that it was the Ministry of Social Affairs and Employment that took the lead in the negotiations can explain this. Other Ministries were occasionally involved through interdepartmental meetings, but in general their contributions were limited. The only exception was that of the question of admissibility criteria; the idea to propose their insertion originated from the Ministry of Welfare, Health and Cultural Affairs. In general, there was no disagreement about the position that the Netherlands should take. Sometimes, there was a divergence of views, for instance with respect to the role of international NGOs in the supervisory procedures, but passionate discussions never took place.

Neither human rights NGOs nor parliament exerted any noticeable influence on the Netherlands' policies, either. Contacts with nongovernmental actors were confined to the international organisations of employers and workers, ETUC and UNICE. It is possible that these organisations influenced the Netherlands on more than one issue only – for instance, with respect to its proposals on the regularity of reporting – but it is clear that their impact on the Dutch position was particularly great on the question of the organisation of the complaints procedure. When it appeared that these organisations could not accept the involvement of the Governmental Committee, the Netherlands radically changed its opinion, and it began to defend a more independent complaints procedure.

CHAPTER 6 THE NETHERLANDS AND THE RIGHTS OF THE CHILD

Whereas the previous chapters dealt with the Dutch policy with regard to a certain category of rights (economic and social rights) and the refinement of norms relating to a specific human rights question (torture), in this and the next chapter the Netherlands' policy towards the drafting of instruments that deal with a particular group of persons (children) is studied. In international law, attention has been devoted to children since the early twentieth century. Although it was never denied that children had human rights too, it took a while before issues of child welfare were integrated into the human rights discourse and before the rights of the child became accepted as a separate human rights concern. Still, it is mainly the United Nations that has developed instruments to deal specifically with the rights of this particular group. As a consequence, the emphasis in this chapter will be on this organisation.

Since 2000, there have been a number of initiatives to give children's rights a more explicit place in the work of the OSCE, but OSCE commitments have never really focused on these rights.¹ Even in the document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE of 1990, through which many human rights commitments were elaborated, the rights of the child are dealt with in a very summary way.² Therefore, the OSCE, and its predecessor CSCE, will not be discussed in this chapter. Neither has there been much treaty-making on the subject of

1 Consolidated summary of the implementation meeting on human dimension issues, Warsaw, 17-27 September 2001, p. 42. This document can be found at: <http://www.osce.org/documents/chronological.php>, accessed 8 September 2006.

2 In the document, it reads: 'The participating states decide to accord particular attention to the recognition of the rights of the child, his civil rights and his individual freedoms, his economic, social and cultural rights, and his right to special protection against all forms of violence and exploitation. They will consider acceding to the Convention on the Rights of the Child, if they have not yet done so, which was opened for signature by States on 26 January 1990. They will recognize in their domestic legislation the rights of the child as affirmed in the international agreements to which they are Parties.' See: Document of the Copenhagen meeting of the conference on the human dimension, para 13. This document can be found at: <http://www.osce.org/documents/chronological.php>, accessed 8 September 2006.

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children's rights in the Council of Europe.³ Therefore, there will be only limited attention paid to this organisation as well.

The organisation of this chapter is as follows. The first section gives some information on the historical background of children's rights and its rise in international law. In section two, the Netherlands' general attitude towards the idea of the rights of the child is addressed. Because the Dutch position in early discussions on special human rights norms for children demonstrates its initial points of departure so well, information on the case of the UN Declaration of the Rights of the Child is integrated into this chapter. In the sections that follow, a number of other case studies are dealt with. The UN Convention on the Rights of the Child, the most important treaty in the field of children's rights, is not considered in this chapter; the next chapter is completely devoted to that instrument.

6.1 TOWARDS HUMAN RIGHTS FOR CHILDREN

People who are involved with child welfare and children's rights have called the twentieth century the 'Century of the Child'.⁴ Although one may wonder whether children can be considered to be better off in this century than in previous centuries, indeed, interest in children and child protection has increased.⁵ In the beginning of the 1900s, pioneers of children's rights, such as Ellen Key, Janusz Korczak, and Eglantyne Jebb, published their ideas and attempted to realize them in different ways.⁶ It was an initiative of the latter of these persons that led to the first international instrument on the rights of the child: the 'Geneva Declaration' of 1924.

Alarmed by the deplorable circumstances millions of children faced as a consequence of the First World War, Eglantyne Jebb founded a relief organisation, 'Save the Children Fund', in the United Kingdom in 1919, and then, in 1920, an international non-governmental organisation, 'Save the Children International Union'. Its aim was to deal with the (post-war) plight of children.⁷ Within the Save the Children International Union, a Declaration was drawn up with standard minimum rules to protect children, and in February 1924, this 'Geneva Declaration' was formally presented to the public.⁸ On the basis of the consideration that 'Mankind owes to the Child the best

3 It must be noted that there are some Council of Europe conventions that deal with children, but even though they may be related to the protection of children's human rights, they are themselves not generally recognized human rights instruments. Examples are: the European Convention on the Adoption of Children of 1967, the European Convention on the Legal Status of Children born out of Wedlock of 1975, and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 1980.

4 Dekker, 2000, p. 133. The idea of the twentieth century as the 'Century of the Child' is derived from a book by one of the early champions of children's rights, Ellen Key.

5 Verhellen, 1994, p. 57-58; Dekker, 2000, p. 143.

6 See: Veerman, 1992, p. 75-111.

7 For information on Eglantyne Jebb and the founding of the 'Save the Children International Union', see: Veerman, 1992, p. 87-92.

8 *Ibidem*, p. 155-156.

it has to give', it declared, among others: 'the child must be given the means requisite for its normal development, both materially and spiritually', 'the child that is hungry must be fed', 'the child that is sick must be nursed', and the 'child must be the first to receive relief in times of distress'.⁹ The Declaration was translated into thirty-seven languages, and sent to all members of the League of Nations. It also received a lot of attention in newspapers, many of which welcomed and reproduced its text.¹⁰

A few months after the Save the Children International Union had adopted the Declaration, the Assembly of the League of Nations passed a resolution that endorsed its contents. Thereby, the Declaration was given an intergovernmental status, which the members of the League reconfirmed in 1934.¹¹ Another resolution adopted on the same day authorized the Secretariat of the League to establish a 'Child Welfare Committee', composed of a number of representatives of states and voluntary organisations.¹² Child welfare had thus become an official object of international diplomacy. The idea of the League's involvement in these matters was not undisputed. Within the organisation's permanent Secretariat, opinions were divided; some were of the opinion that this was not a priority issue, while others thought that this was typically a subject of general international interest.¹³ Among states, views differed as well. Guided by increasing domestic support for child welfare, some states, like Belgium, Switzerland and Australia, favoured making it a topic of international discussion as well. Others disagreed. The United Kingdom, for example, was reluctant to accept the League's involvement with the issue of child welfare.¹⁴ At the time, the Netherlands was not very much in favour of humanitarian activities in the context of international organisations anyway, and it denounced the Geneva Declaration as 'somewhat ridiculous'.¹⁵

Nonetheless, the Geneva Declaration can be considered the beginning of a trend; although it did not contain any children's rights in the sense of human rights, as we know them today, it contained the roots of human rights instruments for children that would later be developed in the context of the United Nations.¹⁶ Typical of the Geneva Declaration was the idea that a child was a legal object rather than a legal subject, which means that it could not actually claim its rights, because the Declaration's language was such that the child remained dependent upon others – namely the 'men and women of all nations' to which the Declaration was addressed – for its rights to be fulfilled.¹⁷ In connection with that, and in accordance with the then prevailing image

9 See: Marshall, 1999, p. 129; Verhellen, 1994, p. 58; Veerman, 1992, p. 157-159.

10 Marshall, 1999, p. 129 and 133.

11 Veerman, 1992, p. 155-159; Verhellen, 1994, p. 58-59; Cantwell, 1992, p. 19; Price Cohen, 1990a, p. 138; Van Dijk, 1979, p. 168-169.

12 Marshall, 1999, p. 103.

13 *Ibidem*, p. 107-108.

14 *Ibidem*, p. 114-115 and 120-122.

15 Castermans-Holleman, 1992, p. 95-96. See also section 1.3.1.

16 See, for example: Verhellen, 1994, p. 59.

17 *Ibidem*, 1994, p. 61.

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of childhood, the emphasis was on the protection of children and not on rights that they might wish to claim as individual human beings.¹⁸

After the Second World War, the issue of the rights of the child was soon taken up within the newly established United Nations. Within the ECOSOC, suggestions were made to draft a 'Charter of the Rights of the Child', but after consultations with UN member states and interested organisations, it was decided that the new instrument would be restricted to a declaration of principles, a draft of which was put to the Commission on Human Rights in 1950. Yet, as the work on the two Covenants took almost all the Commission's time, considerations on this draft did not begin until 1957. They were concluded in 1959.¹⁹

In spite of the fact that there had not been sufficient support for drawing up a legally binding treaty, the new Declaration still meant a qualitative improvement, compared to its predecessor of 1924. A principle such as 'the child that is sick should be helped' was rephrased according to more modern legal terminology, such as: 'the child shall have the right to adequate...medical services.'²⁰ The child was no longer the legal object, but had become the legal subject, or rights holder, instead.²¹ Moreover, the Declaration of 1959 was more extensive and precise than the Geneva Declaration and, for the first time, a civil right, namely the right to a name and a nationality, was incorporated in an international instrument on the rights of the child.²² The rights of the child were further developed and, among others, brought into line with the idea of the child as an independent individual in its own right, in the UN Convention on the Rights of the Child of 1989.²³

Within the Council of Europe, its general human rights instruments, the ECHR and the ESC also apply to children, and under the first of these children can even lodge complaints.²⁴ Attempts to develop special instruments on the rights of the child were also made. The first attempt was in 1979, when the Parliamentary Assembly recommended drafting a European Convention on the Rights of the Child.²⁵ The Secretariat of the Council of Europe strongly supported this idea, and together with a number of NGOs it developed a draft text.²⁶ The idea, however, was not welcomed by the organisation's member states. The Netherlands was not in favour because it feared that this

18 Veerman, 1992, p. 396; Verhellen, 1994, p. 61-62.

19 Verhellen, 1994, p. 59; United Nations, 1949, p. 611-612; United Nations, 1950, p. 603; United Nations, 1951, p. 597-598.

20 Quotation from: Detrick, 1992, p. 641 and 643 respectively.

21 Verhellen, 1994, p. 61.

22 Verhellen, 1994, p. 60-61; Cantwell, 1992, p. 19-20. On the issue of the reflection of a changing image of childhood, see: Veerman, 1992.

23 Veerman, 1992, p. 113 and 396.

24 See, for example: Kilkelly, 2001; Van Bueren, 1996; Buquicchio-De Boer, 1988; Van Bueren, 1998, p. 22, 270-271 and 404.

25 Boucaud, 1989, p. 5-6; Van Bueren, 1998, p. 22 and 403.

26 Letter from the Ministry of Justice to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 13 November 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2566. See also: Boucaud, 1989, p. 5-6 and 49-50.

might further complicate the negotiations on the draft UN Convention on the Rights of the Child, which was simultaneously ongoing.²⁷ In 1990, the Parliamentary Assembly adopted another recommendation, in which it invited the Committee of Ministers to draw up a legal instrument to supplement the UN Convention on the Rights of the Child.²⁸ This resulted in the adoption of the European Convention on the Exercise of Children's Rights in 1996. Its principal object is to grant children procedural rights and facilitate their exercise in family proceedings affecting them.²⁹

Not much has been written about this Convention, at least not by human rights scholars.³⁰ A reason for this might be that it is not considered a very important instrument. Firstly, its scope and additional value are very limited, and secondly, there has been disappointment with its weak supervisory machinery.³¹ In addition, it has not been widely ratified; only nine states have thus far given their consent to be bound by this treaty.³² Apparently, the Netherlands did not attach much importance to the European Convention on the Exercise of Children's Rights, either. In any case, it has never been mentioned in either the explanatory memoranda to the national budget or the human rights policy papers, not even in an extensive description of initiatives taken in the field of children's rights written in the first year after this European Convention's adoption, or in enumerations of the Council of Europe's human rights instruments.³³ Moreover, in a 2004 overview of the status of ratification of different international treaties, the government indicated that it had not made up its mind about the desirability of becoming a party to the Convention on the Exercise of Children's Rights, and up to now, it has not even put its signature to the document.³⁴

6.2 THE NETHERLANDS' VIEWS ON CHILDREN'S RIGHTS

For a long time, the rights of the child were far from a priority human rights issue in the Netherlands.³⁵ Apart from not prioritizing children's rights, one may wonder whether the Netherlands was in favour of special rights for children at all. It was

27 Letter from the Ministry of Justice to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 13 November 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Interview with I. Jansen, 6 October 2003. See also: Boucaud, 1989, p. 5-6 and 49-50.

28 See: Explanatory report to the European Convention on the Exercise of Children's Rights, para 1-2.

29 See: Article 1.2 and 1.3, European Convention on the Exercise of Children's Rights. See also: Explanatory report to the European Convention on the Exercise of Children's Rights, para 14.

30 Some more information about its backgrounds and content, can, however be found in: Killerby, 1995; Jansen, 1996.

31 Van Bueren, 1998, p. 22-23 and 403-404; Van Bueren, 1996, p. 180.

32 See: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>, accessed 11 September 2006.

33 See: Appendices to the reports of the Second Chamber, 1996-1997, 25 300, chapter V, no. 1, p. 11-13; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 23 and 38-39.

34 Appendices to the reports of the Second Chamber, 2003-2004, 29 200, chapter V, no. 70, p. 15. For information on the status of ratification, see: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>, accessed 11 September 2006.

35 Interview with J.A. Walkate, 21 April 2004.

already mentioned that the Netherlands had in the past not shown itself very positively disposed towards the League of Nations' initiative to endorse the Geneva Declaration. When the matter of children's rights was taken up again in the United Nations, hesitations and objections also characterized the Dutch attitude. During the negotiations on the UN Covenant on Civil and Political Rights, the Netherlands opposed a separate provision for children – which was eventually adopted as article 24 – on the ground that 'the Covenant applied to all individuals irrespective of age and status.' It argued that '[i]f the rights of one single group are singled out for mention in a separate article, the same would have to be done for other groups in need of protection, such as the aged and the mentally handicapped', which it obviously did not consider desirable.³⁶ Similar arguments were used to oppose the idea of a charter on rights and duties of the youth, which Eastern European states put before the United Nations several times.³⁷

The Netherlands did not welcome the idea of a separate document on children's rights either. Initially, it questioned the usefulness of a Declaration of the Rights of the Child. It argued that the Universal Declaration of Human Rights applied to children as well, and that the fundamental rights of the child would thus be adequately protected if that Declaration were observed. It considered it unlikely that anything would be achieved by another Declaration if the Universal Declaration was not observed.³⁸ It did, however, not support the idea of drafting an instrument with a legally binding character either. Poland, the Soviet Union and other communist states were in favour of that. They wanted a convention that would not only include general principles, but also duties of the state, an idea which was not only rejected by the Netherlands, but also by other Western delegations, who preferred a brief and concise declaration, which would not include details on how to implement the basic principles.³⁹ Without a doubt, an important, though not formal, reason behind this was that the rights of the child were traditionally linked to economic and social rights in the first place, and a Convention was likely to impose duties on the state, rather than on the parents, which, in Western eyes, had the prime responsibility for the child.⁴⁰ Hence, in the Commission, the Netherlands advised against a legally binding Convention.⁴¹ On 4 July 1957, the Dutch delegate also made a rejecting statement in the Social Committee of the ECOSOC: 'Without denying in principle the desirability of a convention on this subject it seems to us that, for the time being, only a declaration is possible. The time for a Convention has not yet arrived. Considering the great differences in national

36 Bossuyt, 1987, p. 456.

37 Ministerie van Buitenlandse Zaken, 1974, p. 153-154; Ministerie van Buitenlandse Zaken, 1982a, p. 245; Ministerie van Buitenlandse Zaken, 1983, p. 228-229; Ministerie van Buitenlandse Zaken, 1985, p. 69.

38 Veerman, 1992, p. 167.

39 Veerman, 1992, p. 167; Verhellen, 1994, p. 63; United Nations, 1960, p. 193; Ministerie van Buitenlandse Zaken, 1960a, p. 141. See also: UN Doc. E/CN.5/111, p. 30.

40 Veerman, 1992, p. 164.

41 Van Bueren, 1998, p. 12.

legislation, the number of difficulties that would have to be solved before a convention could be concluded, can not yet be foreseen.⁴² However, the Netherlands now stated that it recognized that a special declaration could improve the child's position, and it welcomed a *Declaration of the Rights of the Child*.⁴³ All in all, however, it can not be said that the Netherlands was very positive about children's rights.

Nonetheless, in the last decades of the twentieth century, the topic received increasing international attention, and in spite of its initial doubts about the desirability of recognizing children's rights, it gradually became a more important human rights theme for the Netherlands too. As was recognized in the human rights follow-up memorandum of 1991, the 1979 policy paper had not made mention of any discussion about special rights for children.⁴⁴ That the Netherlands' mindset was still not focused on children's rights at that time is also obvious from the fact that development questions were clearly at the heart of the Dutch policies in regard to the International Year of the Child in 1979. Whereas, as we shall see in the next chapter, Poland would use this thematic year as an occasion to launch a proposal to supplement the existing human rights regime with a Convention on the Rights of the Child, the Netherlands did not even make a link between child-related questions and human rights.⁴⁵

In the course of the 1980s, incidental attention started to be paid to children's rights in explanatory memoranda to the national budget.⁴⁶ Nonetheless, it was not until the 1990s that the government of the Netherlands began to refer to questions regarding the rights of the child on a more structural basis in these documents.⁴⁷ Eventually, it even became a priority theme.⁴⁸ In the policy papers on human rights and foreign policy, the turning point was also in the beginning of the 1990s. In the first follow-up memorandum of 1987, there was still hardly any notice given to the rights of the child.⁴⁹ The

42 Ministerie van Buitenlandse Zaken, 1958, p. 283. See also: Paper with the text of a statement by the Netherlands' representative to ECOSOC's Social Committee on July 4th, 1957, Archive MJ, unfiled records.

43 Ministerie van Buitenlandse Zaken, 1960a, p. 370.

44 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 26. See also: Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979.

45 Appendices to the reports of the Second Chamber, 1979-1980, 15 800, chapter V, no. 2, p. 88-89.

46 See: Appendices to the reports of the Second Chamber, 1984-1985, 18 600, chapter V, no. 2, p. 62; Appendices to the reports of the Second Chamber, 1985-1986, 19 200, chapter V, no. 2, p. 68.

47 See: Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 2, p. 59; Appendices to the reports of the Second Chamber, 1991-1992, 22 300, chapter V, no. 2, p. 28; Appendices to the reports of the Second Chamber, 1995-1996, 24 400, chapter V, no. 2, p. 49; Appendices to the reports of the Second Chamber, 1997-1998, 25 600, chapter V, no. 2, p. 42 and 45; Appendices to the reports of the Second Chamber, 1999-2000, 26 800, chapter V, no. 2, p. 34; Appendices to the reports of the Second Chamber, 2000-2001, 27 400, chapter V, no. 2, p. 8; Appendices to the reports of the Second Chamber, 2001-2002, 28 000, chapter V, no. 2, p. 28; Appendices to the reports of the Second Chamber, 2004-2005, 29 800, chapter V, no. 2, p. 23.

48 Appendices to the reports of the Second Chamber, 1999-2000, 26 800, chapter V, no. 2, p. 34; Appendices to the reports of the Second Chamber, 2000-2001, 27 400, chapter V, no. 2, p. 8.

49 Only the Netherlands' role in the negotiations on the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally of 1986 was shortly mentioned, but strictly

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1991 policy memorandum was the first to go extensively into the children's rights topic. It was concluded that the UN Convention on the Rights of the Child of 1989 was a good and useful example of how more general human rights standards could be specified for particular groups of people.⁵⁰ Moreover, in light of growing international attention for children's rights, the issue was dealt with as one of the selected topics in the policy paper. The government declared that it attached great importance to UN initiatives taken in this regard, and stated that it intended to pay attention to the realization of the child's right to education, health care and food in its own development policies. It also made mention of EC-interventions in reaction to reports of murder of and violence against street children.⁵¹

A special focus on the rights of the child continued to exist in the memoranda of 1997 and 2001 respectively.⁵² In these documents, the Netherlands' government reported on the latest international developments and its contributions in that connection. Apart from its participation in negotiations on a number of new instruments, which will be dealt with later in this chapter, these consisted, for instance, of support for an omnibus-resolution on various children's rights issues that were previously dealt with in separate resolutions in the UN Commission on Human Rights, or of the lodging of objections against other countries' reservations to the Convention on the Rights of the Child if these were incompatible with the object and purpose of the treaty.⁵³ Other activities that were referred to were projects to demobilize and rehabilitate child soldiers in Angola and Uganda, and major financial contributions to projects all over the world to prevent child labour.⁵⁴ Furthermore, the Netherlands showed its involvement by an active participation in international conferences and summits relating to the rights of the child.⁵⁵ Finally, the Netherlands also lobbied to get Dutch expert Jaap Doek elected in the supervisory organ of the Convention on the Rights of the Child, the Committee on the Rights of the Child.⁵⁶ This proved to be successful; he was elected in 1999, and starting from May 2001, he served as the Chairperson of the Committee.⁵⁷

speaking this is not a human rights instrument. See: Appendices to the reports of the Second Chamber, 1986-1987, 19 700, chapter V, no. 125, p. 4.

50 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 4 and 10.

51 *Ibidem*, p. 26-28. See also: Ministerie van Buitenlandse Zaken, 1993, p. 216; Ministerie van Buitenlandse Zaken, 1994, p. 272.

52 See: Appendices to the reports of the Second Chamber, 1996-1997, 25 300, chapter V, no. 1, p. 11-13; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 38-39.

53 Appendices to the reports of the Second Chamber, 1996-1997, 25 300, chapter V, no. 1, p. 11. See also: Castermans-Holleman, 1997b, p. 666; Malcontent and Huijboom, 2006, p. 79.

54 Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 39. See also: Mazaheri, 2005, p. 813-814.

55 Appendices to the reports of the Second Chamber, 1996-1997, 25 300, chapter V, no. 1, p. 12; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 21-22 and 39.

56 Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 22.

57 His term expires in February 2007. See: <http://www.ohchr.org/english/bodies/crc/members.htm>, accessed 11 September 2006. See also: UN Doc. CRC/SP/33, p 12.

It is remarkable that the policy papers do not go into the relationship between the different actors involved in the protection of children's rights. In this regard there is something special about the rights of the child. As Van Bueren explains: 'the traditional legal approach to rights conceives of individuals who are in direct relationships with the state, albeit a territorial or jurisdictional relationship. The travaux préparatoires of many human rights instruments presuppose that individuals are autonomous. Such an approach is problematic when applied to children, who achieve autonomy at different stages in their lives and whose relationship with the state is both direct and through their parents.'⁵⁸ Hence, in addition to the relationship between the state and the individual to be protected, there is a third actor involved when it comes to children's rights, namely the parents or the family.⁵⁹

In the West, great importance has historically been attached to the privacy of the family. As a consequence, Western states have generally been reluctant to intervene in family life.⁶⁰ Traditionally, protection of the family sphere has also been of great importance for the Netherlands. This becomes clear, for example, from the fact that the role of the family seemed to weigh heavily in various human rights standard-setting activities. In the drafting of the Universal Declaration, the UN Declaration of the Rights of the Child as well as the ICCPR, the Netherlands made great efforts to include formulations that recognized the family as the fundamental unit of society and as the first party responsible for children's upbringing.⁶¹ As it explained to the Third Committee of the General Assembly in 1988 and 1990, the Netherlands continued to see the family as the basic unit of society in later years.⁶² However, in general, cultural traditions and societal factors very much determine the definition of the family concept, and due to social transformations, in the last decades, the Dutch understanding of the concept has changed so as to include not only its traditional definition of father, mother and children, but a diversity of family structures.⁶³ In practice, this meant that its policies were now 'geared towards strengthening the family and comparable social units alike'.⁶⁴

6.3 A PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT

In the first section of this chapter, it was mentioned that the UN Convention on the Rights of the Child was the first legally binding treaty in the field of children's rights.

⁵⁸ Van Bueren, 1998, p. 3.

⁵⁹ A term Willems uses for the constitutional triangle between state, parents and children is 'Trias pedagogica'. See: Willems, 1998, p. 45.

⁶⁰ Van Bueren, 1998, p. 67-68, 72 and 87; Willems, 1998, p. 21; Van Crombrugge, 1999, p. 26-28.

⁶¹ See: Castermans-Holleman, 1992, p. 127 and 174-177; Van Genugten, p. 32-33.

⁶² Ministerie van Buitenlandse Zaken, 1989, p. 334-335; Ministerie van Buitenlandse Zaken, 1991, p. 418.

⁶³ Ministerie van Buitenlandse Zaken, 1989, p. 132; Ministerie van Buitenlandse Zaken, 1991, p. 173 and 418; Ministerie van Buitenlandse Zaken, 1992, p. 199. See also: Van Bueren, 1998, p. 68-71.

⁶⁴ Ministerie van Buitenlandse Zaken, 1991, p. 418. See also: Ministerie van Buitenlandse Zaken, 1989, p. 334.

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However, it was not very long after the adoption of this treaty in 1989 that new standard-setting initiatives in the field of children's rights were again taken. The issue remained on the agenda of the World Summit for Children, which the UN had organised on 29 and 30 September 1990. Two out of many matters raised there were the plight of children in war-situations and those trapped in prostitution, sexual abuse or other forms of exploitation.⁶⁵ In the next decade, these two issues would receive a lot of attention, and new instruments would be developed to meet these particular human rights concerns.

The Convention on the Rights of the Child already included an article on children in military conflict, but according to the Netherlands and a number of other countries, the minimum age of fifteen that it laid down for recruitment and participation in armed conflicts was too low.⁶⁶ The Committee on the Rights of the Child, the supervisory body of the Convention on the Rights of the Child, shared these concerns and tried to keep the issue on the agenda. It requested the Secretary General to undertake a study to improve the protection of children from the adverse consequences of armed conflict.⁶⁷ The General Assembly agreed with this idea, and in 1994, Graça Machel from Mozambique was appointed to conduct this study.⁶⁸ Furthermore, the Committee prepared a draft Optional Protocol to the Convention on the Rights of the Child to raise the age limit for entry into the military and participation in an armed conflict from fifteen to eighteen years, and it submitted this draft to the Commission on Human Rights for consideration.⁶⁹ In March 1994, the Commission reacted with the creation of a Working Group to elaborate an Optional Protocol on the Involvement of Children in Armed Conflict. The Committee's text-proposal was used as a basis for its discussions.⁷⁰ Six years later, in 2000, the Working Group finalized its work, and an Optional Protocol was adopted by the General Assembly.⁷¹

The Protocol prohibits the compulsory recruitment of persons who are not yet eighteen.⁷² Below that age, voluntary enrolment remains possible, but the Protocol obliges states parties to raise the minimum age for voluntary recruitment to an age above the fifteen-years standard of the Convention on the Rights of the Child, and to

65 See: United Nations, 1999, p. 797-802; UN Doc. E/CN.4/1991/50, p. 4.

66 See, for instance: UN Doc. A/C.3/44/SR.44, p. 15; UN Doc. A/C.3/44/SR.36, p. 10; UN Doc. A/C.3/44/SR.37, p. 5; UN Doc. A/C.3/44/SR.38, p. 5, 13 and 15; UN Doc. A/C.3/44/SR.39, p. 3 and 9; UN Doc. A/C.3/44/SR.41, p. 2-3 and 10; UN Doc. A/C.3/44/SR.44, p. 16.

67 United Nations, 1994, p. 964.

68 See: General Assembly resolution 48/157, 20 December 1993; United Nations, 1995, p. 1116 and 1119. Contrary to a number of other European countries, the Netherlands did not act as a co-sponsor of the resolution that approved the conduct of a study. See: United Nations, 1994, p. 967.

69 Breen, 2003, p. 460-465; United Nations, 1993, p. 812; United Nations, 1994, p. 964; UNICEF, 2002, p. 568-569, and 642; Van Baarda, 1996, p. 68.

70 For the text of the resolution, see: Commission on Human Rights resolution 1994/91, 9 March 1994. See also: United Nations, 1995, p. 1116-1117; UNICEF, 2002, p. 568-569, and 642; Van Baarda, 1996, p. 68.

71 See: General Assembly resolution 54/263, 25 May 2000.

72 Article 2 CRC OPAC.

take a number of extra safeguards to protect the voluntariness of those who are recruited under the age of eighteen years.⁷³ In respect to participation in armed conflicts, it is determined that states parties 'shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.'⁷⁴ Apart from these important provisions, the Protocol includes articles that oblige states to take measures to prevent recruiting and use of children under eighteen years by nongovernmental armed groups, and to demobilize and assist persons that are recruited or used in hostilities contrary to the Protocol.⁷⁵ As to the Protocol's supervisory machinery, a reporting procedure is provided for.⁷⁶

The Netherlands sponsored the resolution that established a Working Group to draft the Protocol, and in principle it was favourably disposed towards the idea of a higher level of protection for children in armed conflicts.⁷⁷ In the Working Group, almost every delegation, including the Dutch, agreed that the minimum age of compulsory conscription should be set at eighteen.⁷⁸ Nevertheless, opinions were divided on many other issues. The debate focused on the standards; the question of supervision received no more than summary attention. Poland made a proposal for an enquiry procedure that would provide the Committee on the Rights of the Child with the possibility to start a confidential inquiry if it received reliable information regarding recruitment of children contrary to the provisions of the Protocol.⁷⁹ The Netherlands was in favour of this procedure, but many others were not, and it was put aside without much discussion.⁸⁰ Topics on which the debate in the Working Group focused were voluntary recruitment and participation in hostilities.

According to the proposal of the Committee on the Rights of the Child, the minimum age for voluntary recruitment and participation in armed conflicts should be the same as for compulsory conscription: eighteen years. The Dutch Ministry of Foreign Affairs could agree with this standard, but the Ministry of Defence found it unacceptable. It wanted to limit the age of protection against voluntary enrolment and participation in armed conflicts to sixteen years.⁸¹ This position can be traced to the organisa-

73 Article 3 CRC OPAC.

74 Article 1 CRC OPAC.

75 Article 4 and 6.3 CRC OPAC.

76 Article 8 CRC OPAC.

77 Memorandum from the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Minister of Foreign Affairs, through the Head of the International Organisations Department and the Director-General International Cooperation and the Secretary General of the Ministry, 19 August 1994, Archive MFA, DGIS-CM, file dgis/cm/ara/00394. See also: Malcontent and Huijboom, 2006, p. 80.

78 Dennis, 2000, p. 790. For the Dutch position, see: UN Doc. E/CN.4/1995/96, p. 15.

79 UN Doc. E/CN.4/1995/96, p. 29-30.

80 UN Doc. E/CN.4/1998/102, p. 13 and 21.

81 Memorandum from the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Minister of Foreign Affairs, through the Head of the International Organisations Department and the Director-General International Cooperation and the Secretary General of the Ministry, 19 August 1994, Archive MFA, DGIS-CM, file dgis/cm/ara/00394; Memorandum from the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Minister of Foreign Affairs, through the Head of the International Organisations Department and the Director-General International Cooperation and the

tion of the Dutch military forces. As of 1993, the Dutch army became a professional army. On paper, military service still existed, but in practice, it did not, because conscription was suspended. These changes had great consequences for the army: among others, it had to deal with a shortage of personnel. The Ministry of Defence believed that it would be extremely difficult to combat staff shortages if it could no longer employ persons below eighteen years, because the moment potential recruits usually chose a profession was before that age.⁸² Even though new recruits would not immediately take part in military operations, because of their training the Ministry of Defence could not exclude the possibility that persons under eighteen years would sometimes participate in hostilities.⁸³

At the Ministry of Foreign Affairs, it was feared that the Netherlands' reputation as a country that takes human rights seriously would be damaged if it defended this position. It could understand and accept the arguments in favour of a lower age for voluntary recruitment, but it would be hard to explain to the public and parliament why the Netherlands could not support a minimum age limit of eighteen years for participation in military conflicts, especially after it had earlier expressed itself in favour of that.⁸⁴ Apparently, the Ministry of Defence could be convinced, because in the Working Group, the Netherlands joined the group of states that wanted to keep an age limit of eighteen years in respect to direct participation in hostilities or an armed conflict, and opposed proposals to lower that limit.⁸⁵ Yet, in respect to the issue of voluntary recruitment, the Netherlands followed the instructions of the Ministry of Defence. In the Working Group's session of January 1996, it submitted a proposal together with Australia, Denmark, New Zealand, the United Kingdom and the United States that set the age limit for voluntary recruitment at sixteen years, provided that those under eighteen years would have the full and informed consent of their parents or legal

Secretary General of the Ministry, 7 September 1994, Archive MFA, DGIS-CM, file dgis/cm/ara/00394. See also: 'Nederland en het Optioneel Protocol' [The Netherlands and the Optional Protocol] – In: *Tijdschrift voor de Rechten van het Kind*, Vol. 7, No. 4, 1997, 24; 'Standpunt Nederlandse regering' [Position Dutch government] – In: *Tijdschrift voor de Rechten van het Kind*, Vol. 6-7, No. 3, 1996, p. 9.

82 See: Appendices to the reports of the Second Chamber, 2000-2001, 26 900, no. 45. See also: Grünfeld, 2002, p. 309-312; Droogleever Fortuyn, Politiek, and Melkebeeke, 2000, p. 4-6; Nuij, 2001, p. 20-21; Dennis, 2000, p. 790.

83 Memorandum from the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Minister of Foreign Affairs, through the Head of the International Organisations Department and the Director-General International Cooperation and the Secretary General of the Ministry, 19 August 1994, Archive MFA, DGIS-CM, file dgis/cm/ara/00394; Memorandum from the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Minister of Foreign Affairs, through the Head of the International Organisations Department and the Director-General International Cooperation and the Secretary General of the Ministry, 7 September 1994, Archive MFA, DGIS-CM, file dgis/cm/ara/00394. See also: 'Nederland en het Optioneel Protocol' [The Netherlands and the Optional Protocol] – In: *Tijdschrift voor de Rechten van het Kind*, Vol. 7, No. 4, 1997, 24; 'Standpunt Nederlandse regering' [Position Dutch Government] – In: *Tijdschrift voor de Rechten van het Kind*, Vol. 6-7, No. 3, 1996, p. 9.

84 *Ibidem*.

85 UN Doc. E/CN.4/1996/102, p. 15; UN Doc. E/CN.4/1997/96, p. 14.

guardians.⁸⁶ Belgium, Finland, Sweden and Switzerland, on the other hand, proposed an age limit of seventeen years.⁸⁷

However, the NGOs involved in the negotiations could not agree with either of these proposals and propagated the so-called 'straight 18' rule, which stood for the principled idea that children under the age of eighteen year should not be allowed to participate in armed conflicts, and should not be recruited, whether compulsorily or voluntarily. Different organisations, inter alia the Quaker Friends World Committee for Consultation and Defence for Children International, approached the delegation and the Ministry of Foreign Affairs to try and convince the Netherlands to change its position.⁸⁸ In September 1996, questions were also raised in parliament, and a few weeks later, the government announced that it would change its recruitment policy and raise the minimum age for voluntary recruitment to seventeen years to facilitate international consensus and a speedy conclusion of the work on the Protocol.⁸⁹ The Ministry of Foreign Affairs must have been relieved, because here it was believed that the Dutch position had become untenable, and that it was necessary to accept a threshold of at least seventeen years for voluntary recruitment.⁹⁰ When the Working Group met again in 1997, it appeared that the Netherlands was not the only state that had reconsidered its position, because most of the delegations that had previously supported the 'sixteen-years-proposal', were now prepared to accept a minimum age of seventeen. Only the United Kingdom declared that it still favoured sixteen years as the minimum age for voluntary recruitment, but it indicated that it would not stand in the way of an emerging consensus on seventeen years.⁹¹

However, those countries that had suggested that age limit in the Working Group's last session had changed their minds as well, and now insisted to keep it at eighteen years. As a consequence, the Working Group could not come any closer to a solution than before, and the deadlock would continue for years.⁹² One group of states, mostly

⁸⁶ UN Doc. E/CN.4/1996/102, p. 19-20. See also: UN Doc. E/CN.4/1995/96, p. 15.

⁸⁷ UN Doc. E/CN.4/1996/102, p. 19.

⁸⁸ Malcontent and Huijboom, 2006, p. 81. See also: Letter from the Director of the Dutch DCI-section to the Minister of Defence and the Minister of Foreign Affairs, 1 November 1996, Archive MFA, file entitled *dvb/cv/military affairs/various topics*, September 1996; UN Doc. E/CN.4/1997/96, p. 16; UN Doc. E/CN.4/1994/NGO/1.

⁸⁹ Appendices to the reports of the Second Chamber, 1996-1997, no. 116; Appendices to the reports of the Second Chamber, 1996-1997, 25 300, no. 1, p. 11-12; UN Doc. E/CN.4/1997/96, p. 11; Memorandum from the Human Rights, Good Governance and Democratisation Department of the Ministry of Foreign Affairs to the Director-General Political Affairs, 24 November 1997, Archive MFA, DDI-DVN/JS 1996-1999, file: *dvn/ara/00357*. See also: Malcontent and Huijboom, 2006, p. 81; Grünfeld, 2002, p. 309-310.

⁹⁰ Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Minister of Foreign Affairs and the Minister for Development Cooperation through the Head of the International Organisations Department, the Head of the Atlantic Cooperation and Security Affairs Department, the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 18 July 1996, Archive MFA, DDI-DMD 1996-1998, file: *ddi-dmd/2010/00084*.

⁹¹ UN Doc. E/CN.4/1997/96, p. 16-17.

⁹² *Ibidem*.

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countries with a volunteer military system, did not want to raise the minimum age for voluntary enrolment higher than seventeen years.⁹³ Apart from the Netherlands, countries that belonged to this group were, inter alia, the United States, Australia, Canada, Austria, France, Brazil, China, South Africa, and Cuba.⁹⁴ On the other hand, the representatives of Sweden, Switzerland, Finland, and a number of other countries from different parts in the world, agreed with the NGOs that the only way to ensure that no persons under eighteen years would participate in military conflict was to prevent their recruitment in the first place, also on a voluntary basis.⁹⁵

Apart from the question of the minimum age for recruitment, another question addressed by proponents of the 'straight 18' concept was that of the formulation of the article that forbade the use of persons below eighteen years in armed conflict.⁹⁶ They considered it insufficient for the Protocol to only oblige states to take all *feasible* measures to ensure that persons who had not attained the age of eighteen years would not take a *direct* part in hostilities, and felt that states parties should take all *necessary* measures to ensure that they would not in any way take part in hostilities, either directly or indirectly.⁹⁷ On this matter, the Netherlands did not agree with proponents of the strongest possible norms either. In the Working Group, the Netherlands argued that 'for reasons of coherence with the Convention on the Rights of the Child, the inclusion of the term 'a direct part' was necessary.'⁹⁸ Considering that drawing up a Protocol to the Convention would be completely pointless if its 'coherence' with that Convention would be the main consideration, this was a somewhat curious argument. The real reason behind the Dutch stand was that it was difficult to accept stronger guarantees for states that permitted recruiting under eighteen years, among others, because all members of the armed forces are lawful subjects of attack under international humanitarian law.⁹⁹ Besides, it was unclear whether the deletion of the word 'direct' could be interpreted so as to exclude activities that were related to the hostilities only in a very indirect way and that concerned, for instance, the preparation of a ship before it would leave for a mission.¹⁰⁰

However, pressure on states that opposed the adoption of the 'straight 18' rule, and a general prohibition of participation in armed conflicts for persons below eighteen years old was considerable and seemed to increase. Starting from June 1998, NGOs joined forces in an NGO Coalition to Stop the Use of Child Soldiers to fight for the adoption and adherence to an Optional Protocol that would prohibit all recruitment and

93 Dennis, 2000, p. 790.

94 UN Doc. E/CN.4/1998/102, p. 19.

95 *Ibidem*. See also: UN Doc. E/CN.4/1999/73, p. 12; UN Doc. E/CN.4/2000/74, p. 23.

96 See, for example: UN Doc. E/CN.4/1997/96, p. 15; UN Doc. E/CN.4/1998/102, p. 10-12 and 14.

97 Dennis, 2000, p. 791-792.

98 UN Doc. E/CN.4/1998/102, p. 13; UN Doc. E/CN.4/1997/96, p. 15.

99 Dennis, 2000, p. 791-792.

100 Code-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 10 January 2000, Archive MFA, DMV/Arch, file: DMV/policy/themes, children/armed conflict/Optional Protocol CRC, part 1, 2000-2001.

use of children in military conflicts.¹⁰¹ Major and influential international NGOs, like Amnesty International, Defence for Children International, and Human Rights Watch, were among the NGOs that comprised the Coalition's Steering Committee.¹⁰² The Coalition exerted considerable pressure at the international level, and in several countries, networks or coalitions also became active at the national level.¹⁰³ The NGOs that participated roundly criticized states that opposed maximum protection and held them responsible for the delay in the Protocol's adoption.¹⁰⁴ The Netherlands could not escape this criticism, and was also blamed for 'undermining serious international efforts to tackle the child soldier problem'.¹⁰⁵

Pressure on the government increased domestically, as well. The Netherlands was one of the countries with an active national coalition.¹⁰⁶ This Dutch Coalition against the Use of Child Soldiers attended some of the Working Group's sessions in Geneva, but its focus was on influencing the Dutch parliament.¹⁰⁷ In this respect, it was very successful. To illustrate, in November 1999, parliamentarians of different political parties attended a debate that the Dutch Coalition had organised. Apart from the representative of the liberal party, VVD, all of the parliamentarians present expressed support for the Coalition's 'straight 18' demands.¹⁰⁸ Shortly after the debate, the matter was also raised in parliament, and in 1999 and 2000 respectively, motions were adopted that requested the government to raise the minimum age for voluntary recruitment in the Netherlands to eighteen years, and to also endeavour to ensure the acceptance of the 'straight 18' rule in the Working Group.¹⁰⁹

In spite of the pressure by NGOs and parliament, the Ministry of Defence maintained its position that seventeen years would be an appropriate age limit for voluntary recruitment. However, at the Ministry of Foreign Affairs there were growing concerns about the Dutch reputation. It could understand the arguments of the Ministry of Defence, but at the same time it felt uncomfortable with the questions it was con-

101 Breen, 2003, p. 473; Maslen, 1998, p. 447. See also: UN Doc. E/CN.4/1999/73, p. 12.

102 Maslen, 1998, p. 447. See also: UN Doc. E/CN.4/2000/WG.13/2, p. 4.

103 Maslen, 1998, p. 448; Droogleever Fortuyn, Politiek and Melkebeeke, 2000, p. 4.

104 See, for example: UN Doc. E/CN.4/2000/WG.13/2, p. 3; UN Doc. E/CN.4/1998/102, p. 11-12.

105 Code-message from the Ministry of Foreign Affairs to the Dutch Representative in Maputo, Mozambique and the Permanent Representative in New York, 16 April 1999, Archive MFA, DDI-DVN/JS 1996-1999, file: dvn/ara/00357.

106 Droogleever Fortuyn, Politiek and Melkebeeke, 2000, p. 5.

107 UN Doc. E/CN.4/1998/102; UN Doc. E/CN.4/2000/74, p. 4; Droogleever Fortuyn, Politiek and Melkebeeke, 2000, p. 5.

108 Memorandum from the Acting Head of the Regional and Global Organisations Division of the Human Rights, Good Governance and Democratisation Department of the Ministry of Foreign Affairs to the Minister of Foreign Affairs through the Head of the Human Rights, Good Governance and Democratisation Department, the Director-General Political Affairs, and the Secretary-General of the Ministry of Foreign Affairs, 3 December 1999, Archive MFA, file dnb/cv/military affairs/various topics, September 1996.

109 See: Appendices to the reports of the Second Chamber, 1999-2000, 26 800 X, no. 22; Appendices to the reports of the Second Chamber, 1999-2000, 26 900, no. 15. See also: Droogleever Fortuyn, Politiek and Melkebeeke, 2000, p. 5-6.

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fronted with in international contacts. Hence, the option to keep resisting a ‘straight 18’ Protocol was unattractive, but to accept it was not a very good alternative either, because in that case the Netherlands would not be able to ratify.¹¹⁰ In consultation with the Ministry of Defence, it was therefore decided to support a proposal by the Chairman of the Working Group to accept a general minimum age of eighteen years, with an opt-out clause for voluntary recruitment of seventeen-year-olds.¹¹¹

Eventually, though, another compromise was reached in the negotiations; namely to make it compulsory for states parties to submit a declaration that raised the minimum age for voluntary recruitment to an age above fifteen years. This solution was also acceptable for the Netherlands, and in principle, it should therefore not be a problem to become a party to the Protocol. However, as an exception among Western European countries, the Netherlands has, as yet, not ratified.¹¹² The reason for this delay is that the ‘straight 18’ debate has continued on the domestic level, and no agreement has been reached on the declaration the Netherlands would have to submit upon ratification. It followed from the motions of 1999 and 2000 and from additional motions of 2002, that many parliamentarians were concerned about the Dutch recruitment practice. They preferred to set the minimum age for voluntary enrolment at eighteen, or at least to create some additional safeguards for seventeen-year-old recruits.¹¹³ In order to reconcile these demands with the Ministry of Defence’s need to be provided with sufficient staffing, the government proposed to create the status of candidate-member of the military forces for seventeen-year-olds. By means of a trainee post, the candidate-members would gain work experience, while at the same time, they would not yet be full members of the military force. Moreover, extra safeguards, such as a prohibition from carrying arms or participating in any combat situation would protect them in several ways.¹¹⁴ The Christian-Democratic party, CDA, supports this proposal, but the left-wing parties SP and Groenlinks disagree, and other parties have

110 Memorandum from the Private Secretary to the Minister and State Secretary of Foreign Affairs to the Head of the Human Rights, Good Governance and Democratisation Department and the Head of the Security Policy Department of the Ministry of Foreign Affairs through the Director-General Political Affairs, 25 November 1999, Archive MFA, DDI-DVN/JS 1996-1999, file: dvn/ara/00357.

111 Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, the Permanent Representative to the NATO, and the Embassies in Paris, Vienna, London, Dublin, Brussels, Luxembourg, Berlin, Rome, Athens, Madrid, Lisbon, Oslo, Stockholm, Copenhagen, Bern, Prague, Warsaw, Budapest, Ankara, Washington, Ottawa, Canberra and Wellington, 23 December 1999, Archive MFA, DDI-DMD 1999, file: ddi-dmd/2010/00312. Hence, Sheppard’s assumption that the Netherlands must have been disappointed with the United States position that it should remain possible to recruit 17-year-olds on a voluntary basis is incorrect. See: Sheppard, 2000, p. 56-57.

112 See: http://www.ohchr.org/english/countries/ratification/11_b.htm, accessed 11 September 2006.

113 Appendices to the reports of the Second Chamber, 2001-2002, 26 900, no. 53; Appendices to the reports of the Second Chamber, 2001-2002, 26 900, no. 54.

114 See: Appendices to the reports of the Second Chamber, 2001-2002, 26 900, no. 48; Appendices to the reports of the Second Chamber, 2001-2002, 26 900, no. 52; Appendices to the reports of the Second Chamber, 2004-2005, 29 976 (R1780), no. 1-3.

either not yet expressed their opinion or determined their position. At the time of writing, no final conclusions have been drawn.¹¹⁵

6.4 A PROTOCOL ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY

As was mentioned in the beginning of the previous section, apart from the topic of children in military conflicts, other children's rights issues that received a lot of international attention in the 1990s were the sale of children, child prostitution and child pornography. In August 1990, the Commission on Human Rights decided to follow a recommendation of the Sub-Commission's Working Group on Contemporary Forms of Slavery to appoint a Special Rapporteur to consider and report on matters relating to the sale of children, child prostitution and child pornography, including the problem of adoption of children for commercial purposes.¹¹⁶

A second instrument that was elaborated was the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of 2000. The Protocol codifies measures states parties should take in order to combat the sale of children, child prostitution and child pornography, as defined in the Protocol, and to help guarantee that perpetrators will be brought to justice.¹¹⁷ States parties are obliged to cover offences listed in the Protocol under their criminal or penal law, and although the Protocol does not, like the Convention against Torture, provide for universal jurisdiction, it does establish broad grounds for jurisdiction.¹¹⁸ States parties are allowed to establish jurisdiction over offences if the alleged offender is a national of their state or a person who has his habitual residence in their territory, or if the victim is a national of their state.¹¹⁹ This becomes obligatory when an offence is committed in its territory, or 'when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.'¹²⁰ Furthermore, the Protocol incorporates provisions that concern extradition and legal assistance between states

115 See: Appendices to the reports of the Second Chamber, 2004-2005, 29 976 (R1780), no. 4; Appendices to the reports of the Second Chamber, 2005-2006, 29 976 (R1780), no. 7-9.

116 UN Doc. E/CN.4/1991/50, p. 2. Viti Muntarbhorn of Thailand was appointed as the first Rapporteur. As of January 1995, Ofelia Calcetas-Santos of the Philippines succeeded him and in 2001, Juan Miguel Petit of Uruguay was appointed. See: United Nations, 1997, p. 769; United Nations, 2003, p. 682.

117 Article 1 CRC-OPSC. Article 2 provides for a number of definitions and reads:
'For the purposes of the present Protocol: (a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration; (b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration; (c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.'

118 Article 3 CRC-OPSC.

119 Article 4.2 CRC-OPSC.

120 Articles 4.1 and 4.3 CRC-OPSC.

parties, and other measures that should be taken at the domestic level to effectively prosecute offenders and protect and help child victims.¹²¹ Supervision of the implementation of the Protocol takes place by a reporting procedure.¹²²

The initiative to draft this Protocol came from Cuba. It received support from several developing countries, but apart from Australia, France and Finland, no Western countries were prepared to sponsor resolutions in favour of the establishment of a Working Group to create this instrument.¹²³ In fact, many Western countries, including the Netherlands, had serious objections to the creation of a new treaty on this particular subject.¹²⁴ The main argument that opponents brought to the fore was that they did not see the need to draft a new instrument. Pointing to the norms and supervisory mechanisms of the Convention on the Rights of the Child, the activities of the Working Group on Contemporary Forms of Slavery, the work of the Special Rapporteur and the adoption by the Commission on Human Rights of a Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography, they argued that it might be better to try and ensure that existing machinery would be used to its full potential than to devote already scarce resources to a new standard setting project.¹²⁵ The position of these states was strengthened, because the Committee on the Rights of the Child and a number of NGOs shared this opinion.¹²⁶

Nonetheless, proponents of the creation of a Protocol were more numerous than those that openly expressed their objections. On 9 March 1994, the Commission on Human Rights passed a resolution to establish an open-ended Working Group to elaborate guidelines for a possible Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.¹²⁷ Starting from 1995, its mandate was changed into the actual elaboration of this Protocol.¹²⁸ Together with nine other Western states, the Netherlands abstained from the vote on this decision.¹²⁹ One reason why the Netherlands was opposed to the drafting of the Protocol was that it did not see what it could add to existing instruments.¹³⁰

121 Articles 5 to 10 CRC-OPSC.

122 Article 12 CRC-OPSC.

123 Malcontent and Huijboom, 2006, p. 83-84. See also: United Nations, 1994, p. 965.

124 Code-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 28 November 1994, Archive MFA, DGIS-CM 1989, file dgis/cm/ara/00394.

125 UN Doc. E/CN.4/1995/95, p. 5-7. See also: UN Doc. E/CN.4/1996/101, p. 6-7; UN. Doc. E/CN.4/1997/97, p. 5.

126 UN Doc. E/CN.4/1995/95, p. 5; UN Doc. E/CN.4/1994/WG.14/2, p. 16-21; UN Doc. E/CN.4/1994/WG.14/2 Add. 1, p. 9; UN Doc. E/CN.4/1997/WG.14/2, p. 13.

127 United Nations, 1995, p. 1117.

128 United Nations, 1997, p. 707-708.

129 Malcontent and Huijboom, 2006, p. 84. See also: United Nations, 1997, p. 707-708.

130 Code-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 28 November 1994, Archive MFA, DGIS-CM 1989, file dgis/cm/ara/00394; Message from the Permanent Representative in Geneva to the Legal and Social Affairs Division of the Ministry of Foreign Affairs, 21 November 1994, Archive MFA, DGIS-CM 1989, file dgis/cm/ara/00394; Memorandum from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Permanent

However, apart from the belief that this project would not result in anything but an undesirable proliferation of norms, there were other factors that contributed to the rejection of this standard setting initiative. First of all, the Netherlands had the impression that Cuba and a number of other countries, such as Iran, India, and Nigeria, had started the discussion on this Protocol for spurious reasons. It believed that these countries' main aim was not to tackle the problems of the sale of children, child prostitution and child pornography, but rather to find a way to put the industrialised countries in a bad light, and to distract attention away from their own problems. In the Working Group, they constantly related the issue of the sale of children, child prostitution and child pornography to the enormous differences in standard of living between North and South, and by stressing the role of phenomena like sex tourism, and the use of modern technology and internet in the sex industry, they tried to place the blame for everything on the industrialised countries.¹³¹ The Netherlands did not want to cooperate if this one-sided representation of reality was taken as the basis for a new instrument.

In addition, it should be noted that the problems addressed in the Protocol were particularly sensitive issues for the Netherlands. In relation to the issue area of the sale of children, child prostitution and child pornography, it had been exposed to international criticism on several occasions. In the early 1980s, there was, for instance, the so-called 'Spartacus-case'. Spartacus was an organisation that organised tours for homosexuals, and in its brochures it had brought to the attention the possibility of paedophile contacts in the countries of destination.¹³² Since it could not be proven that the organisation actually arranged illicit sexual acts, to the great indignation of some international NGOs, the organisation could not be prosecuted under Dutch law.¹³³ About a year later, in 1984, the situation became even more embarrassing. In an American report, the Netherlands was depicted as a major export country of child pornography. Although it was questionable whether the claims made were in fact true

Representative in Geneva, 18 January 1996, Archive MFA, DDI-DIO 1995-1996, file: ddi-dio/2007/00562.

¹³¹ Document entitled 'Contribution COHOM 20 February 1997, background information concerning the Working Groups on the Optional Protocols to the Convention on the Rights of the Child in armed conflict and sale of children, child prostitution, child pornography', Archive MFA, DDI-DMD 1996-1999, file: ddi-dmd/2010/00311; Code-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 21 February 1996, Archive MFA, DDI-DIO 1995-1996, file: ddi-dio/2007/00562. See also: Malcontent and Huijboom, 2006, p. 85-86.

¹³² Ennew, 1986, p. 105-107.

¹³³ See, for example: Letter from the Deputy Director-General International Cooperation on behalf of the Minister of Foreign Affairs to a law professor at the Vrije Universiteit in Amsterdam, 28 November 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Letter from the organisation 'Sentinelles' to the Minister for Development Cooperation, 4 November 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Letter from the Deputy Director-General International Cooperation on behalf of the Minister of Foreign Affairs to the organisation 'Sentinelles', 9 January 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2566.

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– an investigation into the facts later mitigated them – it did of course not make a positive impression internationally.¹³⁴

Probably, the bad reputation that it had obtained in relation to these matters was also the reason the Netherlands was the destination of the first country-visit of the Special Rapporteur on the Sale of Children, Child Prostitution and Pornography in June 1991.¹³⁵ He concluded that especially with regard to child prostitution and child pornography, there were shortcomings. For instance, he drew attention to the fact that the police usually did not act in case of prostitution of those of sixteen years and older because the age of sexual consent was sixteen, and prostitution was not illegal in the Netherlands.¹³⁶ Other issues that were raised were, among others, the fact that possession of child pornography was not prohibited and the need to pay more attention to vulnerable groups such as illegal migrant prostitutes or children of migrant workers.¹³⁷

In 1998, there was another visit to the Netherlands by the Special Rapporteur. This time, it was combined with a visit to its neighbouring country, Belgium, which had also come into the picture because of the arrest of Marc Dutroux, who had been accused of the kidnapping, raping and murdering of several children.¹³⁸ In the report resulting from this visit, the Netherlands was described as a country with very liberal laws regarding sexual activity, the capital of which had, during the past decennia, developed into a 'host to the largest sex industry in Europe' and 'a large scale organised paedophile venture'.¹³⁹ Moreover, '[t]he growing prostitution market in Amsterdam, constantly needing new women, girls and boys to serve in its brothels, proved a strong magnet for the traffickers who delivered their victims to this market.'¹⁴⁰ In the report, it was concluded that there were indications that Belgium as well as the Netherlands had, to an alarming extent, become transit points and receiving countries for victims of trafficking.¹⁴¹

Naturally, the Netherlands wanted to combat sexual offences and trafficking, but on the other hand, it wanted to maintain sovereign control over its legislation, for instance, in respect to the age of sexual consent. Developing countries, as well as Italy, Canada and the United States, were of the opinion that the Protocol should preclude

134 See: Meuwese, 1994, p. 6, *DCI Info*, Vol. 1, No. 2, p. 9-15, Documentation Centre DCI Nederland, Amsterdam; *DCI Info*, Vol. 2, No. 1, Documentation Centre DCI Nederland, Amsterdam; Open message from the Minister of Foreign Affairs to the Permanent Representative in Geneva, 1 March 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259. See also: UN Doc. E/CN.4/1992/55, p. 53-54.

135 UN Doc. E/CN.4/1992/55, p. 6.

136 *Ibidem*, p. 51-52, 57. It must be noted that in other EC member states, the age of consent for sexual activity was also below eighteen years, and that in these countries, prostitution of persons below the age of eighteen was not always illegal either. See: UN Doc. E/CN.4/1994/WG.14/2, p. 15; UN Doc. E/CN.4/1996/WG.14/2 Add. 2, p. 2.

137 UN Doc. E/CN.4/1992/55, p. 52, 54-55, 57.

138 UN Doc. E/CN.4/2000/73/Add.1, p. 3.

139 *Ibidem*, p. 18.

140 *Ibidem*.

141 *Ibidem*, p. 4.

the possibility that persons under eighteen years could consent to prostitution or pornography. However, in the Netherlands and several other Western countries, the age of sexual consent was lower than eighteen.¹⁴² It was obvious that in this respect the Netherlands did not want to be restrained by the Protocol, because in the Working Group, it suggested to leave it to the individual states parties to define the notions of sale of children, child prostitution and child pornography, and to permit them to derogate from the majority age otherwise contained in their legislation, so that an age of consent below eighteen years would also be possible.¹⁴³ Its formal argument was that the adoption of this proposal would facilitate the Protocol's speedy adoption, because it circumvented a question on which agreement was not likely to be reached anyway, but it is clear that it could just as well be considered as a way to create loopholes.¹⁴⁴ In any case, the proposal was not adopted.

Another example that illustrates the Dutch concerns over its sovereign prerogatives was its opposition against a Phillipine proposal to include a provision that would prohibit reservations to the Protocol. In the negotiations on the Protocol on the Involvement of Children in Armed Conflict, the Netherlands had supported such a provision on the basis of the argument that it was already of an optional character anyway.¹⁴⁵ Of course, the same was true for the Protocol on the Sale of Children, Child Prostitution and Child Pornography, but in spite of this, the Netherlands expressed the opinion that it should be possible to enter reservations to this instrument.¹⁴⁶

As had been the case with the UN Convention against Torture, the Netherlands also made objections to the idea of creating universal jurisdiction for the offences that would be covered by this Protocol.¹⁴⁷ One reason for this was that, apart from some exceptions, the Dutch legal system recognized no other grounds of jurisdiction than the territorial principle and the nationality principle.¹⁴⁸ Another, but related, argument against universal jurisdiction was that it would be contrary to the principle of legal certainty for citizens. The difficult discussions about the definitions of the terms sale of children, child prostitution and child pornography demonstrated that each country gave its own interpretation to these terms and that national laws varied. In practice, this

142 Dennis, 2000, p. 794.

143 UN Doc. E/CN.4/1996/101, p. 15 and 28. See also: Dennis, 2000, p. 794; UN Doc. E/CN.4/1996/101, p. 7; UN Doc. E/CN.4/1997/97, p. 6.

144 UN Doc. E/CN.4/1997/97, p. 7-8; UN Doc. E/CN.4/1998/103, p. 19; UN Doc. E/CN.4/1999/74, p. 7.

145 UN Doc. E/CN.4/1997/96, p. 21; UN Doc. E/CN.4/1998/102, p. 13 and 20.

146 UN Doc. E/CN.4/1995/95, p. 44.

147 For that reason, it proposed to make some amendments to a text-proposal by France, which read: 'Any natural person involved in any capacity in the sale of children, child prostitution and child pornography should be prosecuted in the country where the offences were committed or their effects are felt or by the country where the natural person resides or of which he is a national or where the legal entity on whose behalf he acted is incorporated.' The Netherlands proposed to delete the words 'resides or'. See: UN Doc. E/CN.4/1995/95, p. 25-26. For more information on 'universal jurisdiction', see section 3.3.

148 Fax from the Ministry of Justice to the Legal and Social Affairs Division of the Ministry of Foreign Affairs, 28 November 1994, Archive MFA, DDI-DIO 1995-1996, file: ddi-dio/2007/00562. For an explanation of the different grounds of jurisdiction and the term universal jurisdiction, see section 3.3.1.

would mean that a Dutch citizen could be punished elsewhere for something that was legal in the Netherlands, even if he had committed the act in the Netherlands without the involvement of another country's citizens.¹⁴⁹

For similar reasons, the Netherlands was also of the opinion that the obligation to either prosecute or extradite its nationals for alleged offences outside its territory, should be made conditional upon the so-called double criminality rule.¹⁵⁰ This rule was central to several countries' and also to the Netherlands' own extradition-policy, and it implied that extradition to another country was confined only to those situations in which the acts for which the extradition request was made were also recognized as criminal offences in the Netherlands.¹⁵¹ Although no explicit references to the double criminality rule were made in the final draft, it was determined that extradition would be subject to the conditions provided by the law of the requested state.

In spite of its initial objections to the drafting of the Protocol, the Netherlands signed it soon after its adoption in May 2000, and ratified it on 23 August 2005.¹⁵² Apparently, the government could agree with the end-result, and in any case, reservations were not prohibited. However, when the government submitted a bill of approval for ratification to parliament in May 2005, no reservations were proposed. Under the influence of a number of other international treaties, the Dutch legislation had already been modified, and the age of consent for pornography and exploitation for prostitution had, for instance, been raised to eighteen years.¹⁵³

6.5 THE ILO'S EFFORTS TO ERADICATE CHILD LABOUR

From the time when the UN Convention on the Rights of the Child was adopted, the issue of child labour also became framed as a human rights issue.¹⁵⁴ Historically, the ILO has, however, been one of the most important players in the field of child labour.¹⁵⁵ Its early Conventions established minimum ages for work, but they were not drawn up from the point of view that employment of children was always bad, and they usually allowed employment when the purpose was to educate children.¹⁵⁶

149 See: Malanczuk, 2003, p. 112. See also: Malcontent and Huijboom, 2006, p. 86.

150 Memorandum from the Regional and Global Organisations Division of the Human Rights, Good Governance and Democratisation Department of the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 2 February 1998, Archive MFA, DDI-DMD 1996-1999, file: ddi-dmd/2010/00311. See also: UN Doc. E/CN.4/1995/95, p. 26; UN Doc. E/CN.4/1999/74, p. 15.

151 Kooijmans, 2002, p. 63-67; Werkgroep kinderporno en kinderprostitutie in Nederland, 1998, p. 52-53.

152 The Netherlands gave its signature to the Protocol on 7 September 2000. See: http://www.ohchr.org/english/countries/ratification/11_c.htm, accessed 11 September 2006.

153 Appendices to the reports of the Second Chamber, 2004-2005, 30 158 (R1793), A and no. 1. See also: UN Doc. E/CN.4/2003/79, p. 16. Note that one of these other international treaties was the Worst Forms of Child Labour Convention, which is dealt with in the next section.

154 Hanson and Vandaele, 2003, p. 107.

155 *Ibidem*, p. 74. For an overview of ILO standards on children and young persons, see also: Valticos and Von Potobsky, 1995, p. 216-224; Betten, 1993, p. 291-297 and 317-320.

156 Hanson and Vandaele, 2003, p. 98.

Formulating a commitment to achieve the total abolition of child labour, the Minimum Age Convention of 1973 (Convention No. 138) represented a break with this approach.¹⁵⁷ States parties to this Convention are obliged to undertake 'to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.'¹⁵⁸ Although there are several exceptions and escape clauses – such as the possibility for developing countries, where the economy and educational facilities are insufficiently developed, to adopt a lower minimum age, and the possibility to exclude certain categories of employment – in principle, the 1973 Convention raises the minimum age laid down in earlier ILO Conventions to fifteen years.¹⁵⁹

Since the Minimum Age Convention's acceptance, the goal of complete eradication of child labour has received increasing support, and in its Declaration on Fundamental Principles and Rights at Work of 1998, the ILO even declared the abolition of child labour one of its main four principles concerning fundamental rights to be observed by all member states.¹⁶⁰ The Dutch government attached great importance to the elimination of child labour, and it also recognized the question's human rights dimensions.¹⁶¹ In 1997, it even devoted a separate policy paper to the issue, in which it set forth its visions on the root causes of the phenomenon of child labour and the measures that were needed to combat it.¹⁶² Poverty and lack of educational facilities were identified as important factors that contributed to a need for children to start working at an early age.¹⁶³ Therefore, many of the Netherlands' efforts were made in the form of financial support to projects that assisted third world countries to fight child labour. It contributed to projects that were carried out by the ILO's International Programme on the Elimination of Child Labour (IPEC), UNICEF and NGOs, and in its own bilateral development policies, different programs and projects to end child labour were developed as well.¹⁶⁴

As it stated in an intervention in the Third Committee of the General Assembly of 13 November 1990, the Netherlands was thus very much aware that legal measures

157 *Ibidem*, p. 99. See also: Preamble, Minimum Age Convention 1973.

158 Article 1, Minimum Age Convention 1973.

159 Hanson and Vandaele, 2003, p. 99-100.

160 *Ibidem*, p. 100 and 110. See also: Appendices to the reports of the Second Chamber, 1997-1998, 25 640, no. 1, p. 3.

161 See, for example: Appendices to the reports of the Second Chamber, 1995-1996, 24 400, chapter V, no. 2, p. 49; Appendices to the reports of the Second Chamber, 1996-1997, 25 300, no. 1, p. 13; Appendices to the reports of the Second Chamber, 1997-1998, 25 600, chapter V, no. 2, p. 45.

162 See: Appendices to the reports of the Second Chamber, 1997-1998, 25 640, no. 1.

163 *Ibidem*, p. 3.

164 See, for example: Appendices to the reports of the Second Chamber, 1996-1997, 25 300, no. 1, p. 13; Appendices to the reports of the Second Chamber, 1997-1998, 25 600, chapter V, no. 2, p. 45; Appendices to the reports of the Second Chamber, 1997-1998, 25 640, no. 1, p. 18-20; Appendices to the reports of the Second Chamber, 1998-1999, 26 200, chapter V, no. 11, p. 45; Appendices to the reports of the Second Chamber, 1999-2000, 27 100 (R 1654), no. 3, p. 9 and 11.

that aimed to protect children against economic exploitation would remain without much effect if the social and economic root causes were not dealt with.¹⁶⁵ Nevertheless, legal measures were deemed essential too. Convention No. 138 was, for instance, considered one of the most important ILO Conventions, and the Netherlands had already ratified this treaty in September 1976.¹⁶⁶ However, decades later, many other states, in particular Asian and African, had not yet done so.¹⁶⁷ As a consequence, the Minimum Age Convention remained the least ratified of all the ILO's core conventions.¹⁶⁸ This was the reason the initiative was made to draft another Convention: the Worst Forms of Child Labour Convention (Convention No. 182), which was adopted in 1999. The purpose of this Convention was to complement existing instruments and to put states parties under an obligation to 'take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.'¹⁶⁹

For the purposes of the Convention, the term 'child' is intended to refer to 'all persons under the age of 18',¹⁷⁰ and four categories of 'worst forms of child labour' are identified. The first category comprises 'all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict'.¹⁷¹ The second and the third category are 'the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances' and 'the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties' respectively.¹⁷² Finally, there is the category of 'work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children', which is to be defined in more exact terms at the domestic level.¹⁷³

The Netherlands was very pleased with the coming into being of Convention No. 182. It acknowledged that in the short run, a complete ban on child labour would not be a realistic goal to pursue, and therefore, a phased approach in which priority would first of all be given to the worst forms of child labour was considered appropriate and important.¹⁷⁴ During the entire codification process, the Netherlands showed itself an

165 Ministerie van Buitenlandse Zaken, 1991, p. 425.

166 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 17. See also: <http://www.ilo.org/ilolex/english/convdisp2.htm>, accessed 11 September 2006.

167 Hanson and Vandaele, 2003, p. 113. See also: Appendices to the reports of the Second Chamber, 2000-2001, 27 100 (R 1654), no. 5, p. 2.

168 Hanson and Vandaele, 2003, p. 113.

169 Article 1, Worst Forms of Child Labour Convention 1999.

170 Article 2, Worst Forms of Child Labour Convention 1999.

171 Article 3, Worst Forms of Child Labour Convention 1999.

172 *Ibidem*.

173 Articles 3 and 4, Worst Forms of Child Labour Convention 1999.

174 Appendices to the reports of the Second Chamber, 1997-1998, 25 640, no. 1, p. 4 and 12.

active protagonist of the Convention.¹⁷⁵ First, the Dutch Ministry of Social Affairs and Employment and the Ministry of Foreign Affairs cooperated with the ILO in the organisation of an important international conference on child labour in February 1997.¹⁷⁶ This Amsterdam Child Labour Conference was part of the preparatory stage that would eventually lead to the drafting and adoption of the Worst Forms of Child Labour Convention.¹⁷⁷ When the actual negotiations got started, the Netherlands also fulfilled an important role, because it acted as the coordinator and spokesperson of the so-called Industrialised Market Economy Countries (IMEC), or Western group.¹⁷⁸ Its basic points of departure were to draft a treaty that states could realistically be expected to put into practice, and that as many states as possible could ratify. As it reported to parliament, the Dutch government felt this objective had been achieved, because many countries had indicated that they intended to ratify this Convention.¹⁷⁹ By now, 161 countries have indeed become parties.¹⁸⁰

On the one hand, it can be considered remarkable that the Netherlands was so enthusiastic about the Worst Forms of Child Labour Convention; after all, it partly dealt with the same issues as the Protocols to the UN Convention on the Rights of the Child, to which the Netherlands had some clear-cut objections. On the other hand, it should be noted that the ILO Convention left out some of the issues that the Netherlands considered particularly problematic for the drafts of the UN Protocols. It did not, for instance, contain any norms on voluntary enrolment into the army, nor did it deal with questions of extraterritorial jurisdiction for the sale of children, child prostitution and child pornography. Perhaps, the atmosphere in which the instrument was being negotiated was also less affected by tensions between North and South than in the case of the drafting of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

The Netherlands ratified the Worst Forms of Child Labour Convention in 2002.¹⁸¹ It had to accept some changes in its domestic law, relating to the penalization of prostitution and pornography that involved children under the age of eighteen, in order to meet the obligations the Worst Forms of Child Labour Convention.¹⁸² The reason

175 Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 21; Appendices to the reports of the Second Chamber, 1999-2000, 27 100 (R 1654) A, p. 2; Appendices to the reports of the Second Chamber, 1999-2000, 27 100 (R 1654), no. 4, p. 2.

176 Appendices to the reports of the Second Chamber, 1996-1997, 25 300, no. 1, p. 13; Appendices to the reports of the Second Chamber, 1997-1998, 25 640, no. 1, p. 19-20; Appendices to the reports of the Second Chamber, 1997-1998, 25 600, chapter V, no. 2, p. 45.

177 Stan Meuwese, 'Discussie over kinderarbeid duurt maar voort' [Discussion about child labour drags on] – In: *Tijdschrift voor de Rechten van het Kind*, Vol. 12, No. 1, 2002, pp. 19-20, p. 19.

178 Appendices to the reports of the Second Chamber, 1999-2000, 27 100 (R 1654), no. 3, p. 2.

179 Appendices to the reports of the Second Chamber, 1999-2000, 27 100 (R 1654), no. 3, p. 2; Appendices to the reports of the Second Chamber, 2000-2001, 27 100 (R 1654), no. 5, p. 2.

180 See: <http://www.ilo.org/ilolex/english/convdsp2.htm>, accessed 11 September 2006.

181 *Ibidem*.

182 Appendices to the reports of the Second Chamber, 1999-2000, 27 100 (R 1654), no. 3, p. 3; Appendices to the reports of the Second Chamber, 2000-2001, 27 100 (R 1654), no. 5, p. 4.

it ratified this Convention earlier than the two Protocols may have something to do with the Netherlands' general attitude towards the respective instruments, but it is more likely that this swift ratification is related to article 19 of the ILO Constitution, which prescribes that member states put newly adopted Conventions before the authority that is competent to decide on ratification within a year, or at most one and a half year time.¹⁸³

6.6 CONCLUSION

For a long time, children's rights were not a priority for the Netherlands. On the contrary, it was reluctant to accept international instruments aimed at the protection of the rights of the child. It is very likely that this had something to do with the emphasis on the privacy of the family atmosphere prevailing in the Western world. In the period after the Second World War, it was probably also related to the fact that proposals to codify children's rights and to develop new instruments usually came from the Eastern half of Europe, and oftentimes put an emphasis on social and economic rights. Another argument against these initiatives, which the Netherlands drew attention to on many occasions, was the question of whether it was necessary or even desirable to set separate standards for specific groups of people. If general human rights codes, focusing on adults and children alike, would be adhered to, there would be no need to provide for extra protection. As the Netherlands argued in the negotiations on the ICCPR, states must not start accepting specific rights for specific groups, because there would be no end to it. In a rhetorical question, it said: Should we then also start to develop special rights for the aged and the handicapped?

Clearly, it did not consider this desirable. However, in a decision of 19 December 2001, the UN General Assembly indeed decided to establish an Ad Hoc Committee 'to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities'.¹⁸⁴ Although it was not in favour at first, the Netherlands has now given its support to this initiative and it is participating in the negotiations in the Ad Hoc Committee.¹⁸⁵ This is an illustrative example that demonstrates that over time, there have been great shifts in the Dutch policies carried out in respect to the question to what extent new norms should be supported. As is demonstrated in this chapter, a comparable policy change is visible with regard to the issue of children's rights. From the second half of the 1980s onwards, the rights of the child started to be a topic of consideration in the Netherlands' policy papers. During the 1990s and beyond, more and more attention

183 See article 19.5 ILO Constitution.

184 UN Doc. A/57/357, para. 1.

185 See: Appendices to the reports of the Second Chamber, 2004-2005, 29 800 V, no. 11, p. 3; Appendices to the reports of the Second Chamber, 2004-2005, no. 1494, p. 3187-3188. It must be noted, however, that the Netherlands and other EU member states are careful not to develop any new rights. See: Appendices to the reports of the Second Chamber, 2004-2005, no. 1494, p. 3188.

was paid to it, and eventually, children's rights even became one of the priority issues in the Dutch human rights policy.

Although the Netherlands developed activities in the field of the rights of the child, such as support for an omnibus resolution in the Commission on Human Rights and attention for children's rights in its development policies, it is clear that its decision to make this a priority issue did not necessarily mean that it would support all standard-setting activities on children's rights. In the case of the Council of Europe's Convention on the Exercise of Children's Rights, the Netherlands has not demonstrated much interest, and up to now, it has not become a party to this Convention either. The Netherlands did give its full support to ILO-initiatives to combat child labour, and it played an important role in the drafting process of the Worst Forms of Child Labour Convention of 1999. However, in the case of the two Protocols to the UN Convention on the Rights of the Child, its position was more ambivalent.

In principle, the Netherlands was not opposed to the creation of an Optional Protocol on the Involvement of Children in Armed Conflict, and on a number of issues its position was similar to that of countries favouring the strongest possible protection. Yet in spite of its belief that the age limit that the Convention on the Rights of the Child laid down in respect to the issue of children in military conflicts was too low, it was not able to side with the group of states that were in favour of the 'straight 18' principle. The main reason for this was that the Ministry of Defence was concerned about its ability to attract personnel and wanted to be able to recruit persons below eighteen years old. At the Ministry of Foreign Affairs, this was understood, but at the same time it felt embarrassed to defend this position, and it was concerned about the Dutch international reputation. From the side of NGOs and parliament, there was considerable pressure on the Netherlands to adapt its policies and support a 'straight 18' Protocol. In 1996, this resulted in a raise of the minimum age for voluntary enrolment from sixteen to seventeen years, but further concessions were not made.

While the Netherlands had, in principle, been positive to the idea of the Optional Protocol on the Involvement of Children in Armed Conflict, the same could not be said of the suggestion to create an Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. The Netherlands had serious doubts about the desirability of this instrument, among others because it did not think that it would add anything to the Convention on the Rights of the Child and other instruments that already existed. The Committee on the Rights of the Child and a number of NGOs held the same position, so there was no pressure for the Netherlands to change its opinion in this respect. Apart from the argument of redundancy, the detailed definitions and far-reaching provisions on jurisdiction that were proposed were considered a problem from the perspective of state sovereignty and legal certainty for citizens. The attitude of the developing countries that had taken the initiative to draw up a Protocol did not contribute to a sympathetic consideration of the draft, either. They seemed to use every opportunity to put the industrial countries in a bad light, and the Netherlands did not think that they were driven by humanitarian motivations at all. For the Netherlands, the issues of sale of children, child prostitution and child pornography were sensitive

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anyway, and as a consequence of the accusatory tone of the debate, it went on the defensive and tried to prevent the adoption of any text that seemed incompatible with its own laws and policies.

CHAPTER 7

THE UN CONVENTION ON THE RIGHTS OF THE CHILD

In the previous chapter, it was made clear that the Netherlands has not always been positive about the creation of special human rights norms for children, partially because it believed that the child's rights were already guaranteed by general human rights treaties. From formal policy documents, it can be concluded that the Netherlands changed this point of view in the second half of the 1980s. What is the explanation for this? This chapter intends to find an answer to that question. It examines whether this general tendency was also visible in the Dutch position towards the negotiations on the UN Convention on the Rights of the Child, and how it can be explained. Factors that are looked at are the role of the Cold War and other foreign policy interests, as well as the influence of NGOs, parliament and different bureaucratic institutions.

This chapter's first two sections analyse the course of the negotiations and the Netherlands' role and basic points of departure. In section 7.3, the Dutch views on a number of substantive articles are described. Contrary to the other case studies that have been dealt with in this book, the negotiations on the UN Convention on the Rights of the Child were not so obviously centred around a number of key questions that were of particular importance throughout the whole process. As an exhaustive account of the Dutch position on each and every article would probably result in no more than an opaque list of insipid descriptions, only a limited number of issues are studied. They include matters that were of particular importance to the Netherlands or that illustrate its basic points of departure well. A separate section, section 7.4, is devoted to the question of the child in military conflict. The issue receives special attention, because it was such a major bone of contention in the Working Group that drafted the Convention. Finally, the question of supervision is dealt with in section 7.5, and in section 7.6, the conclusions that can be drawn from this chapter are summarized.

7.1 THE NEGOTIATIONS ON THE UN CONVENTION ON THE RIGHTS OF THE CHILD

7.1.1 Contents of the Convention

The General Assembly adopted the Convention on the Rights of the Child on 20 November 1989.¹ In article 1, a child is defined as 'every human being below the age

¹ General Assembly resolution 44/25, 20 November 1989. The complete text of the Convention can also be found in annex 8 of this book.

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of eighteen unless under the law applicable to the child majority is attained earlier.² Apart from this article, the substantive part consists of forty other articles, defining a great number of rights of the child and obligations of states parties. According to Steiner and Alston ‘the CRC is the most comprehensive single treaty in the human rights field.’³ As the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) had done earlier, the Convention on the Rights of the Child breaks with the existing tradition of treating ‘civil and political rights’ and ‘economic, social and cultural rights’ as different sets of rights.⁴ Several of the rights that are codified in the two UN Covenants, have also been incorporated in this Convention. It includes, for instance, articles on non-discrimination, the right to life, the freedom of expression, the freedom of thought, conscience and religion, the right to the enjoyment of the highest attainable standard of health, the right to benefit from social security, the right to education, the freedom from torture and the freedom from arbitrary arrest.⁵

Apart from the rights formulated in the Covenants, the CRC also includes a number of rights and principles that are specifically relevant for the Convention’s target group. An important example is article 3, which determines that ‘[i]n all actions including children...the best interests of the child shall be the primary consideration.’⁶ Another crucial article is article 5, which deals with the triangular relationship between the state, the family and the child. It reads as follows: ‘States parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.’⁷ Examples of newly formulated human rights norms are the child’s right not to be separated from his or her parents (except in situations where this is in the best interest of the child), the right for the child’s opinions to be given due weight in all matters affecting the child, and the right of the child to be protected against all forms of exploitation prejudicial to any aspects of its welfare.⁸

2 Article 1 CRC.

3 Steiner and Alston, 2000, p. 511.

4 In order to underline the indivisibility and equal importance of all these rights in the Convention, the use of this traditional classification is often avoided and other subdivisions are used to analyse the scope of the Convention. A commonly used categorization is the one of the three P’s, in which the P’s stand for: Provision, Protection, and Participation. Cantwell, 1992, p. 27. Other subdivisions have also been used though. See for example: Verhellen, 1994, p. 72-74; LeBlanc, 1995, xvii-xix.

5 For these examples, see: articles 2, 6, 13, 14, 24, 26, 28 and 37 CRC.

6 Article 3.1 CRC.

7 Article 5 CRC.

8 For these examples, see: articles 9, 12, and 36 CRC.

The Convention mandates that a supervisory committee of independent experts shall be established to supervise the implementation of its provisions: the Committee on the Rights of the Child.⁹ The main task of this Committee is to help states parties to meet their obligations under the Convention rather than to penalize them if they fail to do so, and therefore, the reporting procedure it has at its disposal aims to concentrate on mutual assistance, aid and co-operation.¹⁰ An innovative element in the Convention's supervisory provisions is that specialized agencies of the United Nations, as well as 'other competent bodies', a phrase that is understood to refer to, among others, NGOs, are explicitly mentioned to assist the Committee in its advisory functions.¹¹

7.1.2 A difficult start

As has been explained in chapter 6, the idea for a legally binding treaty on the rights of the child originated in the 1950s. In 1978, a renewed initiative to draw up a Convention on the Rights of the Child was made by Poland. Poland had also been one of the major forces behind the Declaration of the Rights of the Child of 1959 and the ICCPR's article on children's rights.¹² After the General Assembly had, in December 1976, adopted a resolution that proclaimed 1979 as the International Year of the Child, Poland seized the opportunity to once again put the issue of a Convention on the Rights of the Child on the UN agenda.¹³ On 13 February 1978, Poland introduced a draft resolution in the Commission on Human Rights, which proposed to adopt a Convention on the Rights of the Child. The draft resolution and the text of the draft Convention attached to it were co-sponsored by Austria, Bulgaria, Colombia, Jordan, Senegal and the Syrian Arab Republic.¹⁴

In the Commission on Human Rights, Poland argued that, now that more than twenty years had passed since the adoption of the Declaration of the Rights of the Child, the time had come 'to take more consistent steps through the adoption of an internationally binding instrument such as a convention.'¹⁵ The Polish proposal urged for the Convention to be adopted in 1979, during the International Year of the Child, but many states had objections against such a rapid adoption.¹⁶ An important argument raised against it, also by NGOs, was that the proposal excluded the possibility of taking into account the national reports that states would, on the occasion of the

9 See article 43 CRC.

10 LeBlanc, 1995, p. xx-xxi; Verhellen, 1994, p. 82.

11 Article 45 CRC. See also: LeBlanc, 1995, p. xxi; Price Cohen, 1990a, p. 146.

12 On the Polish reputation as a protagonist of children's rights, see: LeBlanc, 1995, p. 16; Cantwell, 1992, p. 20-21; Verhellen, 1994, p. 63 and 66; Tolley, 1987, p. 44; Bossuyt, 1987, p. 455-468; Veerman, 1992, p. 93-111.

13 For the text of the resolution on the International Year of the Child, see: General Assembly resolution 31/169, 21 December 1976.

14 UN Doc. E/1978/34, p. 75. For the text of the draft resolution, see: UN Doc. E/CN.4/L.1366 and UN Doc. E/CN.4/L.1366/Rev.1.

15 UN Doc. E/CN.4/SR.1438, p. 10.

16 *Ibidem*.

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International Year of the Child, present on the situation of children in their countries.¹⁷ It was soon apparent that the timetable Poland had in mind was not realistic, but the issue of the Convention remained on the agenda. In 1979, the Commission on Human Rights created a Working Group, which was re-established yearly until the Convention's adoption in 1989. At the first meeting, Adam Lopatka of Poland was elected Chairman-Rapporteur of the Group, and he was re-elected by acclamation until the conclusion of the Working Group's work in 1989.¹⁸ Similar to the Working Group that elaborated the UN Convention against Torture, all UN member states could send delegates to the meetings, and NGOs with consultative status were allowed to attend as well.¹⁹

During the first few years, the negotiations in the Working Group advanced slowly, and only with difficulty. The number of articles that could be adopted each year was limited, and there appeared to be issues on which it seemed almost impossible to reach agreement. At the end of the session of 1983, after six years of negotiations, there were only fifteen draft articles; so, leaving aside the pre-ambular paragraphs, the average was less than three articles a year, while at the same time it was clear that a comprehensive treaty would have to deal with many more.²⁰ The most important reason for the limited progress was that the Convention lacked support, especially from Western countries. Other conditions that negatively influenced the negotiations were the lack of participation by experts that could actually contribute to discussions on child-related issues and the lack of effective NGO participation.²¹

As was pointed out by LeBlanc, Poland did not indicate any deficiencies or weaknesses in the existing human rights instruments that would explain the need for a Convention on the Rights of the Child when it launched its initiative.²² For many Western countries, it was not clear why a special Convention should be drawn up for children

17 See, for instance: UN Doc. E/CN.4/SR.1471, p. 12 and 13; UN Doc. E/CN.4/SR.1472, p. 2; UN Doc. E/CN.4/NGO/225.

18 See: UN Doc. E/1979/36, p. 60; UN Doc. E/1980/13, p. 93; UN Doc. E/1981/25, p. 106; UN Doc. E/1982/12/Add.1, p. 47; UN Doc. E/CN.4/1983/62, p. 2; UN Doc. E/CN.4/1984/71, p. 2; UN Doc. E/CN.4/1985/64, p. 2; UN Doc. E/CN.4/1986/39, p. 2; UN Doc. E/CN.4/1987/25, p. 3; UN Doc. E/CN.4/1988/28, p. 3; UN Doc. E/CN.4/1989/48, p. 4. Lopatka was a Polish professor, a delegate to the Commission on Human Rights and the president of the Polish Association of Jurists. In January 1979, this organisation had, together with the International Commission of Jurists and another high-profile NGO, the International Association of Democratic Lawyers, organised a conference on Legal Protection of the Rights of the Child, in Warsaw. Lopatka chaired this conference, so he was familiar with the topic under discussion in the UN Working Group. He would, however, only chair the meetings, while another delegate represented the position of Poland. See: International Commission of Jurists, 1979, p. 63-66; LeBlanc, 1995, p. 17; Price Cohen 1990b, p. 37; Interview with I. Jansen, 6 October 2003. Later, in the 1980s, Lopatka would hold important functions in Poland, such as Minister for Religious Affairs and President of the Supreme Court. See: Cantwell, 1991, p. 23.

19 Longford, 1996, p. 220.

20 For the results of the Working Group after six years of negotiations, see: UN Doc. E/CN.4/1983/62, Annex I.

21 Interview with N. Cantwell, 30 November 2003.

22 LeBlanc, 1995, p. 17-18.

if they were already protected under general human rights treaties, more especially so if the Convention merely repeated the principles that had already been laid down in the 1959 Declaration of the Rights of the Child, as the Polish draft did.²³ Yet, the only motivation Poland gave was that '[p]rogress in legislation on the rights of the child should not lag behind that made in other spheres of international law.'²⁴ It is possible that 'other spheres of international law' can be read as 'international law in the field of civil and political rights'. After all, the initiative to draft a Convention against Torture had been taken just one year before, and communist bloc countries may have felt the need to balance the development of new civil and political rights instruments with a proposal for a treaty that concentrated on social and economic rights.²⁵

The exclusive concentration on these rights was exactly why most Western nations viewed the idea of a Convention on the Rights of the Child merely as a typical Eastern Bloc project.²⁶ This impression was strengthened by the unanimous support that other countries of the communist bloc gave to the Polish proposal, and the language they used to express themselves.²⁷ In a statement in favour of the Convention, the observer for the German Democratic Republic declared, for instance, that '[c]hildren continued to be the innocent victims of acts of aggression, colonialism, fascism and racism'. It was obvious that references to the traditional communist list of Western wrongs as a rationale for the Convention and other ideological overtones incited Cold War reflexes on the part of Western states rather than convincing them to embrace the Convention.²⁸ The Federal Republic of Germany even suspected that the Polish initiative was intended 'to delay the Western initiative for the elaboration of a convention against torture.'²⁹ It is hard to say whether this was really the intention of Poland, and there are no indications that the German suspicion was widely shared among other delegations, but the statement is a clear illustration of the Cold War atmosphere that allowed such thoughts to arise. As a result, the formal comments that Western governments submitted to the Secretary-General were unenthusiastic. Some countries expressed tepid support for the Convention, others openly expressed their doubts. The United States gave expression to its opinion by complete silence.³⁰ Poland received some support

23 See, for instance: UN Doc. E/CN.4/SR.1471, p. 10 and 12. See also: Longford, 1996, p. 219.

24 UN Doc. E/CN.4/SR.1438, p. 10.

25 See chapter 3. As Tolley notes in his overview on the UN Commission on Human Rights in the period from 1947 to 1986, in general the Commission on Human Rights gave more attention to standard setting in the field of civil and political rights than to the development of norms regarding economic and social rights. See: Tolley, 1987, p. 189.

26 Price Cohen, 1990b, p. 37.

27 See, for instance: UN Doc. E/CN.4/1324; UN Doc. E/CN.4/1324/Add.1.

28 See: UN Doc. E/CN.4/SR.1471, p. 11. For other examples of such Cold War rhetoric, see: UN Doc. E/CN.4/SR.1471, p. 11, 12 and 13.

29 CoE Doc. CM/Del/Concl(83)361, p. 49, Archive MJ, unfiled records.

30 For an overview of comments, see: UN Doc. E/CN.4/1324; UN Doc. E/CN.4/1324/Add.1; UN Doc. E/CN.4/1324/Add.2; UN Doc. E/CN.4/1324/Add.3; UN Doc. E/CN.4/1324/Add.4; UN Doc. E/CN.4/1324/Add.5. See also: LeBlanc, 1995, p. 21; Cantwell, 1992, p. 21; Veerman, 1992, p. 181; Longford, 1996, p. 219.

from non-aligned states – the intensity of which varied – but most of the developing countries felt that this project was too much of a European affair.³¹ Moreover, in practice support from developing countries would have been of limited use anyway, for their ministries often lacked the needed resources and staff to send expert delegates to Geneva to participate in the drafting of human rights instruments.³²

In spite of the Western states' objections to the draft Convention on the Rights of the Child, from 1981 onwards their participation in the Working Group began to increase. The United States and Australia brought forward most of the new proposals and amendments, and the delegations of Denmark, France and Norway also took an active part in the negotiations.³³ Although more articles could be adopted during this session than during the sessions of 1979 and 1980, the increased Western participation did not mean a change for the better in every respect. Since many of the Western amendments tried to modify the Polish draft so as to bring it into line with their own human rights agenda and their own views on what society should look like, ideological antagonism came to the surface in a more concrete form than before.

In conformity with communist theory, the Polish text emphasized economic and social rights, and reading between the lines it also reflected a socialist view on the role of the state as a steering force and patron of human emancipation.³⁴ Or as a representative of the United States would later put it, there was a 'systematic bias' in the Polish draft 'in favour of assuming centralized government control over all aspects of society and the corresponding disregard of the private sector.'³⁵ In Western states, and in particular the United States, civil and political rights traditionally received more attention and in their eyes, the state should be less omnipresent.³⁶ Several of the amendments that were submitted reflected exactly this point of view. Some of them were of a more subtle character, others, such as a proposal to explicitly prohibit discrimination or punishment of the child based on the activities or beliefs of its parents and a proposal to guarantee the child's freedom of expression in matters such as religion and political and social beliefs, were more clearly referring to sensitive issues.³⁷ Perhaps,

31 See, for instance: UN Doc. E/CN.4/1324, p. 9 and 14; UN Doc. E/CN.4/1324/Add.1, p. 4. See also: Veerman, 1992, p. 181.

32 Veerman, 1992, p. 182; LeBlanc, 1995, p. 34.

33 Report on the 37th session of the UN Commission on Human Rights, Geneva, 2 February-13 March 1981, Archive MJ, unfiled records. A tendency of growing interest among other Western delegations had already become visible at the end of 1980, when seven Western states, Australia, Austria, France, the Federal Republic of Germany, Greece, Norway and Spain, sponsored a General Assembly resolution on the draft Convention on the Rights of the Child. See: Ministerie van Buitenlandse Zaken, 1981a, p. 240; United Nations, 1983, p. 883-884.

34 On communist views, see: Van Genugten, 1988, p. 184-189 and 224-238.

35 See: Transcript of the Commission on Human Rights' debate of 8 March 1989, drawn up by Rädde Barnen International, p. 53, Archive MJ, unfiled records.

36 On Western views, see: Van Genugten, 1998, p. 168-184 and 211-224.

37 For the proposals, see: UN Doc. E/1981/25, p. 114 and 118. For an example of a more subtle amendment, see the American amendment to the Polish article 3.1. The latter article read: 'In all actions concerning children, whether undertaken by their parents, guardians, social or State institutions, and in particular by courts of law and administrative authorities, the best interest of the child shall be the

these debates were to some extent unavoidable, but obviously, they did not do much good to the general atmosphere in the Working Group.

Insofar as the increased participation of the United States was concerned, its intentions were doubted. In view of the fact that Ronald Reagan, who was known for his strong anti-communist views and strategies, had just come to power in January 1981, this is hardly surprising. Sjaak Jansen, who represented the Netherlands from 1983 onwards, believed that the American delegation was deliberately raising all kinds of issues that were sensitive for the Soviets and that by doing so, they actually tried to frustrate the negotiation process and to blow up the whole idea of having this Convention.³⁸ According to a statement in 1982 by the International Commission of Jurists, this was a 'widespread feeling among those attending the Working Group'.³⁹ In a Council of Europe meeting on UN standard setting in 1988 where the United States was present as an observer, it would more or less admit its true intentions when it stated that, right from the start, its main aim had been 'damage limitation'.⁴⁰

Whatever its intentions, the United States' proposals were in any case met with infuriated reactions on the part of the Soviet Union.⁴¹ From the beginning of the 1980s, the general position of the Western Bloc in the Commission on Human Rights had become stronger, and it became increasingly successful in condemning the Eastern Bloc.⁴² Especially in view of this, it must have been frustrating for the Soviet Union to have been forced into a defensive position even in the Working Group on the Convention on the Rights of the Child, which was supposed to deal with a communist-friendly document. Its dissatisfaction was clearly reflected in the intervention of the representative of the Byelorussian Soviet Socialist Republic in the Third Committee of the General Assembly in 1981. This representative condemned 'the unconstructive attitude of a number of countries' that were to blame for the fact that the Convention

paramount consideration.' The United States amendment read: 'In all official actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, or administrative authorities, the best interests of the child shall be a primary consideration.' By deleting references to parents and guardians, their autonomy vis-à-vis the state was enhanced and possible legitimating circumstances for state-interference were removed. See: UN Doc. E/1981/25, p. 108.

38 Interview with I. Jansen, 6 October 2003.

39 See: International Commission of Jurists, 'Draft Convention on the Rights of the Child' – In: *The Review*, No. 28, 1982, p. 38.

40 Code-message from the Ministry of Foreign Affairs to the Permanent Representatives in New York and Strasbourg, 28 September 1988, Archive MJ, unfiled records.

41 Report on the 37th session of the UN Commission on Human Rights, Geneva, 2 February-13 March 1981, Archive MJ, unfiled records; Telex-message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 1328.

42 Tolley, 1987, p. 101 and 115. The Netherlands' report on the 1980 session of the Commission on Human Rights also states that this session turned into a rout for the Soviet Union and its allies. (See: Report on the 36th session of the UN Commission on Human Rights, Geneva, 4 February-15 March 1980, Archive MJ, unfiled records.)

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had not yet emerged from the drafting stage.⁴³ Comparable statements were made each year.⁴⁴

During the first half of the 1980s, the Cold War climate deteriorated. On 13 December 1981, after persistent Soviet pressure, military leaders in Poland declared martial law. This event and the continued Soviet presence in Afghanistan clouded the international atmosphere. In 1983, East-West relations reached a low point: the United States announced its plans for the development of the Strategic Defense Initiative, while the Soviet Union shot down a Korean airliner that had violated its airspace.⁴⁵ In this international climate, the negotiations in the Working Group remained affected by ideological antagonism as well; during these years, discussions often had a highly political character.⁴⁶

In view of this general tendency of Cold War impact, however, it is remarkable to note that the discussions in the Working Group of 1982 had – at least as compared to the discussions in 1981 and 1983 – a relatively constructive and legal-technical character.⁴⁷ It must be noted that at ECOSOC and in the General Assembly, the debate on the question of the Convention on the Rights of the Child was indeed overshadowed by controversies between the two superpowers.⁴⁸ Yet, since the Convention on the Rights of the Child was inevitably associated with its originator, Poland, so shortly after the declaration of martial law in that country, one would have expected more

43 UN Doc. A/C.3/36/SR.31, p. 8. It is remarkable to note that, contrary to the position of the Soviet Union, in 1981, Poland was pleased with the developments in the Working Group. See, for example, UN Doc. E/CN.4/SR.1635, p. 12; UN Doc. A/C.3/36/SR.27, p. 9.

44 See, for example: UN Doc. A/C.3/37/SR.56, p. 5-6; UN Doc. A/C.3/38/SR.49, p. 11-12; UN Doc. A/C.3/39/SR.48, p. 6; UN Doc. A/C.3/40/SR.52, p. 15; UN Doc. A/C.3/41/SR.48, p. 5.

45 See: for example: Crockatt, 1995, p. 277 and 316-317.

46 Interviews with I. Jansen, 6 October and 5 November 2003; Interview with J.E. Doek, 28 October 2003. See also: Cantwell, 1992, p. 22. For examples, see the discussion on the issues of mass-media, the right to leave a state, the freedom of religion and the question of the relative importance of different categories of rights: UN Doc. E/1982/12/Add.1, p. 51, 55-56 and 70; UN Doc. E/CN.4/1983/62, p. 4, 9, 12-13.

47 Report on the 38th session of the UN Commission on Human Rights, Geneva, 1 February-12 March 1982, Archive MJ, unfiled records. In its statement in the Third Committee of the General Assembly, the Netherlands referred to 'the rather legal work now undertaken in the Commission on Human Rights' too. See: Ministerie van Buitenlandse Zaken, 1983, p. 484.

48 In the ECOSOC and the General Assembly, a highly controversial debate took place about a 14-year old Russian boy who resided in the United States. According to the Soviet Union and the Ukrainian Republic, the United States was illegally holding this child and preventing it from returning to its native land and its parents, while the United States maintained it was seeking political asylum and did not want to be forced to return to the Soviet Union. See: UN Doc. E/1982/SR.28, p. 101; UN Doc. A/C.3/37/SR.56, p. 7; UN Doc. A/C.3/37/SR. 67, p. 8. See also: Open message from the Permanent Representative in New York to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 7 May 1982, Archive MFA, VN 1975-1984, 999.232.154, file 1328. Besides, the political situation was also reflected in the list of sponsors of the General Assembly resolution on the question of the Convention on the Rights of the Child: that year there were no Western sponsors. See: United Nations, 1986, p. 1136.

negative consequences for the negotiation process itself.⁴⁹ Western governments denounced the events in Poland, and in the Commission on Human Rights, that same year a resolution was adopted on the situation in Poland.⁵⁰ In the beginning of January 1982, both NATO and the European Community had even decided that they would freeze all political contacts and stop economic aid until Poland reversed the measures it had taken.⁵¹ Since Chairman Lopatka would, from 1982 onwards, occupy the post of Minister of Religious Affairs in the Jaruzelski-regime, one could question whether working with him in this Working Group could also be considered a 'political contact'.⁵² However, in spite of noises that were sometimes made in the corridors, there are no indications whatsoever that his position has ever been seriously in discussion.⁵³

7.1.3 Gaining and maintaining the momentum

In 1983, a low point in the negotiations was reached. The atmosphere of the meetings was acrimonious and it was realized that very little progress had been made since 1979. There did not seem to be a common aim in the Working Group, and there was a general sentiment that the Convention would never be concluded, and that it might even be better to give the whole project up.⁵⁴ However, starting from 1984, the draft work began to become more successful. One reason was that there was a reduction in the East-West tensions. In 1984, the most intense period of Reagan's foreign policy offensive came to an end and the beginnings of a change of heart in the Reagan

49 It is hard to explain why the impact of the declaration of martial law was relatively limited in the Working Group. Possible reasons could be the following: In the first place, controversy over the Polish question did not permeate all other discussions in the Commission on Human Rights, as had been feared in Western circles. Secondly, a number of states had sent specialists in the field of juvenile law to represent them in the Working Group, which probably advanced a more technical discussion. And finally, it may also have been a conscious decision of Chairman-Rapporteur Lopatka to try and avoid deliberations about particularly sensitive issues. This would have been in line with the general policy Eastern Bloc delegations to the Commission seemed to follow that year. See: Report on the 38th session of the UN Commission on Human Rights, Geneva, 1 February-12 March 1982, Archive MJ, unfiled records; Handwritten notes, 16 November 1983, Archive MJ, unfiled records.

50 For the question of Poland in the Commission, see: Castermans-Holleman, 1992, p. 241-255; Baudet, 2001a, p. 154-156.

51 Baudet, 2001a, p. 152-153.

52 Longford, 1996, p. 220; Cantwell, 1991, p. 23; Interview with N. Cantwell, 30 November 2003. Adam Lopatka was Minister of Religious Affairs from 1982 to 1987. He served as the President of the Supreme Court from 1987 to 1990. This information was confirmed by the Embassy of Poland in an email to the author on 17 October 2003.

53 That there were rumours is clear from the following document: Open message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 26 January 1982, Personal archive J.H. Burgers. In the literature, there are no indications that his position was challenged though. See, for instance: Longford, 1996, p. 220-221. Furthermore, neither Doek nor Cantwell can recall any serious discussions or negative influence on the negotiations that resulted from his position. See: Interview with J.E. Doek, 28 October 2003; Interview with N. Cantwell, 30 November 2003.

54 Longford, 1996, p. 221; Interview with J.E. Doek, 28 October 2003.

administration became noticeable.⁵⁵ In the course of that same year, most Western states restored their relations with Poland, which they had limited after the declaration of martial law in December 1981, to their original state. The Netherlands did so as well.⁵⁶ In March 1985, Mikhail Gorbachev assumed power in the Soviet Union, which marked a period of liberalisation and reform, and further improvements in the relations with the West.⁵⁷

The diminishing political tension had favourable effects on the drafting work: negotiations were not so much dominated by international political problems, and although rivalry was probably never completely absent, the atmosphere between the two superpowers became more relaxed. For example, in 1984, a standstill in negotiations was twice avoided by jointly produced compromise proposals of the United States and the Soviet Union.⁵⁸ The report of the Dutch delegate, Jansen, confirms the improved negotiating climate. He noticed that preparedness to take a cooperative attitude on the part of the United States' delegation in particular had increased.⁵⁹ An article by the British delegate to the Working Group, Michael Longford, presents the same picture.⁶⁰

Apart from the improved international atmosphere, there was another development that greatly stimulated the work in the Working Group: NGOs joined their forces and increased their impact on the negotiations. Before 1984, NGOs had also been present at the Working Group's meetings, and often they had participated by making proposals.⁶¹ Yet, because they were all acting individually and because they were presenting impracticable and sometimes even contradictory proposals, they were not convincing and exerted hardly any influence.⁶² In 1982, ten NGOs made a first attempt at cooperation by submitting a single position paper, but before the 1983 session, such coordinated efforts failed to materialise.⁶³ Frustrated that the enormous potential for drafting that the NGOs constituted was not translated into any real influence, a number of them decided that it was necessary to systematically cooperate and present well-reasoned joint proposals prior to the drafting sessions. Therefore, in the course of 1983 a so-called 'Informal NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child', an alliance of more than twenty NGOs, was formed to systemati-

55 Crockatt, 1995, p. 316-317.

56 Baudet, 2001a, p. 156-159.

57 Crockatt, 1995, p. 316-317.

58 UN Doc. E/CN.4/1984/71, p. 11 and 14. See also: Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the Rights of the Child' (Geneva 30 January-3 February 1984), 21 February 1984, Archive MJ, unfiled records.

59 Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the Rights of the Child' (Geneva 30 January-3 February 1984), 21 February 1984, Archive MJ, unfiled records.

60 Longford, 1996, p. 222.

61 Price Cohen, 1990a, p. 139.

62 Longford, 1996, p. 221-223; Interview with N. Cantwell, 30 November 2003; Interview with I. Jansen, 6 October 2003; Interview with J.E. Doek, 28 October 2003.

63 Price Cohen, 1990a, p. 140. For the NGO position-paper, see: UN Doc. E/CN.4/1982/WG.1/WP.1.

cally monitor and contribute to the progress of the drafting process.⁶⁴ The same year, UNICEF, which up to then had not shown much of an interest in the Convention, took its first step to become involved, and agreed to host and financially support the meetings of the NGO Ad Hoc Group.⁶⁵

The moving spirit behind the NGO Ad Hoc Group was Defence for Children International (DCI), which also acted as the Ad Hoc Group's Secretariat.⁶⁶ DCI was a relatively young organisation. On 5 July 1979, during the International Year of the Child, it had been founded on the initiative of Nigel Cantwell, who had previously been working for another NGO, the International Union for Child Welfare. The main reason why it was set up was that no other organisations dealt with violence against children and the protection of their human rights.⁶⁷ Apart from DCI, other NGOs that specialized in children's affairs, such as the International Union for Child Welfare, the International Catholic Child Bureau and Rädde Barnen International, as well as general human rights NGOs like Amnesty International and the International Commission of Jurists joined this Ad Hoc Group.⁶⁸ Their cooperation was particularly valuable, because it brought together NGOs that had particular knowledge of children's issues and NGOs that were familiar with human rights standard setting. It is generally recognized that the NGO Ad Hoc Group had an important impact on the work in the Working Group.⁶⁹ For example, Verhellen is of the opinion that '[i]t was to be this Ad Hoc Group which gave new impetus to work which had ground to a halt after 1979',

64 Price Cohen, 1990a, p. 139-140; Cantwell, 1992, p. 24; Veerman, 1992, p. 183; Letter from the Chairman of the Informal NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child to the Permanent Representatives to International Organisations based in Geneva, 15 November 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Interview with N. Cantwell, 30 November 2003. Over time, the amount of participating NGOs increased up to about 50 organisations.

65 Verhellen, 1994, p. 67-68; Price Cohen, 1990a, p. 140; Cantwell, 1992, p. 23-24; Interview with N. Cantwell, 30 November 2003. In other respects, the contribution of UNICEF remained disappointing in the eyes of some NGO-representatives. Although it acted as a full partner in the NGO Ad Hoc Group, it was not before 1986 that it first took a stand in the Working Group of the Commission on Human Rights. See: LeBlanc, 1995, p. 37-40; Cantwell, 1992, p. 24; Interview with J.E. Doek, 28 October 2003; Interview with N. Cantwell, 30 November.

66 Van Bueren, 1998, p. 407; Kaandorp and Meuwese, 1996, p. 132; *DCI Info*, first information bulletin of the Dutch section of DCI (in formation), without date, p. 4, Documentation Centre DCI Nederland, Amsterdam; Interview with J.E. Doek, 28 October 2003.

67 Kaandorp and Meuwese, 1996, p. 119-121; First information bulletin of the Dutch section of DCI (in formation), without date, p. 4, Documentation Centre DCI Nederland, Amsterdam; *DCI Info*, Vol. 1. No. 2, p. 5, Documentation Centre DCI Nederland, Amsterdam; Interview with N. Cantwell, 30 November 2003; Interview with J.E. Doek, 28 October 2003; Van Bueren, 1998, p. 407.

68 Document of the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, entitled: 'The draft Convention on the rights of the Child. The Report of informal consultations among international non-governmental organisations', Archive MJ, unfiled records; Document of the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, entitled: 'The Draft Convention on the Rights of the Child, Report on conclusions of informal consultations among international non-governmental organisations, 1984', Archive MFA, VN 1985-1994, 999.232.154, file 259.

69 See, for instance: Longford, 1996, p. 222-225; Price Cohen, 1990a, p. 144; Miljeteig-Olssen, 1990, p. 151-152; Kaandorp and Meuwese, 1996, p. 132; Jupp, 1990, p. 134.

and according to the NGO Ad Hoc Group's main spokesperson, Cantwell, the Group more or less forced governments to take the drafting more seriously by demanding valid responses to the issues it raised.⁷⁰

That the combined factors of decreasing international tensions and increased NGO-input had favourable effects on the negotiations, is clearly shown by the statements made in the Commission on Human Rights in 1984, in which the 'constructive atmosphere' and the 'spirit of co-operation' in the Working Group were frequently mentioned.⁷¹ This more constructive atmosphere continued to exist in 1985.⁷² The success of the Ad Hoc Group was an incentive for the NGOs to continue their combined efforts to influence the negotiation process. According to Cantwell, the NGO Group quickly achieved a high level of credibility with all sides – both East and West – and it was able to establish excellent relations with delegates from all regions. The proposals that it made were meant to be non-political and professional, and paid attention to civil and political as well as economic, social and cultural rights.⁷³ As a consequence, the proposals of the NGO Ad Hoc Group could be utilized as a tool to diminish political tensions.⁷⁴ Moreover, a yearly 'fish-soup-event' that the NGO Ad Hoc Group organised in the house of Simone Ek of Rädde Barnen International, provided an opportunity for delegates from East and West to meet and talk in an informal setting.⁷⁵

As the Cold War element in the negotiations became less dominant and attention began to shift to content, the number of expert-delegates with knowledge of child-related issues in the Working Group increased, as a consequence of which the active participation of several delegations became greater than before.⁷⁶ This, in turn, led to a further improvement in the quality of the discussions and a growing interest in the

70 Verhellen, 1994, p. 68; Interview with N. Cantwell, 30 November 2003. In other interviews the influence of the NGO Ad Hoc Group was confirmed as well. Interviews with I. Jansen, 6 October 2003 and 5 November 2003; Interview with J.E. Doek, 28 October 2003.

71 See, for instance the statements of Chairman Lopatka and the representatives of the Ukraine, Australia, France, United Kingdom: UN Doc. E/CN.4/1984/SR.46, p. 2-3.

72 Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the rights of the child' (Geneva 28 January-1 February 1985), 4 March 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259.

73 Interview with N. Cantwell, 30 November 2003.

74 Price Cohen, 1990a, p. 144; Price Cohen, 1990b, p. 38.

75 Interview with I. Jansen, 5 November 2003; Interview with N. Cantwell, 30 November 2003. Jansen explained that up to the late 1980s, there were hardly any occasions where Western delegates could have 'off-the-record' conversations with Eastern European colleagues. These delegates did not meet for dinners or drinks, and they did not spend the night in a hotel, but at their missions. They only engaged in the formal part of the negotiations.

76 Interview with I. Jansen, 6 October 2003; Interview with J.E. Doek, 28 October 2003. See also: *International Children's Rights Monitor*, 1985, Vol 2, No. 1, pull-out supplement. Note that it was not only Western states that started to send specialists in juvenile and family law. As a consequence of Gorbachev's policy of 'glasnost' and 'perestroika', the party officials of the Eastern European delegations started to be replaced by real experts as well. See: Jansen, 2004, p. 206; Interview with I. Jansen, 6 October 2003.

legal details of the NGO Ad Hoc Group's proposals. This way, the conditions for constructive deliberations became more and more favourable and the factors adding to that mutually reinforced each other. Although it may be questioned whether all Western states had now really put aside their initial doubts about the Convention, it is true that their attitude changed and from 1984 or 1985 onwards, they started to become more and more seriously involved in the drafting work.⁷⁷ As Veerman put it, 'from now on the sceptics were fighting a lost battle.'⁷⁸

Now that enthusiasm and interest in the Convention had increased, more and more proposals and modifications started to flow in, and gradually, the original draft was expanded to a degree that no one could have imagined in advance.⁷⁹ The negative consequence of this infinite stream of proposals was, however, that the drafting process began to show signs of a lack of direction. Among proponents of the Convention, it was increasingly felt that a timetable was needed. From 1987 onwards, appeals were therefore made to exercise restraint in tabling new proposals and amendments, and the idea that a target date should be set started to develop, and received gradually more support.⁸⁰ The symbolic year 1989 – the year of the thirtieth anniversary of the Declaration of the Rights of the Child, and the tenth anniversary of the International Year of the Child – was chosen as the year in which the Convention was to be adopted, and several NGOs and United Nations bodies, in a loosely formed alliance, started to push towards that goal by means of a plan called 'Target 1989'.⁸¹ One of the NGO Ad Hoc Group's main aims became to ensure the Convention's completion by 1989, and there

77 In the 1986 session of the General Assembly, the United States openly questioned the usefulness of the Convention. See: Ministerie van Buitenlandse Zaken, 1987a, p. 142. And in the Commission's session of 1989, Belgium made a statement in which its scepticism of drafting this Convention was mentioned. See: Transcript of the Commission on Human Rights' debate of 8 March 1989, drawn up by Rädde Barnen International, p. 26, Archive MJ, unfiled records. Moreover, reports of the Council of Europe meetings on UN standard setting in 1987 and 1988 contain indications that at least a number of states, among others the Federal Republic of Germany, the United States and Belgium, were still unfavourably disposed towards the Convention on the Rights of the Child. Others, such as the delegates from Sweden and the Netherlands argued in favour of the Convention. See: Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Strasbourg, 18 December 1987, Archive MJ, unfiled records; Appendix to a letter from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Principal Administrator of the Directorate of Human Rights of the Council of Europe, 4 January 1988, Archive MJ, unfiled records; Code-message from the Ministry of Foreign Affairs to the Permanent Representatives in New York and Geneva, 28 September 1988, Archive MJ, unfiled records; CoE Doc. CM (88) 174, CAHST (88) 2, Strasbourg, 24 October 1988, Archive MJ, unfiled record. This information was partially confirmed in the interviews with I. Jansen and Mr. N. Cantwell.

78 Veerman, 1992, p. 183. See also: Cantwell, 1992, p. 22.

79 Miljeteig-Olssen, 1990, p. 149-150.

80 UN Doc. E/CN.4/1986/SR.56/Add.2, p. 7; UN Doc. E/CN.4/1987/25, p. 3; DCI Briefing Kit (second edition), 'The future United Nations Convention on the Rights of the Child', document no. 5 (rev. 1) 'Target 89: why and how', Archive MFA, DDI-DVE, 999(3), file dve/ara/00435.

81 Price Cohen, 1990b, p. 37.

were several states that supported this.⁸² On 20 November 1989, the Convention on the Rights of the Child was indeed adopted unanimously by the General Assembly: a ten-year long task had been accomplished.⁸³

7.2 THE NETHERLANDS' POINTS OF DEPARTURE

7.2.1 Passive resistance

When Poland submitted its proposal for a UN Convention on the Rights of the Child in 1978, the Netherlands' reaction was no more positive than that of most other Western countries. As with many others, the Netherlands was first of all concerned about the haste of the communist countries, but apart from that the Netherlands also had some more fundamental doubts.⁸⁴ These came to expression when a Netherlands' delegate to ECOSOC referred to the draft Convention and declared that 'the drafting of a convention – particularly if it lacked adequate implementation machinery – did not in itself remedy any evil'.⁸⁵ In other words: according to the Netherlands, the treaty that Poland had proposed did not have any additional value.⁸⁶ Seven months later, in November 1978, this message also came across when the Netherlands submitted its formal comments on the draft to the Secretary-General, who had invited the UN member states to communicate their views.⁸⁷

82 See: Document of the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, entitled: 'Summary report of an information meeting for representatives of permanent missions in Geneva on NGO proposals on the draft convention on the rights of the child, held at Palais des Nations, Geneva on Monday, 16th November, 1987: 14h30-16h00', Archive MFA, VN 1985-1994, 999.232.154, file 259; Open message from the Permanent Representative in New York to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 17 December 1987, Archive MFA, VN 1985-1994, 999.232.154, file 259; Letter from the Director of UNICEF to the Netherlands' Permanent Representative in Geneva, 4 January 1988, Archive MFA, VN 1985-1994, 999.232.154, file 430; Open message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 6 January 1988, Archive MFA, VN 1985-1994, 999.232.154, file 430; Letter from the Associate Director of UNICEF's Division of Information and Public Affairs to the Netherlands' Permanent Representative in Geneva, 24 October 1988, Archive MFA, VN 1985-1994, 999.232.154, file 430; UN Doc. A/C.3/42/SR.41, p. 3 and 5; UN Doc. A/C.3/42/SR.43, p. 3 and 12; UN Doc. A/C.3/42/SR.46, p. 11.

83 UN Doc. A/44/PV.61, p. 2-3. For the text of the resolution, see: General Assembly resolution 44/25, 20 November 1989.

84 Telex-message from the Permanent Representative in New York to the Social and Environmental Affairs Section and the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 7 December 1978, Archive MFA, VN 1975-1984, 999.232.154, file 1328; Telex-message from the Social and Environmental Affairs Section of the Ministry of Foreign Affairs to the Permanent Representative in New York, 8 December 1978, Archive MFA, VN 1975-1984, 999.232.154, file 1328.

85 Ministerie van Buitenlandse Zaken, 1978c, p. 120. See also: UN Doc. E/1978/C.2/SR.14, p. 7.

86 Interviews with I. Jansen, 6 October 2003 and 5 November 2003.

87 Letter no. G/SO 214 (28) of the United Nations Office at Geneva to the Minister of Foreign Affairs, 29 June 1978, Archive MFA, VN 1975-1984, 999.232.154, file 1328.

In its reaction, the Netherlands' government declared that it could 'subscribe in principle to the idea of devoting a special convention to the rights of the child', but this statement was immediately followed by a list of objections and doubts that explained why, at the same time, it 'seriously doubt[ed] the usefulness' of a draft Convention as proposed by Poland.⁸⁸ First, it remarked that the Netherlands did not consider it 'sufficient to merely try and copy the Declaration of the Rights of the Child, which dates back as early as 1959 and does not reflect the social, economic and cultural developments and changes since then.'⁸⁹ It furthermore stated: '[t]he formulation of the principles in the present draft Convention is rather vague. A lot of them are already embodied in the mandates of agencies like the ILO, WHO and UNESCO, or in some more appropriate juridical wordings, in instruments like the Covenants on Civil and Political and on Economic, Social and Cultural Rights. In these contexts the implementation and observance of the principles is taken care of in a far more extended and concrete manner.'⁹⁰ Elements that were not mentioned in the communication, but that did in fact play a role in the position towards the draft Convention on the Rights of the Child were in the first place the Netherlands' general reservations to the idea of separate treaties for particular groups of people, which were also mentioned in the previous chapter, and in the second place, the fact that the Polish draft consisted almost exclusively of economic and social rights, while civil and political rights were virtually neglected.⁹¹

The reaction that the Netherlands communicated was drawn up under the responsibility of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, but it was partially based on the comments of other ministries that it consulted.⁹² Their views had, however, been quite diverse. The Ministry of Education and Science, and the Ministry of Culture, Recreation and Welfare Work believed that it could be a good idea to draft a Convention on the Rights of the Child, although the latter Ministry added that it would be necessary to adjust the text of the draft Convention to modern social and family structures, as they were known in the Netherlands.⁹³ Negative comments were, on the other hand, received from the Ministry of Social Affairs and

88 UN Doc. E/CN.4/1324, p. 14.

89 *Ibidem*.

90 *Ibidem*.

91 Interview with I. Jansen, 5 November 2003; Interview with J.A. Walkate, 21 April 2004.

92 Letter from the Head of the Legal and Social Affairs Division on behalf of the Minister of Foreign Affairs to the Minister of Culture, Recreation and Welfare Work, the Minister of Justice and the Minister of Social Affairs, 27 July 1978, Archive MFA, VN 1975-1984, 999.232.154, file 1328.

93 Letter from the Ministry of Education and Science to the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, 3 October 1978, Archive MFA, VN 1975-1984, 999.232.154, file 1328; Paper entitled 'Memorandum regarding the discussion in the Co-ordinating Group on Juvenile Policies of 24 August 1978, on the request of the Ministry of Foreign Affairs to comment on resolution 20 (XXXIV) of the UN Commission on Human Rights', 4 September 1978, Archive MJ, unfiled records; Letter from the Head of the International Affairs Department of the Ministry of Culture, Recreation and Welfare Work to the Head of the Social and Environmental Affairs Section of the Ministry of Foreign Affairs, 10 August 1978, Archive MFA, VN 1975-1984, 999.232.154, file 1328.

Chapter 7

Employment, the Ministry of Justice, and the Treaties Preparation Section of the Ministry of Foreign Affairs. The objections of the latter and the Ministry of Justice were of a predominantly legal character: the principles that were laid down in the Polish draft were declarations of intent rather than treaty provisions, and the supervisory mechanism was very weak. For these two reasons, it was unlikely that the Convention would contribute to a better compliance with the draft's principles, and it was therefore not considered desirable to convert the 1959 Declaration into a Convention.⁹⁴ The Ministry of Social Affairs and Employment added the objection that a number of specialized organisations, like the ILO, WHO and UNESCO, were already occupied with many of the issues dealt with in the draft Convention as well, as a consequence of which overlap and conflict were likely to occur. Besides, the Ministry was unhappy about the prospect of another obligation to report, especially if it concerned matters on which it was also reporting to other organisations.⁹⁵

It could be contended that the final text of the comment was formulated in such a way that there was something in it for all, but it was clear that problematic aspects and doubts were given so much emphasis that the comment could actually be read as a statement against the Convention. In reaction to a Belgian appeal to the EC-partners to exchange opinions and reject the Convention, the Netherlands, however, made it clear that it did not want to go so far as to block the realisation of a Convention if a majority of states were in favour.⁹⁶ An openly negative stand would, according to diplomatic practice, be very impolite, and as an employee of the Ministry of Justice remarked at the time, not very advisable from a political point of view.⁹⁷ As LeBlanc put it in his work on the UN Convention on the Rights of the Child: 'It is difficult enough for governments to be officially indifferent to violations of human rights; it is

94 Letter from the Head of the Private Law Branch on behalf of the Minister of Justice to the Minister of Foreign Affairs, 6 December 1978, Archive MJ, unfiled records; Paper by the Legal Affairs Section of the Child Protection Department of the Ministry of Justice, entitled 'On the Polish proposal on a draft convention on the rights of the child in the UN', Archive MJ, unfiled records; Memorandum from the Head of the Child Protection Department of the Ministry of Justice to the Legislation Division for Public Law of the Ministry of Justice, 25 September 1978, Archive MJ, unfiled records; Memorandum from one official of the Legislation Division for Public Law of the Ministry of Justice to another official of that same Division, 9 October 1978, Archive MJ, unfiled records; Memorandum on the draft Convention on the Rights of the Child from the Treaties Preparation Section to the Social and Environmental Affairs Section of the Ministry of Foreign Affairs, 12 September 1978, Archive MFA, VN 1975-1984, 999.232.154, file 1328.

95 Letter from the Director for International Affairs of the Ministry of Social Affairs to the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, 8 September 1978, Archive MFA, VN 1975-1984, 999.232.154, file 1328.

96 Memorandum from one official of the Legislation Division for Public Law of the Ministry of Justice to another official of that same Division, 9 October 1978, Archive MJ, unfiled records.

97 Paper of the Legal Affairs Section of the Child Protection Department of the Ministry of Justice, entitled 'On the Polish proposal on a draft convention on the rights of the child in the UN', Archive MJ, unfiled records; Memorandum from one official of the Legislation Division for Public Law of the Ministry of Justice to another official of that same Division, 9 October 1978, Archive MJ, unfiled records; Interview with I. Jansen, 6 October 2003.

even more difficult to be indifferent when children are involved because they are perceived as being so vulnerable to the most serious forms of human rights abuses.⁹⁸

When the negotiations started, this attitude resulted in a policy of passive resistance. The Netherlands did not obstruct the work on the draft Convention, but it refused to do anything to help the drafting forward. To illustrate, when it was invited to co-sponsor a General Assembly resolution that would, among others, grant the Working Group pre-sessional meeting time in 1981, it turned down the request on account of its reservations in regard to drawing up a Convention on the Rights of the Child.⁹⁹ Clearly, it was another story now than it was in the case of the draft Convention against Torture, where the Netherlands had sponsored resolutions in spite of doubts about the desirability of the instrument.¹⁰⁰ Apparently, the fear of harm to its good human rights reputation was less predominant in this case. One reason for this may have been that at the Ministry of Foreign Affairs, which was responsible for the Dutch policies towards the negotiations until 1983, the Convention continued to be seen as peripheral to the human rights debate.¹⁰¹

That the Netherlands did not give priority to the issue of children's rights must also have been obvious to other diplomats because the Netherlands did not send an expert to the Working Group, but most of the time confined itself to sending a delegate from the Permanent Mission in Geneva. Since representation by a non-specialized diplomat, who does not have much substantive knowledge and who often has to carry out a number of other duties at the same time, means representation by someone who cannot reasonably be expected to make a real contribution to the drafting work, this can be understood as an indication that the topic under discussion is not a priority.¹⁰² During the discussions, the Dutch representatives to the Working Group took a rather passive stand indeed. For instance, in 1980, some efforts were made to prevent the adoption of provisions that would be contrary to Dutch domestic policy and law, but apart from

98 LeBlanc, 1995, p. 21. See also Keck and Sikkink, 1998, p. 205. They maintain that 'concern with protecting the most vulnerable parts of the population – especially infants and children' is a 'transcultural belief with wide resonance'.

99 Telex-message from the Permanent Representative in New York to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 9 October 1980, Archive MFA, VN 1975-1984, 999.232.154, file 1328; Telex-message from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Permanent Representative in New York, 23 October 1980, Archive MFA, VN 1975-1984, 999.232.154, file 1328. For the text of the resolution, see: General Assembly resolution 35/131, 11 December 1980.

100 See section 3.2.

101 Interview with J.A. Walkate, 21 April 2004.

102 Interview with I. Jansen, 6 October 2003; Interview with J.E. Doek, 28 October 2003. On the composition of delegations and the tasks of a Permanent Mission, see: Kaufmann, 1988, p. 116-129, in particular p. 128. The Netherlands was not the only state that sent a diplomat of its Permanent Mission; in fact, almost every state had done so. Although the communist allies were in favour of the Convention, their representatives were selected on the basis of their loyalty to the communist regimes rather than on the basis of their outstanding qualities in the field of juvenile and family law, so all in all, there were hardly any experts in the Working Group at all. Interviews with I. Jansen, 6 October and 5 November 2003; Interview with J.E. Doek, 28 October 2003.

that the Netherlands did not make any relevant contributions.¹⁰³ In its own report of 1981, the Netherlands included itself in the list of active participants.¹⁰⁴ This classification must, however, be put into perspective by the fact that the official UN report of the Working Group refers to a small contribution on the part of the Netherlands only once, while the most active delegations, the United States and Australia, are each mentioned more than fifteen times.¹⁰⁵

Insofar as one could speak of a cautious policy change towards a slightly higher level of activity at all, it did not, in any case, persist: in 1982, there does not seem to have been any Dutch involvement at all.¹⁰⁶ Perhaps, the political situation in Poland had dampened the already limited Dutch enthusiasm for the draft Convention even further.¹⁰⁷ However, it is also possible that it had something to do with the extremely technical character of the deliberations of that year, to which the junior official of the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs who represented the Netherlands in 1982, could not realistically be expected to contribute.¹⁰⁸

7.2.2 A policy change

As was explained in section 7.1.3, the atmosphere in the Working Group improved considerably in 1984. The Netherlands' attitude towards the Convention changed in that very same year. One prior condition for a more active participation in the Working Group had already been fulfilled in 1983, because starting from that year, an expert

103 For the few contributions of the Netherlands to the discussion, see: UN Doc. E/1980/13, p. 93-102; Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 28 February 1980, Archive MFA, VN 1975-1984, 999.232.154, file 1328; Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 17 March 1980, Archive MFA, VN 1975-1984, 999.232.154, file 1328; Telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, 25 February 1980, Archive MFA, VN 1975-1984, 999.232.154, file 1328.

104 Report on the 37th session of the UN Commission on Human Rights, Geneva, 2 February-13 March 1981, Archive MJ, unfiled records.

105 See: UN Doc E/1981/25, p. 105-130. The reference to the Netherlands can be found on page 110. Admittedly, an official UN report does not always tell the whole story – it does not include information about everything that has been said and done, and it certainly does not include information about informal consultations – but if a delegation can indeed be classified as an active participant this will always be reflected in that report, because if it were not, the delegation would probably insist on changing the draft of the report in such a way that it would reflect its contributions.

106 Neither the report of the Working Group nor any files in the records of the Ministries of Justice and Foreign Affairs make mention of any active participation on the part of the Netherlands. For the report, see: UN Doc. E/1982/12/Add.1. For the ministerial records see: Archive MFA, VN 1975-1984, 999.232.154, file 1328, Archive MJ, unfiled records.

107 The Netherlands was taking the political situation in Poland very badly and it became one of the driving forces behind the Poland-resolution in the Commission. See: Baudet, 2001a, p. 152-156; Castermans-Holleman, 1992, p. 241-255.

108 Handwritten notes, Archive MJ, unfiled records. This document mentions the name of the Dutch representative. No particular date is assigned to it, but it is clear that the first notes are made on 16 November 1981, while the last ones must be made in the period between January 1982 and September 1982.

represented the Netherlands in the Working Group. Back in The Hague it was realized that the Ministry of Foreign Affairs lacked the specific expertise that was needed in the Working Group. At the initiative of the Ministry of Justice, it was decided that one of its officials, Sjaak Jansen, would represent the Netherlands in 1983.¹⁰⁹ He was a specialist in family law and juvenile law and although he had never really been involved with human rights or the Commission on Human Rights – at the time, relating family law to human rights law was a very recent development – he did have considerable international experience as a negotiator in other international forums.¹¹⁰

Before 1983, Jansen had followed the negotiations on the draft Convention on the Rights of the Child from a distance.¹¹¹ In 1980, the Ministry of Justice had become aware that the negotiations on this Convention included issues within the scope of its competence, and it had informed the Ministry of Foreign Affairs that it would like to be consulted on these matters.¹¹² During the week of the Working Group's meetings, Dutch representatives frequently called Jansen for advice on legal-technical issues, and before the 1982 session of the Working Group, there had also been preparatory consultations.¹¹³ However, this method of working proved to be ineffective. The consultations were time-consuming, and did not have the desired effect.¹¹⁴ The exact course of the negotiations could not be anticipated and a number of the adopted articles contained elements that were at variance with Dutch legislation, and among others, Dutch immigration policy.¹¹⁵ A number of other states had also started to send experts in juvenile law to represent them, and in 1982, the negotiations had taken such a legal-

109 Letter from the Head of the International Organisations Department of the Ministry of Foreign Affairs on behalf of the Minister of Foreign Affairs to the Minister of Justice through the Secretary-General of the Ministry of Justice, 10 January 1983, Archive MFA, VN 1975-1984, 999.232.154, file 1328.

110 Interview with I. Jansen, 6 October 2003. Note that apart from the negotiations on the Convention on the Rights of the Child, it was the so-called Marckx-arrest, an arrest of the European Court of Human Rights, that dealt with the issue of discrimination between children born in wedlock and children born out of wedlock and the consequences for inheritance rights, that made clear that family law had everything to do with human rights. Interview with I. Jansen, 6 October 2003. For the arrest, see: Case of Marckx v. Belgium, judgment of 13 June 1979, Series A, Volume 31. Mr. Doek also confirmed that at the time, human rights and juvenile law were not so much considered connected fields of law yet. Interview with J.E. Doek, 28 October 2003.

111 Interview with I. Jansen, 6 October 2003.

112 Handwriting on telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, Archive MJ, unfiled records. (The copy in the records of the Ministry of Justice does not give a date, the one in the records of the Ministry of Foreign Affairs does: 27 February 1980).

113 Note on the 'Report on the 38th session of the UN Commission on Human Rights, Geneva, 1 February-12 March 1982', 6 January 1983, Archive MJ, unfiled records; Interview with I. Jansen, 6 October 2003.

114 Interview with I. Jansen, 6 October 2003.

115 Paper entitled 'Comments on the 'Draft convention on the rights of the child'', Archive MJ, unfiled records; Note from an official of the Ministry of Justice to the Legislation Division for Public Law of the Ministry of Justice through the Head of the International and Policy Affairs Section of the Immigration Department of the Ministry of Justice, 9 December 1982, Archive MJ, unfiled records; Instructions for the Dutch representative to the meeting of the UN Working Group on a draft convention on the rights of the child, 10 January 1983, Archive MJ, unfiled records. On this issue, see also: section 7.3.5.

technical course, that the Ministry of Justice felt that a more specialised contribution by the Netherlands would also be desirable.¹¹⁶ The Ministry of Foreign Affairs seemed happy to get rid of its responsibilities. It immediately accepted the proposal, and Jansen was requested to represent the Netherlands each of the coming years.¹¹⁷

Even though it was easier to participate for the Netherlands now that it was represented by an expert, in 1983 its contributions were still relatively modest. The Netherlands is hardly mentioned anywhere in the official UN report on the Working Group, but Jansen's report shows that he did, at least to a certain extent, take an active part in the drafting work.¹¹⁸ Similar to a growing number of other Western states, the Netherlands also appeared to be ready to co-sponsor the yearly Commission's resolution on the draft Convention now. This did, however, not mean that it had put aside its reservations about the project.¹¹⁹ To illustrate, it still made objections to the assertion that children's rights were basic human rights, because it was of the opinion that all basic human rights were children's rights, but that the opposite was not true.¹²⁰ Moreover, it should not be forgotten that the main reason to delegate an expert to

116 Handwritten notes, written in the period between the 1982 and the 1983 session of the Working Group, Archive MJ, unfiled records; Letter from the Secretary-General of the Ministry of Justice on behalf of the Minister of Justice to the Minister of Foreign Affairs, 28 December 1982, Archive MJ, unfiled records; Note to the concept of the letter from the Secretary-General of the Ministry of Justice on behalf of the Minister of Justice to the Minister of Foreign Affairs, Archive MJ, unfiled records; Report on the 38th session of the UN Commission on Human Rights, Geneva, 1 February-12 March 1982, Archive MJ, unfiled records.

117 See, for instance: Letter from the Secretary-General of the Ministry of Justice on behalf of the Minister of Justice to the Minister of Foreign Affairs, 28 December 1982, Archive MJ, unfiled records; Letter from the Head of the Humanitarian and Legal Affairs Section on behalf of the Minister of Foreign Affairs to the Minister of Justice through the Legislation Division for Private Law of the Ministry of Justice, 14 December 1984, Archive MJ, unfiled records; Letter from the Head of the Humanitarian and Legal Affairs Section on behalf of the Minister of Foreign Affairs to the Minister of Justice through the Legislation Division for Private Law of the Ministry of Justice, 8 January 1987, Archive MJ, unfiled records. For the impression of the eagerness of the Ministry of Foreign Affairs to transfer the responsibility to the Ministry of Justice: Interview with I. Jansen, 6 October 2003.

118 For the UN report, see: UN Doc. E/CN.4/1983/62. The Netherlands is only referred to in connection with an alternative text-proposal of several states on the dissemination of information on preventive health care and treatment for disabled children. (See: UN Doc. E/CN.4/1983/62, p. 18). For Jansen's report, see: Summary report of the meeting of the pre-sessional Working Group 'on the Question of a Convention on the Rights of the Child' (Geneva 24-28 January 1983), 28 January 1983, Archive MJ, unfiled records.

119 Letter from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs (sent from the Permanent Representation in Geneva) to the Legislation Division for Private Law of the Ministry of Justice, 10 February 1983, Archive MJ, unfiled records. See also: UN Doc. E/1983/13, p. 72; UN Doc. E/CN.4/1983/SR.56, p. 11.

120 Open message from the Permanent Representative in New York to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 19 October 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Open message from the Ministry of Foreign Affairs to the Permanent Representative in New York, 21 October 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Open message from the Permanent Representative in New York to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 1 December 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566.

participate in the Working Group was to make sure that the contents and the legal quality of the Convention would, in case of its coming into being, be acceptable for the Netherlands rather than to promote its actual creation.¹²¹

Nonetheless, within a year, the Dutch attitude towards the Convention changed completely. In the Working Group's session of 1984, the Netherlands showed itself a more active participant than ever before; in the official UN report, the Netherlands was mentioned several times.¹²² On two occasions, its proposals to elaborate a compromise-text even put an end to fruitless debates about which of the existing text-proposals should be taken as a basis for discussions.¹²³ Hence, the Netherlands no longer restricted itself to making sure that the draft would be acceptable; it started to facilitate progress in the negotiations. This shift would appear to be a persistent change of policy. In 1985, the Netherlands continued its constructive attitude, and on 31 January 1985, it even presented a text proposal on children in military conflicts, on which it had taken the initiative.¹²⁴ By doing so, the Netherlands created a distinct role and profile for itself in the drafting process, which in turn increased its connection with the process as a whole.¹²⁵ Gradually, the Netherlands started to become one of the most active participants in the Working Group, and in general, its share in the work was highly appreciated.¹²⁶ For instance, DCI-representative Jaap Doek summarized the Netherlands' contributions as 'active, influential and of a high quality'.¹²⁷

Hence, it is obvious that the combination of a changing international climate and growing NGO-participation also had an activating influence on the Dutch policy. With respect to the NGO-element, two factors played a role. In the first place, the Dutch delegate, Jansen, had great confidence in the professionalism of the NGO Ad Hoc Group's main spokesman, Nigel Cantwell, and DCI-representative Doek, whom he had already known for many years, among others from the time that they had both worked

121 Jansen, 2004, p. 206; Interviews with I. Jansen, 6 October and 5 November.

122 See: UN Doc. E/CN.4/1984/71.

123 Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the Rights of the Child' (Geneva 30 January-3 February 1984), 21 February 1984, Archive MJ, unfiled records. See also: UN Doc. E/CN.4/1984/71, p. 4-5 and 9-16.

124 UN Doc. E/CN.4/1985/64; Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the rights of the child' (Geneva 28 January-1 February 1985), 4 March 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259.

125 The Dutch position on children and military conflict will be dealt with more extensively in section 7.4.

126 Interview with J.E. Doek, 28 October 2003; Interview with N. Cantwell, 30 November 2003. Several documents in the records contain implicit and explicit indications of appreciation. See, for example: Letter from the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Legislation Division for Private Law of the Ministry of Justice, 12 March 1984, Archive MJ, unfiled records. The Netherlands' active role can, among others, be traced from the UN reports of the Working Group. See: UN Doc. E/CN.4/1986/39; UN Doc. E/CN.4/1987/25; UN Doc. E/CN.4/1988/28; UN Doc. E/CN.4/1989/48.

127 Interview with J.E. Doek, 28 October 2003.

at the Dutch Ministry of Justice.¹²⁸ Apart from that, there was an element of pressure as well. In the first place, on 7 April 1984, a Dutch section of Defence for Children International (DCI) was established at the initiative of Doek, who was at that time a Dutch professor in juvenile and family law.¹²⁹ Dutch news media paid attention to the foundation of a Dutch DCI-section, and an open day with a panel discussion was organised to bring the organisation and its objectives to the attention of all those interested.¹³⁰ The State Secretary for Justice, Virginie Korte-Van Hemel, had accepted an invitation to participate in this panel discussion. However, some of the main topics that the newly established organisation wanted to discuss with the panel were sensitive issues that might put the State Secretary in a difficult situation. They included, among others, detention of children and children's access to the courts.¹³¹ In spite of criticism, the government could not guarantee that juvenile delinquents would always be detained separately from adults and it was not prepared to meet requests to give the child general access to the courts.¹³²

However, from a political point of view, it was advisable to avoid a situation in which the State Secretary would have to refuse every request that was made in the course of the panel discussion. So, unsurprisingly, she made pledges with respect to other questions DCI considered important, and she assured the public of the importance that the Ministry of Justice attached to the realization of a Convention on the Rights of the Child. As Keck and Sikkink rightly point out, such statements cannot just be dismissed as 'cheap talk', because no government likes to be embarrassed by disclosures of gaps between discourse and practice, as a consequence of which a

128 Interview with I. Jansen, 6 October 2003; Interview with J.E. Doek, 28 October 2003. See also: Ineke Boerefijn and Martin Kuijer, 'Nederlandse kruideniersmentaliteit niet bevorderlijk voor optimale interpretatie IVRK, een interview met Jaap Doek, voorzitter van het VN Kinderrechtencomité' [Dutch petit bourgeois mentality not good for optimum interpretation of ICRC, an interview with Jaap Doek, chairman of the UN Committee on the Rights of the Child] – In: *NJCM-Bulletin*, Vol. 30, No. 6, 2005, pp. 692-699. See page 693.

129 Kaandorp and Meuwese, 1996, p. 125 and 140; Interview with J.E. Doek, 28 October 2003.

130 *DCI Info*, Vol. 1, No. 1, p. 16, Documentation Centre DCI Nederland, Amsterdam; *DCI Info*, first information bulletin of the Dutch section of DCI (in formation), without date, p. 2, Documentation Centre DCI Nederland, Amsterdam.

131 Letter from the chairman of the Dutch section of DCI to the State Secretary for Justice, 13 March 1984, Archive MJ, unfiled records; Letter from the Dutch section of DCI to the State Secretary for Justice, 30 March 1984, Archive MJ, unfiled records; Memorandum from the Legislation Division for Private Law of the Ministry of Justice to the State Secretary for Justice through the Deputy Secretary-General of the Ministry of Justice, 30 March 1984, Archive MJ, unfiled records.

132 With respect to the issue of non-separate detention of children, a critical DCI-report on the situation in the Netherlands had just been received, and was immediately linked to the State Secretary's participation in the forum. See: Memorandum from the Head of the Department of Legal Affairs to the State Secretary for Justice, 28 March 1984, Archive MJ, unfiled records. For further details on the question of separate detention, see section 7.3.4. The issue of children's access to the court was also very topical among specialists in juvenile and family law, and it was discussed in parliament too. Interview with I. Jansen, 6 October 2003. For examples of experts' and parliamentary involvement, see: Doek and Slagter, 1976; Appendices to the reports of the Second Chamber, 1983-1984, 18 100, chapters VI and XVI, no. 17; Reports of the Second Chamber, 1983-1984, 2 February 1984, p. 2830.

government becomes much more vulnerable to charges once it has publicly committed itself to a cause.¹³³ Besides, the State Secretary agreed to enter into consultation with the organisation to further discuss how the Netherlands could try and expedite the negotiation process in Geneva.¹³⁴ As we shall see later in this chapter, the Dutch initiative to draw up an article on children in military conflict also resulted from this panel-debate.

In the Working Group, a more individual human element also played a role in the Dutch policy change. Initially, the Dutch representative, Sjaak Jansen, had not personally been very enthusiastic about the draft Convention, and he shared the objections that the Netherlands had raised against it. However, once participating in its drafting, he gradually began to support the Convention. He started to get to know other delegates, with whom he became friendly, and he felt that now that he was involved in the negotiations anyway, the best thing to do was to try and make the best of it. This way, his enthusiasm for the project increased during the process, and he began to believe that the Convention could truly have an additional value.¹³⁵ At a formal policy level, a similar tendency became visible: in the explanatory memorandum to the national budget of 1985, the Ministry of Foreign Affairs mentioned the drafting work on the Convention as an example of completion of the international system of human rights norms in which it actively participated, and many years later, the statement to the bill of approval of the Convention would also emphasize its additional value.¹³⁶ Apparently, considerations about the additional value of a new human rights instrument not only affected the Netherlands' preparedness to actively participate in its drafting, but active involvement could also influence the Dutch opinion about its value.

7.2.3 The Netherlands' role in the Cold War antagonism

It was described in section 7.1.2 that until 1984, Cold War rivalries negatively influenced the atmosphere in the Working Group, but it has not yet been discussed to what extent this influenced the Netherlands' policies. In the period after the Second World War, Dutch foreign policy can, in general, be characterized as strongly anti-

¹³³ Keck and Sikkink, 1998, p. 24 and 26.

¹³⁴ Draft of a letter from the Secretary-General of the Ministry of Justice on behalf of the Minister of Justice to the Minister of Foreign Affairs, 24 July 1984, Archive MJ, unfiled records; *DCI Info*, Vol 1, no 1, p. 10, Documentation Centre DCI Nederland, Amsterdam. Consultations indeed took place, see: Handwritten notes of a conversation with DCI on 11 September 1984, Archive MJ, unfiled records. Jansen confirmed the above interpretation of the role of the panel discussion (Interview with I. Jansen, 5 November 2003).

¹³⁵ Interview with I. Jansen, 6 October 2003. In an interview, a former official of the Ministry of Foreign Affairs confirmed that, in practice, this is indeed the way things go. Once a drafting process has gained momentum, it is often better to accept that and to try and see the positive aspects rather than to concentrate on one's initial objections (Interview with H.A.M. von Hebel, 21 December 2005).

¹³⁶ Appendices to the reports of the Second Chamber, 1984-1985, 18 600, chapter V, no. 2, p. 62; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 2-3 and 7. See also: Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 4.

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communist and pro-Atlantic.¹³⁷ In his study on the Netherlands' policy towards Eastern European countries, Baudet even comes to the conclusion that the Netherlands' human rights policy and its position within the CSCE were in the first place determined by strategic considerations that aimed at realising self-determination for individual Eastern European countries and undermining communist regimes.¹³⁸ However, the Netherlands did not use the human rights instrument for that purpose in the context of the negotiations of this particular Convention.

Considering the fact that international human rights discussions and the Cold War were often inextricably linked to each other, it is unlikely that the Cold War atmosphere did not affect the Netherlands' position at all.¹³⁹ It goes without saying that the fact that the initiative was advocated mainly by Warsaw Pact countries, and so clearly bore the stamp of communist thinking about human rights, was not advantageous for its reception in the Netherlands. Moreover, it is unlikely that it was purely accidental that the changes in the Dutch participation coincided with the waves of international Cold War rivalry and the intensity of the crisis over Poland in the beginning of the 1980s. However, the observation that the Cold War climate influenced the Dutch policies cannot automatically be understood to mean that the Netherlands' policies were primarily driven by strategic considerations.

First of all, it should be noted that the objections that the Netherlands raised were mainly related to its opinion that the proposed treaty did not add much to existing instruments. This point of view was also shared by officials of Ministries that did not usually think in terms of Cold War rivalry, and if one takes into account that it was also brought to the fore in policy memoranda and other cases of international human rights standard setting, it is clear that it cannot be disposed of as a false argument that was used only to conceal other political motivations. As was already mentioned in section 7.2.1, insofar as the Netherlands participated in the discussions in the early years of the negotiations, the focus of its contributions seemed to be concentrated on the avoidance of conflict with domestic policies. Often, its approach seemed to be of a legalistic rather than a political nature anyway. To illustrate, a report on the deliberations in the Working Group that the delegation in Geneva sent to the Ministry of Foreign Affairs in 1981 paid more attention to the risk that the draft Convention would weaken existing instruments than to positions it had taken in ideological debates.¹⁴⁰

137 Van Staden's qualification of the Netherlands as a 'loyal ally' is probably one of the most quoted descriptions of the Dutch position during the Cold War. See: Van Staden, 1974, p. 220-230. Hellema has moderated this statement for the 1950s (see: Hellema, 1990), but in general, it can be said that the Netherlands was loyal to the United States. See also: Voorhoeve, 1985, 146-150; Baudet, 2001a, p. 57-62, 255 and 258.

138 Baudet, 2001a, p. 256-257 and 272.

139 On the inextricable link between the Cold War and human rights debates, see, for instance: Van Genugten, 1988, p. 36; Vincent, 1986, p. 61; Kuitenbrouwer, 2003, p. 189.

140 Telex-message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 1328.

Besides, if the main idea of the Netherlands had been to use the Working Group as a forum for Cold War politics, it would probably have sent a Cold War expert to represent it, and not an expert in juvenile and family law, as it did in 1983.

It is also important to note that Dutch policy differed from that of the United States in some important ways. Starting from 1981, the latter followed a strategy of *active* resistance, which seemed to aim primarily at discrediting the Soviet system and the draft Convention, while the Netherlands remained relatively passive. Admittedly, the Netherlands did not always stay out of the typical Cold War debates that took place in the Working Group.¹⁴¹ For example, in discussions about 'the right of everyone to leave any country, including his own', a controversial topic with which the West traditionally confronted the Eastern Europeans, the Netherlands sided with the United States when that country, in 1983, accused Poland of taking reprisals against persons who submitted a request for emigration, and Poland denied that this was true.¹⁴² However, there are no indications that the Netherlands' input in the political part of the negotiations of these early years was any greater than with respect to other issues.¹⁴³ Moreover, when it became actively involved in the deliberations in the second half of the 1980s, it also left the impression that it took a pragmatic rather than an ideological approach and that it judged each issue on its own merit.¹⁴⁴

That its approach was different from that of the United States can also be demonstrated by the example of the question of the incorporation of civil and political rights. The policy-makers in the United States were of the opinion that the original Polish draft was too one-sidedly concentrated on social and economic rights, and they made a list of rights that, according to them, were missing in the Polish draft, which they distributed to their allies. It included such rights as the right not to be tortured, freedom of expression and freedom of (political) thought, but also newly constructed rights such as 'the right not to be alienated from the family through indoctrination in the school, including political and anti-religious indoctrination.'¹⁴⁵ In principle, the Netherlands agreed that if a Convention on the Rights of the Child would indeed come into existence, it was important that it would not only reflect the rights attributed to all by the ICESCR, but also those of the ICCPR. Nonetheless, it did not think that all the

141 Interview with I. Jansen, 6 October 2003.

142 Summary report of the meeting of the pre-sessional Working Group 'on the Question of a Convention on the Rights of the Child' (Geneva 24-28 January 1983), 28 January 1983, Archive MJ, unfiled records. Note that from the 1960s, the idea existed to draft a declaration on the right of everyone to leave any country, including his own. In the early 1980s, this project was revived by the West. See: Tolley, 1987, p. 145.

143 Apart from the example that was mentioned above, official UN reports of the Working Group and internal communications do not mention many occasions, in which the Netherlands was involved in East-West debates.

144 Interview with I. Jansen, 5 November 2003; Interview with J.E. Doek, 28 October 2003; Interview with N. Cantwell, 30 November 2003.

145 United States list of rights missing in the Polish draft, appendix to the Summary report of the meeting of the pre-sessional Working Group 'on the Question of a Convention on the Rights of the Child' (Geneva 24-28 January 1983), Archive MJ, unfiled records.

rights included in the list were suitable for incorporation in the draft Convention on the Rights of the Child, and proposals that seemed to serve a political purpose only could not count on its support.¹⁴⁶

7.2.4 NGO influence

Apart from the Cold War aspect, there is another element that deserves some special attention, namely the relationship between the Dutch policy-makers and the NGOs that participated in the drafting process. In section 7.2.2, it has been made clear that the Dutch policy change of 1984 can be ascribed partially to the emergence of the NGO Ad Hoc Group and the establishment of a national DCI-section in the Netherlands. Indirectly, the Netherlands, in turn, contributed to the rise of these organisations as a factor of influence in the negotiations. When Cantwell founded DCI, he had obtained support from influential persons like Canon Joseph Moerman, the Secretary-General of the International Catholic Child Bureau and the Chair of the International Year of the Child, and André Dunant, the Vice-President of the International Association of Family Court Magistrates, but nonetheless, it had proved difficult to secure recognition and the necessary resources.¹⁴⁷

A first major subsidy was granted to DCI in 1980 as a result of a spontaneous initiative that Theo Van Boven's wife, Anne-Marie, took on behalf of the organisation.¹⁴⁸ At the time, Theo van Boven was the Director of the UN Division of Human Rights, and in this function and as a former employee of the Dutch Ministry of Foreign Affairs, he had excellent contacts with this Ministry.¹⁴⁹ It may therefore not be surprising that the funding came from that Ministry.¹⁵⁰ The grant was crucial during the attempt to launch the organisation; not only was DCI's founder Cantwell at the point of giving up, it also set a precedent for subsequent support from other governmental

146 Summary report of the meeting of the pre-session Working Group 'on the Question of a Convention on the Rights of the Child' (Geneva 24-28 January 1983), 28 January 1983, Archive MJ, unfiled records. See also: UN Doc. E/CN.4/1983/62, p. 4; Interviews with I. Jansen, 6 October and 5 November 2003; Interview with J.E. Doek, 28 October 2003.

147 Veerman, 1992, p. 124-125; Interview with N. Cantwell 30 November 2003.

148 Interview with N. Cantwell 30 November 2003.

149 See for example: Castermans-Holleman, 1992, p. 123 and 264. Van Boven was also known for his good relations with NGOs. See, for instance: Keck en Sikkink, 1998, p. 96-97.

150 Kaandorp and Meuwese, 1996, p. 121. The exact amount of money granted to DCI was probably somewhere between 25.000 and 50.000 Dutch guilders. In the request from the Permanent Representative to the Ministry, 50.000 guilders were asked for, but Nigel Cantwell and Jaap Doek recall a subsidy of about 25.000 guilders. See: Copy of a memorandum from the Social and Environmental Affairs Section to the Director-General International Cooperation through the Legal and Social Affairs Division, the Secretary of the International Organisations Department and the Policy Planning Section and the Advisory Council Secretariat of the International Cooperation Division, 13 June 1980, Archive MFA, VN 1975-1984, 999.232.154, file 1328; Interview with Cantwell, 30 November 2003; Interview with Doek, 28 October 2003.

donors.¹⁵¹ Hence, without this grant, DCI would probably not have been able to take a next step and to take the lead in the creation and functioning of the NGO Ad Hoc Group.

The NGOs not only influenced the Dutch position towards the question of the Convention's desirability and its preparedness to participate in the negotiations, but also its stand on questions that concerned the contents of the Convention's articles. The NGO Ad Hoc Group distributed a report before each of the Working Group's sessions, which included comments on adopted as well as proposed articles, and additional text-proposals.¹⁵² Dutch policy-makers took these proposals very seriously. For instance, when the Netherlands received a copy of the NGO Ad Hoc Group's first report in late 1983, it was judged positively. The Ministry of Foreign Affairs forwarded the report to Sjaak Jansen of the Ministry of Justice with the request to consider it carefully and with the suggestion to take up some of the NGO proposals if they were deemed practicable.¹⁵³ As was mentioned before, Jansen put great trust in the main spokespersons of the NGO Ad Hoc Group. He valued their expertise and the NGOs grass-root experience highly, and he was of the opinion that the Ad Hoc Group's representatives had a good sense of what could realistically be achieved. In fact, he was not only prepared to listen to them when they approached him, when he wanted to submit a proposal himself he would usually ask them for their comments as well.¹⁵⁴ Further proof of appreciation for the work of the NGOs was that the Ministry of Justice financially supported DCI-activities relating to the Convention.¹⁵⁵

151 Interview with Cantwell, 30 November 2003; Interview with Doek, 28 October 2003. On-going support came mainly from Denmark, Norway and Sweden.

152 Price Cohen, 1990a, p. 140-141; Interview with N. Cantwell, 30 November 2003.

153 Letter from the Head of the Humanitarian and Legal Affairs Section on behalf of the Minister of Foreign Affairs to the Minister of Justice through the Legislation Division for Private Law of the Ministry of Justice, 2 December 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Letter from the Chairman of the Informal NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child to the Permanent Representatives to International Organisations based in Geneva, 15 November 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Document of the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, entitled: 'The Draft Convention on the Rights of the Child, The Report of informal consultations among international non-governmental organisations' [1983], Archive MJ, unfiled records.

154 Interviews with I. Jansen, 6 October 2003 and 5 November 2003. The Norwegian representative, Per Miljeteig-Olssen, and the British delegate, Michael Longford, also mentioned the professional and grass-root experience element as an important reason for taking the NGOs seriously. See: Miljeteig-Olssen, 1990, p. 151; Longford, 1996, p. 224 and 231. Apparently, the trust that Jansen put in DCI-representative Doek was also shared at the Ministry of Foreign Affairs, because after the Convention's adoption, the Head of the Legal and Social Affairs Division of that Ministry even considered accepting an offer by Jaap Doek to help drawing up the explanatory statement to the bill of approval of the Convention for the parliament. See: Memorandum from Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs to the Head of the International Organisations Department, 20 April 1990, Archive MFA, DDI-DVE, 999(3), file dve/ara/00435.

155 Document entitled 'work on the draft convention on the rights of the child, interim progress report, 1 January-30 June 1988', Documentation Centre DCI Nederland, Amsterdam, box entitled 'CRC Drafting Process'.

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In the chapter on the UN Convention against Torture, it was demonstrated that the traditional idea of NGOs as external actors holding a position that is more or less opposite to that of the government is too restricted, and that there may be government officials or institutions that actually pursue the same goals as NGOs, and that can thus be considered part of a transnational advocacy network.¹⁵⁶ In the case of the Convention on the Rights of the Child, this was even more obvious. The NGOs organised themselves in a more or less institutionalized international network, the NGO Ad Hoc Group. The Group quickly achieved a high level of credibility, and good relations were soon established with Chairman Lopatka and many of the delegates to the Working Group.¹⁵⁷ Although there were regular contacts with delegates from all regions, they were most intense with a core-group of a number of Western states to which the Netherlands belonged as well.¹⁵⁸

The relations between the NGOs and representatives of these countries were characterized most of all by mutual cooperation based on an equal standing.¹⁵⁹ Even though the NGOs' formal position was not equal to that of a state's representative – they were not allowed to take the floor unless they were invited to – in corridor chats, these delegations accepted their representatives as part of the group. Informal meetings and consultations, where government delegations and NGO representatives exchanged views and worked on draft texts, were organised very frequently.¹⁶⁰

The Dutch delegate Jansen also spoke very often with the main spokesperson of the NGO Ad Hoc Group, Cantwell.¹⁶¹ Contacts between him and the Dutch DCI-representative, Doek, who also acted as an important spokesperson of the Group, were even more intense.¹⁶² These contacts usually took place in Geneva, where they stayed in the same hotel and had dinner almost every night together with the representatives of Austria, Finland, and the United Kingdom.¹⁶³ In fact, they were a club of

156 See section 3.3. For the concept of a transnational advocacy networks, see section 1.6.

157 Interview with N. Cantwell, 30 November 2003. See also: Miljeteig-Olssen, 1990, p. 152.

158 Interview with J.E. Doek, 28 October 2003.

159 As the Norwegian representative, Per Miljeteig-Olssen, put it: 'In the Working Group a constructive dialogue between the two parties developed, sharing their common wish to create a comprehensive Convention. It was not an antagonistic relationship as often seen in other human rights fora, where the role of NGOs to a large extent has been that of criticizing governments and international organisations for not fulfilling their obligations.' See: Miljeteig-Olssen, 1990, p. 152.

160 Interview with J.E. Doek, 28 October 2003; Interview with N. Cantwell, 30 November 2003; Interviews with I. Jansen, 6 October 2003 and 5 November 2003.

161 Interview with I. Jansen, 6 October 2003. For the position of Cantwell, see also: LeBlanc, 1995, p. 42.

162 Interviews with I. Jansen, 6 October 2003 and 5 November 2003; Jansen, 2004, p. 205-206. See also: 'Jaap Doek gekozen tot lid van het VN-Kinderrechtencomité'- In: *Tijdschrift voor de Rechten van het Kind*, Vol. 9, No. 1, 1999, pp 6-7, see: p. 6.

163 Back in The Hague, consultations about the Convention were rare. (Interview with I. Jansen, 6 October 2003; Interview with J.E. Doek, 28 October 2003) There seems to have been only one meeting between representatives of the Dutch section of DCI and the Ministries of Justice shortly after the panel discussion that was mentioned before. (See: *DCI Info*, Vol 1, no 1, p. 10, Documentation Centre DCI Nederland, Amsterdam; Handwritten notes of a conversation with DCI on 11 September 1984, Archive MJ, unfiled records).

friends.¹⁶⁴ As a representative of the Dutch government, Jansen had his own responsibilities, and certainly there were NGO proposals that he was not willing to support, but he also felt that he had a certain interest in common with the NGOs and a number of other delegations, namely: to draft a good Convention.¹⁶⁵ Freudian slips by Jaap Doek – when asked for his opinion about the Netherlands' negotiation-policy, he would sometimes speak of 'we' – reveal that NGOs shared this idea, at least to a certain extent.¹⁶⁶

This was also obvious from the measure of cooperation between the different actors in the network. Sometimes, Jansen or other delegates would, at the request of the NGOs, submit a proposal for them, because they themselves could not formally put them on the agenda in the Working Group.¹⁶⁷ Furthermore, when it became clear that a text that was discussed in the Working Group was not generally supported, government delegates would sometimes give a signal to the NGOs to write an alternative text-proposal that could help break the deadlock. This could greatly facilitate the negotiations, especially because the UN Secretariat could not usually provide this kind of assistance.¹⁶⁸ Occasionally, government delegations would also suggest – usually in passing – that the NGO Ad Hoc Group raise certain sensitive matters first, because they were afraid to harm the relations with other states that would be offended by bringing them up. In such a situation, backing an NGO proposal was more comfortable for government delegates than tabling a proposal themselves. Moreover, if the issue concerned proved to meet with too much resistance, it was much easier for government delegates to drop a proposal that was not formally their own.¹⁶⁹ It is difficult to recover concrete examples in which this happened, but it seems likely that the provision on the

164 Interview with I. Jansen, 5 November 2003. Although Doek did not explicitly mention these dinners, he did make clear that these delegations, and the ones of Australia, Canada and Sweden were the delegations with which he was most frequently in contact. (Interview with J.E. Doek, 28 October 2003). Note that in his article on the origins, development and significance of the CRC, Cantwell also refers to a gradually developed 'family atmosphere' among the delegations. See also: Cantwell, 1992, p. 23.

165 Interview with I. Jansen, 5 November 2003.

166 Interview with J.E. Doek, 28 October 2003. An example that shows that NGOs did not always get their way is that of the issue of indigenous children. To the great disappointment of the Ad Hoc Group, the Netherlands did not back the extensive draft article on indigenous children by the Four Directions Council, an NGO that deals with questions concerning indigenous people. See: Interview with N. Cantwell, 30 November 2003. See also: UN Doc. E/CN.4/1986/39, p. 13; UN Doc. E/CN.4/1987/25, p. 12-15.

167 Interviews with I. Jansen, 6 October 2003 and 5 November 2003; Interview with J.E. Doek, 28 October 2003.

168 Interviews with I. Jansen, 6 October 2003 and 5 November 2003. For more information on the lack of assistance from the UN Secretariat, see also: Memorandum approved at the meeting of the ad hoc Committee of Experts to exchange views on the draft Convention on the rights of the child (CAHDE), Council of Europe, Strasbourg, 5-6 November 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Letter from the Legislation Division for Private Law of the Ministry of Justice to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 13 November 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2566.

169 Interview with J.E. Doek, 28 October 2003; Interview with I. Jansen, 5 November 2003; Interview with N. Cantwell, 30 November 2003.

abolishment of traditional practices prejudicial to the health of children came into being this way, and it could well be that the Netherlands was one of the delegations actually behind the proposal, for in the debate it showed itself a proponent of a strong text that would preferably refer explicitly to the practice of female circumcision.¹⁷⁰

7.2.5 Questions of general concern

In the introduction to this chapter, it was mentioned that in the negotiations on the UN Convention on the Rights of the Child there were no particular issues that dominated the debate or that could be considered the key to a successful conclusion of the work. In the Working Group, the proposed articles were dealt with one by one; discussions on some matters could be concluded within one session, while other, more difficult or contentious, issues recurred on the agenda a number of times.¹⁷¹ The Netherlands did not have particular pet-items on which it strongly focused at all times either; once it had decided to commit itself to the project of the Convention, it showed itself an all-round participant that took an active interest in practically all articles discussed.¹⁷² This makes it difficult to point out what the most essential elements of the discussion were for the Netherlands, but going beyond an article-by-article analysis of the debate, a number of fundamental considerations can be distinguished.

Right from the start, the Netherlands indicated that if a Convention on the Rights of the Child were to be created, it should be more than just a copy of the Declaration of the Rights of the Child of 1959. As logically followed from the comments it had made on the initial Polish draft, the Netherlands felt that the text should be comprehensive and supplementary to already existing instruments.¹⁷³ As was mentioned, the

170 Recovering concrete examples is difficult, because written sources do not usually give information on what happened behind the scene, and in this case none of the persons interviewed were completely certain about any example given. Jansen could vaguely remember the question of 'traditional practices' and 'female circumcision' being dealt with this way. However, contrary to other possible examples, there are other indications that underscore this particular assumption. Inasmuch as the official reports of the Working Group might reflect such a process, they indeed do so. The reports show that the issue was first tabled by the NGO Ad Hoc Group in 1986, and was then taken up by the Netherlands and a number of other delegates in 1987. See: UN Doc. E/CN.4/1986/39, p. 10-11; UN Doc. E/CN.4/1987/25, p. 8-10. In later years, the Netherlands would also be the initiator of resolutions on the topic of traditional practices harmful to the health of women and girls in the Third Committee of the General Assembly. See, for instance: Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 21. See also: Appendices to the reports of the Second Chamber, 2003-2004, 29 540, no. 10, p. 24.

171 For an overview of the discussions, see: UN Doc. E/1979/36, p. 60-65; UN Doc. E/1980/13, p. 93-102; UN Doc. E/1981/25, p. 105-130; UN Doc. E/1982/12/Add.1, p. 47-77; UN Doc. E/CN.4/1983/62; UN Doc. E/CN.4/1984/71; UN Doc. E/CN.4/1985/64; UN Doc. E/CN.4/1986/39; UN Doc. E/CN.4/1987/25; UN Doc. E/CN.4/1988/28; UN Doc. E/CN.4/1989/48.

172 Interview with I. Jansen, 5 November 2003; Interview with J.E. Doek, 28 October 2003; Interview with N. Cantwell, 30 November 2003.

173 UN Doc. E/CN.4/1324, p. 14; Open message from the Permanent Representative in New York to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 19 October 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Open message from the Ministry of Foreign Affairs to

Netherlands agreed with the United States that the Convention should not only contain economic and social rights, but also civil and political rights. Apart from that, it felt that the Convention should preferably add something new and should also contain rights that were not included in the Covenants and that were specifically relevant for children.¹⁷⁴ Therefore, it was very much in favour of the creation of human rights norms that related to such questions as child abduction, abuse, maltreatment, sexual exploitation, and other forms of exploitation of children.¹⁷⁵

Many others shared this opinion, and according to the Norwegian representative to the Working Group, Per Miljeteig-Olssen, the original text was changed so much that the drafting could actually be seen as no less than 'a process of developing a new conceptual framework for the understanding of children's rights'.¹⁷⁶ The result was that during the drafting process, the scope of the Convention was expanded considerably. However, as is implicitly recognized in an article by the British delegate, Michael Longford, the other side of the coin was that potential sovereignty costs increased for states.¹⁷⁷ It was notable that the representatives that participated in the negotiations were well aware of this, because draft provisions were constantly rephrased to bring them into line with the various values and different systems of law and policies that they represented.

For the Netherlands, it was also important to ensure that the Convention would not contain elements that it could not fit into its own system. Generally speaking, this meant that it preferred to avoid the need to change its domestic laws, because these laws usually had already proven to function well in the national situation, while their implementation was considered realistic from a practical and financial point of view. Moreover, existing laws had been established in a democratic process in which different interests had already been balanced against each other, and had thus already proven to be acceptable from a political point of view.¹⁷⁸ Especially at the Ministry of

the Permanent Representative in New York, 21 October 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Open message from the Permanent Representative in New York to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 1 December 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566.

174 Interviews with I. Jansen, 6 October and 5 November 2003.

175 For the question of child abduction, see: Summary report of the meeting of the pre-sessional Working Group 'on the Question of a Convention on the Rights of the Child' (Geneva 24-28 January 1983), 28 January 1983, Archive MJ, unfiled records; UN Doc. E/CN.4/1983/62, p. 11. For the question of abuse and maltreatment, see: Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the Rights of the Child' (Geneva 30 January-3 February 1984), 21 February 1984, Archive MJ, unfiled records; UN Doc. E/CN.4/1984/71, p. 8-11.

176 Miljeteig-Olssen, 1990, p. 149-150.

177 Longford, 1996, p. 219.

178 Interview with I. Jansen, 6 October 2003. However, an example where the Dutch government was, on the contrary, prepared to adapt its laws, concerned wartime law. In the explanatory statement to the bill of approval of the Convention, it announced that, in the context of this law's general revision, it intended to set an age limit of eighteen years for calling up civilians to join the army in times of war. (See: Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 47. See also Grünfeld, 2002, p. 309-310.)

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Justice, an eye was kept on the draft's conformity with domestic legislation right from the start.¹⁷⁹ As was explained in section 7.2.2, concerns with regard to exactly this point had been one of the main reasons why it had requested to be represented in the Working Group. This did not mean that its main purpose was to defend its own policies and to develop an international treaty that resembled Dutch law, but on the other hand, it was important to be aware of domestic realities. According to Jansen, for the delegates the real art of negotiating the Convention on the Rights of the Child was to find a balance between making compromises and making sure that the result would be acceptable in their own countries.¹⁸⁰

In respect to the latter aspect, the ultimate test was the ratification process. In this process, possible sovereignty costs were carefully considered. The Ministry of Foreign Affairs usually prefers a rapid ratification to keep its good international reputation, but Dutch line ministries normally scrutinize international treaties to determine the exact implications for the domestic legal order before they are willing to ratify.¹⁸¹ Because the Convention on the Rights of the Child touched on many policy areas, and included also provisions that could affect the relationship between the child and its parents, assessing what its impact might be was particularly complicated.¹⁸² Moreover, due to the court's decisions concerning article 26 ICCPR (described in section 5.4.1), the government had become increasingly aware that through their application by the national judge, allowed for by the Dutch Constitution, international human rights norms could seriously thwart government policies, and it tended to be even more cautious than it had been before.¹⁸³ To the great frustration of human rights activists and the Minister for Development Cooperation, Jan Pronk, who wrote letters to try and speed up the ratification process, it therefore took until 6 February 1995 before the Netherlands, as one of the last states in the world, ratified the Convention.¹⁸⁴

179 See, for example: Memorandum from the Head of the Child Protection Department of the Ministry of Justice to the Legislation Division for Public Law of the Ministry of Justice, 25 September 1978, Archive MJ, unfiled records; Handwritten notes on a telex-message from the Permanent Representative in Geneva to the Ministry of Foreign Affairs, without date, Archive MJ, unfiled records; Paper entitled 'Comments on the 'Draft convention on the rights of the child'', Archive MJ, unfiled records.

180 Interviews with I. Jansen, 6 October and 5 November 2003.

181 Interview with J.A. Walkate, 21 April 2004.

182 See: Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 6, p. 4; Reports of the Second Chamber, 1993-1994, 23 June 1994, p. 5560; Reports of the Second Chamber, 1993-1994, 30 June 1994, p. 5704. See also: Doek, 1995, p. 14-17; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 8-10.

183 See: Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 6, p. 4; Reports of the Second Chamber, 1993-1994, 23 June 1994, p. 5560; Reports of the Second Chamber, 1993-1994, 30 June 1994, p. 5704. See also: Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 8-10. On the change of climate after the article-26 verdicts, see also: 5.4.1.

184 See: Staatsblad van het Koninkrijk der Nederlanden [Bulletin of Acts of the Kingdom of the Netherlands], 1994, No. 862; Ruitenbergh, 2003, p. 33-45; Appendices to the reports of the Second Chamber, 1996-1997, 25 300, no. 1, p. 11-12. For the letters by the Minister for Development Cooperation, see: Letter from the Minister for Development Cooperation to the Minister of Justice, 8 February 1991, Archive MJ, unfiled records; Letter from the Minister for Development Cooperation to the Minister of

However, the Netherlands was not concerned only with sovereignty costs and possible consequences for its domestic legal order. This is evident from the fact that it also paid considerable attention to the question of how the new Convention's provisions related to existing international law. As the international legislative activity in the area of human rights continued, the risk of conflicts between instruments increased.¹⁸⁵ For Australia, this had been one of the reasons why, in 1986, it took the initiative for a resolution with guidelines for human rights standard setting within the UN, which was eventually adopted as General Assembly resolution 41/120.¹⁸⁶ One of the principles of this resolution was that new instruments '[b]e consistent with the existing body of international human rights law'.¹⁸⁷

The Netherlands had actively lobbied for the adoption of resolution 41/120 and considered it to be of great importance for the Convention on the Rights of the Child to be drafted according to the principles that it laid down.¹⁸⁸ Most importantly, this implied that codification of the rights of this new Convention should not be allowed to undermine the existing level of protection.¹⁸⁹ The Netherlands had become concerned about this at quite an early stage of the negotiations, and in 1981, the idea to prepare a proposal for a general clause saving more advantageous provisions of other instruments began to circulate among Dutch officials.¹⁹⁰ Eventually such a clause was indeed included in the Convention.¹⁹¹ A Canadian proposal served as the basis for this article, but the Netherlands had an active part in the Working Group's debate on the matter too.¹⁹²

Even so, the Netherlands still considered it detrimental for the Convention to contain articles that watered down the existent level of protection. Therefore, the

Justice, 18 October 1993, Archive MJ, unfiled records. For examples of calls from non-governmental actors, see: Letter from the Director of the Dutch section of DCI to the Minister of Justice, 20 November 1993, Archive MJ, unfiled records; Letter from the President of the Dutch UNICEF Committee to the Prime Minister, 15 November 1993, Archive MFA, DDI-DIO, 1993-1994, file dio/ara/00107, part 2; Newspaper-article P.R. Baehr en J. Smith, 'Ratificeer verdrag over recht van kind' [Ratify Convention on the Rights of the Child] – In: *NRC Handelsblad*, 11 December 1993, p. 9, Archive MFA, DDI-DIO, 1993-1994, file dio/ara/00107, part 2.

185 See: Meron, 1982, p. 756-758 and 771-772; Tolley, 1987, p. 97.

186 See: General Assembly resolution 41/120, 4 December 1986. See also: Ministerie van Buitenlandse Zaken, 1987a, p. 144. In an article on the proliferation of human rights of 1984, Australian human rights expert Philip Alston drew up a list of criteria for proposed new rights which was very similar to the criteria that were included in the resolution of 1986. See: Alston, 1984, p. 614-615.

187 See: General Assembly resolution 41/120, 4 December 1986.

188 For information on the Dutch role in the adoption of the resolution, see: Ministerie van Buitenlandse Zaken, 1987a, p. 144.

189 See, for example: UN Doc. A/C.3/43/SR.46, p. 14.

190 Telex-message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 1328. Similar clauses can also be found in other human rights treaties. On this issue, see, for instance: Meron, 1982, p. 758-759.

191 See article 41 CRC.

192 UN Doc. E/CN.4/1986/39, p. 30-31; UN Doc. E/CN.4/1989/48, p. 116-119. A number of other countries submitted proposals as well. See: UN Doc. E/CN.4/1983/62, p. 5.

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instructions for the Dutch delegation to the Commission on Human Rights stipulated that it was to contact the Ministry of Foreign Affairs if concrete text-proposals were made that would have far-reaching consequences for rights and freedoms already recognized in existing instruments.¹⁹³ Nonetheless, it could not prevent the final draft from containing a number of articles that compared unfavourably with the existing human rights standards. In this respect, the Netherlands was especially dissatisfied with the contents of the articles that dealt with the freedom of religion and the issue of children in military conflict.¹⁹⁴ Although the Netherlands was, in principle, in favour of the Convention's conclusion in 1989, and supported, for instance, a resolution that gave the Working Group additional meeting time to finish its work, it thought that it was even more important to improve the texts of these articles.¹⁹⁵ Among the Western partners with which the issue was discussed, there did not, however, seem to be many states that were prepared to bear the risk of causing delay along with the Netherlands, so it was unlikely that its proposals for improvement would make a difference, and there was no option for the Netherlands other than to reconcile itself with the situation.¹⁹⁶

7.3 SUBSTANTIVE ARTICLES

7.3.1 The role of the family

It was already pointed out that a treaty that deals with children's rights is different from other human rights treaties, because it not only deals with the relationship between the state and the child, but also has to take the role of the parents into account. As was explained in section 6.2, many Western countries traditionally attached great importance to the privacy of the family atmosphere. This was certainly true for the Netherlands, because during the negotiations on different human rights instruments, it had repeatedly called for provisions that recognized the family as the basic unit of society and the party first responsible for children's upbringing. It was clear to the Dutch representative to the Working Group that these values were still dominantly

193 Memorandum on the draft guidelines for the delegation to the 39th Commission on Human Rights from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the members of the Coordination Commission on Human Rights (CMM), 17 January 1983, Archive MJ, unfiled records; Telex-message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva and the Ministry of Justice, 23 January 1986, Archive MJ, unfiled records.

194 For more details, see: sections 7.3.2 and 7.4 respectively.

195 Code-message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 3 February 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430. For the Dutch attitude towards the request for extra meeting time, see: UN Doc. A/42/PV.93, p. 32-34; UN Doc. A/42/805, p. 2-3; UN Doc. A/C.3/42/SR.53, p. 11-13. See also: General Assembly resolution 42/101, 7 December 1987.

196 Code-message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 3 February 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430.

present in the government and in parliament, especially among political parties based on Christian principles. During the entire negotiation-period the Christian-democratic party, CDA, occupied a key position on the national political scene, and in representative Jansen's judgement of whether the result of the negotiations would be acceptable for the Netherlands, he had to take this into account.¹⁹⁷ Jansen sensed in advance that the CDA and other denominational parties in parliament would be concerned that the Convention on the Rights of the Child would erode parental authority.¹⁹⁸

During the negotiations, Jansen tried to anticipate these feelings by paying careful attention to the role of the family throughout the entire drafting process. For example, when the child's freedom of thought, conscience and religion was discussed, Jansen stressed the need to take the position of the parents into account, and when the Working Group took up the matter of the child's right to education, he proposed the inclusion of a paragraph that read: 'The States Parties to the present Convention shall respect the rights and duties of the parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his right in a manner consistent with the evolving capacities of the child.'¹⁹⁹ Furthermore, the value that the Netherlands had historically, and according to its Constitution, attributed to the related issue of denominational education came to expression in a proposal the Dutch delegate made in relation to the article on the objectives of education. He stressed the importance of the freedom of the parents to choose a school for their children, and suggested the incorporation of a clause that determined that the article must not 'be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions'.²⁰⁰

197 Interviews with I. Jansen, 6 October 2003 and 5 November 2003. On the political set-up of these years, see: Bosmans, 1999, 108-160.

198 Interviews with I. Jansen, 6 October 2003 and 5 November 2003. During the parliamentary considerations on the bill of approval of the Convention this was indeed one of the main issues raised by these parties. See: Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 4, p. 4-8, 12-13 and 15; Reports of the Second Chamber, 1993-1994, 23 June 1994, p. 5553-5554, 5557-5558, 5560, 5563-5564; Reports of the Second Chamber, 1993-1994, 30 June 1994, p. 5704-5708, 5716-5717, 5720-5724, 5731 and 5777.

199 For the deliberations on the freedom of thought, conscience and religion, see: Summary report of the meeting of the pre-sessional Working Group 'on the Question of a Convention on the Rights of the Child' (Geneva 24-28 January 1983), 28 January 1983, Archive MJ, unfiled records; Instructions for the Netherlands' representative to the meeting of the UN Working Group on a draft convention on the rights of the child, 10 January 1983, Archive MJ, unfiled records; Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the Rights of the Child' (Geneva 30 January-3 February 1984, 21 February 1984, Archive MJ, unfiled records. See also: UN Doc. E/CN.4/1983/62, p. 12-13; UN Doc. E/CN.4/1984/71, p. 4-8. For the deliberations on the right to education, see: UN Doc. E/CN.4/1985/64, p. 12 and 15; Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the rights of the child' (Geneva 28 January-1 February 1985), 4 March 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259.

200 UN Doc. E/CN.4/1985/64, p.17; UN Doc. E/CN.4/1989/48, p. 86-87. See also: Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the rights of the child' (Geneva 28 January-1 February 1985), 4 March 1985, Archive MFA, VN 1985-1994, 999.232.154,

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The Dutch attempts to ensure attention for the role of the parents should not, however, be interpreted as efforts that were exclusively aimed to strengthen parental authority. What the Netherlands' representative tried to do was to find the right balance between the rights and duties of the family, on the one hand, and those of the child on the other. The basic idea that the Netherlands defended in the Working Group was that the child's growth is a gradual process, during which the need for parental guidance decreases as the child becomes older and can carry more responsibilities, and that parental authority should therefore be exercised in a manner consistent with the evolving capacities of the child.²⁰¹ This became evident when a general article was drawn up to deal with the role of the parents and family. Australia and the United States proposed a text that gave parents a very dominant position in the triangle relationship between the state, the family and the child, and which made the latter dependent on his parents or guardians for the actual exercise of his rights.²⁰²

In the alternative that was proposed by the Netherlands, there was a better balance between the rights of the parents and the child. Its proposal was to keep the first sentence of the other draft, which read: 'To help the child enjoy the rights enumerated in this Convention, States Parties undertake to protect the family as the natural and fundamental unit of society', but to add the following sentence: 'The States Parties to the present Convention shall respect the rights and duties of the parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his rights enumerated in this Convention in a manner consistent with the evolving capacities of the child, having due regard for the importance of allowing the child to develop the skills and knowledge required for an independent adulthood.'²⁰³ The proposal met with the support of other delegations, and eventually, it was adopted with the addition of a phrase that recognized extended family or community responsibility for the child as provided for by local customs.²⁰⁴

file 259. See also: Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 41, and article 23 of the Dutch Constitution.

201 See, for example: Summary report of the meeting of the pre-sessional Working Group 'on the Question of a Convention on the Rights of the Child' (Geneva 24-28 January 1983), 28 January 1983, Archive MJ, unfiled records; Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the Rights of the Child' (Geneva 30 January-3 February 1984), 21 February 1984, Archive MJ, unfiled records; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 10-12 and 16-17.

202 The proposal read: 'To help the child enjoy the rights enumerated in this Convention, States Parties undertake to protect the family as the natural and fundamental unit of society. Parents or legal guardians shall enjoy the primary rights and responsibilities for the care, upbringing and development of the child, having due regard for the importance of allowing the child to develop the skills and knowledge required for an independent adulthood.' See: UN Doc. E/CN.4/1987/25, p. 24.

203 UN Doc. E/CN.4/1987/25, p. 25.

204 See: UN Doc. E/CN.4/1987/25, p. 25-26; UN Doc. E/CN.4/1988/28, p. 7-9; UN Doc. E/CN.4/1989/48, p. 31-32.

7.3.2 Freedom of religion

Another topic that traditionally received a lot of attention in the Netherlands was freedom of religion.²⁰⁵ A United States' proposal to include an article on the freedom of thought, conscience and religion could, for instance, count on Dutch support.²⁰⁶ The draft article that was adopted during the first reading was in conformity with the standards of other international treaties, and the Netherlands was satisfied with the way it was formulated.²⁰⁷ However, soon after its acceptance by the Working Group, it appeared that the article caused difficulties for Islamic countries. The problem was that the article included a phrase that stipulated that the child's right to freedom of thought, conscience and religion included 'the freedom to have or *to adopt* a religion or whatsoever belief of his choice', which implied that the child could also change its religion.²⁰⁸ As the observer for Morocco explained, for instance, in 1988, this ran counter to the principles of Muslim law, because 'the child of a Muslim was bound to be a Muslim'.²⁰⁹

During the second reading, the Working Group came back to the issue, and because giving the child a freedom to choose and change its religion proved completely unacceptable for Islamic states, the paragraph that had included the contested phrase was deleted.²¹⁰ Since article 18 of the ICCPR did explicitly recognize the freedom to adopt a religion as an element of the freedom of religion, in this formulation, the draft provision seemed to erode the general norm that was laid down in the ICCPR.²¹¹ The problem was not new, because in the negotiations on the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief in 1981, the same question had occurred. The Islamic objections against the freedom to choose religion had then been solved by the so-called 'Dutch clause', which determined that nothing in the Declaration could be 'construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights'.²¹²

205 See, for instance: Baudet 2001a, p. 59-60 and 64; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 30-33.

206 Summary report of the meeting of the pre-sessional Working Group 'on the Question of a Convention on the Rights of the Child' (Geneva 24-28 January 1983), 28 January 1983, Archive MJ, unfiled records; Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the Rights of the Child' (Geneva 30 January-3 February 1984), 21 February 1984, Archive MJ, unfiled records. See also: UN Doc. E/CN.4/1983/62, p. 12-13; UN Doc. E/CN.4/1984/71, p. 4-8.

207 For the deliberations, see: UN Doc. E/CN.4/1983/62, p. 12-13; UN Doc. E/CN.4/1984/71, p. 4-8.

208 UN Doc. E/CN.4/1984/71, Annex I, p. 4 [Italics HR].

209 UN Doc. E/CN.4/1988/28, p. 12. See also: UN Doc. E/CN.4/1986/39, Annex IV, p. 2.

210 UN Doc. E/CN.4/1989/48, p. 48; Interview with I. Jansen, 6 October 2003.

211 See: Article 18.1 ICCPR.

212 For the quotation, see: Article 8 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. See also: Ministerie van Buitenlandse Zaken, 1982a, p. 277-281. For information on the Declaration, see also: Tolley, 1987, p. 141-142.

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The Netherlands realized that the draft Convention's general saving clause that was referred to in section 7.2.5, would have the same effect, but still it felt that 'deliberate sub-standard drafting seem[ed] to be a highly unsatisfactory way of developing international law in the field of human rights.'²¹³ The Netherlands had already been concerned about this at a quite early stage of the negotiations, and in 1981, the idea to prepare a proposal for a general clause saving more advantageous provisions of other instruments began to circulate among Dutch officials.²¹⁴ Eventually such a clause was indeed included in the Convention.²¹⁵ In the deliberations on a number of other issues, the Netherlands also made clear that it considered it crucial that the Convention on the Rights of the Child would not contain articles that lowered the level of protection that existing standards provided for. For instance, when the United States wanted to amend the non-discrimination article in such a way that states parties were obliged to respect and extend the rights that were set forth in the Convention only to 'all children *lawfully* in its territory', the Netherlands objected to this suggestion on the ground that this could have adverse consequences for non-discrimination provisions of existing treaties, such as the Covenants and the CERD.²¹⁶

In view of its aim to prevent watering down the existing norms, the text of the provision on freedom of religion that emerged from the second reading, was not acceptable to the Netherlands either. However, as was pointed out above, there was insufficient support for the Dutch proposal to try and repair the article to bring it into line with the ICCPR. Other Western states shared the dissatisfaction with the deletion of the reference to the freedom to adopt a religion, but no one was willing to risk a delay in the Convention's adoption.²¹⁷ In the Commission on Human Rights, the Netherlands made a statement in which it expressed its opinion on the matter, and when it ratified the Convention many years later, it issued a formal declaration that,

213 Informal discussion paper, confidential, The Hague, 13 September 1989, Archive MFA, VN 1985-1994, 999.232.154, file 6263.

214 Telex-message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 3 February 1981, Archive MFA, VN 1975-1984, 999.232.154, file 1328. Similar clauses can also be found in other human rights treaties. On this issue, see, for instance: Meron, 1982, p. 758-759.

215 See article 41 CRC.

216 UN Doc. E/1981/25, p. 111-114 [*Italics HR*]; Report on the 37th session of the UN Commission on Human Rights, Geneva, 2 February-13 March 1981, Archive MJ, unfiled records. For the quotation, see: UN Doc. E/1981/25, p. 112. Another example was that of the provision concerning illegal abduction of children, in regard to which the Netherlands expressed the view that it might be better just to refer to existing instruments to prevent counterproductive effects of overlapping regimes. See: Summary report of the meeting of the pre-session Working Group 'on the Question of a Convention on the Rights of the Child' (Geneva 24-28 January 1983), 28 January 1983, Archive MJ, unfiled records. For another example, see: section 7.4.

217 Code-message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 3 February 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430; Letter by fax from the Legislation Division for Private Law of the Ministry of Justice to the Humanitarian and Legal Affairs Section, 13 February 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430.

according to the Dutch understanding, the article should be interpreted in conformity with the ICCPR.²¹⁸ Aside from this, there was nothing it could do.

7.3.3 Social rights

As was mentioned in section 7.2.1, one of the Netherlands' silent objections to the Polish draft Convention was that it concentrated exclusively on social and economic rights. In its own contributions, the Netherlands concentrated on the inclusion of classic rights and articles that could add something new to the Convention.²¹⁹ On the one hand, this can be considered a natural result of the social rights accent in the initial draft, but on the other hand, there are also some indications that the Netherlands simply considered social rights less important. To illustrate, in an evaluation of the Working Group's session of 1984, the Dutch representative expressed the opinion that the articles concerning mistreatment of children and freedom of thought, conscience and religion were the most important ones adopted that year. Agreement had also been reached on the article on social security, but apparently this was not considered equally important.²²⁰

Another indication that points in that direction is that the watering down of existing norms did not seem to have been a great source of anxiety for the Netherlands when it concerned economic and social rights. When the Working Group entered a discussion on the question of whether education should be provided to children free of charge, there were states, especially China, that refused to accept the principle of gratuity even with regard to primary schools. As a compromise solution the words 'as early as possible' were included in the draft article. The Netherlands recognized that this constituted a step backward compared to the provisions of the ICESCR. It certainly did not have objections to repairing it, but in spite of its general attentiveness not to allow existing standards to be whittled down, there are no signs whatsoever that it was firm on this issue, while the Canadian delegate, for example, was.²²¹

218 Open message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 1 March 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430; Transcript of the Commission on Human Rights' debate of 8 March 1989, drawn up by Rädä Barnen International, p. 53, Archive MJ, unfiled records; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 24-25 and 53 (annex I).

219 Interview with I. Jansen, 5 November 2003; Interview with J.E. Doek, 28 October 2003.

220 Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the Rights of the Child' (Geneva 30 January-3 February 1984), 21 February 1984, Archive MJ, unfiled records.

221 Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the rights of the child' (Geneva 28 January-1 February 1985), 4 March 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259; Note from the Legislation Division for Private Law of the Ministry of Justice to the Permanent Representative in Geneva, 21 January 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259. See also: UN Doc. E/CN.4/1985/64, p. 11-12; UN Doc. E/CN.4/1985/SR.53/Add.1, p. 31; and UN Doc. E/CN.4/1989/48, p. 81. See also: Article 13.2.a ICESCR, which reads: 'primary education shall be compulsory and available free to all'.

Chapter 7

While it would be fair to conclude that the Netherlands was less interested in the articles that dealt with children's social rights, it would, on the other hand, go too far to maintain that the Netherlands considered these rights unimportant. In any case, as a social welfare state, the Netherlands showed itself a more generous supporter of the inclusion of social rights provisions than, for instance, the United States.²²² At the same time, it took care that the level of social services recognized by the Convention would not exceed the achievements of the Dutch welfare state. One example that can illustrate this is a discussion in 1983 on the question of whether assistance to disabled children should be given free of charge. The Soviet Union and Poland, together with Australia and the Scandinavian countries, answered this question in the affirmative, but for the United States and Japan this was unacceptable. The Netherlands took up an intermediate position that clearly reflected its domestic arrangements with respect to the matter; it did not reject free assistance, but, considering that, in principle, the child's parents and guardians were liable for maintenance, it proposed that the resources of the parents or others caring for the child should be taken into account.²²³

A second example that can be given is that of the Dutch position in the deliberations on the provision concerning the child's right to social security. In this discussion, the United States tried to include formulations such as 'granted by law' or 'every *eligible* child', that would in fact give states complete freedom of action.²²⁴ The Netherlands could more easily accept a text without such loopholes, but it did, on the other hand, feel the need to make clear that the child's right to benefit from social security did not necessarily mean that it would have an independent entitlement to social security. It explained that in its own system, social benefits were granted to the family, so that the child could only benefit indirectly. It furthermore stressed that it was of the opinion that, in granting social security, states should take into account the financial circumstances of the child's parents or guardians. The Dutch representative to the Working Group was of the opinion that these points of view were sufficiently taken into account in the final text of the Convention, and that no new obligations were created for the Netherlands.²²⁵

Later, however, it appeared that the Ministry of Social Affairs and Employment did not share this opinion. When it received the text of the draft Convention after the completion of the second reading, it expressed concern that the article might still be

222 For an opinion about the United States' position, see: Longford, 1996, p. 226.

223 Summary report of the meeting of the pre-sessional Working Group 'on the Question of a Convention on the Rights of the Child' (Geneva 24-28 January 1983), 28 January 1983, Archive MJ, unfiled records; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 33. See also: UN Doc. E/CN.4/1983/62, p. 15-17. Note that during the second reading, the Netherlands did not agree with the United States proposal to limit the right of the disabled child by the words 'as necessary' either. See: UN Doc. E/CN.4/1989/48, p. 69.

224 UN Doc. E/CN.4/1984/71, p. 16-18.

225 Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the Rights of the Child' (Geneva 30 January-3 February 1984), 21 February 1984, Archive MJ, unfiled records. See also: UN Doc. E/CN.4/1984/71, p. 16-18.

interpreted so as to grant an independent right to social security for the child. The Ministry had not yet recovered from the shock of the Dutch courts' interpretation of article 26 ICCPR, and in the light of the recent tendencies in the domestic administration of social security law, it wanted to be two hundred percent sure that this new Convention's article on social security would not bring any surprises, and it requested the Ministry of Foreign Affairs to take steps to obtain more clarity about the exact obligations deriving from it.²²⁶ However, in the last meetings of the Working Group, during which the report was to be adopted, there was no opportunity to do so anymore.²²⁷

The Ministry of Social Affairs and Employment then insisted that the Netherlands should make a reservation with respect to this article to make clear that the Netherlands would not be obliged to grant children an independent right to social security. The Ministries of General Affairs, Economic Affairs and Finance seemed to support this point of view, but the Ministries of Justice, Foreign Affairs, Internal Affairs, Education and Sciences and Welfare, Health and Cultural Affairs were of the opinion that this was unnecessary.²²⁸ The Ministry of Foreign Affairs was especially angry about the idea, because it felt that such a reservation would harm the Netherlands' reputation abroad. However, for the Dutch State Secretary for Employment and Social Security, Elske ter Veld, it was a very important matter, on which she did not want to make concessions.²²⁹ Eventually, the matter had to be decided at the highest political level: State Secretary Ter Veld, and the State Secretary for Justice, Aad Kosto, both listed their arguments in letters to the Prime Minister and the other members of the Cabinet to settle the issue there.²³⁰ The Cabinet decided in favour of the reservation, and an amendment to delete it in parliament did not receive sufficient votes, so eventually the Ministry of Social Affairs and Employment got its way.²³¹

226 Letter from the Central Department for Law and Legal Questions of the Ministry of Social Affairs and Employment to the Head of the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 16 February 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430; Interview with L.J.A. van Amersfoort, 13 January 2005. On the article-26 cases, see section 5.4.1.

227 Open message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 27 February 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430.

228 Letter from the State Secretary for Justice to the State Secretary for Employment and Social Security, 7 October 1991, Archive MJ, unfiled records; Interview with L.J.A. van Amersfoort, 13 January 2005; Memorandum from an official of the Ministry of Justice to the State Secretary for Justice, 5 December 1991, Archive MJ, unfiled records.

229 Interview with L.J.A. van Amersfoort, 13 January 2005.

230 Letter from the State Secretary for Justice to the Prime Minister, 12 November 1991, Archive MJ, unfiled records; Letter from the State Secretary for Employment and Social Security to the Prime Minister, 25 November 1991, Archive MJ, unfiled records; Letter from the State Secretary for Justice to the Prime Minister and other members of the Council of Ministers of the Kingdom of the Netherlands, 6 December 1991, Archive MJ, unfiled records.

231 Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 1-2, p. 2; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 35-36; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 15; Reports of the Second

There are other examples that illustrate that the Netherlands wanted to avoid social rights in the Convention that, from a financial point of view, would go too far. For instance, it favoured the inclusion of provisions on the child's right to the highest attainable standard of health, and it recognized the importance of a principle that determined that secondary and higher education should be made accessible for every child, but in both cases it expressed the opinion that this did not mean that these services should always be provided free of charge.²³² It should be noted, however, that the Netherlands took this stand not because it was unfavourably disposed towards one category of rights in particular, but simply because it wanted to avoid obligations that would have financial consequences, and that would restrict its freedom to allocate government budgets. Such consequences were more likely to occur in the field of social and economic rights, but when civil and political rights seemed to involve costs that the Netherlands considered undesirable, it was not prepared to accept them either.

7.3.4 Detention of juvenile delinquents

An example that shows that the Netherlands was also careful to commit itself to civil and political rights that entailed considerable budgetary consequences, was that of the issue of the detention of juvenile delinquents. It was proposed to include a provision in the Convention on the Rights of the Child that obliged states to detain juveniles separately from adults. For the Netherlands, financial considerations were an important motive to oppose this idea.²³³ In the Netherlands, children were not always detained in institutions specially meant for juveniles. Sometimes they were kept in police cells or houses of detention for adults. The main reason for this was that there were capacity problems. The government intended to solve that problem, but as the number of children that got in trouble with the police constantly increased, this involved considerable financial costs.²³⁴ A second argument was that due to the personality of the child

Chamber, 1993-1994, 30 June 1994, p. 5777; *Staatsblad van het Koninkrijk der Nederlanden* [Bulletin of Acts of the Kingdom of the Netherlands], 1994, No. 862. The text of the Dutch reservation read: 'The Kingdom of the Netherlands accepts the provisions of article 26 of the Convention with the reservation that these provisions shall not imply an independent entitlement of children to social security, including social insurance.' See: <http://www.ohchr.org/english/countries/ratification/11.htm#reservations>, accessed 11 September 2006.

232 Concise report of the meeting of the pre-sessional Working Group 'on the question of a convention on the rights of the child' (Geneva 28 January-1 February 1985), 4 March 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 38-40. See also: UN Doc. E/CN.4/1985/64, p. 4-5.

233 Instructions for the Dutch representative to the meeting of the UN Working Group on a draft convention on the rights of the child, 10 January 1983, Archive MJ, unfiled records; Note from the Legislation Division for Private Law of the Ministry of Justice to the Permanent Representative in Geneva, 21 January 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259.

234 Interview with I. Jansen, 6 October 2003; Reports of the Second Chamber, 1993-1994, 30 June 1994, p. 5730. See also: 'Commentaar van Defence for Children International Nederland op de nota naar aanleiding van het verslag bij het wetsontwerp ter goedkeuring van het VN-verdrag inzake de Rechten van het Kind' [Commentary by the Dutch section of Defence for Children International on the govern-

or the seriousness of the offence, it could, according to the government, be more appropriate to apply adult criminal law and to detain a child in a prison for adults. Dutch law allowed for this if the child was sixteen years or older.²³⁵ In view of the existing situation, the Netherlands had already made a reservation to a similar provision in the International Covenant on Civil and Political Rights.²³⁶ Naturally, it could do the same if the rule would be repeated in the Convention on the Rights of the Child, but it preferred a formulation with which it would be able to agree.

In the Working Group, the Netherlands proposed a clause that would make it possible not to separate children deprived of their liberty from adults when 'it is unnecessary for the protection of the child'.²³⁷ In the light of its general concern regarding the possible erosion of existing norms, this was a remarkable proposal. The norm that was laid down in the ICCPR read: 'Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.'²³⁸ It did not contain any qualifications whatsoever, so it was obvious that the Netherlands' proposal created loopholes that previously did not exist, and watered down the standard that had been agreed upon in the past.

At any rate, the Dutch suggestion did not meet with major objections in the Working Group, and, initially, it was adopted without many problems.²³⁹ In spite of this, the issue was raised again during the second reading, and eventually, the sentence was deleted again. As an alternative, the Netherlands then suggested to include another escape clause: 'save in exceptional circumstances', which was accepted.²⁴⁰ The proposal was intended to keep the option to detain children together with adults open, if the amount of juvenile delinquents would warrant it.²⁴¹ However, the Council of State, which advises the government in the field of legislation, was not sure whether the clause would really be interpreted that way, and during the ratification process, it therefore recommended a reservation with respect to this article.²⁴² The government

ment's memorandum in response to the report of parliamentary deliberations on the bill of approval of the UN Convention on the Rights of the Child] – In: *Tijdschrift voor de Rechten van het Kind*, Vol. 4, No. 1, 1994, pp. 18-20.

235 Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 45-46; 'Children in prison/kinderen in gevangenissen' – In: *DCI Info*, Vol. 1, No. 1, 1984, p. 11, Documentation Centre DCI Nederland, Amsterdam; 'Minderjarigen en politiecellen' [Minors and police cells] – In: *DCI Info*, January 1988, p. 6-9, Documentation Centre DCI Nederland, Amsterdam.

236 For the text of the reservations, see: http://www.ohchr.org/english/countries/ratification/4_1.htm, accessed 11 September 2006.

237 UN Doc. E/CN.4/1986/39, p. 26.

238 Article 10.2.b ICCPR.

239 UN Doc. E/CN.4/1986/39, p. 26.

240 UN Doc. E/CN.4/1989/48, p. 99 and 104. For the quotation, see: p. 104.

241 Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451) B, p. 2.

242 Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451) A, p. 3-4.

adopted that suggestion, but it did not receive parliamentary approval, so eventually, a reservation was made only with respect to the Netherlands Antilles and Aruba.²⁴³

7.3.5 Migration-related issues

The above examples have already made clear that the Netherlands did not easily give up sovereignty when it sensed that a proposed norm could have budgetary consequences. Another area where the Netherlands wanted to be certain not to be restricted in its policies was that of migration, an area that had also proven sensitive in the past.²⁴⁴ The risk that the draft Convention might contain provisions that were at variance with Dutch immigration law, an issue close to the heart of the concept of sovereignty, became apparent during the early stages of the drafting process.

One provision that appeared to be problematic was the one on the child's right to a nationality. As adopted during the first reading, the disputed paragraph read: 'The States parties to the present Convention shall ensure that their legislation recognizes the principle according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.'²⁴⁵ For the Netherlands, the main problem with this article was that this could be interpreted so as to mean that a stateless child should immediately be given the nationality of the state in which it was born, while in the Netherlands there was a legal requirement of habitual residence on its territory for at least three years.²⁴⁶ The Netherlands had not been able to prevent this article's provisional adoption in 1981, but during the second reading, it submitted an

243 Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 1-2, p. 2; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451) A, p. 3; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 16; Reports of the Second Chamber, 1993-1994, 30 June 1994, p. 5777-5778; Staatsblad van het Koninkrijk der Nederlanden [Bulletin of Acts of the Kingdom of the Netherlands], 1994, No. 862. The reservation for the Netherlands Antilles and Aruba reads: 'The Kingdom of the Netherlands accepts the provisions of article 37(c) of the Convention with the reservation that these provisions shall not prevent...that a child which has been detained will not always be accommodated separately from adults; if the number of children that has to be detained at a certain time is unexpectedly large, (temporary) accommodations together with adults may be unavoidable.' See: <http://www.ohchr.org/english/countries/ratification/11.htm#reservations>, accessed 11 September 2006.

244 In the beginning of the twentieth century, the Netherlands had not been willing to fully cooperate with the system of the Nansen-passports for stateless Russian and Armenian refugees, because it wanted to keep control over its own immigration policies. Similar considerations also determined the Dutch policies towards the drafting and ratification of the Convention relating to the Status of Refugees of 1951. See: Van Goudoever, 1998; Leenders and Van Meurs, 1996.

245 UN Doc. E/1981/25, p. 107.

246 Note from the Legislation Division for Private Law of the Ministry of Justice to the Permanent Representative in Geneva, 21 January 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259. It should be noted that the draft article was based on the so-called 'ius soli'-principle, according to which a state confers its nationality on children born on its territory. However, the legislation of the Netherlands was, in principle, based on the 'ius sanguinis'-principle, by which children, in principle, get the nationality of their parents. See: Kooijmans, 2002, p 54-5; Malanczuk, 2003, p. 263.

amendment to make it compatible with its domestic system.²⁴⁷ The Netherlands was not the only state that had difficulties with the original text, and several other countries proposed alternatives as well. The text that was finally adopted, left much more room for states to determine their own policies, as a consequence of which the Netherlands could easily accept it.²⁴⁸

Draft provisions on the right to cross-border family reunification, and the right of the child to personal relations and direct contacts with a parent that resides in another country also caused difficulties. The Netherlands was opposed to provisions that might imply an automatic right to family reunification.²⁴⁹ In view of compatibility with Dutch immigration law, the Netherlands was also unhappy about the deletion of the condition that the parents of the visiting child must *lawfully* reside in the state party concerned. It did not press the point only because it did not want to be the sole delegation raising objections, and because it expected that, in practice, the consequences would be limited because aliens illegally residing in the state would not be in a position to claim these rights anyway.²⁵⁰

Nonetheless, the Netherlands wanted to make sure that neither this, nor any other of the Convention's provisions could be interpreted in such a way that it would frustrate its immigration policies. Together with the delegations of the United Kingdom and the United States, the Netherlands introduced a draft article to the Working Group to that end. It read: 'Nothing in this Convention shall be interpreted as legitimizing any alien's illegal entry into and presence in a State, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay, or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights.'²⁵¹ Apart from the representative of the Federal Republic of Germany, there were, however, not many delegations that supported the proposal.²⁵² It was not easy to reach agreement, but during the second reading, the matter was finally resolved by an official statement for the record by the Chairman of the Working Group. In the statement, it was declared that the articles concerned were not 'intended

247 UN Doc. E/1981/25, p.108; UN Doc. E/CN.4/1989/48, p.19.

248 UN Doc. E/CN.4/1989/48, p. 18-22. See also: Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451) no. 3, p. 17-18. For the final text, see article 7 CRC.

249 Instructions for the Dutch representative to the meeting of the UN Working Group on a draft convention on the rights of the child, 10 January 1983, Archive MJ, unfiled records; Note from an official of the Ministry of Justice to the Legislation Division for Public Law of the Ministry of Justice through the Head of the International and Policy Affairs Section of the Immigration Department of the Ministry of Justice, 9 December 1982, Archive MJ, unfiled records. See also: UN Doc. E/1982/12/Add.1, p. 49-55 and 64-68.

250 Summary report of the meeting of the pre-sessional Working Group 'on the Question of a Convention on the Rights of the Child' (Geneva 24-28 January 1983), 28 January 1983, Archive MJ, unfiled records. See also: UN Doc. E/CN.4/1983/62, p. 8-10.

251 UN Doc. E/CN.4/1986/39, p. 3. See also: UN Doc. E/CN.4/1987/25, p. 30-31.

252 UN Doc. E/CN.4/1987/25, p. 30-31.

to affect the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations.²⁵³

The Netherlands accepted this solution, but it was apparently still somewhat afraid of undesirable consequences, because when it ratified the Convention, it made an interpretative declaration with respect to article 22 concerning the refugee child. In the first place, it declared that it understood the term 'refugee' as having the same meaning as in the Convention relating to the Status of Refugees of 1951. Furthermore, it stated that the obligations imposed under the terms of this article did, according to the Dutch opinion, not prevent the submission of a request for admission from being made subject to certain conditions.²⁵⁴

7.3.6 Mistreatment and exploitation

From the above, it has become clear that the position that the Netherlands took in respect to individual draft articles, was determined by different considerations, of which expectations concerning sovereignty costs and consequences for the overall human rights system were certainly important ones. In section 7.2.4, it was, however, mentioned that there were good relations between the Netherlands' policy-makers and the NGOs involved in the work on the draft Convention. It can thus be expected that they also influenced the Dutch position towards the issues dealt with in the framework of the Convention. One issue where this was particularly evident was that of the question of mistreatment of children.²⁵⁵

When the Netherlands received a copy of the first report of the NGO Ad Hoc Group, the Ministry of Foreign Affairs sent it through to the Ministry of Justice, and immediately drew its attention to the proposals on this very issue.²⁵⁶ One reason was

²⁵³ UN Doc. E/CN.4/1989/48, p. 36.

²⁵⁴ Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 32 and 53; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 6, p. 28-30. For the complete text of the declaration, see: <http://www.ohchr.org/english/countries/ratification/11.htm#reservations>, accessed 11 September 2006.

²⁵⁵ This is not to say that this was the only issue where NGOs influenced the Netherlands' position. Other NGO-proposals that it supported were, for instance, the idea to include a separate subparagraph in the article on the right to health for an active promotion and protection of breast-feeding, and suggestions in favour of a better protection of the child's standard of living. For the example of breast-feeding, see: Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the rights of the child' (Geneva 28 January-1 February 1985), 4 March 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259. See also: UN Doc. E/CN.4/1985/64, p. 6-7. For the example concerning the standard of living, see: Note from the Legislation Division for Private Law of the Ministry of Justice to the Permanent Representative in Geneva, 21 January 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259. See also: UN Doc. E/CN.4/1985/64, p. 8-10.

²⁵⁶ Letter from the Head of the Humanitarian and Legal Affairs Section on behalf of the Minister of Foreign Affairs to the Minister of Justice through the Legislation Division for Private Law of the Ministry of Justice, 2 December 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Letter from the Chairman of the Informal NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child to the Permanent Representatives to International Organisations based in Geneva,

that these articles could give the Convention on the Rights of the Child an additional value, because general human rights treaties did not contain any standards on mistreatment of children. Another important motive was probably that the Netherlands wanted to exonerate itself from charges that it did not effectively combat child prostitution and pornography. In section 6.4, it was described that Dutch law made it difficult to prosecute travel organisations that mentioned the possibility of sexual contacts with minors at holiday destinations. It was also mentioned that in 1984 a report was published in the United States that identified the Netherlands as one of the major export countries of child pornography. This caused a lot of rumours – a telex-message from Reuter's in Washington which summarized the report included, for instance, the accusation that child auctions took place in Amsterdam – and in parliament, questions were raised as a consequence.²⁵⁷ One of them, a question by Wijberig Jabaaij of the Dutch labour party PvdA, explicitly linked the issue of child pornography to international law on the rights of the child.²⁵⁸

The parliamentary questions and the NGO criticism clearly contributed to the importance that was attached to the proposed articles on the abuse and exploitation of children. As is obvious from some handwritten notes in the margin of a letter from the Ministry of Foreign Affairs to the Ministry of Justice, the latter immediately made a link between NGO questions concerning the Dutch government's failure to effectively combat sex-tourism and the standards on mistreatment that the NGOs presented in 1983.²⁵⁹ Moreover, in reaction to a critical letter from Jaap Doek, the Ministry of Foreign Affairs also ensured him that it took these issues very seriously, and that the Netherlands would make that clear if sex-tourism were taken up for discussion in international forums.²⁶⁰ The parliamentary questions only added to the feeling of urgency, and in his communication with officials of the Ministry of Foreign Affairs, Dutch representative Jansen explicitly referred to them to underline the weight that the

15 November 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Document of the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, entitled: 'The Draft Convention on the Rights of the Child, The Report of informal consultations among international non-governmental organisations' [1983], Archive MJ, unfiled records.

257 See: *DCI Info*, Vol. 1, No. 2, p. 9-15, Documentation Centre DCI Nederland, Amsterdam; *DCI Info*, Vol. 2, No. 1, Documentation Centre DCI Nederland, Amsterdam; Open message from the Minister of Foreign Affairs to the Permanent Representative in Geneva, 1 March 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259. See also: UN Doc. E/CN.4/1992/55, p. 53-54.

258 Appendices to the reports of the Second Chamber, 1984-1985, no. 431, p. 857.

259 Handwritten notes on a letter from the Head of the Humanitarian and Legal Affairs Section on behalf of the Minister of Foreign Affairs to the Minister of Justice through the Legislation Division for Private Law of the Ministry of Justice, 2 December 1983, Archive MJ, unfiled records. The notes that were written on this document referred to correspondence about the 'Spartacus-case', which was mentioned in section 6.4 of this book.

260 Letter from the Deputy Director-General International Cooperation on behalf of the Minister of Foreign Affairs to a law professor at the Vrije Universiteit in Amsterdam, 28 November 1983, Archive MFA, VN 1975-1984, 999.232.154, file 2566.

Netherlands should give to the provisions on maltreatment and exploitation in the negotiations.²⁶¹

When the Working Group started deliberations in 1984 on an article on mistreatment and abuse of children within the family, the Netherlands welcomed a Canadian text which prescribed states parties to take appropriate legislative and administrative measures to protect the child as a basis for discussion, but it agreed with the NGO Ad Hoc Group that more emphasis needed to be put on preventive action. Therefore, it supported the NGOs' suggestion to add a reference to social and educational measures that a state should take in order to protect the child from abuse and maltreatment.²⁶² Another aim of the NGO Ad Hoc Group was to insert a paragraph to make more concrete the measures a state should take to protect the child. This was completely in line with the Netherlands' own instructions, in which it could be read that it should seek the adoption of provisions with a concrete character.²⁶³

The Netherlands not only supported the NGO suggestions that concerned mistreatment and abuse within the family, but also those in respect to the question of child abuse and (sexual) exploitation outside the family. In 1984, it conceived a plan to take the NGO suggestions on this matter as a basis for its own proposals, and two years later, it submitted a text-proposal together with France that undeniably bore strong resemblance to parts of a draft text as initially formulated by the NGO Ad Hoc Group.²⁶⁴ It read: 'The States Parties to this Convention undertake to protect the child against all forms of exploitation, particularly sexual exploitation, as well as against all degrading treatment and all acts prejudicial to the moral, spiritual, mental or physical integrity of the child.'²⁶⁵ In the Working Group, the idea of including an article on this issue could, in principle, count on considerable support, although opinions on how it

261 Note to the concept of a letter from the Secretary-General of the Ministry of Justice on behalf of the Minister of Justice to the Minister of Foreign Affairs through the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, 7 January 1985, Archive MJ, unfiled records; Note from the Legislation Division for Private Law of the Ministry of Justice to the Permanent Representative in Geneva, 21 January 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259.

262 Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the Rights of the Child' (Geneva 30 January-3 February 1984), 21 February 1984, Archive MJ, unfiled records. See also: UN Doc. E/CN.4/1984/71, p. 8-11.

263 *Ibidem*.

264 Summary report of the meeting of the pre-sessional Working Group 'on the question of a convention on the Rights of the Child' (Geneva 30 January-3 February 1984), 21 February 1984, Archive MJ, unfiled records; Note from the Legislation Division for Private Law of the Ministry of Justice to the Permanent Representative in Geneva, 21 January 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259.

265 UN Doc. E/CN.4/1986/39, p. 3. For a comparison with the NGO proposals, see: Document of the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, entitled: 'The Draft Convention on the Rights of the Child, Report on conclusions of informal consultations among international non-governmental organisations, 1984', Archive MFA, VN 1985-1994, 999.232.154, file 259; Document of the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, entitled: 'Informal consultations among international non-governmental organisations. Report on conclusions regarding substantive draft articles of the draft convention on the rights of the child, September 1985', Archive MFA, VN 1985-1994, 999.232.154, file 259.

should be formulated differed. Eventually, the proposal resulted in the adoption of two articles, which are now included in the Convention as article 34 and 36, and which deal with the child's protection against sexual exploitation and abuse, and all other forms of exploitation prejudicial to the child's welfare respectively.²⁶⁶

7.4 A POINT OF MAIN CONCERN: CHILDREN IN MILITARY CONFLICT

7.4.1 The coming into being of a text-proposal

As was mentioned earlier in this chapter, one issue that was particularly contentious concerned the question of children in military conflict. The view that the Convention should contain a provision on this topic had first been raised by NGOs. Two organisations that were particularly active in this regard were the Swedish Save the Children organisation, Rädde Barnen, and the Quaker's Friends World Committee for Consultation, but within the broader framework of the NGO Ad Hoc Group the idea was obviously applauded as well.²⁶⁷ The Netherlands was receptive to the NGO-proposals, and it decided to take the initiative to discuss it further in the Working Group.

From a humanitarian point of view, there were good reasons to support the proposals of the NGO Ad Hoc Group on children in military conflict, but apart from that, for the Netherlands there were political motives to do so as well. As pointed out in section 7.2.2, due to her participation in a DCI panel-discussion, the State Secretary for Justice was under pressure to meet some of the NGOs' wishes in order to avoid the impression that she was reluctant to take any action in the field of children's rights. An announcement that the Netherlands would take action on the issue of children in military conflict, which at that time seemed a relatively 'safe' issue from a domestic point of view, could draw attention away from the other, more sensitive topics that were also on the forum's agenda.²⁶⁸

At the Ministry of Foreign Affairs, the State Secretary's announcement received full support. The week before the panel-discussion, the Dutch section of DCI sent an open letter to the Minister of Foreign Affairs, Hans van den Broek, in which he was

²⁶⁶ UN Doc. E/CN.4/1987/25, p. 16-24.

²⁶⁷ On the role of Rädde Barnen, see: Price Cohen, 1990a, p. 142; Letter from Rädde Barnen to the Permanent Representative of the Netherlands in Geneva, 15 January 1982, Archive MFA, VN 1975-1984, 999.232.154, file 1328; Letters of the Director International Relations of Rädde Barnen, October 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2566. On the role of the Quaker's Friends World Committee, see: Longford, 1996, p. 227; UN Doc. E/CN.4/NGO/265; UN Doc. E/CN.4/NGO/295. For the proposals of the NGO Ad Hoc Group, see: Document of the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, entitled: 'The Draft Convention on the Rights of the Child, The Report of informal consultations among international non-governmental organisations' [1983], Archive MJ, unfiled records; Document of the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, entitled: 'The Draft Convention on the Rights of the Child, Report on conclusions of informal consultations among international non-governmental organisations, 1984', Archive MFA, VN 1985-1994, 999.232.154, file 259.

²⁶⁸ This line of reasoning was confirmed by Jansen. (Interview with I. Jansen, 5 November 2003).

asked to pay more attention to the large-scale use of child-soldiers by Iran.²⁶⁹ In the war against Iraq, this country recruited children with the promise of martyrdom, or just took them away from their parents to serve as human shields and minesweepers for the Iranian troops.²⁷⁰ The Ministry of Foreign Affairs was willing to meet DCI's demands. In principle, they fit perfectly into the policies that the Ministry of Foreign Affairs had previously carried out. Since 1982, the Netherlands had been the moving force behind the resolutions adopted by the Commission on Human Rights on the human rights situation in Iran, and in March 1984, the Netherlands also voted in favour of a resolution that called on Iran to cease its practices with respect to child soldiers.²⁷¹ To demonstrate that the government was prepared to pay more attention to the issue of child soldiers, one day before the DCI panel-discussion, an instruction was sent out to the delegation to the Advisory Committee on the International Youth Year in Vienna to make a statement on the practice of the use of child-soldiers as soon as it got the opportunity to do so.²⁷²

At the end of 1984, the Netherlands also started preparations for the submission of a draft article on children in military conflict to the Working Group. When Western support for the draft Convention increased, an Ad Hoc Committee of Experts was established in the framework of the Council of Europe, which first met in November 1984. It was based on the model of the Ad Hoc Committee that had been established to discuss the UN Convention against Torture, and consisted of representatives of Council of Europe members and observers from other states that belonged to the Western group at the United Nations.²⁷³ For the Netherlands, the Ad Hoc Committee's

269 Letter from the Ministry of Foreign Affairs to the Dutch section of DCI, 10 April 1984, Archive MJ, unfiled records; Memorandum from the Head of the Asylum Policy Section of the Ministry of Justice to the State Secretary for Justice, 6 April 1984, Archive MJ, unfiled records; Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Vienna, 6 April 1984, Archive MJ, unfiled records; Memorandum from the Legislation Division for Private Law of the Ministry of Justice to the State Secretary for Justice, 6 April 1984, Archive MJ, unfiled records; *DCI Info*, Vol. 1, No.1, p. 16, Documentation Centre DCI Nederland, Amsterdam.

270 Grünfeld, 2002, p. 302; *DCI Info*, first information bulletin of the Dutch section of DCI (in formation), without date, p. 7-8, Documentation Centre DCI Nederland, Amsterdam; *DCI Info*, October 1987, p. 6-8, Documentation Centre DCI Nederland, Amsterdam.

271 Castermans-Holleman, 1992, p. 228-241; Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Vienna, 6 April 1984, Archive MJ, unfiled records. See also: Commission on Human Rights resolution 1984/39, 12 March 1984.

272 Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Vienna, 6 April 1984, Archive MJ, unfiled records; Memorandum from the Legislation Division for Private Law of the Ministry of Justice to the State Secretary for Justice, 6 April 1984, Archive MJ, unfiled records. On 9 April, a statement was indeed made. See: Ministerie van Buitenlandse Zaken, 1984b, p. 77B.

273 Code-message from the Permanent Representative in Strasbourg to the Ministry of Foreign Affairs, 25 June 1984, Archive MJ, unfiled records; Memorandum approved at the meeting of the ad hoc Committee of Experts to exchange views on the draft Convention on the rights of the child (CAHDE), Council of Europe, Strasbourg, 5-6 November 1984, Archive BZ, VN 1975-1984, 999.232.154, file 2566; Letter from the Legislation Division for Private Law of the Ministry of Justice to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 13 November 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2566. See also section 3.1.2.

first meeting was a good opportunity to have some informal talks about submitting a proposal on the question of children in military conflict. At the meeting, the Swedish expert let Dutch representative Jansen know that his country would be interested in introducing a draft article together with the Netherlands.²⁷⁴ At the UN, the Netherlands also started to draw attention to the matter, and on 27 November 1984, its representative to the Third Committee of the General Assembly announced that the Netherlands would, in the next session of the Commission on Human Rights, 'introduce specific draft provisions to be included in the draft convention on the rights of the child, in order to reiterate already existing international obligations against the use of children in armed forces.'²⁷⁵

The Netherlands was true to its word: in the course of the Working Group's session of 1985, it submitted a draft article relating to children in armed conflicts.²⁷⁶ It had taken the NGO Ad Hoc Group's proposal as a starting point, and together with Sweden, Denmark and the International Committee of the Red Cross (ICRC) it further elaborated the final text-proposal.²⁷⁷ To avoid the impression that it was a purely Western proposal, the Netherlands successfully tried to find some sponsors from other regions in the world as well. After some lobbying, the draft could be introduced also on behalf of Belgium, Sweden, Finland, Peru and Senegal.²⁷⁸

7.4.2 A drafting mistake

The draft of the Netherlands and the other sponsors was first discussed during the Working Group's 1986 session.²⁷⁹ The first paragraph was adopted relatively easily. After a minor amendment to the original proposal, it read: 'States parties to the present

274 Letter from the Legislation Division for Private Law of the Ministry of Justice to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 13 November 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2566.

275 Ministerie van Buitenlandse Zaken, 1984a, p. 239. See also: UN Doc. A/C.3/39/SR.51, p. 7.

276 Summary report of the meeting of the pre-session Working Group 'on the question of a convention on the rights of the child' (Geneva 28 January-1 February 1985), 4 March 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259. See also: UN Doc. E/CN.4/1985/64, p. 3.

277 Summary report of the meeting of the pre-session Working Group 'on the question of a convention on the Rights of the Child' (Geneva 30 January-3 February 1984), 21 February 1984, Archive MJ, unfiled records; Note from the Legislation Division for Private Law of the Ministry of Justice to the Permanent Representative in Geneva, 21 January 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259; Open message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, the Ministry of Justice and the Ministry of Defence, 29 January 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259.

278 Handwritten memorandum from the Permanent Representative in Geneva to the Legislation Division for Private Law of the Ministry of Justice, without date, Archive MJ, unfiled records; Summary report of the meeting of the pre-session Working Group 'on the question of a convention on the rights of the child' (Geneva 28 January-1 February 1985), 4 March 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259. See also: UN Doc. E/CN.4/1985/64, Annex II, p. 1; E/CN.4/1986/39, p. 26-27. On the strategy to submit proposals with sponsors from different regions, see also: Castermans-Holleman, 1992, p. 267-268.

279 UN Doc. E/CN.4/1986/39, p. 26-30.

Chapter 7

Convention undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflict which are relevant to children.²⁸⁰ In respect to the second paragraph of the draft article, however, there was much more discussion. The text of the proposal read: 'In order to implement these obligations, States Parties to the present Convention shall, in conformity with the relevant rules of international humanitarian law, refrain in particular from recruiting children into the armed forces and shall take all feasible measures to ensure that children do not take part in hostilities.'²⁸¹ The topics debated with respect to this provision were very similar to those that would later come up in the deliberations on the Protocol on the Involvement of Children in Armed Conflict, which was dealt with in chapter 6. It was discussed whether the article should prohibit all forms of recruitment and participation, or only *compulsory* conscription and *direct* participation in hostilities. The Netherlands expressed a preference for an article that referred to all forms of recruitment, but it did not try to prevent the limitation of protection against children's involvement in a conflict to direct forms of participation only.²⁸²

Another question that was raised was whether there should be a reference to a minimum age-limit, and if so, whether that limit should be fifteen or eighteen years of age. The proposal of the Netherlands and the other sponsors implicitly referred to a minimum age of fifteen years; it contained the phrase 'in conformity with the relevant rules of international humanitarian law', and these set the age below which children may not be recruited at fifteen. This formulation had been added at the proposal of the Dutch Ministry of Defence, because at that time, the Dutch Navy still accepted sailors under the age of sixteen, and other army units also trained and appointed persons under the age of eighteen. Therefore, it wanted to prevent this new Convention from setting a higher threshold for recruitment into the army than existing humanitarian law.²⁸³

280 UN Doc. E/CN.4/1985/64, Annex II, p. 1; UN Doc. E/CN.4/1986/39, p. 26-28. See also: Open message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, the Ministry of Justice and the Ministry of Defence, 1 February 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259.

281 UN Doc. E/CN.4/1985/64, Annex II, p. 1; UN Doc. E/CN.4/1986/39, p. 26-27. See also: Open message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, the Ministry of Justice and the Ministry of Defence, 1 February 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259.

282 UN Doc. E/CN.4/1986/39, p. 28-30.

283 Open message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, the Ministry of Justice and the Ministry of Defence, 29 January 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259; Handwritten memorandum from the Permanent Representative in Geneva to the Legislation Division for Private Law of the Ministry of Justice, without date, Archive MJ, unfiled records; Memo from the Permanent Representative in Geneva to the Legislation Division for Private Law of the Ministry of Justice, without date, Archive MJ, unfiled records; Grünfeld, 2002, p. 309; Memorandum explaining the answers to the questions of Van Heemskerck Pillis-Duvekot en Weisglas from the Legislation Division for Private Law of the Ministry of Justice to the Minister through the Deputy Secretary-General of the Ministry of Justice, 11 June 1987; Interview with I. Jansen, 6 October 2003; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 46-47.

In the text that was eventually adopted by the Working Group, the reference to existing rules of international humanitarian law was deleted, but it incorporated a minimum age for recruitment of fifteen years. In its final version, the second paragraph of the article read: 'States Parties to the present Convention shall take all feasible measures to ensure that no child takes a direct part in hostilities and they shall refrain in particular from recruiting any child who had not attained the age of 15 into their armed forces.'²⁸⁴ Initially, the Netherlands and other states that had been in favour of inclusion of a provision on children in military conflict were satisfied with this provision, and they felt that they had achieved their goals. However, what seemed to be a success at first, soon appeared actually to be a terrible mistake. What was not realized was that the link to existing humanitarian law did not only protect states parties from higher standards, but also served as a guarantee that these norms would not be eroded, and in that respect, its deletion from the text proved problematic.

As a matter of fact the proposed article watered down existing humanitarian law standards, and shortly after the closure of the Working Group's session of 1986, this set the alarm bells ringing at the International Committee of the Red Cross (ICRC).²⁸⁵ According to the ICRC, in several respects the article's second paragraph was formulated in an unsatisfactory way. First of all, it undermined the protection of existing international humanitarian law in respect to participation in armed conflicts. In this respect, the 1977 Protocols to the Geneva Convention of 1949 set the age limit at fifteen years.²⁸⁶ At face value, the article that was drafted for the Convention on the Rights of the Child seemed to extend the protection afforded by the Geneva Protocols, because it used the term 'no child', and in respect to the participation in a conflict, no age qualifications were given. However, according to article 1 of the draft Convention, a child was 'every human being to the age of 18 years unless, under the law of his State, he has attained his age of majority earlier.' Although under the law of most industrialized countries, the age of majority was usually not below eighteen years, this was different in other parts of the world, where children of fourteen or even twelve years old were already considered adults. In this respect, the article in the draft Convention undermined existing humanitarian law, and this was particularly alarming,

²⁸⁴ UN Doc. E/CN.4/1986/39, p. 30.

²⁸⁵ Annex to a letter from the Legal Division of the ICRC to the Netherlands' Permanent Representative in Geneva of 22 January 1987, entitled 'Legal comments on article 20 (children in armed conflicts) of the draft convention on the rights of the child', Archive MFA, VN 1985-1994, 999.232.154, file 259. Note that much has already been written about the CRC being less protective than some of the provisions of international humanitarian law. See, for example: Grünfeld, 2002, p. 279-282; Van Baarda, 1996, p. 72-80; UNICEF, 2002, p. 566-567; Van Bueren, 1998, p. 334-342.

²⁸⁶ Article 77.2 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) reads: 'Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities.' Article 4.3.c of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) determines that 'children who have not attained the age of fifteen years shall...[not be] allowed to take part in hostilities'.

because those parts of the world where majority was reached at an earlier age than fifteen, were exactly the areas where most of the world's armed conflicts took place.²⁸⁷

Insofar as *non-international* conflicts were concerned, the article adopted by the Working Group could also be considered to weaken existing law, because the Geneva Protocol that dealt with these kinds of conflicts did not speak of 'feasible measures' and 'direct participation', but plainly prohibited all participation in an armed conflict for children under fifteen years old. For *international* conflicts, the rules were formulated in the same way as in the draft Convention's article, but because the latter dealt with *all* military conflicts, the ICRC thought it would be better to remove the word 'direct', and to have the word 'feasible' replaced by the adjective 'necessary'.²⁸⁸

In respect to the question of recruitment, the ICRC reasoning followed a similar line. The provision proposed by the Working Group did not compare unfavourably with the humanitarian law standards for *non-international* conflict, but in the Geneva Protocol that deals with *international* conflicts, a clause was added to the general rule to refrain from recruiting children who have not attained the age of fifteen years, which read: 'In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.'²⁸⁹ The Convention's draft article did not include such a provision, and therefore, it diminished protection that existing humanitarian law gave to children.²⁹⁰

A final, and most crucial, point of concern for the ICRC was related to the third paragraph the Working Group added to the original proposal of the Netherlands and others. It read: 'In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States parties to this Convention shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.'²⁹¹ Sweden had taken the initiative for this paragraph. However, a crucial difference between the original Swedish proposal and the final draft was that the former included the words 'any necessary measures', while in the

287 Annex to a letter from the Legal Division of the ICRC to the Netherlands' Permanent Representative in Geneva of 22 January 1987, entitled 'Legal comments on article 20 (children in armed conflicts) of the draft convention on the rights of the child', Archive MFA, VN 1985-1994, 999.232.154, file 259.

288 *Ibidem*. Note that amending the draft article according to the ICRC suggestions could just as well be seen as stretching existing rules, as was the view of, for example the United States. This was highly dependent on whether the existing regulations on international conflict, or on non-international conflicts were considered, a distinction that the draft CRC article did not make. For the position of the United States, see: UN Doc. E/CN.4/1989/48, p. 112.

289 See: Article 77.2 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Article 4.3.c of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) does not contain this additional sentence.

290 Annex to a letter from the Legal Division of the ICRC to the Netherlands' Permanent Representative in Geneva of 22 January 1987, entitled 'Legal comments on article 20 (children in armed conflicts) of the draft convention on the rights of the child', Archive MFA, VN 1985-1994, 999.232.154, file 259.

291 UN Doc. E/CN.4/1986/39, p. 30.

latter, the term 'feasible measures' was used.²⁹² According to the ICRC, the article could now be interpreted to erode some of the fundamental and inviolable rules of international humanitarian law, namely the rule prohibiting attacks on civilians, and the right for care and assistance. As these were absolute rights under existing law, states were expected to do everything within their power to live up to these rules, which entailed much more than just taking feasible measures.²⁹³

7.4.3 Trying to correct the mistake

There were several government delegations that were seriously cross with the ICRC. Formally, these government delegates were the first responsible for the drafting and adoption of this article, but, especially since many of them were family or juvenile law experts, they had put their trust in the ICRC, which had been invited to actively participate in the drafting as a specialist in humanitarian law.²⁹⁴ No one had expected that a provision that undermined the Geneva Convention or its Protocols, could have been drafted under the watchful eye of the ICRC.²⁹⁵ However, now that it had happened anyway, the best thing to do seemed to try and correct the mistakes.

Sweden and Switzerland took the lead in these attempts, because they felt they had a special commitment to the topic.²⁹⁶ The Dutch delegation also lobbied in favour of repairing the text, but it felt that two leading countries for one topic was enough and left it to Sweden and Switzerland to take up the primary role.²⁹⁷ In the Working Group of 1987, the two countries made an urgent appeal in favour of re-opening discussion on the article on the protection of children in military conflicts, for which the Netherlands and Venezuela manifested their support as well.²⁹⁸ It was, however, not easy to convince Chairman Lopatka of this idea, because he was afraid a precedent would be set. If a re-opening of the debate on this article was allowed before the second reading, others might propose to do the same with respect to other articles that had already been

292 *Ibidem*.

293 Annex to a letter from the Legal Division of the ICRC to the Netherlands' Permanent Representative in Geneva of 22 January 1987, entitled 'Legal comments on article 20 (children in armed conflicts) of the draft convention on the rights of the child', Archive MFA, VN 1985-1994, 999.232.154, file 259.

294 Interview with I. Jansen, 5 November 2003. See also: UN Doc. E/CN.4/1986/39, p. 26-30.

295 In this respect, it is interesting to note that the ICRC had pointed to the danger of reduction of protection by existing humanitarian laws right from the start, so the expectation that the ICRC would help prevent this was not entirely unjustified. See: UN Doc. E/CN.4/1324, p. 27-28.

296 In the case of Switzerland, this commitment followed from the fact that, formally, the ICRC is a private Swiss association. For Sweden, the leading role of the Swedish organisation, Rädde Barnen, on this topic probably played a role, as well as the fact that the most senior representative of the ICRC in Geneva was a Swede. See: Interview with I. Jansen, 5 November 2003.

297 Interview with I. Jansen, 5 November 2003.

298 UN Doc. E/CN.4/1987/25, p. 41-42. See also: Annex to a letter from the Legal Division of the ICRC to the Netherlands' Permanent Representative in Geneva of 22 January 1987, entitled 'Legal comments on article 20 (children in armed conflicts) of the draft convention on the rights of the child', Archive MFA, VN 1985-1994, 999.232.154, file 259.

adopted in the first reading.²⁹⁹ Nonetheless, Lopatka permitted a reconsideration of the matter in 1988, a decision which was probably prompted by pressure of public opinion, which was greatly focused on the issue of 'child soldiers'.³⁰⁰

The ICRC, Sweden and the Netherlands had each tabled their own proposal for an alternative article on children in military conflict. The ICRC's draft aimed to bring it into line with existing humanitarian law, according to the comments that it had earlier made.³⁰¹ The Swedish amendments did the same, but in addition, it tried to raise the age limit for participation in armed conflicts to eighteen years.³⁰² The third proposal by the Netherlands adopted the ICRC's proposal to delete the word 'direct' from the text in order to broaden the protection of children against participation in a military conflict, but otherwise it focused on a completely different suggestion namely, to raise the age of recruitment from fifteen to sixteen years.³⁰³ It was obvious that the proposal was inspired by a discussion in the Dutch parliament. On 27 May 1987, two members of the Dutch Liberal Party, the VVD, Sara van Heemskerck Pillis-Duvekot and Frans Weisglas, posed questions to the Ministers of Foreign Affairs, Defence and Justice that concerned the minimum age of fifteen years that the draft Convention's article had laid down for the recruitment of children into the armed forces. The Ministers had promised parliament to use their best endeavours to have the age-limit raised to sixteen years.³⁰⁴

299 UN Doc. E/CN.4/1987/25, p. 41.

300 Annex to a letter from Rädde Barna International, the Quaker UN Office and the International Committee of the Red Cross to the Netherlands' Permanent Representative in Geneva of July 1988, entitled 'United Nations draft convention on the rights of the child, article 20, Geneva June 1988' (transcription of the debate in the Working Group), Archive MFA, VN 1985-1994, 999.232.154, file 430; UN Doc. E/CN.4/1988/28, p. 19-20. For information on NGO pressure and public opinion, see also: Van Bueren, 1998, p. 155 and 337.

301 UN Doc. E/CN.4/1988/WG.1/WP.2, p. 17.

302 UN Doc. E/CN.4/1988/WG.1/WP.19; UN Doc. E/CN.4/1988/28, p.19; Annex to a letter from Rädde Barna International, the Quaker UN Office and the International Committee of the Red Cross to the Netherlands' Permanent Representative in Geneva of July 1988, entitled 'United Nations draft convention on the rights of the child, article 20, Geneva June 1988' (transcription of the debate in the Working Group), Archive MFA, VN 1985-1994, 999.232.154, file 430.

303 The proposal read: 'The States Parties to the present Convention shall take all feasible measures to ensure that no child *takes part in hostilities* and they shall refrain in particular from *recruiting* any child who has not attained the age of *16 years* into their armed forces.' See: UN Doc. E/CN.4/1988/WG.1/WP.26; Annex to a letter from Rädde Barna International, the Quaker UN Office and the International Committee of the Red Cross to the Netherlands' Permanent Representative in Geneva of July 1988, entitled 'United Nations draft convention on the rights of the child, article 20, Geneva June 1988' (transcription of the debate in the Working Group), Archive MFA, VN 1985-1994, 999.232.154, file 430.

304 Appendices to the reports of the Second Chamber, 1986-1987, no. 791, p. 1571. See also: Reports of the Second Chamber, 1985-1986, 20 February 1986, p. 3561; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 46-47; Memo entitled 'points of interest and issues to raise for the Minister's visit to Poland', 18 August 1987, Archive MFA, VN 1985-1994, 999.232.154, file 430.

Realizing that, overall, the Swedish proposal was further reaching than its own, the Netherlands, at the beginning of the debate, suggested that the Working Group should, for the time being, concentrate on that proposal.³⁰⁵ Sweden could use the Dutch support, because there were many delegations in the Working Group that criticized the contents of its proposal and the timing of the discussion. The only matter on which agreement could be reached, was to insert a clause with priority regulations. It read: 'In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the States Parties to the present Convention shall endeavour to give priority to those who are oldest.'³⁰⁶

7.4.4 A forced consensus

When the second reading began at the end of 1988, it was still uncertain whether it would be possible to strengthen the initial draft. In the Working Group, Sweden explained that several states were of the opinion that the provision that regulated participation in military conflicts should at least include an absolute bar against the involvement of children under fifteen years old, while many of them also felt that states parties to the Convention should at least 'endeavour to prevent persons between 15 and 18 years of age from taking a direct part in hostilities'.³⁰⁷ In addition, the article's last paragraph, which dealt with the protection and care of children as a part of the civilian population, should be changed in accordance with the ICRC's request, and the term 'feasible measures' should be replaced by 'necessary measures'.³⁰⁸

However, it soon appeared that this met with objections by the United States, in particular. It was clear that the United States was not ready to compromise on the matter: it was prepared to accept the article as it had been adopted in first reading, but if no consensus could be reached on that text, it was in favour of its deletion. This view was shared by the Federal Republic of Germany, but contested by numerous delega-

³⁰⁵ Open message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs and the Ministry of Justice, 8 February 1988, Archive MFA, VN 1985-1994, 999.232.154, file 430; Annex to a letter from Rädde Barna International, the Quaker UN Office and the International Committee of the Red Cross to the Netherlands' Permanent Representative in Geneva of July 1988, entitled 'United Nations draft convention on the rights of the child, article 20, Geneva June 1988' (transcription of the debate in the Working Group), Archive MFA, VN 1985-1994, 999.232.154, file 430; UN Doc. E/CN.4/1988/28, p. 19. In later stages of the negotiations, the Netherlands would informally come back to its proposal to raise the minimum age for recruitment, but it did not receive sufficient support. See: Code-message from the Ministry of Foreign Affairs to the Permanent Representatives in New York and Strasbourg, 28 September 1988, Archive MJ, unfiled records. See also: UN Doc. E/CN.4/1989/48, p. 113.

³⁰⁶ Annex to a letter from Rädde Barna International, the Quaker UN Office and the International Committee of the Red Cross to the Netherlands' Permanent Representative in Geneva of July 1988, entitled 'United Nations draft convention on the rights of the child, article 20, Geneva June 1988' (transcription of the debate in the Working Group), Archive MFA, VN 1985-1994, 999.232.154, file 430. See also: UN Doc. E/CN.4/1988/28, p. 19-20.

³⁰⁷ UN Doc. E/CN.4/1989/48, p. 111.

³⁰⁸ *Ibidem*.

tions, which advocated the retention of the article. To solve the matter, the Netherlands, Austria, India, and New Zealand suggested to adopt an article in square brackets or with alternative wording and to leave it to the competence of the Commission on Human Rights to choose.³⁰⁹ Yet, Chairman Lopatka did not agree with this suggestion; according to him 'it would be preferable for the Working Group to adopt a minimum text with a consensus rather than to transmit a text without consensus and with brackets to the Commission on Human Rights'.³¹⁰

On the basis of the Chairman's philosophy, agreement could in the end be reached on the question of whether to use the word 'feasible' or 'necessary' in the article's last paragraph. The delegations of the Netherlands and some other states stated that, in spite of their preference for the word 'necessary', they were willing to join a consensus in favour of the word 'feasible'. As none of the other delegations that had expressed their preference for using the word 'necessary', objected to 'feasible', Lopatka suggested to adopt the latter word. The Working Group agreed with his proposal.³¹¹ Lopatka tried to follow the same strategy with respect to the paragraph that dealt with participation in hostilities, but here the stalemate could not be broken. Among the majority of representatives, agreement was reached in favour of a more protective version of the text, while the United States remained strongly opposed, and the Soviet Union did not offer a clear position in favour of stronger protection either. The Chairman then concluded that no consensus could be reached on drafts that provided for a higher level of protection than that of the first reading, and that this should thus be regarded the maximum that could be achieved. Hence, he ruled that the paragraph on which consensus had been reached, was: 'States parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.'³¹²

This conclusion was drawn against the will of a considerable number of delegations. The Netherlands and nine other delegations stated that they could not join the consensus on this decision, but the Chairman refused to accept that the consensus had been broken. Referring to the fact that a consensus is often really a 'pseudo-consensus', a situation in which opposing delegations do not formally object, while at the same time their statements make clear that in fact they do, he stated: '[W]e have had consensus because there are no consensus.'³¹³ Although it is usually up to the Chair-

309 *Ibidem*, p. 112. Contrary to the working methods in the Working Group, in the Commission no consensus was needed, and issues could be settled by a vote. Apparently, the Netherlands expected a majority to be in favour of a stronger protection, so that in case of voting, the option they favoured would be adopted.

310 *Ibidem*, p. 112-113.

311 *Ibidem*, p. 115-116.

312 *Ibidem*, p. 113-114. For the quotation, see : p. 114.

313 UN Doc. E/CN.4/1989/48, p. 114-115; Facsimile message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 27 February 1989, verbatim record of the discussion (1988) about para. 2 art. 38, Archive MFA, VN 1985-1994, 999.232.154, file 430.

man's judgement to decide to what extent there is a consensus, it was clear that here, Lopatka pushed too far.³¹⁴ Delegations that did not agree with the Chairman's conclusions were very angry. Not only had Lopatka decided that consensus had been reached in spite of their explicit objections, he had also muzzled them by immediately closing the debate and leaving. The Dutch delegation sceptically concluded that obviously, he had been in a hurry get to New York to receive the United Nations Prize in the Field of Human Rights, which he had been awarded on the occasion of the fortieth anniversary of the UN Declaration of Human Rights.³¹⁵

Proponents of a strengthened article on children in military conflict had no intention of reconciling themselves to the situation just like that. They continued their lobby-efforts, and tried to make sure that it would at least be evident from the Working Group's report that no consensus had actually be reached.³¹⁶ The Netherlands' delegation to the Commission also received an instruction to this end.³¹⁷ However, it proved to be impossible to change the article on children in military conflict in the Commission. States in favour of such a change continued their efforts in the General Assembly, but the general context of the further negotiations on the draft Convention was very much to the United States' advantage. The United States capitalized on the 'Target 1989' campaign and emphasized that any changes in the draft articles that the Working Group had adopted would result in a barrage of other text-proposals and a re-opening of the discussions.³¹⁸ It was clear that the Netherlands and other proponents of a stronger standard of protection were fighting a rearguard action. No delegation wanted to run the risk of becoming responsible for a delay in the adoption of this Convention, and during consultations within the Western Group it had already become clear that the great majority of Western delegations also held the opinion that the aims of 'Target

314 For more information on common diplomatic practices in this regard, see: Kaufmann, 1988, p. 24-30.

315 Facsimile message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 27 February 1989, verbatim record of the discussion (1988) about para. 2 art. 38, Archive MFA, VN 1985-1994, 999.232.154, file 430; Open message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 27 February 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430. On the United Nations Prize in the Field of Human Rights, and a list of awardees, see: <http://193.194.138.190/html/50th/hrprize.htm>, accessed 11 September 2006.

316 Facsimile message from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 24 January 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430.

317 Fax from the Legislation Division for Private Law of the Ministry of Justice to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 13 February 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430; Code-message from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 14 February 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430.

318 Open message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 27 February 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430.

1989' outweighed objections against the present article on children in military conflict.³¹⁹

The Netherlands and a number of other states made statements in the Commission on Human Rights and the General Assembly that made clear that they were worried and disappointed about the text of the article on children in military conflict, but this was all they could do.³²⁰ Furthermore, on becoming a party to the Convention, the Netherlands submitted a declaration in which it was stated that the Netherlands was of the opinion that states would not be allowed to involve children directly or indirectly in hostilities and that the minimum age for the recruitment or incorporation of children in the armed forces should be more than fifteen years. It also stated that, in times of armed conflict, provisions that are most conducive to guaranteeing the protection of children under international law should prevail.³²¹

7.5 THE QUESTION OF SUPERVISION

On the whole, it can be said that the Convention's substantive provisions received more attention than the question of international supervision, which came up for discussion only in the last few sessions of the Working Group.

The draft Convention Poland had submitted in 1978 provided for a reporting procedure according to which states parties would be obliged to submit reports to ECOSOC once every five years.³²² This body would be allowed to 'make general observations and bring them to the attention of the General Assembly.'³²³ The Netherlands was not impressed by the strength of this proposed supervisory mechanism, so considering the stress that its policy papers put on the need for effective international

319 Code-message from the Permanent Representative in Geneva to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 3 February 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430.

320 See: Open message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 1 March 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430; Transcript of the Commission on Human Rights' debate of 8 March 1989, drawn up by Rädä Barnen International, p. 7, 18, 22, 24, 27, 53, 56, 62, 63, Archive MJ, unfiled records; UN Doc. A/C.3/44/SR.44, p. 15; Paper entitled 'Explanation of vote by the representative of the Kingdom of the Netherlands, Third Committee on Wednesday, 15 November 1989. Agenda item 108: Adoption of a Convention on the Rights of the Child', Archive MFA, VN 1985-1994, 999.232.154, file 6263; UN Doc. A/C.3/44/SR.36, p. 10; UN Doc. A/C.3/44/SR.37, p. 5; UN Doc. A/C.3/44/SR.38, p. 5, 13 and 15; UN Doc. A/C.3/44/SR.39, p. 3 and 9; UN Doc. A/C.3/44/SR.41, p. 2-3 and 10; UN Doc. A/C.3/44/SR.44, p. 16.

321 Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 53. As we have seen in chapter 6, for many states, this was insufficient, and the debate continued in the deliberations on a Protocol on the Involvement of Children in Armed Conflict, which can in a way be considered a reopening of the discussions on the Convention's article on the matter.

322 UN Doc. E/CN.4/L.1366; UN Doc. E/CN.4/L.1366/Rev.1; UN Doc. E/CN.4/L.1366/Rev.2.

323 UN Doc. E/CN.4/L.1366/Rev.2.

supervision, it could be expected that the Netherlands would want to do something about this.³²⁴

When negotiations on supervision started in 1987, one of the first issues that was discussed was the question what organ should be charged with monitoring compliance with the Convention. Two questions needed to be answered in this respect: should the supervisory organ be an independent or a state-controlled organ, and should a new organ be created or should supervision be carried out by an existing body? According to a revised draft by Poland, a 'Group of *Governmental* Experts' should be created to assist ECOSOC in the supervision of the Convention.³²⁵ A proposal by Canada and Sweden, on the other hand, suggested the establishment of a separate committee of experts, whose members would be elected by the states parties through a procedure that was similar to that of the supervisory bodies that were established under other human rights treaties in the UN.³²⁶ This proposal was in conformity with the views of the NGO Ad Hoc Group, which communicated that it considered it important to create a new committee of individual experts and to prevent any distinction being made between civil and political rights on the one hand, and economic, social and cultural rights on the other, as would, for instance, be the case if the Covenants' supervisory bodies were made responsible for monitoring the implementation of the Convention on the Rights of the Child.³²⁷

An option that was not tabled as a text-proposal, but that Belgium, Australia and France raised during the discussion in the Working Group, was to give the responsibility to supervise the implementation of the Convention to the Committees that were established under the Covenants. Those parts of the states reports that dealt with economic, social and cultural rights would thus be considered separately from the parts concerned with civil and political rights.³²⁸ The Netherlands did not agree with this proposal. It felt that a separate organ should be created, and, contrary to the position it had taken when the UN Covenants were drawn up, it thus accepted that there would be *one* supervisory system for economic, social and cultural rights as well as civil and political rights.³²⁹ In respect to the question of the organ's composition, it also agreed

324 Paper entitled 'Draft convention rights of the child', Archive MJ, unfiled records; Report on the 36th session of the UN Commission on Human Rights, Geneva, 4 February-5 March 1980, Archive MJ, unfiled records; Paper entitled 'On the Polish proposal on a draft convention on the rights of the child in the UN', Archive MJ, unfiled records; Telex-message from the International Organisations Department of the Ministry of Foreign Affairs to the Permanent Representative in New York, 3 November 1978, Archive MFA, VN 1975-1984, 999.232.154, file 1328.

325 UN Doc. A/C.3/40/3, p. 15; UN Doc. E/CN.4/1987/25, p. 31. [Italics, HR]

326 UN Doc. E/CN.4/1987/25, p. 32.

327 Document of the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, entitled: 'Informal consultations among international non-governmental organisations. Draft proposals and recommendations on implementation provisions of the draft convention on the rights of the child, October 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259.

328 UN Doc. E/CN.4/1987/25, p. 35 and 36.

329 See also section 4.3.

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with Canada and Sweden.³³⁰ The majority of other states shared these preferences, and eventually, it was decided to create a Committee on the Rights of the Child to supervise the implementation of the Convention.³³¹

An issue that indirectly related to the independence of the Committee, concerned the problem of how to finance its work.³³² In the Working Group, the United States and a number of others advocated the 'user pays-principle', and they proposed to make the states parties responsible for the expenses ensuing from the Convention.³³³ The Netherlands and many other delegations were opposed to this solution, because they feared that many states, in particular developing countries, would in that case, not ratify, and because past experiences had taught that supervisory committees could be faced with serious problems if states parties were unable or unwilling to meet their financial obligations.³³⁴ Moreover, the Netherlands did not want to view this exclusively from a narrowly defined bookkeeping perspective. The Netherlands explained to Western partners that were critical to financing from the UN budget that it considered it important to pursue a financial policy that was beneficial for the human rights system as a whole. In this view, undesirable precedents should be avoided and desirable ones should be set, even with respect to instruments that one might as such consider less fundamental or necessary.³³⁵ However, in the Working Group, it appeared impossible to reach agreement on the option to pay the Committee's expenses out of general United Nations funds. Pointing to the fact that the UN budget was already overstressed, some states refused to accept payment from this source.³³⁶ The question

330 UN Doc. E/CN.4/1987/25, p. 35; Letter from the Legislation Division for Private Law of the Ministry of Justice to the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, 13 November 1984, Archive MFA, VN 1975-1984, 999.232.154, file 2566; Note from the Legislation Division for Private Law of the Ministry of Justice to the Permanent Representative in Geneva, 21 January 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259.

331 UN Doc. E/CN.4/1988/28, p. 21.

332 In an interview, the Dutch delegate Jansen confirmed that, for the Netherlands, this issue was indeed closely linked to the question of independence. See: Interview with I. Jansen, 5 November 2003.

333 UN Doc. E/CN.4/1988/28, p. 25; Code-message from the Ministry of Foreign Affairs to the Permanent Representatives in New York and Strasbourg, 28 September 1988, Archive MJ, unfiled records.

334 Code-message from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the Permanent Representative in Geneva, 14 February 1989, Archive MFA, VN 1985-1994, 999.232.154, file 430; Informal discussion paper (confidential), The Hague, 13 September 1989, Archive MFA, VN 1985-1994, 999.232.154, file 6263. See also: UN Doc. E/CN.4/1988/28, p. 25. The experiences that the Netherlands referred to related to CERD and CAT. Since 1986, the Committee on the Elimination of Racial Discrimination had been forced to cancel meetings due to financial problems, and according to the Dutch government, the Committee against Torture 'was threatened with the possibility of finding itself in a comparable situation before it had even begun to carry out its functions'. See: UN Doc. A/C.3/43/SR.39, p. 5; LeBlanc, 1995, p. 213-218. Moreover, the latter Committee was faced with an announcement of the German Democratic Republic that it repudiated payment for those activities of the Committee that it had not recognized: complaints procedures and fact-finding. See: Ministerie van Buitenlandse Zaken, 1988a, p. 126.

335 Code-message from the Ministry of Foreign Affairs to the Permanent Representatives in New York and Strasbourg, 28 September 1988, Archive MJ, unfiled records.

336 UN Doc. E/CN.4/1988/28, p. 25.

remained unsolved until the last stages of the process, and eventually it was settled by a vote in the Third Committee of the General Assembly. Apart from the United States and Japan, all delegations voted in favour of covering the expenses from the UN budget.³³⁷

From the above it can be concluded that the Netherlands favoured measures that could contribute to an independent functioning of the Convention's supervisory procedure. At the same time, it should be noted that its efforts for stronger supervisory procedures were not comparable to those displayed in the negotiations on the UN Convention against Torture. According to its instructions, the Dutch delegation should be alert that the Convention would not have negative effects for existing procedures and would contain a 'sensible' monitoring mechanism, but nowhere did it contain a directive whatsoever to promote more far-reaching procedures.³³⁸ Indeed, the Netherlands' contributions to the discussion did not reach beyond the combined system of reporting and technical assistance.³³⁹ In view of the burden that reporting procedures put on government bureaucracy, the Netherlands agreed that reports should not need to be submitted more frequently than once every five years, and not once every two years, as some NGOs had requested.³⁴⁰ It is striking that in spite of the fact that its policy papers expressed the opinion that complaints procedures were an important element of the effective methods of supervision that it aimed to pursue, the Netherlands was not in favour of the idea of also including them in this Convention.³⁴¹

The Netherlands did not stand alone in this opinion. The NGO Ad Hoc Group recommended adding a complaints procedure to the reporting procedure to make the supervisory procedure more complete, but no government delegation was prepared to do this. As a communist country, Poland was unlikely to do so anyway, but the text-proposals that Sweden and Canada made in respect to the question of supervision did

337 UN Doc. A/C.3/44/SR.39, p. 10; UN Doc. A/C.3/44/SR.44, p. 12-13; UN Doc. A/C.3/44/SR.45, p. 2.

338 Memorandum on the draft guidelines for the delegation to the 39th Commission on Human Rights from the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs to the members of the Coordination Commission on Human Rights (CMM), 17 January 1983, Archive MJ, unfiled records; Telex-message from the Ministry of Foreign Affairs to the Permanent Representative in Geneva and the Ministry of Justice, 23 January 1986, Archive MJ, unfiled records.

339 Note that the idea to stress the element of advice and technical assistance in the supervisory procedure had come from the NGO Ad Hoc Group. In relation to this, the NGOs promoted the idea to give UNICEF, other specialized organisations of the UN and NGOs a special and explicit role in the reporting procedure. In the Working Group, this caused some debate, but the Netherlands did not seem to hold very strong opinions on the matter. See: UN Doc. E/CN.4/1988/28, p. 34-41.

340 Instructions for the Netherlands' representative to the meeting of the UN Working Group on a draft convention on the rights of the child, 10 January 1983, Archive MJ, unfiled records. See also: UN Doc. E/CN.4/1987/25, p. 33 and 35-36; UN Doc. E/CN.4/1988/28, p. 28 and 31-32; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 6, p. 39. For the problem of the reporting burden, see, for instance: Heyns and Viljoen, 2001, p. 504-513.

341 Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 4; Note on the NJCM comment on the bill of approval on the convention on the rights of the child, Archive MFA, DDI-DMP/DDI-DCH, file: DMP/UN/ARA/00009.

not contain any suggestions in favour of a complaints procedure either.³⁴² It should be noted that even the NGOs used carefully-worded formulations and suggested that complaints procedures might be included in an optional protocol rather than in the Convention itself.³⁴³ For the NGO Ad Hoc Group, the question of a complaints procedure was not a top priority, and it did not really press the issue.³⁴⁴ In fact, it never even formally tabled its proposals due to a lack of state support.³⁴⁵

Naturally, this raises the question of why there was so little support for the idea of monitoring the implementation of the Convention through a complaints procedure. For the Netherlands, one reason was probably that the treaty related not only to civil and political rights, but also to economic, social and cultural rights. This presumption is sustained by a note that a Dutch official wrote down in relation to the statement that the implementation part of the Convention needed to be studied critically: it was exposed to the same problems as the supervisory system of the UN Covenant on Economic, Social and Cultural Rights.³⁴⁶ This indicated that the consequence of the Dutch acceptance to have one system for monitoring the different kinds of rights in the Convention was that, in terms of forcefulness, it did not want to reach beyond the lowest common denominator of the Covenant's monitoring instruments.

However, Dutch objections against a petition system were not exclusively inspired by considerations concerning the category of the rights involved. This also had to do with practical problems that followed from the child's immaturity.³⁴⁷ In the Netherlands and many other Western countries, minors were, in general, not considered legally capable, and their rights had to be exercised by those who had parental authority. From a children's rights perspective, the disadvantage of this situation was that if there were a conflict of interest between the child and its parents, the child could not

³⁴² UN Doc. E/CN.4/1987/25, p. 33-34.

³⁴³ Document of the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, entitled: 'Informal consultations among international non-governmental organisations. Draft proposals and recommendations on implementation provisions of the draft convention on the rights of the child, October 1985, Archive MFA, VN 1985-1994, 999.232.154, file 259. See also: Document of the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, entitled: 'Summary report of an information meeting for representatives of permanent missions in Geneva on NGO proposals on the draft convention on the rights of the child, held at Palais des Nations, Geneva on Monday, 16th November, 1987: 14h30-16h00', Archive MFA, VN 1985-1994, 999.232.154, file 259; Memorandum from a member of the Ad Hoc Group on the drafting of the convention on the rights of the child (on behalf of Human Rights Internet), to: 'all persons interested in the drafting of the convention on the rights of the child', without date [from the contents it can be derived the document dates from the end of 1987 or the beginning of 1988], Archive MJ, unfiled records; Letter from the Dutch section of DCI to the members of the Working Group Rights of the Child, 28 August 1984, Archive MJ, unfiled records.

³⁴⁴ Interview with J.E. Doek, 28 October 2003; Interview with N. Cantwell, 30 November 2003.

³⁴⁵ Van Bueren, 1998, p. 389.

³⁴⁶ Paper entitled 'Draft convention rights of the child', Archive MJ, unfiled records. For other indications that the category of the rights concerned played a role, see also: Van Bueren, 1998, p. 411; Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 6, p. 6.

³⁴⁷ Van Boven, 2002, p. 17.

claim its rights before a court.³⁴⁸ In the light of the importance that it attached to the privacy of the family environment, however, the Dutch government was not in favour of a general access to court for children. An argument that it often put to the fore in this respect was that it would consider it an undesirable development if the relationship between the child and its parents were to be drawn into the legal sphere.³⁴⁹ As the Convention on the Rights of the Child not only involved the relationship between the state and the child, but also concerned the relation between the child and its parents, for the Netherlands, this was also an important argument against a complaints procedure.³⁵⁰

7.6 CONCLUSION

In the explanatory statements to the bill of approval of the Convention on the Rights of the Child that the government presented to parliament in 1992, it was maintained that the Netherlands had consistently been a very active participant in the drafting process.³⁵¹ This chapter has demonstrated that this was not entirely true. Initially, the Netherlands had serious objections to the creation of the Convention, most importantly because it did not add anything to existing instruments. Other factors that negatively influenced the Dutch opinion on the draft were the fact that the Polish draft was focused almost exclusively on economic and social rights, and received ideologically based support from other states of the communist bloc.

Nonetheless, the Netherlands did not want to damage its international reputation, and therefore, it did not consider it desirable to openly reject the idea of the Convention. In public statements that were made on behalf of the Dutch government, its concerns were expressly mentioned, but the Netherlands did not go so far as to actively obstruct or complicate the negotiations, and in the Working Group, the Netherlands followed a policy of passive resistance. In this respect, its policy was obviously different from that of the United States, because starting from 1981, the latter pursued a policy of active resistance, which included many obvious attacks on the Soviet Union and other communist bloc countries. The Netherlands did not always stay out of the political debates that resulted from these confrontations, but it would certainly go too far to say that it used the Working Group as a forum for Cold War struggles.

In 1984, the general climate of negotiation in the Working Group improved considerably, basically for two reasons: tensions in the relations between East and West eased, and NGOs joined their forces and created the NGO Ad Hoc Group to influence the drafting process. The Netherlands' policies were also influenced by these developments, and it started to see the Convention in a different light, and began to actively participate in its drafting. Its efforts were, among others, aimed at giving the

348 Doek, 1995, p. 18; Verhellen, 1994, p. 38.

349 Interview with I. Jansen, 5 November 2003.

350 Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 6, p. 13-14.

351 Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 3.

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Convention a truly additional value, which meant that the Netherlands supported in particular the incorporation of classic rights and new rights that were created especially for children. The Netherlands could also have concentrated its efforts on more effective supervisory mechanisms, and it could, for instance, have lobbied for a complaints procedure. According to its formal policy principles, this would perhaps have been the most logical step to take, but the character of the rights that were incorporated in the Convention, and the complications that followed from the fact that it also dealt with the relationship between the child and the parents, made this an unattractive option.

In its policies, the Netherlands was visibly influenced by the ideas of the NGO Ad Hoc Group. In the first place, the Netherlands' policy change can to a large extent be related to the coming into being of the NGO Ad Hoc Group and the DCI panel-discussion of April 1984. The Dutch representative to the Working Group soon established good relations with the NGOs, and it would be fair to say that he and a number of other government delegates participated in a transnational advocacy network in favour of the draft Convention on the Rights of the Child. The Netherlands was willing to lend a ready ear to the ideas that were brought up by the NGO Ad Hoc Group, and sometimes its influence would be visibly present in the proposals the Netherlands made. This was the case, for instance, with respect to the issues of mistreatment and exploitation as well as the question of children in military conflict.

On these two matters, parliamentary questions were raised as well, but although they seemed to contribute to the policy-makers' awareness that they needed to pay attention to these matters, considering that these questions were posed in a climate of already increasing pressure on the government, it would be difficult to say that these questions were of an overriding importance for the Netherlands' stand. Furthermore, it should be noted that the parliamentary suggestion to raise the minimum age of recruitment to sixteen years was as easily dropped as it had been adopted. Parliament could, however, play an important role in a more indirect way. During the negotiations, the Dutch representative clearly took into account dominant opinions in parliament. Conscious of the importance that the denominational political parties attached to the concept of parental authority, he made sure that the Convention included provisions that dealt with the role of the parents and the family.

In the assessment of whether the provisions of the Convention would be acceptable for the Netherlands, domestic implications were also considered with respect to other issues. The Netherlands was particularly cautious not to agree with obligations that could involve great budgetary consequences. As a rule, these concerns were particularly relevant where social rights were concerned, but sometimes, they also occurred in relation to political or civil rights. The provision that dealt with the detention of juvenile delinquents was a clear case in point. Apart from this, the Netherlands was alert that the Convention would not contain articles that could infringe its policies in areas that were at the heart of its sovereign prerogatives. It was, for instance, considered very important to guarantee that the Convention would not affect Dutch immigration laws and policies. For the Ministry of Justice this had in fact been one of the main reasons it had requested to be represented in the Working Group.

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Another important directive that was also important to the Netherlands was to make sure that the Convention on the Rights of the Child would not erode existing international law. This was of particular importance in the deliberations on the freedom of religion, but also in respect to the issue of children in military conflict. Considering the importance that the Netherlands attached to the principle that new standards would not undermine existing ones, it can be considered a blunder that it agreed with an article that, in view of this aim, contained some crucial flaws, although it must be added that other states and the ICRC were responsible for this mistake as well. Together with a number of other states, the Netherlands tried to adjust and strengthen the article, but because of the strong opposition of the United States in particular and the general aim to reach the target date of 1989, this proved to be impossible.

CHAPTER 8

THE NETHERLANDS AND THE PROTECTION OF MINORITY RIGHTS

In the previous two chapters, it was demonstrated that the development of special human rights instruments for children became more generally accepted from the second half of the 1980s. In the 1990s, the idea to create norms and procedures for the protection of minorities gained support as well. After the fall of communism in the Eastern half of Europe, minority related problems emerged in Yugoslavia and the territory of the former Soviet Union, among others. These developments pushed the question of how to deal with minority populations to the centre of the world's attention. Confronted with this new reality, organisations like the CSCE, the United Nations, and the Council of Europe began to adapt their policies and they started to expand their normative frameworks and enforcement mechanisms in order to improve the protection of minority rights. In this chapter, the Dutch position in the talks about these initiatives is investigated. Did the Netherlands consider it desirable to create special minority rights instruments, or did it – similar to its initial stand on the question of children's rights – prefer to stick to the use of general human rights treaties?

Before delving into that question, this chapter first devotes some attention to historical developments and some conceptual problems involved in dealing with minority rights as a human rights issue. Section 8.2 analyses the Netherlands' general attitude towards the issue of minority rights, as it comes to the fore in formal policy papers, and in the sections that follow, the role of the Netherlands in different treaty making activities is studied. The conclusions that can be drawn from this chapter are summarized in section 8.6.

8.1 HISTORICAL DEVELOPMENTS

Historically, the question of minorities has been an often-discussed topic in the relations between states since the rise of the state system in the sixteenth and seventeenth century, and the cross-border protection of minority groups has been one of the oldest concerns of international law.¹ Initially, this legislation concerned a number of unconnected treaties between two or more states that were to guarantee, for example, freedom of worship, or equal treatment of certain groups.² The well-known and relatively extensive League of Nations' minority protection regime built on these precedents. The system was based on a large number of separate, but quite similar

¹ Thornberry, 1991, p. 1.

² Thornberry, 1991, p. 25-32; Herman, 1994, p. 21-25.

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treaties with different Eastern and Central European countries, which included elements that were to ensure equal treatment as well as obligations to take measures of positive action, such as giving minorities the right to use their own language in courts, or to maintain special institutions.³ An important rationale behind the League's system was that experience had taught that bad treatment of minorities could easily lead to war, and therefore, the question was considered a potential threat to international stability.⁴ The words of American President Woodrow Wilson illustrate this: 'Nothing, I venture to say, is more likely to disturb the peace of the world than the treatment which might, in certain circumstances be meted out to the minorities...'⁵

One of the weaknesses inherent in the minority treaties system of the League of Nations was its exclusive concentration on those states in the Eastern and Central European region that had been newly created after the end of World War I, or that had been subject to important border adjustments.⁶ This imbalance discredited the system in the eyes of the states bound by it, while at the same time it left large groups unprotected.⁷ Another shortcoming was that it was clear from the treaty texts that they were the product of rash decisions; key terminology remained undefined and the procedures that were to be used to implement them were formulated in rather unspecific terms.⁸ In spite of these flaws, in practice the League of Nations did make positive contributions to the protection of rights of minorities.⁹

After the end of the Second World War, the minority regime's achievements were, however, not recognized. The system was generally considered to have failed. Referring to the so-called *clausula rebus sic stantibus* formula, which makes it possible to terminate a treaty if there has been a fundamental change of circumstances, the Secretary-General of the newly established United Nations declared that the pre-war minority treaties were no longer in force.¹⁰ There were a number of reasons for this negative stand. First of all, an unfavourable atmosphere around the League of Nations as an organisation that had failed to achieve its main objective – namely to guarantee collective security in Europe – also discredited its minority regime.¹¹ In addition, there was a negative association from the concept of minority rights with Nazi doctrine. Not

3 Herman, 1994, p. 303; Thornberry, 1991, p. 41-44. The treaties also included control machinery, which did not only provide for the possibility to discuss violations and to take measures in order to restore the situation according to the treaties, but also gave minority groups and states parties the opportunity to submit petitions to the League of Nations. According to Kooijmans, these provisions can be regarded as early examples of modern international human rights complaints procedures. See: Kooijmans, 1981, p. 42. See also: Herman, 1996, p. 43-45; Castermans-Holleman, 1992, p.15. For an extensive study on the exact working of the system, see: Herman, 1994.

4 Herman, 1994, p. 2; Herman, 1996, p. 44.

5 Quotation extracted from: Thornberry, 1991, p. 40-41.

6 Thornberry, 1991, p. 38 and 47; Herman, 1994, p. 304.

7 Thornberry, 1991, p. 47 and 386; Herman, p. 46.

8 Herman, 1994, p. 304.

9 *Ibidem*, p. 310-314.

10 *Ibidem*, p. 3.

11 *Ibidem*.

only because an emphasis on the distinctions between different groups of people was at the basis of the persecution of Jews and gypsies, but also because Hitler's attempts to reunify all Germans in one nation had been the first stage of a process that had eventually led to World War II.¹²

Even though the League's system of minority treaties has, in hindsight, been seen as an important stepping-stone to the development of international human rights legislation, in the first decades after the Second World War, it appeared difficult to integrate minority rights in the general human rights system. Within the United Nations the emphasis was on *individual* human rights that were to apply *universally* and equally to all.¹³ The universality-principle was one aspect that hindered the acceptance of minority rights. When arrangements for minorities had been discussed in the period after World War I, the allied countries had already resisted the idea of giving it a universal scope.¹⁴ In this respect, nothing had changed: there was a reluctance of many states to accept a minority protection system if they were to be bound by it as well.¹⁵ Recognition of minorities was not in line with the policies of the United States and Latin American states, and the European colonial powers were concerned that attention for minority rights might challenge their colonial control.¹⁶

The other aspect was that within the – basically Western liberal – philosophy of individual rights, there was not much room for specific protection of minority groups. Non-discrimination provisions were considered to offer sufficient protection, also to individuals belonging to a minority group.¹⁷ As explained by Freeman, the liberal eighteenth-century theories on which the concept of human rights was originally based were 'not designed historically to solve the problems of cultural minorities.'¹⁸ The theories assumed the protection of the natural rights of individuals, who were all equal, also in terms of voting and decision-making, and accordingly, 'minorities were simply citizens who had been outvoted'.¹⁹ Yet, in practice, minorities seek more than their individual member's right to equality and participation; they also seek survival as a group with distinct cultural characteristics and traditions.²⁰ On the basis of the argument that identity is often crucial to a person's human dignity, it has indeed been argued that minorities should also have rights that help them preserve their identity. Proponents of this line of thinking often maintain that these rights are not necessarily reducible to existing individual rights, because this identity is largely dependent on the

12 Thornberry, 1991, p. 47-48 and 166; Herman, 1994, p. 3 and 314; Freeman, 2002, p. 114; Oestreich, 1999, p. 113; Tolley, 1987, p. 168.

13 Thornberry, 1991, p. 6 and 53-54; Freeman, 2002, p. 114; Herman, 1994, p. 2.

14 Herman, 1994, p. 33; Rodley, 1995, p. 48; Alexanderson, 1997, p. 47-49.

15 Thornberry, 1991, p. 121-122; Tolley, 1987, p. 89.

16 Eide, 2001, p. 381. See also: Morsink, 1999, p. 269-280.

17 Thornberry, 1991, p. 6 and 53-54; Oestreich, 1999, p. 108; Freeman, 2002, p. 114.

18 Freeman, 2002, p. 115.

19 *Ibidem*, p. 115-116.

20 Sanders, 1991, p. 370.

survival of the group. To fill the gap, collective rights of minorities should be recognized.²¹

This point of view is, however, not uncontested. Many states do not like to talk of group rights, especially when it concerns minorities, because they fear that recognition of collective rights for minorities might stimulate them to manifest themselves as a group and might therefore imply a danger of separation from the state.²² Making the link to the common article 1 of the UN Covenants concerning the right to self-determination of all peoples, Nigel Rodley has described the problem in a nutshell: 'which minorities constitute a people entitled to self-determination? When does self-determination imply a right to secession or merely to autonomy within an existing state?'²³ Apart from political interests like these, there is also the problem of theoretical incompatibility between human rights and collective rights. Reconciling the individual human rights approach with the notion of collective rights has proven very problematic and attempts to do so typically raise questions that in one way or another relate to tensions between the rights and interests of the group and the individual.²⁴ Particularly difficult questions arise when a minority culture involves traditions that are considered violations under existing international human rights law. To give some examples, in many cultural or religious groups, women are seriously discriminated against, and under Islamic law, amputations and stoning are allowed.²⁵

The renaissance of the idea of minority rights of the 1990s has not fundamentally changed the attitude towards collective rights. As we will see below, the United Nations, the Council of Europe and the OSCE adopted new instruments to respond to the needs of minorities, but no fundamental departure from the individual rights approach could be witnessed in any of these organisations.²⁶ Before we arrive at that point, the Netherlands' attitude towards minority rights and the dilemma of individual versus collective rights are, however, reflected on first.

8.2 GROWING ATTENTION FOR MINORITY RIGHTS IN THE NETHERLANDS

The Netherlands' concern with minority issues has been in line with international trends. Before the end of the Cold War, the issue of minorities did not receive much attention in the Netherlands' human rights policy, while, especially from the 1990s onwards, it began to consider minority rights a priority issue.²⁷ The government of the

21 Galenkamp, 1991, p. 297 and 301; Oestreich, 1999, p. 109; Herman, 1995, p. 206-207.

22 Bloed, 1993, p. 98; Thornberry, 1991, p. 387; Herman, 1995, p. 206-207.

23 Rodley, 1995, p. 49. See also: Article 1 ICCPR and ICESCR. Note that, like the concept of a 'minority', the concept of a 'people' also lacks a generally acceptable definition. See: Advisory Committee on Human Rights and Foreign Policy, 1995, p. 24.

24 Galenkamp, 1991, p. 292, 297 and 301; Oestreich, 1999, p. 116; Sanders, 1991, p. 368 and 383-386; Advisory Committee on Human Rights and Foreign Policy, 1995, p. 9-10 and 24.

25 Sanders, 1991, p. 384-386.

26 Herman, 1995, p. 206-208.

27 See: Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 23-25.

Netherlands felt that human rights norms could help solve minority related problems, and in the explanatory memorandum to the national budget of 1991, it stated that it considered minorities an issue area where creation of new norms, in addition to the existing instrumentarium, might be useful.²⁸ From that moment, the subject of minorities became a regular element in the human rights policy of the Netherlands: it supported initiatives in different international forums, and later continued to pay special attention to minorities as a part of its focus on particularly vulnerable groups of people.²⁹ In bilateral and multilateral contacts with other countries, minority policies became relevant as well, and according to the policy papers, the Dutch government called other countries to account if this was deemed necessary.³⁰

According to Alan Phillips, the former Director of the Minority Rights Group (MRG), a London-based NGO that campaigned on behalf of minorities, in the 1990s the Dutch policies in respect to international minority rights instruments can be described as 'progressive and supportive'.³¹ In a book review of a series of books on minority rights of 2004, Dutch scholar Joost Herman presented a comparable picture; according to him, the Netherlands belonged to a group of Western European states that took an active interest in the further development of minority rights standards, but he added that at the same time, it was conscious of the extreme sensitivity of the issue.³²

The growing attention to minority rights overlapped with another tendency in the Netherlands' human rights policy. After the collapse of the communist system in the Soviet Union and the Eastern half of Europe, the understanding of the concept of security changed. In the words of Jan Zielonka, '[t]he traditional concept of security used to be external and military in character. It consequently underplayed both domestic politics as a source of insecurity and the interactions between internal and external matters.'³³ In these circumstances, human rights were usually considered a moral rather than a security concern, and oftentimes, human rights and security would in fact be considered antagonistic interests.³⁴ In an organisation like the CSCE, there was a connection between the two issues through the so-called 'interlinkage of baskets' – this meant that political and security matters, questions of economic co-opera-

28 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 2, p. 58; Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 23.

29 Appendices to the reports of the Second Chamber, 1999-2000, 26 800, chapter V, no. 2, p. 34; Appendices to the reports of the Second Chamber, 2000-2001, 27 400, chapter V, no. 2, p. 8. See also: Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 2, p. 60; Appendices to the reports of the Second Chamber, 1991-1992, 22 300, chapter V, no. 2, p. 30; Appendices to the reports of the Second Chamber, 1993-1994, 23 400, chapter V, no. 2, p. 28; Appendices to the reports of the Second Chamber, 1994-1995, 23 900, chapter V, no. 2, p. 43; Appendices to the reports of the Second Chamber, 1995-1996, 24 400, chapter V, no. 2, p. 49 and 51; Appendices to the reports of the Second Chamber, 1996-1997, 25 000, chapter V, no. 2, p. 80-81.

30 Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 34.

31 Interview with A.D.J. Phillips, 15 July 2006.

32 Herman, 2004, p. 148.

33 Zielonka, 1991, p. 251.

34 Zielonka, 1991, p. 251; Donnelly, 1991, p. 37.

tion, and humanitarian issues were considered interconnected fields of cooperation that were of equal importance – but during the Cold War, this connection was of a tactical rather than a substantive character. The idea of the Western bloc, in particular, was that progress in one basket should be accompanied by simultaneous progress in the others, meaning that it tried to trade progress in fields that were important to the Warsaw Pact bloc, for progress in the politically sensitive area of human rights.³⁵ Yet, after the end of the Cold War, the question of to what extent security concerns permitted the pursuit of human rights interests was no longer the dominant issue; instead, human rights had become a key element of a more comprehensive security concept.³⁶

A gradual perception change is also visible in the succeeding Dutch policy papers on human rights and foreign policy. That there is a relationship between the promotion of human rights and security questions was already recognized in the 1979 policy paper.³⁷ Nevertheless, with regard to the East-West conflict – at the time, security issue number one – this relationship was not unambiguous: on the one hand, greater respect for human rights in the communist countries would remove a source of tensions, but on the other hand, the West had to be careful to avoid too many tensions in relations with these countries, because in a climate of distrust it would be harder to pursue stability in Europe, and to come to terms in, for example, arms control negotiations.³⁸ In the follow-up memorandum of April 1997, it was described how much the character of security issues had changed in the post-Cold War period: many internal conflicts that remained latent then, had by now developed into overt clashes and violent civil wars. As these conflicts were accompanied with grand-scale human rights violations, the result was a growing awareness that a further integration of security and human rights policies was needed.³⁹ In particular, where minorities were involved it was clear that standing up for minority rights would also help to end, or even prevent, internal and international crises.⁴⁰ Hence, the Dutch government saw human rights and security as complementary objectives, and it was more or less presumed that both fields of policy were now in complete harmony with each other.

Although attention to minority rights as such was a relatively new element of the Netherlands' human rights policy, to a large extent it was based on existing policies. In the first place, domestic minority policies were an important guide for dealing with the issue at an international level. The aim of this policy at that time was the realization of a multicultural society in which minorities and their members would have equal positions and opportunities.⁴¹ According to the Dutch definition, the term 'minority'

35 Bloed, 1993, p. 27-28; Korey, 1991.

36 Donnelly, 1991, p. 34; Zielonka, 1991, p. 253.

37 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 71-72.

38 *Ibidem*, p. 111-113.

39 Appendices to the reports of the Second Chamber, 1996-1997, 25 300, no. 1, p. 6 and 8. This trend was further pursued in the 2001 policy paper, in which this is even more expressly emphasized. See: Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 1-2, 4-5, 17, 33-34.

40 Appendices to the reports of the Second Chamber, 1996-1997, 25 300, no. 1, p. 15.

41 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 25.

should be understood to also include migrants, which was a wider interpretation than was common internationally.⁴² Although it is not expressly stated, it can be deduced from the text of the second human rights follow-up memorandum that the Netherlands was quite proud of its approach, and considered itself to be a country that had successfully dealt with minority questions, which could serve as an example for other states.⁴³ A second link between the topic of minority rights and existing policies was its relationship with other human rights themes that had continuously been on the agenda in the period after the Second World War, such as non-discrimination, racism or freedom of religion.⁴⁴ In its foreign human rights policy, the Netherlands had always paid quite a lot of attention to these issues.⁴⁵ This was especially true for the topic of freedom of religion.⁴⁶ Within the UN, the Netherlands actively promoted the drafting and approval of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981, and until today, the Netherlands has acted and presented itself as a leading country on this particular topic within the OSCE.⁴⁷ According to the Netherlands, the topic of religious intolerance was closely related to that of racial discrimination, an issue in regard to which it had, in the past, also been engaged with standard setting activities.⁴⁸

The question of collective rights was not new to the Netherlands either. In the policy paper of 1979, some words were already devoted to the matter. On the very first page, it can be read that '[t]he fundamental point of departure of the idea of human rights is that it regards the individual as an autonomous entity entitled to certain rights and freedoms which he derives from the fact that he is a human being and not from his being part of a larger whole such as a tribe, a class, a people or a State.'⁴⁹ It was not denied that certain rights have collective aspects in that they 'are exercised by people in groups', but its definition of human rights as 'those elementary rights which are considered to be indispensable for the development of the individual' implied that the individual was considered to be the holder of these rights.⁵⁰ The third follow-up memorandum of April 1997 as well as communications with the Dutch Advisory Committee on Human Rights and Foreign Policy demonstrate that the government's opinion on the subject has not changed very much since then.⁵¹ According to Baehr,

42 *Ibidem*.

43 *Ibidem*, p. 24 and 25.

44 See: Thornberry, 1995, p. 18-19; Alfredsson and De Zayas, 1993, p. 1-2.

45 Interview with J.A. Walkate, 21 April 2004.

46 Appendices to the reports of the Second Chamber, 1992-1993, 22 855 (R1451), no. 3, p. 30- 33. See also: Baudet 2001a, p. 59-60 and 64.

47 See: Ministerie van Buitenlandse Zaken, 1982a, p. 277-281; Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 16, 24-25 and 31-32. See also section 7.3.2.

48 See: Ministerie van Buitenlandse Zaken, 1964, p. 524-525 and 531; Ministerie van Buitenlandse Zaken, 1966, p. 262-287 and 586-602.

49 Ministry of Foreign Affairs of the Kingdom of the Netherlands, 1979, p. 10.

50 *Ibidem*, p. 15-16.

51 Appendices to the reports of the Second Chamber, 1996-1997, 25 300, no. 1, p. 3; Baehr, Castermans-Holleman and Grünfeld, 2002, p. 7, footnote 7.

Castermans-Holleman and Grünfeld, this clear preference for individual rights over collective rights was indeed apparent in the Netherlands' policies towards Turkey, in which it hardly ever mentioned the rights of the Kurds as a minority group.⁵²

If one takes a closer look at the Dutch attitude in discussions in which the rights of the individual appeared not to match with certain cultural traditions or practices, it becomes apparent that a similar preference occurs when it comes to international standard-setting. Some examples were already referred to in other chapters in this book. Where freedom of religion came into conflict with traditional Islamic law regarding the question of whether this also included individual freedom to choose and change one's religion, the Dutch position was clearly in favour of that of the individual.⁵³ Furthermore, it was described in the chapter on the UN Convention against Torture that the Netherlands was unhappy with some Islamic states' endeavours to exempt corporal punishments prescribed by Islamic Law from the definition of torture.⁵⁴ A final example is that of the Dutch attitude towards traditional practices harmful to the health of women and girls. As the initiator of resolutions on the topic, it has recurrently tried to denounce these practices in the General Assembly of the United Nations.⁵⁵ Although these discussions were not about collective rights as such, the cited examples do relate to topics where individual rights come into conflict with cultural traditions – which would potentially be protected by collective minority rights – and they thus give a good indication of what the position of the Netherlands would most likely be when individual rights would come into conflict with collective rights. The fact that the Netherlands' government considered non-discrimination one of the most important elements of international initiatives in the field of minorities is an indication that, also with regard to minority rights, the emphasis on the rights of the individual is still prevalent.⁵⁶

8.3 THE UN MINORITY DECLARATION

On a global level, the first instrument to deal with minority rights was the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by a General Assembly resolution of 18 December 1992.⁵⁷ As is clear from the title of the Declaration, in principle it does not attribute any rights to the group, but even though the individual remains to be the rights-holder, the Declaration recognizes the collective dimension of minority rights.⁵⁸ For example, it lays down

52 Baehr, Castermans-Holleman and Grünfeld, 2002, p. 119.

53 See section 7.3.2. See also: Ministerie van Buitenlandse Zaken, 1982a, p. 277-281.

54 See section 3.5.

55 Appendices to the reports of the Second Chamber, 2000-2001, 27 742, no. 2, p. 21; Appendices to the reports of the Second Chamber, 2002-2003, 28 600, chapter V, no. 2, p. 47; Appendices to the reports of the Second Chamber, 2003-2004, 29 540, no. 10, p. 24.

56 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 25.

57 See: General Assembly resolution 47/135, 18 December 1992.

58 Thornberry, 1995, p. 53-54.

that states are to protect the existence and identity of minorities and to encourage conditions for promotion of that identity.⁵⁹ Article 3 also clarifies that persons belonging to minorities 'may exercise their rights...individually as well as in community with other members of their group'.⁶⁰ In five sub-paragraphs, article 2 lists a number of rights and freedoms of persons belonging to minorities, which relate among others to enjoyment of their own culture, participation in public life, and establishment and maintenance of their own associations.⁶¹ The Declaration also sets forth the special measures and policies that states should adopt in order to guarantee minority rights, and finally, it is stipulated that the Declaration should not be understood to undermine the enjoyment of individual human rights or the principles of state sovereignty.⁶²

It was described in section 8.1 that before the adoption of this instrument, hardly any attention had been given to minorities by the UN. There were proposals to include minority rights in the Universal Declaration of Human Rights, but in the course of the discussion support for this decreased, especially when the Soviet Union began to link the issue to Western colonial policies.⁶³ During these years, the Netherlands' colonial policies greatly influenced its general attitude towards the issue of human rights, so it was not surprising that it joined the opposition against the minority rights article, and voted in favour of a Haitian resolution that proposed 'not to deal in a specific provision with the question of minorities in the text of this Declaration'.⁶⁴ The resolution was adopted, and as a consequence the Universal Declaration did not contain a minority rights article.

The only UN human rights treaty that explicitly recognized some minority rights was the Covenant on Civil and Political Rights. Its article 27 reads: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'⁶⁵ This was certainly not the most far-reaching formulation that had been before the drafters, and some scholars consider it disappointing, partly

59 Article 1, UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

60 Article 3, UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

61 Article 2, UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

62 See: Articles 4-8, UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

63 Morsink, 1999, p. 269-280. See also: Thornberry, 1991, p. 129, and 133-137; Tolley, 1987, p. 89 and 168-169; Eide, 2001, p. 381.

64 Ministerie van Buitenlandse Zaken, 1949, p. 75-76. See also: Morsink, 1999, p. 278-279. Another indication that the Netherlands was concerned that attention for minority rights might challenge its colonial policies can be found in: Ministerie van Buitenlandse Zaken, 1948, p. 47-48. On the general influence of colonial considerations on Dutch foreign policy, see: Castermans-Holleman, 1992, p. 99 and 111; Hellema, 2001, p. 137-138, 177, 187-190 and 209-210.

65 Article 27 ICCPR.

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because the article does not explicitly impose affirmative obligations on the state to contribute positively to the actual enjoyment of these rights.⁶⁶ Apparently, this did not disturb the Netherlands at the time. The Netherlands had not participated in the Commission on Human Rights' negotiations that resulted in this text, but it considered it an important provision, with which it was fairly satisfied.⁶⁷

As its name indicates, the issue of protection of racial, national, religious, and linguistic minorities was also an explicit part of the mandate of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, which was created in 1947 by the UN Commission on Human Rights.⁶⁸ However, until the 1990s, its proposals and suggestions regarding minorities usually foundered due to a lack of political will in its parent organs, the Commission on Human Rights and the Economic and Social Council. For example, attempts to reach agreement on a definition of the term 'minority' consistently failed because of the question's complexity and political sensitivities – and after years of futile attempts to carry out its mandate on behalf of minorities, a decision was made to concentrate exclusively on the issue of discrimination and broader human rights questions.⁶⁹ In spite of this, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities can indirectly be traced back to the Sub-Commission's work. In 1971, the Sub-Commission appointed Francesco Capotorti as Special Rapporteur to make a study of the implementation of article 27 of the ICCPR.⁷⁰ This resulted in a final report, submitted to the Sub-Commission in June 1977, in which one of the recommendations, among others, was to seek the preparation of a draft Declaration on the rights of members of minority groups.⁷¹ Shortly after, Yugoslavia tabled a draft Declaration, and in 1978, the Commission on Human Rights established an open-ended Working Group to consider the matter and to draft a text.⁷² Yet, for a long time, negotiations dragged on without much result, and it took until the 1990s for the process to gain any real momentum.⁷³

66 Oestreich, 1999, p. 114; Pejic, 1997, p. 676-677; Freeman, 2002, p. 40 and 114-115; Thornberry, 1991, p. 149-151; Tolley, 1987, p. 144.

67 The only thing it had wondered about was whether it was sufficiently clear that the freedom to manifest one's religion would, just like the Covenant's general provision on freedom of religion, be subject to permissible restrictions if these were prescribed by law and were necessary for the protection of public safety, order, health or morals or the fundamental rights and freedoms of others. Considering that the latter article applied to all, including persons belonging to minorities, it had, however, come to the conclusion that an amendment was not needed. See: Ministerie van Buitenlandse Zaken, 1962b, p. 179-180 and 420; Bossuyt, 1987, p. 493-497.

68 Thornberry, 1991, p. 124-125.

69 Thornberry, 1991, p. 6-7, 124-132 and 164-172; Tolley, 1987, p. 143 and 168-174. Note that general agreement on a definition of 'minority' still does not exist these days; none of the instruments drawn up in the field of minority rights provides for one. See, for example: Letschert, 2005, p. 27-32.

70 Thornberry, 1991, p. 152.

71 Thornberry, 1991, p. 152; Thornberry, 1995, p. 25-26; Eide, 2001, p. 383; Donders, 2002a, p. 191.

72 Thornberry, 1991, p. 152; Thornberry, 1995, p. 26; Eide, 2001, p. 383; Tolley, 1987, p. 89.

73 Thornberry, 1995, p. 26; Tolley, 1987, p. 143-144.

There are no indications that the Netherlands attached any particular importance to the Declaration in the first decade of the Working Group's considerations, and before the early 1990s, it was not mentioned in policy papers or public reports. Indeed, according to the former MRG-Director, Phillips, the Netherlands did not show much interest in these years.⁷⁴ Probably the same was true for most other Western European countries. As becomes clear from a Dutch report of a meeting of Western states in September 1989, many of them did not participate or even attend the negotiations in the Working Group.⁷⁵ The Working Group's official reports do not contain a list of participating countries, and they do not reveal much about the contributions that individual countries made to the debate.⁷⁶ It is therefore difficult to say whether the Netherlands played no role at all, or perhaps made some minor contributions to the drafting work. What can be concluded in any case though, is that the Netherlands did not belong to the group of states that actively participated in the Working Group. This can be derived from the fact that the reports of the Working Group contain written text proposals by several countries, but lack indications of any Dutch proposal whatsoever.⁷⁷ It should also be noted that the government of the Netherlands never reacted to the Secretary General's request to submit comments on the draft Declaration, neither in the beginning of the drafting process, nor after the finalization of the first reading in 1990.⁷⁸

However, once the work gained momentum due to the outbreak of violent civil wars in the Eastern half of Europe, the Netherlands showed itself devoted to the adoption of the Declaration. In an intervention in the Third Committee of the General Assembly of 19 November 1991, the Netherlands stated on behalf of the EC member states that respect for the human rights of all citizens and full involvement of national minorities in economic, social and cultural development had proven crucial for sound development and maintenance of peace, and it concluded, there was 'all the more

⁷⁴ Interview with A.D.J. Phillips, 15 July 2006.

⁷⁵ In fact, several delegates were of the opinion that further discussions on the Declaration were pointless, and felt that it might perhaps be better to suspend or end the activities of the Working Group. See: Code-message from the Ministry of Foreign Affairs to the Permanent Representatives in New York on Geneva, 6 October 1989, Archive MFA, VN 1985-1994, 999.232.150, file 6374.

⁷⁶ See: UN Doc. E/CN.4/1292, p. 70-74 ; UN Doc. E/CN.4/1475, p. 164-171 ; UN Doc. E/CN.4/1982/30/Add.1, p. 78-86 ; UN Doc. E/CN.4/1983/66 ; UN Doc. E/CN.4/1984/74 ; UN Doc. E/CN.4/1985/65 ; UN Doc. E/CN.4/1986/43 ; UN Doc. E/CN.4/1987/32; UN Doc. E/CN.4/1988/36; UN Doc. E/CN.4/1989/38; UN Doc. E/CN.4/1990/41; UN Doc. E/CN.4/1991/53; UN Doc. E/CN.4/1992/48.

⁷⁷ See: UN Doc. E/CN.4/1292, p. 70-74; UN Doc. E/CN.4/1475, p. 164-171; UN Doc. E/CN.4/1982/30/Add.1, p. 78-86; UN Doc. E/CN.4/1983/66; UN Doc. E/CN.4/1984/74; UN Doc. E/CN.4/1985/65; UN Doc. E/CN.4/1986/43; UN Doc. E/CN.4/1987/32; UN Doc. E/CN.4/1988/36; UN Doc. E/CN.4/1989/38; UN Doc. E/CN.4/1990/41; UN Doc. E/CN.4/1991/53; UN Doc. E/CN.4/1992/48.

⁷⁸ For the comments on the Yugoslavian draft of 1978, see: UN Doc. E/CN.4/1298; UN Doc. E/CN.4/1298/Add. 1; UN Doc. E/CN.4/1298/Add. 2; UN Doc. E/CN.4/1298/Add. 3; UN Doc. E/CN.4/1298/Add. 4; UN Doc. E/CN.4/1298/Add. 5; UN Doc. E/CN.4/1298/Add. 6; UN Doc. E/CN.4/1298/Add. 7; UN Doc. E/CN.4/1298/Add. 8; UN Doc. E/CN.4/1298/Add. 9; UN Doc. E/CN.4/1298/Add. 10. For the comments on the draft Declaration, as adopted in first reading, see: UN Doc. E/CN.4/1991/52; UN Doc. E/CN.4/1991/52/ Add. 1; UN Doc. E/CN.4/1991/52/Add. 2.

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reason for the United Nations to step up its activities on human rights and the protection of minorities.⁷⁹ With respect to the Declaration in particular, it began to get impatient about the lack of progress, which it blamed on some governments' fear for a policy based on the idea of a multicultural society.⁸⁰ Therefore, it co-sponsored a General Assembly resolution that urged the Commission on Human Rights to complete its work on the Declaration as soon as possible.⁸¹

The calls by the General Assembly resulted in a speedy conclusion of the work, and a final draft was put before the Commission in 1992. It was introduced by Yugoslavia on behalf of a group of fourteen other co-sponsors, including the Netherlands. The Netherlands supported the draft in other ways as well: the head of its delegation to the Commission, Peter Kooijmans, gave his full backing to the draft, and an intervention of support was held to make that clear.⁸² The Netherlands continued its support in other organs of the United Nations too. After the text gained the approval of the Commission on Human Rights and the Economic and Social Council, it was transmitted to the General Assembly. Again, the Netherlands belonged to the group of sponsors that introduced the draft.⁸³

Even though the Declaration that was adopted in December 1992 was not a legally binding instrument, the question of a mechanism to monitor and promote its implementation was raised even before the conclusion of the negotiations.⁸⁴ It remained on the international agenda, and after the idea had been circulating for a while among diplomats and NGOs, in 1994, the Sub-Commission decided to propose the establishment of a Working Group on Minorities to that end.⁸⁵ In 1995, the Commission on Human Rights authorized the Sub-Commission to establish, initially for three years, a Working Group on Minorities to review the promotion and practical realization of the Declaration, to examine solutions to problems involving minorities, and to recommend further measures for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities.⁸⁶ Its mandate was extended and made permanent in 1998.⁸⁷ The Working Group is comprised of five of the Sub-Commission's members and it holds annual sessions for dialogue, which are

79 Ministerie van Buitenlandse Zaken, 1992, p. 424.

80 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 24.

81 Ministerie van Buitenlandse Zaken, 1992, p. 213-214.

82 UN Doc. E/CN.4/1992/SR.17, p. 7; Herman, 2004, p. 148.

83 Thornberry, 1995, p. 27; Ministerie van Buitenlandse Zaken, 1993, p. 218.

84 Letschert, 2005, p. 95.

85 The idea already existed at the time of the Declaration's adoption, but an international seminar that the MRG organized in September 1994, once more drew attention to this suggestion, and it was eventually included in a report on 'Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities', which Special Rapporteur Asbjørn Eide wrote on the request of the Sub-Commission. See: Letschert, 2005, p. 95-96; Donders, 2002a, p. 199; Thompson, 2003, p. 514; Eide, 2001, p. 386; Thornberry, 1995, p. 59.

86 See: Commission on Human Rights resolution 1995/24.

87 See: Commission on Human Rights resolution 1998/19.

open to governments' representatives, international organisations, NGOs and scholars.⁸⁸

The Netherlands did not belong to the sponsors of the resolution that first created the Working Group in 1995.⁸⁹ At an earlier stage, it had already indicated that it was willing to consider the possible establishment of a Working Group on Minorities, but also foresaw problems. The Netherlands expected that it would be difficult to create an effective system to promote the implementation of minority rights on a global level, and preferred regional initiatives, such as its own proposal for a CSCE High Commissioner on National Minorities, which had at the time of this statement just been made.⁹⁰ Another reason why the Netherlands was not very enthusiastic about the idea of this Working Group may be found in its general concern about the Sub-Commission's 'proliferation of activities', and its opinion that 'the members of the Sub-Commission should show discipline in the number of subjects studied and resolutions and decisions adopted every year.'⁹¹ Nonetheless, once the Working Group on Minorities functioned, the Netherlands did attend most of its sessions, and in 1998, the Netherlands also supported the extension of its mandate.⁹² In recent years though, the Dutch interest in the Working Group seemed to diminish; it was not present at the Working Group's sessions of 2004 and 2005. It should, however, be noted that in this respect the Netherlands was no exception; there is a general trend of decreasing government attendance in the Working Group.⁹³

More recently, another instrument that is specifically designed to monitor the implementation of minority rights has been created. From the beginning, ideas were launched in the Working Group on Minorities to create more far-reaching instruments for the protection of minority rights. One idea was to create a Special Rapporteur of the Commission on Human Rights or a Special Representative under the Secretary-General, among other reasons because the Working Group was not in a position to react to crisis situations, to receive complaints or to make on-site visits. In April 2005, the Commission on Human Rights finally established an independent expert on minority issues, but his mandate does not explicitly refer to the possibility of dealing

88 For more details on the establishment and functioning of the Working Group on Minorities, see: Letschert, 2005, p. 95-121. See also: Thompson, 2003, p. 517-519; Eide, 2001, p. 387; Donders, 2002a, p. 199-200.

89 UN Doc. E/CN.4/1995/176, p. 459.

90 UN Doc. E/CN.4/1992/SR.17, p. 7-8. In practice, a universal approach did indeed prove difficult, because the specific problems of minorities are different in each region of the world. See: Letschert, 2005, p. 117-118.

91 UN Doc. E/CN.4/1994/SR.24, p. 16.

92 UN Doc. E/CN.4/1998/177, p. 379. For information on the Dutch attendance in the Working Group, see: UN Doc. E/CN.4/Sub.2/1996/2, p. 3; UN Doc. E/CN.4/Sub.2/1996/28, p. 3; UN Doc. E/CN.4/Sub.2/1997/18, p. 3; UN Doc. E/CN.4/Sub.2/1998/18, p. 3; UN Doc. E/CN.4/Sub.2/1999/21, p. 3; UN Doc. E/CN.4/Sub.2/2000/27, p. 3; UN Doc. E/CN.4/Sub.2/2001/22, p. 3; UN Doc. E/CN.4/Sub.2/2002/19, p. 3; UN Doc. E/CN.4/Sub.2/2003/19, p. 25; UN Doc. E/CN.4/Sub.2/2004/29, p. 25; UN Doc. E/CN.4/Sub.2/2005/27, p. 25.

93 See: Letschert, 2005, p. 104 and 112-113.

with complaints or paying visits to the territory of UN member states.⁹⁴ Almost fifty states sponsored the resolution creating this new post, but the Netherlands did not belong to this group of states.⁹⁵

8.4 THE FRAMEWORK CONVENTION

The Council of Europe was the first international organisation to adopt a legally binding instrument on the protection of minority rights. The ECHR did not contain a minority rights provision, and proposals to make the rights of minorities the subject of a protocol to the ECHR that the Parliamentary Assembly made in the early 1960s were also put aside on the basis of the argument that this was not necessary from a legal point of view.⁹⁶ However, new initiatives were taken in the wave of attention given to minorities in the 1990s. The Parliamentary Assembly began making recommendations on the issue again, and in the period from 1991 to 1993, the Steering Committee for Human Rights received instructions to study the possibility of a Council of Europe instrument relating to the protection of minorities and to formulate specific proposals.⁹⁷ At a Summit of Heads of State and Government of the Council of Europe that took place in Vienna in 1993, it was eventually decided that two new instruments needed to be drafted: 'a framework convention specifying the principles which contracting States commit themselves to respect, in order to assure the protection of national minorities', and 'a protocol which complements the European Convention on Human Rights in the cultural field by provisions which guarantee individual rights, in particular for persons belonging to national minorities.'⁹⁸

Soon after that, the Committee of Ministers set up an Ad Hoc Committee for the Protection of National Minorities (CAHMIN), in which experts from the Council of Europe member states were to negotiate these instruments.⁹⁹ The Netherlands was positively disposed towards the plan to create special instruments for the protection of minority rights in the Council of Europe, and representatives of the Ministry of Foreign Affairs' Legal Adviser and the Ministry of Home Affairs actively participated

⁹⁴ Letschert, 2005, p. 120-127. For the text of the mandate, see: Commission on Human Rights resolution 2005/79.

⁹⁵ The hope has also been expressed that the functioning of a Working Group would be an incentive for further standard setting activities, and that a legally binding treaty, a minority rights protocol to the ICCPR, or other instruments might eventually be drafted within the UN, but up to now, these ideas have not been realized. See: Thornberry, 1995, p. 60-61; UN Doc. E/CN.4/Sub.2/2003/19, p. 17-18; Letschert, 2005, p. 106-107.

⁹⁶ Zwart, 1999, p. 338; Gilbert, 1996, p. 173. See also: Explanatory report to the FCNM, para 1-2.

⁹⁷ See: Explanatory report to the FCNM, para 3-4.

⁹⁸ See: Vienna Summit Declaration, 9 October 1993, appendix II. An instrument that had, at that time, just been adopted was the European Charter for Regional or Minority Languages of 1992. It aims to protect minority languages, and not linguistic minorities or individuals belonging to such a minority, and therefore, it is usually not regarded a human rights instrument. See: Explanatory report to the European Charter for Regional or Minority Languages, para 11. See also: Coomans, 1993, p. 455.

⁹⁹ Donders, 2002a, p. 251; Letschert, 2005, p. 18; Aarnio, 1995, p. 129.

in the negotiations that were carried out to that end.¹⁰⁰ The meetings of CAHMIN were only open to government delegations; NGOs were not allowed to attend.¹⁰¹ Outside the meetings, there were practically no contacts with NGOs either.¹⁰²

In the Ad Hoc Committee, priority was given to the creation of a Framework Convention, because right from the start it was clear that many states considered a Protocol that would be supervised by the European Court of Human Rights as too intrusive.¹⁰³ When the matter was finally discussed in the period from November 1994 to November 1995, it appeared that opposition to the Protocol was so great that it was impossible to create anything substantial. Eventually, work on the Protocol was suspended and the whole plan was quietly dropped and removed from the agenda.¹⁰⁴ The less far-reaching Framework Convention for the Protection of National Minorities (FCNM) seemed to be the maximum that could be achieved.

The Framework Convention was opened for signature in February 1995. According to its explanatory report, it does not recognize collective rights and it places emphasis 'on the protection of persons belonging to national minorities, who may exercise their rights individually and in community with others'.¹⁰⁵ This does not mean, however, that its provisions are directly applicable to the individual; the Framework Convention typically contains 'programme-type provisions setting out objectives which the Parties undertake to pursue', which leave states a considerable margin of discretion in respect to the manner of implementation.¹⁰⁶ The obligations states parties are put under, relate, among others, to the prevention of discrimination and promotion of equality between persons belonging to a national minority and others, the promotion of conditions necessary for persons belonging to national minorities to maintain and develop their culture, and the recognition that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments.¹⁰⁷ The Convention's implementation is monitored by a reporting procedure. The Committee of Ministers is in charge of this procedure and has to evaluate the adequacy of the measures taken by states. In carrying out this task, it is assisted by an Advisory

100 Appendices to the reports of the Second Chamber, 1994-1995, 23 900, chapter V, no. 2, p. 43; Appendices to the reports of the Second Chamber, 1992-1993, 22 800, chapter V, no. 2, p. 26; Interview with H.A.M. von Hebel, 21 December 2005.

101 Interview with A.D.J. Phillips, 15 July 2006.

102 Interview with H.A.M. von Hebel, 21 December 2005.

103 Letschert, 2005, p. 18.

104 For more details on the negotiations, see: Donders, 2002a, p. 262-267.

105 See: Explanatory report to the FCNM, para 13.

106 See: Explanatory report to the FCNM, para 11. See also: Donders, 2002a, p. 252-253; Letschert, 2005, p. 19 and 24-26.

107 For the examples mentioned, see: Articles 4, 5.1, and 13.1, FCNM. For an article-by-article analysis of the FCNM, see: Weller, 2005.

Committee, composed of persons with recognized expertise in the field of protection of national minorities.¹⁰⁸

In the Parliamentary Assembly, disappointment was expressed with the weak supervisory procedures, and with the vagueness and programme-type character of the Framework Convention's provisions.¹⁰⁹ In some respects, the Netherlands had hoped for a stronger instrument as well. The government communicated to the Dutch parliament that it saw this new treaty as an instrument with additional value about which it was, on the whole, quite satisfied, but it also admitted that it contained some weaknesses, which it had actually preferred not to see back in the end-result.¹¹⁰ Most importantly, these concerned the choices made in respect to the supervisory organs and the question of the definition of the term 'national minority'.

During the negotiations, both had proved contentious issues, that could not be solved completely in the Ad Hoc Committee that was established for the drafting work. On the subject of supervision, opinions differed on whether the creation of an independent monitoring body would be desirable. Some states, such as the United Kingdom, found this difficult to accept and preferred a government-controlled procedure, while others, on the other hand, were in favour of an independent supervisory committee.¹¹¹ The Netherlands belonged to the latter group of states.¹¹² What it had in mind was a procedure that was based on dialogue between the states parties and an independent monitoring organ, combined with the model of 'general comments' that was known from the ICCPR. The 'general comments' would provide for interpretations of the Framework Convention's articles. They would not be legally binding, but as authoritative recommendations they would provide a useful tool in the dialogue between the experts and the states parties.¹¹³ However, to the regret of the Netherlands, the text that was finally adopted gave the Committee of Ministers a dominant role in the procedure, and for that reason the Netherlands was not completely satisfied with the end-result.¹¹⁴

108 See: Articles 24-26, FCNM. It should be noted that the FCNM's text left many issues undecided. For instance, in respect to the composition and procedures of the Advisory Committee, it determined only that this was left to be decided by the Committee of Ministers. See: Article 26.2, FCNM. See also: Klebes, 1995, p. 94; Explanatory report to the FCNM, para 8 and 93-97. For decisions that were eventually taken in this respect, see: Letschert, 2005, p. 148-160.

109 Klebes, 1995, p. 97; Zwart, 1999, p. 353; Gilbert, 1996, p. 189.

110 Appendices to the reports of the Second Chamber, 1998-1999, 26 389, no. 3, p. 5; Appendices to the reports of the Second Chamber, 1999-2000, 26 389, no. 5, p. 1 and 8-9.

111 Packer, 2003, p. 481; Klebes, 1995, p. 94; Appendices to the reports of the Second Chamber, 1999-2000, 26 389, no. 5, p. 12.

112 Appendices to the reports of the Second Chamber, 1998-1999, 26 389, no. 3, p. 15; Interview with H.A.M. von Hebel, 21 December 2005. See also: Appendices to the reports of the Second Chamber, 1996-1997, 25 300, no. 1, p. 16.

113 Appendices to the reports of the Second Chamber, 1999-2000, 26 389, no. 5, p. 12; Interview with H.A.M. von Hebel, 21 December 2005.

114 Later, it would appear that, in practice, the Advisory Committee obtained a considerable measure of independence. See: Letschert, 2005, p. 154-183.

The Netherlands' efforts for a more effective supervisory mechanism, on the other hand, did not mean that it advocated the establishment of an individual complaints procedure, or involvement of the European Court of Human Rights. As it later explained to parliament, it shared the dominant opinion that the Framework Convention's provisions primarily defined an action programme for states, and could thus not be considered directly applicable.¹¹⁵ If it had really wanted a complaints procedure, the Netherlands could of course have advocated a treaty with directly applicable rights, but it had not done so, because the approach of the Framework Convention was actually in conformity with the Dutch policy preferences. It preferred a flexible approach that focused on policy measures and subsidization of initiatives relating to minority rights over a primarily legal approach that focused on granting individually justiciable rights and complaints procedures. This was also why the Netherlands later opposed a cultural rights protocol to the ECHR.¹¹⁶ A second reason the Netherlands was not in favour of this protocol was that it believed the ECHR provided sufficient avenues for an individual to claim his rights, for instance under article 9 on the freedom of religion, or article 11 on the right to freedom of peaceful assembly and association.¹¹⁷ Hence, contrary to the Framework Convention, the cultural rights protocol was not considered as an instrument that could have additional value. Finally, the financial implications of some minority rights were unclear. For instance, the right of persons belonging to a minority to learn their own language could have far-reaching implications if this would also imply a positive obligation for the state to provide for this education. Similar to most of the other Council of Europe member states, the Netherlands shied away from these consequences, and wanted to prevent their enforcement by a court.¹¹⁸

It was already mentioned that the question of supervision was not the only sensitive issue in the negotiations on the Framework Convention. Another difficult problem concerned the question of how to define the term 'national minority'. There was a major difference of opinion between the states about whether the notion should be understood to designate only those with the nationality of the country of residence, or whether this restriction should be left out, so that so-called 'new' minorities, like migrant workers and refugees, or itinerant groups, such as Roma and Sinti, would also fall within the scope of the Framework Convention.¹¹⁹ Most countries wanted to restrict the scope of the Convention to 'traditional' minorities, such as the Danes in Germany, the Hungarians in Slovakia and Romania, or the Frisians in the Netherlands. This was, for instance, true for Germany, which was strongly opposed to the inclusion

115 Appendices to the reports of the Second Chamber, 1998-1999, 26 389, no. 3, p. 15-16; Appendices to the reports of the Second Chamber, 1999-2000, 26 389, no. 5, p. 8. See also: Letschert, 2005, p. 146-147.

116 Interview with H.A.M. von Hebel, 21 December 2005.

117 *Ibidem*. For an overview of the protection of the right to cultural identity in the ECHR case-law, see: Donders, 2002a, p. 269-298.

118 Interview with H.A.M. von Hebel, 21 December 2005. For the generally prevailing attitude, see: Donders, 2002a, p. 262-267.

119 Zwart, 1999, p. 347; Aarnio, 1995, p. 131; Gilbert, 1996, p. 175-177; Letschert, 2005, p. 30-32.

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of 'new minorities', and did not want to recognize the large Turkish community as a national minority. Turkey, on the other hand, did favour application of the Convention to 'new minorities', but at the same time tried to exclude the Kurds from the definition.¹²⁰

For the Netherlands, it was clear that 'traditional' minorities should in any case be included in the definition. The immediate cause of the Council of Europe's standard-setting efforts was the coming accession of countries from the Eastern and Central European region, where a lot of – potentially violent – minority-related problems existed.¹²¹ For the Netherlands, this was also one of the main reasons to support the Council of Europe's involvement in minority issues.¹²² It was clear to the Netherlands that especially in this region, minorities needed protection, and it was thought that by ratifying the Framework Convention, a country like the Netherlands would set an example to those states, and create a basis for dialogue.¹²³ On the other hand, the Dutch government was of the opinion that the Framework Convention could be worthwhile for Western European countries too. As to its own society, it considered it useful in the sense that it might complement the Dutch integration policies, which – with their emphasis on mutual respect – were based on the same values as those reflected in the Framework Convention.¹²⁴ Given this fact, the government was of the opinion that the Netherlands' policies were already in conformity with the Framework Convention, but ratification of this instrument could ensure that this would also be the case in the future.¹²⁵ In that case, 'new' minorities should, however, be included in the definition as well.

Hence, the Netherlands aimed at a comprehensive definition, which included 'traditional' as well as 'new' minorities.¹²⁶ This generous attitude was praised by proponents of strong and broadly applicable minority rights instruments, and in hindsight, one of the leaders of the Dutch Labour Party, Ed van Thijn, even called the

120 Keesings Historisch Archief, April 1995, p. 255.

121 Appendices to the reports of the Second Chamber, 1999-2000, 26 389, no. 5, p. 3.

122 Appendices to the reports of the Second Chamber, 1992-1993, 22 800, chapter V, no. 2, p. 26.

123 Appendices to the reports of the Second Chamber, 1998-1999, 26 389, no. 3, p. 5; Appendices to the reports of the Second Chamber, 1999-2000, 26 389, no. 5, p. 17; Reports of the Second Chamber, 1999-2000, 15 March 2000, No. 56, p. 3982.

124 Appendices to the reports of the Second Chamber, 1998-1999, 26 389, no. 3, p. 2 and 3. In fact, the Dutch representatives to CAHMIN considered some of the Dutch practices valuable 'export-products' that deserved a place in the text of the Framework Convention. This was, for instance, the case with its practice to hold policy-consultations with minority groups to increase their participation in public life. For this reason, the Netherlands had insisted on the inclusion of the words 'in public affairs', in article 15, which eventually read as follows: 'The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.' See: Zwart, 1999, p. 351.

125 Appendices to the reports of the Second Chamber, 1999-2000, 26 389, no. 5, p. 6-7.

126 Appendices to the reports of the Second Chamber, 1993-1994, 23 400, chapter V, no. 2, p. 28; Appendices to the reports of the Second Chamber, 1996-1997, 25 300, no. 1, p. 16; Appendices to the reports of the Second Chamber, 1998-1999, 26 389, no. 3, p. 4; Appendices to the reports of the Second Chamber, 1999-2000, 26 389, no. 5, p. 2. See also: Donders, 2002b, p. 134.

Netherlands a frontrunner in the negotiations on the Framework Convention.¹²⁷ However, there were not many other countries that wanted to go as far as the Netherlands, and it did not receive much support for its position.¹²⁸ In the end, it appeared to be impossible to find a definition that was acceptable to all, and the only way to break the stalemate was to be pragmatic, to agree to disagree, and to accept that every state would give its own interpretation to the term.¹²⁹ According to the Netherlands, this was better than to have a restricted definition, because this way, the possibility of a gradual acceptance of a broader definition would still be open.¹³⁰

Several countries that ratified the Framework Convention submitted a declaration that made clear what their interpretation of the term 'national minority' was, and to whom the Convention should, accordingly, apply.¹³¹ The Dutch government proposed to do the same and to declare that the Framework Convention would, in principle, not only cover the Frisians, but also persons legally residing in the Netherlands and belonging to one of the target groups of its integration policy.¹³² Before the government could actually ratify and submit this declaration, it needed the approval of the Second and the First Chamber of Dutch parliament, respectively. The proposal passed the Second Chamber, but in the First Chamber, it met with considerable resistance.¹³³ The liberal party, VVD, and the Christian parties, including the CDA, which together constituted the majority, expressed themselves against the definition as proposed by the government.¹³⁴ It was felt that the Framework Convention was meant only for traditional minorities, and in particular, the linkage to Dutch integration policies was criticized, among others because this would mean that recognition as a 'national minority' would be dependent upon a policy that might be subject to changes. Once a group would be considered sufficiently integrated, that group would also no longer be covered by the Framework Convention.¹³⁵ Apart from that, other arguments against it were that migrants might be attracted to the Netherlands if it would apply a definition that was more favourable to them than that of surrounding countries, and that an emphasis on minority rights would hamper integration.¹³⁶ Minister Roger van Boxtel,

127 Van Thijn, 2003, p. 27.

128 Interview with H.A.M. von Hebel, 21 December 2005.

129 Zwart, 1999, p. 347-348; Aarnio, 1995, p. 131.

130 Appendices to the reports of the Second Chamber, 1999-2000, 26 389, no. 5, p. 8.

131 Letschert, 2005, p. 30-32; Donders, 2002b, p. 132; Zwart, 1999, p. 347-348.

132 Donders, 2002b, p. 133. See also: Appendices to the reports of the Second Chamber, 1998-1999, 26 389, no. 3, p. 4. For the text of the proposed declaration, see: Appendices to the reports of the Second Chamber, 1998-1999, 26 389, no. 3, p. 33.

133 In the Second Chamber, only the SGP, one of the small Christian parties in parliament, rejected the proposed bill of approval. See: Donders, 2002b, p. 135; Van Thijn, 2003, p. 27.

134 Donders, 2002b, p. 135-136; Van Thijn, 2003, p. 27-28.

135 Donders, 2002b, p. 135-136. See, for example: Appendices to the reports of the First Chamber, 2000-2001, 26 389, no. 60a, p. 1-2 and 4.

136 Van Thijn, 2003, p. 28. See, for example: Appendices to the reports of the First Chamber, 2000-2001, 26 389, no. 60a, p. 3 and 4.

who, as the main person responsible for integration policies, acted as the cabinet's spokesman, then decided to suspend the deliberations for political consultations.¹³⁷

After the decision of May 2001, nothing happened for about two years, but in the context of the Netherlands' presidency of the Council of Europe in the period from November 2003 to May 2004, the ratification of the Framework Convention again gained importance.¹³⁸ In a memorandum that was sent to parliament in December 2003, the government explained that it had decided to change positions. The new government, consisting of CDA, VVD and the Democrats, D66, did not agree with the former government's standpoint on the definition question, and it proposed to make a declaration that it would only recognize the Frisians as a national minority.¹³⁹ It was clarified that there were two reasons for this. First, the composition of the First Chamber made it unlikely that a declaration in favour of a wide definition would now be adopted. Second, the Dutch integration policies had radically changed since the Framework Convention was last discussed in parliament; the emphasis on respect for differences had changed into a policy that stressed one common form of citizenship.¹⁴⁰

The proposal was severely criticized by parties on the left of the political spectrum, and a motion was even submitted to include at least Roma and Sinti in the definition of national minorities. However, in the end, the government's bill of approval, including the changed declaration text, was adopted without a vote, and when it ratified, the Netherlands indeed declared that it would apply the Convention to the Frisians only.¹⁴¹ Hence, the Netherlands eventually let go its intention to be more generous than the majority of other Council of Europe member states. In fact, by its exclusion of Roma and Sinti, it even gave a more limited interpretation to the term 'national minority' than, for instance Germany, which had been one of the countries that had defended a more restrictive definition during the negotiation process.¹⁴²

137 Donders, 2002b, p. 136; Van Thijn, 2003, p. 29. See: Reports of the First Chamber, 2000-2001, 29 May 2001, no. 31, p. 1408.

138 For the relationship between the FCNM's ratification and the Dutch presidency of the Council of Europe, see, for instance: Appendices to the reports of the Second Chamber, 2003-2004, 29 540, no. 10, p. 23. See also: Reports of the First Chamber, 2003-2004, 4 November 2003, no. 5, p. 253, 258, 260; Reports of the First Chamber, 2003-2004, 4 November 2003, no. 5, p. 263.

139 Appendices to the reports of the Second Chamber, 2003-2004, 26 389, no. 8, p. 2. See also: Appendices to the reports of the Second Chamber, 2003-2004, 26 389, no. 9, p. 4-5.

140 Appendices to the reports of the Second Chamber, 2003-2004, 26 389, no. 8, p. 2.

141 For the debate, see: Reports of the First Chamber, 2003-2004, 25 May 2004, no. 30, p. 1589 and 1636; Reports of the First Chamber, 2004-2005, 30 November 2004, no. 7, p. 299- 313 and 338-348. For the text of the motion, see: Reports of the First Chamber, 2004-2005, 30 November 2004, no. 7, p. 307. For the text of the declaration, see: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>, accessed 11 September 2006. See also: Donders, 2002b, p. 137.

142 Germany declared: 'The Framework Convention contains no definition of the notion of national minorities. It is therefore up to the individual Contracting Parties to determine the groups to which it shall apply after ratification. National Minorities in the Federal Republic of Germany are the Danes of German citizenship and the members of the Sorbian people with German citizenship. The Framework Convention will also be applied to members of the ethnic groups traditionally resident in Germany,

8.5 THE QUESTION OF MINORITY RIGHTS IN THE CSCE

Although the Council of Europe was the first international organisation to adopt a legally binding instrument in the field of minority rights, much of its work has been inspired by what, at that time, had already been achieved in the CSCE. The political principles and norms on minority rights that were adopted in this organisation were at the basis of Council of Europe standard-setting activities.¹⁴³

Until the early 1980s, there was an atmosphere of reserve around the question of minority rights that was comparable to that in other international organisations. As was the case in the UN, the protection of minorities was an issue mainly championed by Yugoslavia.¹⁴⁴ This country introduced the theme of national minorities into the CSCE, and as a result, the Helsinki Final Act of 1975 referred to it on two places in the text.¹⁴⁵ In the human rights paragraph of the Decalogue – the ten fundamental principles participating states pledged to respect and put into practice – it could, for instance be read: 'The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.'¹⁴⁶ Objections against the incorporation of minority rights were, among others, met by the inclusion of the phrase 'on whose territory national minorities exist'. At the time, a similar clause had been incorporated in article 27 of the ICCPR.¹⁴⁷ Because the term 'national minority' remained undefined, states that were reluctant to accept commitments with respect to minorities – such as Turkey, Greece and France – were this way left the opportunity to declare that national minorities did not exist on their territories, and that the commitments did therefore not apply to them.¹⁴⁸

The Belgrade and Madrid Follow-Up Meetings, which took place from October 1977 to December 1978 and from November 1980 to September 1983, respectively, did not result in anything really new. However, from 1985 onwards, the idea of laying down something more on the subject of national minorities started to gain ground.¹⁴⁹ The increasingly favourable climate did not immediately lead to concrete results, but in the course of the Vienna Follow-Up Meeting, which took place in the period

the Frisians of German citizenship and the Sinti and Roma of German citizenship.' See: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>, accessed 11 September 2006.

143 Zwart, 1999, p. 336-337. See also: Explanatory report to the FCNM, para 27. Probably, the Council of Europe's desire to draw up minority rights instruments of its own was partially related to its aspirations to promote the organisation, and to make sure that it would not lose its significant role in the field of human rights to the CSCE. See: Zwart, 1999, p. 337; Alexanderson, 1997, p. 56; Bloed, 1995, p. 119.

144 Heraclides, 1992, p. 5.

145 See also: Heraclides, 1992, p. 6-7; Thornberry, 1991, p. 250-252.

146 Principle VII, Final Act of Helsinki, 1 August 1975.

147 See section 8.3.

148 Heraclides, 1992, p. 5-7; Freeman, 2002, p. 115; Kemp, 2001, p. 29; Zaal, 1992, p. 34 (footnote 1); Wright, 1996, p. 194-195; Alexanderson, 1997, p. 50.

149 Heraclides, 1992, p. 7.

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between November 1986 and January 1989, new commitments were negotiated for adoption in the Concluding Document. A total of no less than six paragraphs were included on different places in the Concluding Document of Vienna, and dealt with such issues as non-discrimination, protection and creation of conditions for the promotion of a national minority's identity, international contacts, and possibilities for minorities to give and receive instruction on their own culture.¹⁵⁰

In this process of increasing CSCE attention for minority rights, from an early stage the Netherlands already belonged to the group of countries that embraced the idea of further standard setting in this field. During the Ottawa Meeting of Experts on Human Rights of 1985 and the Bern Meeting of Experts on Human Contacts of 1986, the Netherlands co-sponsored certain proposals in the field of national minorities.¹⁵¹ During the Vienna Follow-Up Meeting, the Netherlands, together with the Federal Republic of Germany, Norway, Austria and Canada, was one of the countries that took a middle-position. These states were not as ambitious as Yugoslavia and Hungary, but did not agree with countries like Greece and Romania, which overtly opposed the recognition of rights for minorities. They were sympathetic to proposals concerning national minority rights, while at the same time they emphasized the individual character of such rights.¹⁵²

After Vienna, the growing interest in minority rights sustained and reached a peak during the Second Meeting of the CSCE Conference on the Human Dimension, which was held in Copenhagen in June 1990. The issue received a lot of attention and many different proposals were tabled.¹⁵³ Although the negotiations could well be labelled arduous, the outcome was quite far-reaching with respect to both human rights in general and minority rights in particular.¹⁵⁴ A whole chapter was devoted to the issue, which included a variety of commitments of non-interference as well as of affirmative action.¹⁵⁵ Although no definition was given of the term 'national minorities', a kind of solution was reached by a provision that read: '[t]o belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice'.¹⁵⁶ In spite of its careful wording and escape clauses, the provisions concerning minority rights were unparalleled international agreements.¹⁵⁷

150 *Ibidem*, p. 7-8. For the provisions dealing with minority rights, see: Concluding document of the Vienna Meeting of 1989, para 18-19 of the principles-part, and para 31, 45, 59 and 68 of the chapter on the human dimension of the CSCE.

151 Heraclides, 1992, p. 7.

152 *Ibidem*, p. 8.

153 Bloed, 1993, p. 92-95; Heraclides, 1992, p. 9-12; Letschert, 2005, p. 13-16.

154 Bloed, 1993, p. 92-95; Heraclides, 1992, p. 9-12; Bloed, 1990, p. 36 and 40-41; Wright, 1996, p. 196-198.

155 See: Chapter IV, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990.

156 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, para 32.

157 See: Bloed, 1990, p. 42.

The Netherlands was very positive about the progress made in this field.¹⁵⁸ During their drafting, the Netherlands had again belonged to a middle-of-the-road group of states. In principle, it was in favour of new commitments on behalf of minorities, but it had a greater understanding for states that had difficulties with more far-reaching undertakings than the 'pro-minority' camp that consisted of Hungary, Yugoslavia, Italy, and the Scandinavian countries Finland, Sweden, and Norway.¹⁵⁹ Notwithstanding its awareness of the sensitivities the topic involved for many states concerned, it regarded the achievements as a start only, and it was of the opinion that the topic needed further attention and elaboration.¹⁶⁰ Therefore, it announced to parliament that it would try and stimulate developments in that direction.¹⁶¹

The first opportunity to really do so was during the Geneva Meeting of Experts on National Minorities of July 1991.¹⁶² The Netherlands had actually not been in favour of convening an expert meeting on national minorities, because it feared that it could lead to a step backwards if no substantial results would be reached, which proved not completely far-fetched. The Geneva Meeting did not achieve much of an impressive result, and in fact, it narrowly escaped complete failure.¹⁶³ There were various reasons for this, but the speech that the Dutch Minister of the Interior, Ien Dales, held on behalf of the EC at the very first day of the conference certainly did not help to create an easy start.¹⁶⁴ On the contrary, by maintaining that migrant workers and other new minorities that had settled in Europe also had a right to protection of their ethnic, cultural, religious or linguistic identity, and should thus not be excluded from the definition, she complicated the discussions.¹⁶⁵ Even though she had stated that attempts to define the term 'national minorities' would be futile, other delegations now felt compelled to once more give their view on the matter.¹⁶⁶

It cannot be excluded that in this way, the Netherlands itself became responsible for what may be interpreted as a setback in standard setting. Whereas the Copenhagen provisions had essentially been universal in character, the Geneva Document included a phrase that read: 'not all ethnic, cultural, linguistic or religious differences necessarily lead to the creation of national minorities'.¹⁶⁷ On the adoption of the Geneva report, eight states made a statement in which they expressed their disappointment with this provision and declared that it conflicted with the Copenhagen Docu-

158 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 2, p. 19 and 60; Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 5.

159 Heraclides, 1992, p. 9.

160 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 2, p. 19; Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 2, p. 60.

161 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 2, p. 60.

162 Roth, 1991, p. 330.

163 Heraclides, 1992, p. 13-15; Bloed, 1993, p. 98-99; Roth, 1991, p. 330-331; Herman, 1991, p. 53.

164 Herman, 1991, p. 53.

165 *Ibidem*. See also: Appendices to the reports of the First Chamber, 2000-2001, 26 389, no. 60b, p. 2.

166 Herman, 1991, p. 53.

167 Alexanderson, 1997, p. 51; Roth, 1991, p. 331. For the quotation, see: Report of the CSCE Meeting of Experts on National Minorities, Geneva 1991, Chapter II.

ment in which it was left entirely to individuals to determine whether they were a national minority, but the Netherlands was not among these states.¹⁶⁸

The only element of importance in the Geneva Document was that it explicitly stated that '[i]ssues concerning national minorities, as well as compliance with international obligations and commitments concerning the rights of persons belonging to them, are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective state.'¹⁶⁹ This prepared the ground for more intrusive instruments in the field of human rights and the protection of minorities that would be developed in later years.¹⁷⁰ Because there were several states that considered it undesirable to create a mechanism exclusively for the protection of minority rights, the Geneva report recommended that the third Meeting of the Conference on the Human Dimension of the CSCE in Moscow, which would take place in the autumn of 1991, 'consider expanding the Human Dimension Mechanism.'¹⁷¹ Under this Mechanism, states were obliged to respond to questions of other CSCE participating states about alleged human rights violations.¹⁷² In Moscow, a system of CSCE missions of independent experts or rapporteurs, was added to the existing Mechanism. The revolutionary aspect about it was that the procedures could, under certain conditions, be initiated by a minority of the CSCE participating states and without the consent of the state to which the visit was to be paid.¹⁷³ It was explicitly recognized that the Mechanism could also be used to intervene on behalf of the rights of minorities, but before a mission could actually be sent, several steps had to be taken, and it could in any case, only be invoked after violations had already taken place.¹⁷⁴ The improvements that were made soon proved insufficient to make any real contribution to a solution for minority-related problems. There was a need for a new instrument that could more effectively deal with the problems that the CSCE participating states were confronted with. In the next chapter, it is demonstrated how this instrument was developed.

8.6 CONCLUSION

After a period of relative silence around the issue of minority rights, the issue once again took a prominent place on the international agenda in the 1990s. Within the CSCE, the Netherlands had already shown itself favourably disposed to initiatives in the field of minority rights that were taken in the second half of the 1980s, and it had

168 Countries that made such a statement were: Austria, the Czech and Slovak Federal Republic, Hungary, Italy, Poland, Yugoslavia, Norway and Sweden. See: Roth, 1991, p. 331.

169 See: Report of the CSCE Meeting of Experts on National Minorities, Chapter II.

170 Letschert, 2005, p. 37; Brenninkmeijer, 2005, p. 20.

171 Heraclides, 1992, p. 15; Bloed, 1993, p. 98-99. For the quotation, see: Report of the CSCE Meeting of Experts on National Minorities, Geneva 1991, Chapter VIII. See also: Roth, 1991, p. 331.

172 See also section 1.1.3.

173 Brett, 1996, p. 681-683; Bloed, 1992a, p. 12-15.

174 Wright, 1996, p. 200; Bloed, 1992a, p. 11; Letschert, 2005, p. 88.

also attached importance to the ICCPR-article on minority rights. Nevertheless, it had not regarded it a priority issue. This radically changed after the end of the Cold War; like many other states, it came to see that violations of minority rights could lead to great humanitarian disasters and security threats, and consequently, protection of these rights became one of its main international concerns.

This was also reflected in its attitude towards efforts of international organisations to develop instruments to meet the challenges they were now confronted with. In the wave of new standard-setting activities that emerged, the Netherlands joined the forces in favour of a further elaboration of rights of persons belonging to minorities. It actively supported the adoption of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in the early 1990s, and in the Council of Europe, the Netherlands also displayed an active and positive attitude towards the initiative of a Framework Convention. With their focus on individual rights, these new instruments were perfectly in line with the Dutch opinion that the recognition of collective human rights was not desirable.

The general presumptions on which the international minority rights standards were based were also in conformity with Dutch domestic policies. At the time these instruments were drafted, the Netherlands integration policies were very much based on the ideal of a multicultural society in which there was equality and mutual respect between different cultural groups. Respect for minority rights was considered to be an integral part of that policy, and therefore, the Netherlands saw these international norms as an endorsement of its own policies. Even though it was clear that the atmosphere of discordance and conflict in the Eastern half of Europe had been the cause of the increased attention for minority rights, the Netherlands felt that 'new minorities' also had a right to preserve their identity, and therefore, it considered it right to promote a broad interpretation of the term 'national minority' and to provide them with minority rights as well. This point of view was defended in the Council of Europe as well as in the CSCE. However, the Dutch integration policies have undergone some important changes since the 1990s, and the course of the ratification procedure of the Framework Convention demonstrates that this also had an effect on the position the Netherlands took internationally.

It should be noted though that even in the 1990s, the Netherlands was not prepared to accept every proposal that was made in the field of international protection of minority rights. It was, for instance, opposed to the idea of a cultural rights protocol to the ECHR, and it did not want to accept individual complaints procedures as a means to supervise the implementation of the newly established norms. With respect to the supervision of the Framework Convention, the Netherlands was prepared to go further than most other European states, but only insofar as the independence of the procedure was concerned. Like the majority of other states, in this sensitive area, the Netherlands preferred a political approach that left states a certain latitude to act as they saw fit, over a strictly legal approach, in which individuals could actually claim their rights before a court.

CHAPTER 9 THE HIGH COMMISSIONER ON NATIONAL MINORITIES

Chapter 8 demonstrated that the Netherlands began advocating international minority rights instruments mainly because of the security problems that emerged after the fall of the communist system in Eastern and Central Europe. However, this was not always apparent from the standards formulated or the mandate of the organs created to monitor the implementation of these norms. From a technical point of view, the same instruments could probably have been drafted without security concerns or connections; they basically treat the issue of minorities from a human rights angle. In this chapter, a case is discussed where the link between security and human rights is more explicit in the instrument itself: the CSCE's High Commissioner on National Minorities (HCNM).¹

This chapter examines how security and human rights considerations as well as other foreign policy interests were balanced and what choices were made. Did the Netherlands aim at a broadly applicable minority rights instrument, as was the case, for instance, in the negotiations on the Council of Europe's Framework Convention? Was it in favour of a strong and effective instrument, or did it prefer a mechanism that could more easily be influenced by state governments? Apart from questions relating to policy preferences, the explanation for how the choices that were made and to what extent they can be related to institutional or nongovernmental influences is also investigated.

The first section of this chapter summarizes the High Commissioner's mandate and provides general information on the course and organisation of the negotiations. In section 9.2, the motives and basic considerations behind the Netherlands' policies are investigated. The four sections that follow deal with a number of questions that were particularly important topics of discussion, and section 9.7 contains some concluding remarks.

¹ In December 1994, the name CSCE was changed into OSCE. Since the organisation was still called CSCE at the time the HCNM's mandate was drafted, that name will be used in this chapter. It should furthermore be noted that after the Maastricht Treaty of December 1991, the European Union (EU) replaced the European Community (EC). Hence, for events that took place before that time the latter term is used, while the former is applied for the period after the adoption of this Treaty.

9.1 THE NEGOTIATIONS ON THE POST OF A HIGH COMMISSIONER ON NATIONAL MINORITIES

9.1.1 The HCNM's mandate

From 24 March to 10 July 1992, the CSCE participating states met in the Finnish capital Helsinki for its fourth Follow-Up Meeting.² One of the decisions that were taken at this Meeting was the establishment of the post of a High Commissioner on National Minorities, whose mandate is set forth in Chapter II of the 1992 Helsinki Document.³ In the mandate, it is stipulated that the High Commissioner is 'an instrument of conflict prevention', and that he will 'provide 'early warning' and, as appropriate, 'early action' at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage, but, in the judgement of the High Commissioner, have the potential to develop into a conflict within the CSCE area, affecting peace, stability or relations between participating States, requiring the attention of and action by [the CSCE's main political bodies,] the Council or the CSO.'⁴

According to the mandate, in the early warning stage the High Commissioner is engaged in preventive diplomacy. He is expected to collect information, assess situations, monitor developments, pay visits to participating states, discuss with the parties directly concerned, and to promote dialogue, confidence and co-operation between them.⁵ If the High Commissioner comes to the conclusion that there is a '*prima facie* risk of potential conflict', he may bring the matter to the attention of the CSCE by issuing an early warning notice.⁶ The High Commissioner may only engage in early action – that is, further contacts and closer consultations for the purpose of problem solving – on the authorization by the Committee of Senior Officials (CSO).⁷ The CSO no longer exists and it has been replaced by the Senior Council, but at that time, the CSO was a central body within the CSCE. It consisted of government officials of all CSCE participating states, and it prepared the meetings of the CSCE's

2 In the CSCE, Follow-Up Meetings used to precede and prepare for periodic meetings of Heads of State or Government, or so-called Summits. See: OSCE, 2000, p. 21-24.

3 See: CSCE Helsinki Document 1992: The Challenges of Change, Chapter II. The complete text of the mandate can also be found in annex 9 of this book.

4 See: CSCE Helsinki Document 1992: The Challenges of Change, Chapter II, paragraphs 2 and 3. In this chapter, for reasons of readability, the High Commissioner is referred to by masculine personal pronouns. This does not imply that women are excluded from occupying this post.

5 See: CSCE Helsinki Document 1992: The Challenges of Change, Chapter II, paragraphs 11 and 12.

6 See: *Ibidem*, paragraphs 13-15.

7 See: *Ibidem*, paragraph 16. It should be noted that the difference between early warning and early action has remained very theoretical; in practice, the HCNM has usually carried out his tasks under what would formally have been the early warning stage. See: Letschert, 2005, p. 48-51; Martín Estébanez, 1997, p. 131-134.

general decision-making and governing body, the Council of Ministers of Foreign Affairs, and carried out its decisions.⁸

The mandate is subject to a number of restrictions. Apart from the limitation that the High Commissioner is not allowed to deal with conflicts that have already broken out, the most important are that he is not allowed to consider 'national minority issues in situations involving organized acts of terrorism', or 'violations of CSCE commitments with regard to an individual person belonging to a national minority'.⁹ Although within his mandate the High Commissioner has considerable independence, he must account to the CSCE through the Chairman-in-Office (CiO), a function of key political leadership, which is on an annually rotating basis fulfilled by the Minister of Foreign Affairs of one of the CSCE participating states.¹⁰ Although the relationship between the HCNM and other CSCE bodies has demonstrated to be more flexible in practice, formally the mandate determines that the High Commissioner is to consult the Chairman-in-Office prior to his departure for a participating state, and he has to report to him afterwards. Moreover, after the termination of the High Commissioner's involvement in a particular matter, he will also draw up a report, which will be transmitted to the CSO.¹¹

As has been pointed out by different authors, the mandate of the High Commissioner on National Minorities is, in many respects, vague, ambiguous and unspecific, and much was left to the interpretation the High Commissioner would give to the mandate.¹² The task of developing the mandate further and putting it into practice fell to the former Dutch Minister of Foreign Affairs, Max van der Stoel, who was appointed as the first High Commissioner on National Minorities on 15 December 1992, and who occupied the post until 1 July 2001. He was succeeded by the Swedish diplomat, Rolf Ekéus, whose mandate runs until 1 July 2007.¹³

8 In practice, the greater part of the Senior Council's work has in turn been shifted to a new organ, the Permanent Council, in which the Permanent Representatives of the participating states meet on a daily basis. For more information on the CSO, the Senior Council, and the Permanent Council, see: OSCE, 2000, p. 25-27; Bloed, 1997, p. 38-44.

9 See: CSCE Helsinki Document 1992: The Challenges of Change, Chapter II, paragraphs 5b-5c. See also: CSCE Helsinki Document 1992: The Challenges of Change, Chapter II, paragraph 25.

10 For more information on the CiO, see: OSCE, 2000, p. 30-31; Bloed, 1997, p. 46-48.

11 CSCE Helsinki Document 1992: The Challenges of Change, Chapter II, paragraphs 17-19. On the relationship between the HCNM and other CSCE institutions, see also: Zaagman, 1994a, p. 142-153; Letschert, 2005, p. 45-47.

12 See, for instance: Grezel, 1993, p. 111-114; Kemp, 2001, p. 21; Zaagman, 1994a, p. 116-117 and 126; Letschert, 2005, p. 62. For an insight into the actual practice of the work of the High Commissioner, see: Kemp, 2001, p. 47-285; Letschert, 2005, p. 62-86, 256-286 and 335-354. For an article with Van der Stoel's own views on the mandate, see: Van der Stoel, 1994, p. 102-107.

13 Letschert, 2005, p. 44-45.

9.1.2 A Dutch initiative

In his standard work on the history of international human rights, Lauren maintained that this history has, in many ways, been 'a history written in blood'.¹⁴ What he meant to say was that major human rights developments have often been stimulated by human catastrophes creating international moral shock, and mobilizing widespread support for human rights. Most certainly, this was the case with the creation of the post of a High Commissioner on National Minorities.

At the Copenhagen Meeting of June 1990, Sweden had already presented an informal idea for a CSCE Representative on National Minorities to study situations of minorities which could affect security in Europe. In Geneva, the United States proposed a mechanism of good offices, carried out by a panel of three experts from a CSCE list that could be invoked on the initiative of a state where minority-related problems occurred. In the same period, Austria, together with five other countries, proposed to establish a CSCE rapporteur for human dimension issues, including national minority issues.¹⁵ Eventually, this resulted in the Moscow Mechanism, which has been described in the previous chapter. The time was not yet ripe for an instrument specifically created to deal with minorities.

To be sure, new commitments in the field of minority rights were agreed upon shortly after the end of the Cold War, but these were still established in a climate of optimism so clearly reflected in, for example, the Charter of Paris for a New Europe of November 1990.¹⁶ This tide turned in the course of 1991, when a number of crises broke out in the CSCE area. Tensions flared into fighting in former Soviet areas such as Nagorno-Karabach and Georgia, and conflict in Yugoslavia rapidly developed into a complicated civil war. This was a wake-up call for European leaders, especially because there were many other latent conflicts, such as the tensions between Hungarian and Romanian populations in Transylvania, which contained the germs of possible armed conflicts.¹⁷ It was realized that war had returned to Europe, and that it was in the shape of ethnic conflict that it oftentimes came. Against that background it was hardly surprising that the CSCE states started to focus on ways and means to deal with these new security threats. As a result of this, a large part of the Helsinki Follow-Up Document was devoted to conflict prevention and crisis management.¹⁸

¹⁴ Lauren, 2003, p. 294. See also: Donnelly, 1984a, p. 636.

¹⁵ See: Kemp, 2001, p. 6; Zaagman and Zaal, 1994, p. 96; Heraclides, 1992, p. 14; Memorandum from the delegation to the CSCE Meeting on National Minorities in Geneva to the Political Affairs Section of the Atlantic Cooperation and Security Department and the Eastern European Section of the European Affairs Department of the Ministry of Foreign Affairs, 12 July 1991, Archive MFA, CSCE 921.353.22, file: CSCE/meeting/on/national/minorities/in/Geneva/1 July to 19 July 1991, Part 3, 10 July 1991 to 31 July 1991.

¹⁶ Bloed, 1993a, p. 63; Kemp, 2001, p. 4.

¹⁷ Kemp, 2001, p. 4-5; Zaagman and Zaal, 1994, p. 95; Brenninkmeijer, 2005, p. 23-24.

¹⁸ Bloed, 1993a, p. 63-64.

One of the instruments that was adopted to meet the need for conflict prevention was the post of the HCNM. The proposal to establish such a post came from the Netherlands. The Dutch Minister of Foreign Affairs, Hans van den Broek, was invited to deliver one of four keynote speeches that were to be held during the Meeting of the Ministerial Council in Prague of 30 and 31 January 1992.¹⁹ He chose to use the opportunity to put forward the idea of establishing a functionary who would occupy himself with minority-related tensions. Holding the EC presidency during the period in which the tensions in Yugoslavia escalated into civil warfare, the Netherlands had experienced first hand that existing European structures were insufficient to prevent such conflicts from breaking out.²⁰ This was also true for the CSCE; it had not been able to adequately react to the crisis in Yugoslavia.²¹ Although minority rights norms, and the mechanisms that could be used to enforce them, were further strengthened in the course of 1991, it was unlikely that these could have stopped the escalation had they been adopted earlier. Hence, it was no surprise that the Director-General Political Affairs of the Dutch Ministry of Foreign Affairs remarked that the reports of the Geneva Expert Meeting and the Moscow Conference on the Human Dimension, which were to be discussed during the Ministerial Council in Prague, had already been superseded by recent events.²² The Netherlands felt that the time had come to finally put into practice an idea that had been in the air since the Swedish proposal of 1990, namely to combine elements of minority protection and security questions in one single instrument.

In his speech, the Minister gave expression to the expectation that ethnic tensions would prove to be the most dangerous threat to stability and common security in the years to come, and he wondered aloud '...how can our capacity to deal with these issues be enhanced?'²³ In answer to that question he proposed to give 'institutionalised attention' to the protection of minority rights, namely in the form of a 'CSCE High Commissioner for Minorities'.²⁴ He emphasized that he did not propose 'that such a Commissioner would involve himself in a detailed examination of individual cases',

19 Code-message from the Netherlands' embassy in Prague to the Ministry of Foreign Affairs, 17 January 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, Prague 30 and 31 January 1992, part 1, period until 29 January 1992.

20 Kemp, 2001, p. 8; Zaal, 1992, p. 33; Zaagman and Zaal, 1994, p. 104.

21 Nederlands Instituut voor Oorlogsdocumentatie, 2002, p. 201-203.

22 Handwriting on a memorandum from the Deputy Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs, through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 9 January 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, Prague 30 and 31 January 1992, part 1, period until 29 January 1992.

23 The relevant parts of the statement are published in: Brenninkmeijer, 2005, p. 171-174. For the quotation, see p. 172.

24 See the text of the statement in: Brenninkmeijer, 2005, p. 173. Later, the title of the function would be changed into High Commissioner on National Minorities. For reasons of readability, the latter title will be used in this chapter.

but that he would serve 'as a link to the political process.'²⁵ The High Commissioner should 'in particular, act in those cases in which national systems for the protection of national minorities appear ineffective', and '[a]fter close scrutiny', he 'could bring the plight of minorities to the attention of the Committee of Senior Officials and, thus, to the entire CSCE community.'²⁶ Moreover, he 'might also offer advice to the CSO, to participating states and to minorities about the implementation of relevant CSCE commitments'.²⁷

The proposal was well received in Prague. As was to be expected, particular support came from the delegations of Russia and Hungary, which felt solidarity with minority groups of their own nationality living in other countries.²⁸ Yet, many other delegations gave positive reactions as well, and apart from Romania, there were no countries that openly expressed their objections.²⁹ Hence, it seemed worthwhile to proceed with the idea, and to work it out for further discussion at the coming Helsinki Follow-Up Meeting in the spring of 1992.

9.1.3 Negotiations on the mandate

The Netherlands promptly began to work on a more detailed text proposal, and on 14 February 1992, two weeks after it had first launched its idea at the meeting in Prague, a first draft mandate was finished.³⁰ It would still be more than a month before the Helsinki Follow-Up Meeting would formally start, but once the draft was prepared, the Netherlands already began to consult other CSCE participating states. At a breakfast

25 See the text of the statement in: Brenninkmeijer, 2005, p. 173.

26 *Ibidem*.

27 *Ibidem*.

28 Document entitled 'Remarks by Andrei V. Kozyrev, Minister of Foreign Affairs of the Russian Federation, at the CSCE Council Meeting, Prague, January 30, 1992', Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, 30 and 31 January 1992 in Prague, part 2, 30 January 1992; Document entitled 'Speaking notes by the Hungarian State Secretary for Foreign Affairs, Mr. Tamas Katona', Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, 30 and 31 January 1992 in Prague, part 2, 30 January 1992. See also: Chugrov, 2000, p. 156 and 163-164; Kardos, 2000, p. 231, 233 and 236-241; Van Meurs, 1996, p. 142-144.

29 Code-message from the Ministry of Foreign Affairs to the Embassies in Bonn, Brussels, London, Paris, Washington, Vienna, Ankara, Athens, Budapest, Belgrade, Bern, Bucharest, Dublin, Helsinki, Copenhagen, Lisbon, Luxembourg, Madrid, Moscow, Oslo, Ottawa, Prague, Rome, Sophia, Stockholm, Vatican City, and Warsaw, and the Permanent Representative to the NATO in Brussels, the Permanent Representative in Strasbourg, and the CSCE delegation in Vienna, 3 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, 30 and 31 January 1992 in Prague, part 3, continuation of 30 January 1992. For the Romanian reaction, see: Document entitled 'Remarks by the Minister of Foreign Affairs of Romania, his Excellency Adrian Nastase', Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, 30 and 31 January 1992 in Prague, part 3, continuation of 30 January 1992.

30 Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 14 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

meeting between Ministers and Secretaries of State of the Benelux-countries and the Visegrad-states (Poland, Hungary and Czechoslovakia) which had been organised in the margin of the Council of Ministers in Prague of January 1992, it had already been agreed that the Netherlands would keep these countries informed as it further developed its HCNM-proposal.³¹ In the course of February, these states, as well as the United States and the EU member states, were provided with the Dutch draft in order to discover whether it could count on sufficient support.³² Gradually, other CSCE participating states were informed as well, and a lobby was started to win their support. By the time of the official opening of the Helsinki Follow-Up Meeting, the Netherlands had already discussed its proposal with several states, and some states' reactions had led to adjustments in the very first draft.³³

The official negotiations in Helsinki took place in four Working Groups, each dealing with different parts of the future Concluding Document. The Dutch proposal for an HCNM was discussed in Working Group 1, which also had to consider questions concerning, among others, the further development of the CSCE's institutions and structures and proposals on crisis management and conflict prevention. Issues in the field of security, the human dimension and economic and environmental cooperation were discussed in other Working Groups.³⁴

The meetings were open to government delegations only. Within the CSCE, NGOs did not have any right to contribute or participate in these years, and apart from the

31 Code-message from the Ministry of Foreign Affairs to the Embassies in Prague, Warsaw, Budapest, Brussels and Luxembourg, 5 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, 30 and 31 January 1992 in Prague, part 3, continuation of 30 January 1992.

32 Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 14 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Minute facsimile message from the Political Affairs Section of the Atlantic Cooperation and Security Affairs Department to the Embassy in Washington, 19 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Message from the Dutch Ministry of Foreign Affairs to the Ministries of Foreign Affairs of the EC member states, 28 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

33 See, for instance: Code-message from the Ministry of Foreign Affairs to the Embassy in Luxembourg, 26 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 6 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Ministry of Foreign Affairs to the delegation to the European Disarmament Conference in Vienna, the Permanent Representative to the NATO, and the Embassies in Washington, London, Paris, Bonn, Rome, Moscow, Warsaw, Budapest and Prague, 18 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

34 Brenninkmeijer, 2005, p. 50-51.

initial and final plenaries, meetings had the closed character that, in international relations, typically goes hand in hand with security matters.³⁵ After all, the CSCE was in the first place an organisation for regional security.³⁶ Besides, the Cold War mentality and the Eastern bloc's wish to keep NGOs out, had also negatively influenced the measure of openness that was allowed for in the CSCE.³⁷ This did not, however, mean that NGOs never tried to exert influence on CSCE meetings. Sometimes, they would organise their own activities parallel to CSCE conferences to draw attention to certain matters, and outside the formal CSCE meetings, there were usually opportunities for NGOs to talk to government representatives. Besides, there were governments that were prepared to include NGO representatives in their delegations, which not only gave them access to the meetings, but also gave them the chance to make statements.³⁸ This also happened at the Helsinki Follow-Up Meeting, but on the whole, only a small number of NGOs were present, and apart from the Minority Rights Group (MRG), they did not seem to focus their lobbies on the HCNM-proposal.³⁹ Hence, the negotiations were an almost exclusively inter-governmental affair.

In the Working Groups and in informal contacts, government representatives had to reach general agreement on each proposal made, because, as a rule, CSCE decision-making was based on the consensus of all participating states.⁴⁰ This is why it was so important for the Netherlands to start lobbying for its proposal at such an early stage. There were several states that quickly expressed their support.⁴¹ Germany immediately indicated that it would like to be a co-sponsor, and other positive reactions were received from, inter alia, Sweden, Russia, Austria, Portugal, and Poland.⁴² On the other

35 Brett, 1994, p. 360-363; Brett, 1992, p. 19-20. It should be noted that means to achieving more openness towards NGOs were, by the Prague Council's order, elaborated during the Helsinki Follow-Up Meeting, but they did not yet apply during the negotiations on the HCNM. For more information on the decisions taken in respect to NGO-participation, see: Brett, 1994, p. 369-375; Brett, 1992, p. 21-24; Bloed, 1993a, p. 29; Zaagman, 1994b, p. 275-277.

36 Leurdijk, 2001, p. 304 and 311.

37 Brett, 1994, p. 362; Interview with A. Bloed, 22 June 2006.

38 Brett, 1994, p. 363-364; Brett, 1992, p. 20; Interview with A. Bloed, 22 June 2006; Interview with J.H.M. Pollmann-Zaal, 7 May 2004.

39 Interview with J.H.M. Pollmann-Zaal, 7 May 2004; Interview with A.D.J. Phillips, 15 July 2006. According to Brett, the reasons not many NGOs were present were the high costs involved with a stay in Helsinki, the NGOs' change of focus away from the CSCE after the revolutions in Eastern Europe, and the CSCE's changing emphasis from human rights to preventive diplomacy. See: Brett, 1994, p. 368. In an interview, Arie Bloed of the Netherlands Helsinki Committee (NHC) gave a similar explanation. See: Interview with A. Bloed, 22 June 2006.

40 Bloed, 1993a, p. 18-19.

41 Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 6 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Brenninkmeijer, 2005, p. 39-41; Heraclides, 1993, p. 101.

42 Code-message from the Ministry of Foreign Affairs to the Embassy in Luxembourg, 26 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in Bonn to the Ministry of Foreign Affairs, 20 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main

hand, there were also some states that raised doubts and misgivings, mostly because they had minority problems which they preferred to solve without international interference. They remained silent when the Netherlands first tabled the idea in Prague, but as the proposal became more concrete, it became more difficult for them to give their approval.⁴³ Countries that showed their disapproval with the Dutch proposal were the United States, the United Kingdom and France. Together with Turkey, these three countries would appear to be the strongest objectors to the creation of an HCNM.⁴⁴ Other countries known to consider withholding their support were Bulgaria, Romania, Greece, and Spain.⁴⁵

During the negotiations, the United Kingdom, and particularly the United States, constantly produced counter-proposals and amendments.⁴⁶ France remained more silent. It is possible that it feared the alienation of potential allies for the French-German conflict prevention proposal for a Court of Conciliation and Arbitration if it openly opposed the Dutch proposal.⁴⁷ It is likely, though, that its aims went further than the sheer protection of this initiative. France seemed to intend to hedge in the plan for a HCNM by combining it with its own proposal for a Court. In Prague, it had already made suggestions in that direction, and in a first reaction to the draft mandate, France had immediately made it clear that it was not in favour of mechanisms that concentrated on sub-problems, but preferred mechanisms of a more general kind, like the one it proposed itself.⁴⁸ In June 1992, France did indeed start to circulate the idea

Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in Moscow to the Ministry of Foreign Affairs, 20 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in Warsaw to the Ministry of Foreign Affairs, 20 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in Vienna, 20 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in Vienna, 23 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in Lisbon, 3 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

⁴³ Kemp, 2001, p. 9.

⁴⁴ Brenninkmeijer, 2005, p. 58; Interview with J.H.M. Pollmann-Zaal, 7 May 2004.

⁴⁵ Code-message from the CSCE-delegation in Helsinki to the Ministry of Foreign Affairs and the Embassies in London, Paris, Washington and Ankara, 14 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Heraclides, 1993, p. 101; Brenninkmeijer, 2005, p. 42.

⁴⁶ Interview with J.H.M. Pollmann-Zaal, 7 May 2004. See also the sections below.

⁴⁷ Brenninkmeijer, 2005, p. 37-38.

⁴⁸ Code-message from the Ministry of Foreign Affairs to the Embassy in Luxembourg, 26 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in Paris to the Ministry of Foreign Affairs, 26 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Permanent Representative in Strasbourg to the Ministry of Foreign Affairs,

of combining the two proposals, but it was unsuccessful.⁴⁹ The Dutch delegation had the impression that France had made a tactical mistake, and that France had expected that the HCNM-proposal would not make it to the end anyway.⁵⁰

This expectation was not completely incomprehensible. After all, France was not the only country that disagreed with the establishment of an HCNM, and as a matter of fact, some of the objections that opponents raised were of a fundamental nature. First of all, there were a number of states that did not recognize any, or only certain national minorities, and that held the view that all citizens had the same rights and duties and that no special position should be created for any particular section of the population. The creation of a mechanism that was exclusively focused on minority-related issues, conflicted with this philosophy.⁵¹ Furthermore, there were countries, especially those states with minority groups living within their borders, that worried that the High Commissioner would weaken the position of the state and strengthen the position of minorities, for instance by acting as an observer of individual or, even worse, collective minority rights. They were afraid that minorities would abuse that position, and that they would radicalize and make greater demands. This could contribute to an escalation of tensions, especially if these groups were to receive the backing of neighbouring kin-countries.⁵²

Another major objection the Dutch proposal met with concerned the High Commissioner's great liberty of action. According to the mandate proposed by the Netherlands, he would be free to decide which minority-situation he would investigate, and he would be given the freedom to travel to any CSCE participating state and meet with the parties concerned without that state's consent or the explicit support of the other participating states. There were many states, including some that sympathized with the idea of an HCNM as such, that felt that some element of accountability to the CSCE's main decision-making organs should be built in.⁵³ Apart from that, there were states

16 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

⁴⁹ Brenninkmeijer, 2005, p. 57-58.

⁵⁰ Code-message from the CSCE delegation in Helsinki to the Ministries of Foreign Affairs and Defence, 23 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

⁵¹ See, for instance: Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 6 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992. See also: Zaagman and Zaal, 1994, p. 105-106; Brenninkmeijer, 2005, p. 44.

⁵² See, for instance: Document entitled 'Remarks by the Minister of Foreign Affairs of Romania, his Excellency Adrian Nastase', Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, 30 and 31 January 1992 in Prague, part 3, continuation of 30 January 1992. See also: Zaagman and Zaal, 1994, p. 107 and 109; Zaal, 1992, p. 35-36; Kemp, 2001, p. 9; Brenninkmeijer, 2005, p. 45-46.

⁵³ See, for instance: Code-message from the Ministry of Foreign Affairs to the Embassy in Luxembourg, 26 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High

that wanted more clarity in the mandate concerning the question when the HCNM was allowed to involve himself in a situation, and, more importantly, which situations would not be within the scope of his mandate.⁵⁴

Finally, and notably for the United States, in the background, there was some fear that setting up the post of the High Commissioner would change the CSCE's character. The United States was afraid that the High Commissioner would create a precedent by giving non-state entities direct input in the CSCE, and that the creation of this post would undermine the CSCE's character as a forum for political consultations among participating states. Moreover, it was resistant to the idea that the number of minority problems might lead to an increasing workload, and that the post might as a consequence develop into a full-time job, requiring many staff-resources.⁵⁵

In spite of these concerns, the Netherlands was able to collect considerable support, and when on 15 April 1992 it finally submitted its draft as a formal text-proposal, it did so on behalf of nineteen other participating states. The co-sponsors were: Austria, Belgium, Denmark, Estonia, Finland, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Poland, the Russian Federation and Sweden.⁵⁶ Actually, it had hoped to be able to table the draft as an EU proposal, but with the United Kingdom and France belonging to the strongest objectors, this was not possible.⁵⁷ According to the Greek delegate, Alexis Heraclides, 'the number of co-sponsors secured by the Netherlands staggered those delegations against it'.⁵⁸ The number and the equal political-geographical distribution of the sponsors boosted the Netherlands' confidence, especially because among the sponsoring states there were also countries such as the Baltic states that had minorities living within their borders.⁵⁹

Commissioner for Minorities, part 1, February 1992 – 2 June 1992. See also: Zaagman and Zaal, 1994, p. 109; Zaal, 1992, p. 36; Kemp, 2001, p. 10; Brenninkmeijer, 2005, p. 49.

54 See, for instance: Code-message from the CSCE-delegation in Helsinki to the Ministry of Foreign Affairs, 27 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992. See also: Zaagman and Zaal, 1994, p. 108; Zaal, 1992, p. 36; Kemp, 2001, p. 10; Brenninkmeijer, 2005, p. 46.

55 Fax from the CSCE-delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 3 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992. In hindsight, the United States was right on both issues. As was stipulated by Bloed, among others, the High Commissioner was 'the first independent, high-ranking personality within the CSCE process which was thus far characterized by a predominantly intergovernmental character.' See: Bloed, 1993a, p. 16.

56 CSCE Doc. CSCE/HM.1, 15 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992, (Documents) Proposals.

57 Code-message from the CSCE-delegation in Helsinki to the Ministry of Foreign Affairs and the Embassies in London, Paris, Washington and Ankara, 14 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Heraclides, 1993, p. 101.

58 Heraclides, 1993, p. 102.

59 Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Embassies in London, Paris, Washington and Ankara, 14 April 1992, Archive MFA, CSCE 921.353.22,

The pressure on the remaining opponents increased now. After things had gone terribly wrong in Yugoslavia, all European leaders were convinced of the need to quickly find solutions for minority-related tensions that came to the surface after the disintegration of the Soviet bloc. In this kind of international climate, it became increasingly difficult for states to explain why they withheld their support from an initiative that so many others sponsored, especially because the Netherlands did not take an uncompromising stand, and was ready to try and adjust the text to make it more generally acceptable.⁶⁰ In the first week of June, the list of co-sponsors grew: Switzerland, Canada, Georgia, Azerbaijan and the Ukraine all promised to support the HCNM-proposal.⁶¹ The major breakthrough came, however, at a meeting on 16 June 1992, where the Netherlands presented a revised draft of its proposal in an unofficial document – a so-called non-paper. There were several co-sponsors that made vigorous statements in favour of the text-proposal, but most importantly, to the surprise of many delegations, the statement by the United States made clear that it would no longer object to the creation of an HCNM, and now supported the idea in principle.⁶²

It is not completely clear what caused this about-face by the United States. It is possible that it changed its mind simply because it had come to believe that the High Commissioner would not become involved in minority-related problems on its own territory.⁶³ Another possibility is that it was a reward for the Dutch stand in the debate on CSCE peacekeeping, which took place simultaneously with the negotiations on the HCNM. In this difficult discussion, a key question was whether the CSCE should create its own peacekeeping infrastructure, or rely on other regional organisations to do the actual job. The Netherlands took the latter position, and it proposed that the CSCE should make use of existing facilities of, in particular, NATO, or perhaps the WEU.⁶⁴ Other participating states did not agree, and aiming at a strengthening of the

file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

60 Interview with J.H.M. Pollmann-Zaal, 7 May 2004. See also: Brenninkmeijer, p. 22 and 112-113.

61 CSCE Doc. CSCE/HM.1/Add.1, 5 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992; CSCE Doc. CSCE/HM.1/Add.2, 10 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992; Code-message from the Ministry of Foreign Affairs to the CSCE delegation in Helsinki, 2 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

62 Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 16 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

63 Brenninkmeijer, 2005, p. 85-86.

64 See: Heraclides, 1993, p. 89-92 and 197; Scheltema, 1994, p. 27; Bloed, 1992b, p. 41; Code-message from the Ministry of Foreign Affairs to the delegation to the European Disarmament Conference in Vienna, the Permanent Representative to the NATO, and the Embassies in Washington, London, Paris, Bonn, Rome, Moscow, Warsaw, Budapest and Prague, 18 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

European pillar of defence, France in particular wanted to restrict NATO involvement as much as possible.⁶⁵ In the light of the already numerous clashes between Washington and Paris, the United States greatly appreciated that the Netherlands had taken the lead in this discussion, and in a conversation of late May, its delegation had already hinted that the like-mindedness of the Netherlands and the United States on the peacekeeping issue might eventually influence its position towards the High Commissioner.⁶⁶

A third factor that can explain the change in the United States' position, was the Bush-Yeltsin summit of June 1992, which had resulted in a 'Charter for American-Russian partnership and friendship'. With many Russian minorities living on the territory of several former Soviet republics, Russia was very much in favour of the establishment of the office of an HCNM, and apparently, it had successfully tried to convince the United States of the importance it attached to it, for in the above mentioned Charter, support was expressed for 'the creation of a CSCE Special Representative to help strengthen efforts to address ethnic antagonism and the treatment of minorities'.⁶⁷

Whatever the exact reasons for the change in the United States' position were, its support for the HCNM created a new momentum, and for the remaining opponents it became more difficult to prevent its creation. In the last weeks, the only question left to be solved was that of situations involving terrorism. The United Kingdom, Turkey and Spain were all confronted with minority-related terrorist groups in their territories, and for them it was unthinkable that the High Commissioner would have the compe-

65 Heraclides, 1993, p. 92 and 99; Scheltema, 1994, p. 28; Bloed, 1992b, p. 41; Code-message from the Embassy of Paris to the Ministry of Foreign Affairs, 19 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

66 Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 20 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 27 May 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 23 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

67 Memorandum from one official of the Political Affairs Section of the Atlantic Cooperation and Security Department to another official of that same Section, 19 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992; Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 15 May 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 16 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

tency to deal with groups that used violence.⁶⁸ As some of the co-sponsors did not agree with the clause that these countries wanted to incorporate in the draft mandate, it continued to be quite a challenge to get the proposal through, but eventually, agreement was reached, and the mandate was adopted by consensus.

9.1.4 Negotiations on budget and staff

With the adoption of the Helsinki document and the HCNM's mandate, a crucial step had been taken, but before the post of the High Commissioner could be put into operation, agreement also needed to be reached on some matters that had not yet been discussed. In the first place, a person had to be found to fulfil the post, and in addition, clarity was required on the details of the budget and related questions of staff support and office supplies.⁶⁹ Formally, the CiO and the Troika, consisting of the previous, present and succeeding CSCE Chairman, were in charge of follow-up matters concerning the Helsinki decision to establish the post of the High Commissioner, but in practice other states expected the Netherlands, as the originator of the idea, to take a leading role.⁷⁰

Starting from late June, in Helsinki, names of possible candidates had begun to circulate.⁷¹ However, it appeared difficult to find persons of consequence who seemed acceptable and who were actually available for the function. Therefore, many of the names that were mentioned faded into the background. After the summer vacation period, it was apparent that the list of candidates had become very short.⁷² The only two names that were still mentioned were those of the former Dutch Minister of Foreign Affairs, Max van der Stoep, and Czechoslovakia's former Minister of Foreign

68 See: Zaagman and Zaal, 1994, p. 108; Zaal, 1992, p. 36; Kemp, 2001, p. 10; Brenninkmeijer, 2005, p. 88.

69 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 20 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

70 Code-message from the Ministry of Foreign Affairs to the Embassies in Stockholm, Prague and Bonn, 16 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

71 Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 1 July 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

72 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 20 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Head of the Atlantic Cooperation and Security Affairs Department, 18 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Fax from the Ministry of Foreign Affairs to the Embassy in London, 26 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

Affairs, Jiří Dienstbier.⁷³ However, there were doubts whether the latter would be acceptable for all, among others because in an earlier phase, some Eastern European countries had already made clear that, for reasons of independence and neutrality, they would not be in favour of a candidate from their own region, but would prefer someone from a Western country. In the UN, Dienstbier's candidacy for the post of UN Commission on Human Rights' Rapporteur on Yugoslavia had indeed foundered on resistance on the part of Slovenia and Croatia.⁷⁴ Eventually, Czechoslovakia decided that it would not put him forward as a formal candidate, so that Van der Stoel was the only person left for nomination.⁷⁵

In principle, there was broad support for this candidate, and no one doubted his personal qualities. However, there were several countries that felt misled by the Netherlands, because during the negotiations it had always said that it did not have a particular (Dutch) candidate in mind for the function. Now that Van der Stoel was presented as the only candidate, it was no longer believed that this was actually true, and many delegations got the impression that the Netherlands had all the time had a hidden agenda.⁷⁶ This feeling was reinforced by the position that the Netherlands and the other EU partners took in the discussion about budget and staff. When these matters were discussed in the CSO of September 1992, there appeared to be major differences of opinion about four crucial questions. The first question was whether the HCNM should be an honorary, part-time function or a full-time job. The second question concerned the staff requirements. Finally, there was disagreement over two other questions that logically followed from the other ones, namely: what budget

73 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 17 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

74 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 17 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 20 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Head of the Atlantic Cooperation and Security Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 15 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

75 Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Head of the Atlantic Cooperation and Security Affairs Department, 11 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the Ministry of Foreign Affairs to the Embassy in Prague, and the Permanent Representative in New York for the Minister of Foreign Affairs, 21 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

76 Interview with J.H.M. Pollmann-Zaal, 7 May 2004; Interviews with H. van den Broek, 25 May 2004 and 1 June 2004.

should be made available for the work of the High Commissioner, and where should that budget come from?

Among the EU member states, the idea had developed that the HCNM would fulfil his tasks as a full-time job, and that he should have a staff of his own to support him in his work. All the costs, including the salaries of the High Commissioner and his staff, should be paid out of the CSCE budget, which participating states provided for by a certain distributive formula.⁷⁷ However, in Helsinki, the implicit assumption had been that the function would not require a full-time commitment, that the staff of the existing Office for Democratic Institutions and Human Rights (ODIHR) would provide for assistance and that the creation of the post of the High Commissioner would thus not involve major expenditures.⁷⁸ Hence, most CSCE participating states were unpleasantly surprised when they were confronted with the much further reaching plans that were presented by the EU member states. Basically, there were three kind of objections. First of all, there were purely financial concerns, which were only exacerbated by the increasing costs for CSCE missions that the delegations were faced with simultaneously, and which already caused problems for smaller and less wealthy CSCE states.⁷⁹ In the second place, there were states that believed that the EU had

77 Handwritten notes on a memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 20 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 17 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Fax from the Ministry of Foreign Affairs to the Embassy in London, 26 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Handwritten fax from the delegation to the CSO in Prague to the Head of the Atlantic Cooperation and Security Affairs Department, without a date, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

78 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 20 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Fax from the CSCE-delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 3 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Legal Adviser of the Ministry of Foreign Affairs, 22 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Document entitled 'Dossier-notes for the lunch of the Minister with the EC Ambassadors', 27 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992. A clear indication that a honorary rather than a full-time function was indeed implicitly aimed at in Helsinki, was the following phrase included in the first formal text-proposal: 'The HCM should be available at short notice...'. See: CSCE Doc. CSCE/HM.1, 15 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992, (Documents) Proposals.

79 Code-message from the Ministry of Foreign Affairs to the Embassy in Prague, and the Permanent Representative in New York for the Minister of Foreign Affairs, 21 September 1992, Archive MFA,

deviated from the original assumptions under the influence of the Netherlands, and that the Netherlands had deceived them in Helsinki.⁸⁰ They were not willing to accept payment of the High Commissioner and a staff from the CSCE budget, and proposed that the ODIHR-staff would support the High Commissioner and that Van der Stoep's salary would be paid from the Netherlands' own national budget.⁸¹

On top of the above problems, there were strong objections from the United States against the EU proposal for more fundamental reasons. Since the early years of its existence, there had always been a discussion whether the CSCE should continue to be seen as a flexible process, or should perhaps become a real international organisation. During the Cold War, the Western bloc's preference for the former option had prevailed over the more ambitious views of both Warsaw Pact states and neutral and non-aligned (NNA) countries.⁸² After the transitions in Eastern Europe, the CSCE had, however, taken on new responsibilities and a process of gradual institutionalization had started.⁸³ The United States kept a careful eye on this process, as it was wary of anything that could upgrade the CSCE to an international organisation with substantive powers in the field of European security.⁸⁴ It had also warned that the CSCE should not become a UN-like bureaucracy.⁸⁵ According to the United States, the EU proposal for budget and staff implied the creation of a separate institution. It did not like this idea, especially because it feared that it might set a precedent in the broader debate on the future structure of the CSCE, which had just come up for discussion.⁸⁶

DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs, through the Roving Ambassador and the Secretary-General of the Ministry of Foreign Affairs, 24 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

- 80 See, for instance: Code-message from the Embassy in Prague to the Ministry of Foreign Affairs, 6 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.
- 81 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 16 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Handwritten fax from the delegation to the CSO in Prague to the Head of the Atlantic Cooperation and Security Affairs Department, without a date, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.
- 82 Sizoo and Jurrjens, 1984, p. 53-56 and 267; Zaagman, 1994b, p. 232.
- 83 OSCE, 2000, p. 12-16; Zaagman, 1994b, p. 232-241; Bloed, 1993a, p. 3.
- 84 Bloed, 1993a, p. 31; Zaagman, 1994b, p. 253.
- 85 Handwritten fax from the delegation to the CSO in Prague to the Head of the Atlantic Cooperation and Security Affairs Department, without a date, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.
- 86 See, for instance: Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Roving Ambassador and the Secretary-General of the Ministry of Foreign Affairs, 9 October 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the CSCE delegation in Vienna to the Ministry of Foreign Affairs and the Ministry of Defence, 28 October 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

It was clear that it would not be easy to convince the United States of the desirability of the EU proposals, and obviously, concessions were needed to obtain support from the other protesting states too. After it proved impossible to reach agreement at the September-meeting of the CSO, the Netherlands prepared an alternative proposal that was based on the idea that the High Commissioner's salary would be paid out of CSCE funds, while his assistants would be seconded by CSCE participating states. The Netherlands was willing to provide for one of these assistants, and it was prepared to offer office space, free of charge.⁸⁷ For the CSCE, this would decrease the costs considerably. After these concessions, states that had been critical, moderated their views, and the idea that the High Commissioner's independence could be better guaranteed if his salary was paid from the CSCE budget gradually gained support.⁸⁸ The pressure on the United States increased now. In principle, it could block the proposal, because consensus was needed, and probably, it would be supported by a number of other countries too, but in the light of the growing international concern over the security threat of minority issues, also among the general public, getting the blame for failed negotiations over the financial modalities of the post of the HCNM was a rather unattractive perspective.⁸⁹ Apparently, the United States thought so too, because on 18 November 1992, a message arrived at the Dutch Ministry of Foreign Affairs that the United States had decided to accept the proposed arrangements.⁹⁰

Now that the United States had given its approval to the budget, others who continued to be critical of the proposed budget, allowed it to pass as well. At the end of November, a financial working group of the CSO reached agreement and drew up

87 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 16 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Roving Ambassador and the Secretary-General of the Ministry of Foreign Affairs, 24 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

88 Code-message from the CSCE delegation in Vienna to the Ministry of Foreign Affairs and the Ministry of Defence, 28 October 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 3 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

89 Code-message from the Embassy in Prague to the Ministry of Foreign Affairs, 6 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 3 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

90 Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 18 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

a draft decision with respect to the matter.⁹¹ Now that all problems had been resolved, the road was also clear for Van der Stoep's formal appointment at the Stockholm meeting of the Council of Ministers on 15 December 1992.⁹²

9.2 THE NETHERLANDS' POINTS OF DEPARTURE

9.2.1 The backgrounds of the proposal

As explained above, the violent conflicts that broke out in the course of 1991 were the immediate cause for the creation of the post of an HCNM. It was in particular the crisis in Yugoslavia that had shocked the humanitarian consciousness of many people in Europe. Without a doubt, the inability to prevent the escalation of this conflict had left all CSCE participating states with a feeling of disillusionment. This was, however, especially true for the Netherlands. Because none of the international security organisations was able or willing to take action when the Yugoslavian crisis broke into the open, the European Community (EC) became the main foreign actor in Yugoslavia.⁹³ It so happened that the Netherlands obtained the presidency of the EC just a few days after the declarations of independence of Slovenia and Croatia of 25 June 1991. Hence, in the period from 1 July to 31 December of that same year, the months in which the situation in Yugoslavia rapidly worsened and developed into a civil war, a great international responsibility fell to the Netherlands.⁹⁴ Like other EC member states, it was at first confident that the EC was ready to solve the problems in Yugoslavia, and right from the start it actively engaged itself with the case.⁹⁵ Yet, what was supposed to be the hour of Europe ended in total failure; the EC was constantly overtaken by events, there was no unity among its member states, and it soon became clear that the instruments the EC had at its disposal, were insufficient to stop the situation from deteriorating.⁹⁶

During the Dutch EC presidency, opinions among the member states constantly differed, in particular in respect to the question of whether Croatia and Slovenia should be recognized as independent republics. Germany was especially determined to follow its own course in favour of recognition of Slovenia and Croatia, and on different

91 Facsimile message from the Head of the Atlantic Cooperation and Security Affairs Department to the candidate for the post of the HCNM, 27 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the CSCE delegation in Vienna to the Ministry of Foreign Affairs and the Ministry of Defence, 3 December 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

92 See: Summary of Conclusions of the Stockholm Meeting of the CSCE Council, 15 December 1992, paragraph 3.

93 Nederlands Instituut voor Oorlogsdocumentatie, 2002, p. 195-205.

94 *Ibidem*, p. 184.

95 *Ibidem*, p. 195-196 and 220.

96 *Ibidem*, p. 204-217, 473-478.

occasions, it ignored the Netherlands' coordinating role.⁹⁷ In the course of the Dutch presidency, frustration over its inability to control the situation in Yugoslavia, and its failure to act as a convincing leader in the EC, increased.⁹⁸ While the Netherlands had hoped to excel in its role during its EC presidency and to make a good impression internationally, in practice, the Netherlands instead damaged its reputation. In domestic as well as international media, the way the Netherlands fulfilled its role during its EC presidency was severely criticized.⁹⁹ The disgrace of so-called 'Black Monday', which stands for the Monday of 30 September 1991 on which the Netherlands' draft-text for a new EU Treaty was relentlessly rejected as completely unacceptable, certainly played a role in this negative assessment, but the Netherlands was also blamed for the EC's inability to effectively deal with the Yugoslavia-crisis.¹⁰⁰ The French daily newspaper, *Le Monde*, qualified it as the most disastrous presidency ever, and the Dutch newspaper, *NRC Handelsblad*, remarked that the EC attempts to end the bloodshed had brought the Netherlands nothing but scorn.¹⁰¹

In light of this, an initiative that could restore the damaged reputation of the Netherlands was of course more than welcome, and besides, after its experiences with Yugoslavia, the Netherlands was more than ever convinced that there was an urgent humanitarian need to find solutions for minority-related tensions. It is obvious that the Dutch initiative to establish a High Commissioner on National Minorities was closely connected to its experience of the EC presidency.¹⁰² Even though its special involvement in the Yugoslavian conflict had been a coincidental result of this presidency, there is a broadly shared sense that it left the Netherlands with a particular commitment to the case afterwards.¹⁰³ The level of ambition and the feeling of 'we must do something', were particularly strong.¹⁰⁴ Obviously, creating a new post that might prevent further ethnic conflicts breaking out in Europe was doing something as well.

The experiences with Yugoslavia also affected the Dutch Minister of Foreign Affairs' personal attitude towards the problem of minority-related conflicts. Earlier in this book, it was stated that ministers are usually not personally involved in negotiations on international human rights instruments.¹⁰⁵ However, this was not true for the case of the HCNM. The Dutch Minister of Foreign Affairs, Hans van den Broek took a great interest in the matter; he kept track of developments in the negotiations, interfered in matters concerning negotiation strategies or the contents of proposals, and

97 See, for instance: Nederlands Instituut voor Oorlogsdocumentatie, 2002, p. 209-217, 233 and 351-365. Eventually, Germany pushed through the idea of recognition, and more or less forced the other EC countries to follow its example. See: Nederlands Instituut voor Oorlogsdocumentatie, 2002, p. 456-473.

98 Nederlands Instituut voor Oorlogsdocumentatie, 2002, p. 342-343.

99 *Ibidem*, p. 478-485.

100 Rusman, 1999, p. 276 and 278-279; Hellema, 2001, p. 355-358.

101 Nederlands Instituut voor Oorlogsdocumentatie, 2002, p. 478-479 and 481.

102 Other authors have made this connection as well. See: Zaal, 1992, p. 33; Kemp, 2001, p. 8.

103 Nederlands Instituut voor Oorlogsdocumentatie, 2002, p. 184 and 487.

104 *Ibidem*, p. 343-344, and 348-349.

105 See: Interview with J.A. Walkate, 21 April 2004; Interview with H.A.M. von Hebel, 21 December 2005; Interview with H. van den Broek, 1 June 2004; Interview with M. van der Stoel, 16 June 2006.

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contacted colleagues in other countries when this was needed to win their support.¹⁰⁶ To understand this high-level political involvement, it is important to be aware of the fact that the HCNM differed from other human rights mechanisms, because it was supposed to be an answer to a newly emerging security threat in Europe that was high on the agenda of all CSCE participating states. In other countries, the HCNM-proposal was not exclusively dealt with by lower level civil servants either, and in their contacts with other countries' ministries, Dutch representatives often talked with high-level civil servants or, occasionally, even the political level.¹⁰⁷

However, even if one takes the general political atmosphere into consideration, the engagement of the Dutch Minister can be seen as exceptionally high. Apparently, Van den Broek was not only interested in the matter from a professional point of view, but also took a personal interest in it. The EC experiences with Yugoslavia had not left him cold either; the later EC mediator for Yugoslavia, David Owen, even said that he had the feeling that Minister Van den Broek was traumatized by these events.¹⁰⁸ In any case, Yugoslavia remained a top-priority during the rest of his ministry.¹⁰⁹ The impression that there was a relation between Minister Van den Broek's personal commitment to the creation of the post of the HCNM and his experiences in the Balkan can perhaps be illustrated by some statements that he made at a conference that the Netherlands Society for International Affairs (NGIZ), organised on the occasion of its sixtieth

106 See, for instance: Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 30 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992; Letter from the Netherlands' Minister of Foreign Affairs to the Acting Secretary of State of the United States, 14 October 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the Ministry of Foreign Affairs to the Embassy in Washington, 31 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Interviews with H. van den Broek, 25 May 2004 and 1 June 2004; Interview with J.H.M. Pollmann-Zaal, 7 May 2004.

107 See, for instance: Code-message from the Embassy in Luxembourg to the Ministry of Foreign Affairs, 25 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in London to the Ministry of Foreign Affairs, 20 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in Moscow to the Ministry of Foreign Affairs, 20 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in Bonn to the Ministry of Foreign Affairs, 20 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 20 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 15 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

108 Nederlands Instituut voor Oorlogsdocumentatie, 2002, p. 343.

109 *Ibidem*.

anniversary on 27 September 2005. Looking back at his period as a Minister, Van den Broek immediately mentioned the EC's inability to stop the Yugoslavia-conflict as the low point in his career, while the first highlight that he came up with was the creation of the HCNM.¹¹⁰

9.2.2 From a basic idea to an actual mandate

According to Hannie Pollmann-Zaal, an official who was closely involved in the development of the Dutch proposal for an HCNM, the idea to create a CSCE functionary to deal with minority-related tensions originated from a discussion between Minister Van den Broek and the Director of the Atlantic Cooperation and Security Department of the Ministry of Foreign Affairs.¹¹¹ It is not clear when exactly these conversations took place, but from the records one gets the impression that the idea for a High Commissioner was developed only after Minister Van den Broek had, on 17 January 1992, received the invitation to hold a key-note speech in Prague.¹¹² This is not to say that there were no earlier suggestions in favour of attention for minority rights at the coming meeting of the Ministerial Council, but these did not yet include the suggestion of a High Commissioner. A memorandum of 13 January 1992 mentions, for instance, only the Minister's wish to develop a formula by which the Ministerial Council could make clear that it considered respect for the rights of minorities a prevailing norm of international relations, and a pre-condition for the diplomatic recognition of a state.¹¹³ The first time the idea of an HCNM appeared on paper was in a draft version of the Minister's speech of 24 January 1992.¹¹⁴

110 On the website of the Netherlands Society for International Affairs, the text of the key-note speech by the Minister of Foreign Affairs, Bernard Bot, can be found (see: www.ngiz.nl, accessed 11 September 2006), but there is no report of the panel-discussion with former Ministers of Foreign Affairs during which these statements were made. Summary notes of the statement can be obtained with the author.

111 Interview with J.H.M. Pollmann-Zaal, 7 May 2004.

112 For the invitation, see: Code-message from the Netherlands' embassy in Prague to the Ministry of Foreign Affairs, 17 January 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, Prague 30 and 31 January 1992, part 1, period until 29 January 1992.

113 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Political Affairs Section of the Atlantic Cooperation and Security Affairs Department, 13 January 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, Prague 30 and 31 January 1992, part 1, period until 29 January 1992. The context of the EC discussions about the recognition of Slovenia and Croatia should be borne in mind here. As a result of a premature announcement by Germany that it would recognize Croatia and Slovenia and some other political complications, republics that did not meet criteria concerning the protection of human rights and minorities, which had earlier been agreed upon, were recognized in the end, while others that would in principle qualify, were not. See: Nederlands Instituut voor Oorlogsdocumentatie, 2002, p. 464-473.

114 Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs, through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 24 January 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, Prague 30 and 31 January 1992, part 1, period until 29 January 1992.

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The speech and the draft mandate that followed later were elaborated and discussed in the hierarchic channel between the Deputy Head of the Political Affairs Section of the Atlantic Cooperation and Security Department of the Ministry of Foreign Affairs and the Minister of Foreign Affairs, and thus involved the Head of the Political Affairs Section, the Atlantic Cooperation and Security Department, and the Director-General Political Affairs of the Ministry.¹¹⁵ In the development of their ideas about the High Commissioner's mandate, the policy-makers took into account earlier discussions in the CSCE and other international organisations, and naturally, the lessons learnt from the Yugoslavia crisis were also an important starting point. Apart from the general conclusion that existing international instruments were unfit for effectively meeting the kind of security threats the world was faced with in Yugoslavia, the Netherlands observed that the Yugoslavian experience had revealed two other shortcomings, which were the patchy knowledge of the region and the backgrounds of the tensions, and the far too late start of mediation efforts. Hence, if a new mechanism were to be created, it should facilitate the CSCE participating states especially with respect to these aspects.¹¹⁶

Insofar as minority debates in the CSCE were concerned, the Swedish proposal for a CSCE Representative on National Minorities of 1990 was relevant, but most attention was given to the recent experiences at the Geneva Expert Meeting, where the position of each CSCE participating state had become very clear.¹¹⁷ On the basis of this, it was evident that a discussion on a definition of the term 'minority' should be avoided.¹¹⁸ This was also the advice that was received from the Assistant Legal Adviser of the Ministry of Foreign Affairs, who had been requested to provide information on developments in other international organisations.¹¹⁹ Another precondition that followed from the state of affairs in international minority debates, was that the instrument should be of a political, rather than legal character. One reason was that only the very beginning of standard setting in the field of minority rights had become visible and the norms still had to crystallize. Hence, the legal basis for an instrument that was based on judicial methods would be rather weak.¹²⁰ A second reason why it

115 Interview with J.H.M. Pollmann-Zaal, 7 May 2004. See also: Brenninkmeijer, 2005, p. 24.

116 Zaal, 1992, p. 33; Zaagman and Zaal, 1994, p. 104. For the matter of the inadequate knowledge, see also: Nederlands Instituut voor Oorlogsdocumentatie, 2002, p. 145, 194-195, 226-227, and 286-288.

117 Interview with J.H.M. Pollmann-Zaal, 7 May 2004. See also: Paper entitled 'CSCE-Ministerial Prague, 30-31 January 1992, Geneva: Meeting of Experts on National Minorities', Archive MFA, CSCE 921.353.22, file: CSCE/Organisation Second Meeting of the Council of Ministers, Prague, 30 and 31 January 1992.

118 Document entitled 'Opening-session Helsinki Follow-Up Meeting, 24-26 March 1992, High Commissioner for Minorities (HCM)', Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Interview with J.H.M. Pollmann-Zaal, 7 May 2004.

119 Memorandum from the Assistant Legal Adviser to the Director-General Political Affairs, 29 January 1992, Archive MFA, CSCE 921.353.22, file: CSCE Ministerial Council in Prague, 30-31 January 1992.

120 Memorandum from the Assistant Legal Adviser to the Director-General Political Affairs, 29 January 1992, Archive MFA, CSCE 921.353.22, file: CSCE Ministerial Council in Prague, 30-31 January 1992;

seemed better to aim at a political instrument was that minority problems were very complex and diverse, and perhaps they could better be solved by a flexible and ad hoc approach than by rigid procedures.¹²¹

The above conclusions were clearly visible in the suggestions that the Netherlands made in Prague. The High Commissioner it proposed would keep himself informed of the minority situation in the CSCE participating states, and would fulfil early warning and advisory functions for the CSO. It was stressed that the function should be seen as 'a link to the political process', and that he would not involve himself with a typical judicial function of examination of individual complaints.¹²² At this stage, only some broad outlines were sketched, and the proposal was still somewhat vague. However, once the work on a text for a concrete mandate started, elements of what are still considered the HCNM's basic features today, quickly became visible. In the first place, it was clear to the Netherlands that the High Commissioner should be a prominent international personality with long-standing relevant political experience, whose early warnings would actually be taken seriously by the governments of the CSCE participating states.¹²³ In the second place, the Netherlands considered it crucial for the High Commissioner to be able to act independently. He should be able to choose which minority issue he would address, and he should be free to travel in any CSCE participating state in order to obtain first-hand information from all parties concerned and to engage in mediation attempts.¹²⁴ Other important elements of the final mandate, such as its scope and the HCNM's accountability to the CSCE's political bodies, were incorporated or made more explicit in the course of the negotiations and in discussion with other states.

Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Minister of Foreign Affairs, 29 January 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, Prague 30 and 31 January 1992, part 1, period until 29 January 1992. This was in particular true in the CSCE context, because this organisation does not, in the strictest sense, provide for a regime of law. See: Packer, 2003, p. 481.

121 Memorandum from the Assistant Legal Adviser to the Director-General Political Affairs, 29 January 1992, Archive MFA, CSCE 921.353.22, file: CSCE Ministerial Council in Prague, 30-31 January 1992; Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Minister of Foreign Affairs, 29 January 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, Prague 30 and 31 January 1992, part 1, period until 29 January 1992.

122 See the text of Van den Broek's statement in: Brenninkmeijer, 2005, p. 173.

123 Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 14 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Interview with J.H.M. Pollmann-Zaal, 7 May 2004.

124 Code-message from the Ministry of Foreign Affairs to the delegation to the European Disarmament Conference in Vienna, the Permanent Representative to the NATO, and the Embassies in Washington, London, Paris, Bonn, Rome, Moscow, Warsaw, Budapest and Prague, 18 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992. See also: Brenninkmeijer, 2005, p. 30-31.

Fully aware of the political importance of the proposal, the Dutch delegation in Helsinki and the officials at the Ministry in The Hague made every effort to try and reach a generally acceptable text. In total, fourteen drafts would be prepared and step by step, the final mandate took shape.¹²⁵ In this process, NGOs did not, in general, play a very important role. Arie Bloed of the Netherlands Helsinki Committee (NHC), a CSCE-focused human rights organisation, was invited to participate as a member of the Dutch delegation in his capacity as a member of one of the government's official advisory bodies, the Advisory Council on Peace and Security (AVV).¹²⁶ He twice came to Helsinki to participate for a week, but he did not concern himself with the deliberations on the HCNM, partly because he was convinced that the Netherlands was already doing the best it could and because he did not want to interfere with its negotiation strategies.¹²⁷ Alan Phillips of the London-based Minority Rights Group (MRG) was involved in the discussions as a member of the British delegation. He occasionally contacted the Netherlands, but he concentrated his lobby efforts on the United Kingdom and other opponents of the HCNM-proposal, so most of the time, he did not exert a direct influence on the Dutch position.¹²⁸

Hence, most of the changes that occurred in the text of the mandate, were the result of amendments that other states proposed. Many of these suggestions were made by the United States, which was one of the major and in any case most active opponents of the HCNM-proposal. The Netherlands spent a lot of time on contacts with all objectors, but in particular on consultations with the United States. Perhaps this had something to do with its continuing Atlantic orientation, but another important reason was that after the end of the Cold War, the United States had an extremely powerful position in the CSCE, because it was the only superpower left.¹²⁹ The Netherlands also attached particular importance to consultations with the other EU member states, because the Maastricht Treaty of December 1991 had formally laid down the European ambition to carry out a Common Foreign and Security Policy.¹³⁰ In general, expectations about the EU's ability to agree on a common policy for items discussed at the Helsinki Follow-Up Meeting did not run high.¹³¹ Nevertheless, the Netherlands tried to reach agreement among the EU member states and it did not completely abandon

125 For an overview of the subsequent drafts and the text of the more important versions, see: Breninkmeijer, 2005, p. 32, footnote 38, and p. 128-170.

126 Interview with A. Bloed, 22 June 2006; Interview with J.H.M. Pollmann-Zaal, 7 May 2004.

127 Interview with A. Bloed, 22 June 2006.

128 Interview with A.D.J. Phillips, 15 July 2006; Interview with J.H.M. Pollmann-Zaal, 7 May 2004.

129 Interview with J.H.M. Pollmann-Zaal, 7 May 2004. On the powerful position of the United States in the CSCE see, for instance: Schlager, 1994, p. 14; Heraclides, 1992, p. 14-15. On the continued Atlantic orientation of the Netherlands after the end of the Cold War, see: Hellema, 2001, p. 352-355; Rusman, 1999, p. 275.

130 Interview with J.H.M. Pollmann-Zaal, 7 May 2004.

131 Schlager, 1994, p. 13-14; Heraclides, 1993, p. 27.

the idea that the draft mandate might be submitted as an EU proposal until the day before the proposal was formally tabled in Helsinki.¹³²

Contrary to the Western CSCE participating states, the former Warsaw Pact states did not have much influence on the text of the mandate. In the first years following the collapse of the communist system, in general, these countries very much tended to go with the Western flow in human rights matters. Hoping to be able to join the European Union, countries like Hungary, Czechoslovakia and Poland, were doing their best to prove their adherence to European norms and expectations, and from late 1991 to mid-1993, even Russia frequently acted as a ‘follower’ of the West.¹³³ Hence, insofar as former communist states did not consider the Dutch initiative as something in their own interest anyway, the most likely things for these countries to do were to either support it, or, at least, not to oppose it. The Netherlands must have understood that if the Western CSCE states had reached agreement, the Eastern European counterparts were likely to follow. This explains why they concentrated their diplomatic efforts on the former rather than on the latter.

In hindsight, it can be concluded that the combined factors of the Eastern European submissiveness and the great political pressure of the moment created a ‘window of opportunity’ for the Netherlands to realize its ambition to create an HCNM. Had a similar proposal been made some years later, it would probably have met with much more Eastern European resistance, and it would have been easier for others to persist in their resistance.¹³⁴ Nonetheless, the HCNM’s mandate was not the result of favourable international circumstances only. In the course of the negotiations, the Netherlands had to make difficult decisions and find the right balance between making concessions and preserving the main features of its initial draft. In this respect, it was, to a large extent, successful.

132 Code-message from the CSCE-delegation in Helsinki to the Ministry of Foreign Affairs and the Embassies in London, Paris, Washington and Ankara, 14 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

133 Kardos, 2000, p. 231, 236, 238-239; Chugrov, 2000, p. 156. Apparently, this was also realized by Turkey, because in reaction to the Dutch argument that its proposal had received wide support from the new established democracies, it said it was not impressed, because that support was only prompted by a general desire to show goodwill, and had nothing to do with the proposal as such. See: Code-message from the Embassy in Ankara to the Ministry of Foreign Affairs, 6 May 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

134 This was also realized by Van der Stoep, and for this reason, he always avoided discussions on a reform of his mandate. See: Letschert, 2002, p. 329 and 333.

9.3 A SPECIAL MINORITY RIGHTS INSTRUMENT?

9.3.1 The alternative of a general human dimension instrument

One of the most fundamental choices that the Netherlands had to make was whether the High Commissioner should focus on minority issues, or whether his mandate should be broadened to include all human dimension issues. This question came up for discussion, because there were countries, in particular the United States, France, Turkey and Greece, that refused to recognize minorities in their own country and that did not want to deviate from their basic point of view that all citizens had the same rights and duties, and should thus be treated equally.¹³⁵ As the United States explained to the Netherlands, 'minorities as separate entities do not fit in the American mind frame. The US has a wide ethnic diversity, and is ensuring no disadvantage to minorities but still provides no protection for minorities to be privileged.'¹³⁶ For this reason, the United States considered it highly important not to create any rights, duties or institutions for specific groups of a state's inhabitants. As an alternative, it suggested that the High Commissioner would be provided with a more wide-ranging mandate that would not only cover tensions related to minority questions, but all tensions with a human dimension aspect.¹³⁷

According to the United States, important advantages of this approach were that discussion about the politically sensitive topic of minorities could be avoided and that it would be much easier to reach consensus among the CSCE participating states.¹³⁸ If an instrument with a narrow focus on minorities were to be developed, on the other hand, it would be necessary to define the word 'minority' and provide a more precise description of 'minority rights'.¹³⁹ As was mentioned above, the Netherlands was well aware that the negotiations were doomed to fail if a definition debate were to start.¹⁴⁰ In the light of this, the proposal for a broader human dimension mechanism was

135 Zaagman and Zaal, 1994, p. 105-106; Brenninkmeijer, 2005, p. 44-45; Zaal, 1992, p. 35; Kemp, 2001, p. 9; Document entitled 'Opening-session Helsinki Follow-Up Meeting, 24-26 March 1992, High Commissioner for Minorities (HCM)', Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

136 Code-message from the Ministry of Foreign Affairs to the CSCE delegation in Helsinki, 2 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

137 Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 6 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

138 *Ibidem*.

139 Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 20 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

140 Document entitled 'Opening-session Helsinki Follow-Up Meeting, 24-26 March 1992, High Commissioner for Minorities (HCM)', Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

attractive. Moreover, if the United States' support was guaranteed, it would be much easier to obtain the support of other participating states too.¹⁴¹

On the other hand, a major disadvantage would be that the instrument would lose its focus, as a consequence of which the High Commissioner ran the risk of 'being drowned in so many responsibilities as to render him ineffective'.¹⁴² Moreover, if the United States' modification were agreed with, the High Commissioner's work would be pushed into the direction of a purely human dimension mechanism. This would not only result in possible overlap with the mechanism that had just been created in Moscow and the work of ODIHR, but it would also seriously restrict the mandate of the HCNM.¹⁴³ However, as would later be confirmed by High Commissioner Van der Stoel, 'preventing ethnic conflict requires that the net be thrown wider than the human dimension'.¹⁴⁴ In the follow-up memorandum on human rights and foreign policy that was issued in September 1991, the Dutch government came to that same conclusion.¹⁴⁵ After all, questions that concerned participation in local government, autonomy or relations with kin-states did not fall within the strict scope of the human dimension. If the proposal of the United States were accepted, it would be impossible, or at least very hard, to deal with these essential questions.¹⁴⁶ Perhaps, this was exactly the intent of the United States, whose general aim was to put more emphasis on the human dimension in order to prevent the CSCE from becoming a competitor to NATO in security questions, but the Netherlands considered it a major disadvantage.¹⁴⁷

Balancing the pros and cons of the United States' proposal, the Netherlands concluded that it should not be agreed with because it eroded the essence of the Dutch proposal.¹⁴⁸ However, the United States was not easily deflected from its course either, and its suggestion for a broader human dimension mandate received support from

141 Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 6 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

142 Facsimile message from the delegation in Helsinki to the Atlantic Cooperation and Security Department, 26 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

143 Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 6 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

144 Quotation in: Kemp, 2001, p. 22.

145 Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 13.

146 Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 6 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

147 See: Zaagman, 1994b, p. 253.

148 Code-message from the CSCE-delegation in Helsinki to the Ministry of Foreign Affairs and the Embassies in London, Paris, Washington and Ankara, 14 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

France, the United Kingdom and, in particular, Turkey.¹⁴⁹ In May, the United States even began to work on a counter-proposal.¹⁵⁰ Yet, realizing that the main argument in favour of a general human dimension functionary had been undermined by the support that several countries with minorities within their own borders had given to the HCNM-proposal in April, the Netherlands stuck to its opinion.¹⁵¹ At the same time, the Netherlands understood very well that the proponents of a broad human dimension instrument could only be persuaded to support a special minority instrument when some other concessions were made. The Netherlands sensed that it would, for instance, be important to make it clearer that the High Commissioner would be an impartial official who would not necessarily take the minorities' side.¹⁵² Perhaps this did indeed make the proposal more acceptable for the United States. In any case, its mid-June announcement of support for the post of an HCNM meant that it dropped the idea of a more wide-ranging mandate.¹⁵³ After that, other states did not come back to it again either.

9.3.2 An international agent for the promotion of minority rights?

In its communications with the United States, it had become clear to the Netherlands that one of the underlying reasons this country was opposed to the HCNM-proposal was that it feared that the High Commissioner might act as a general advocate for minorities. When the Netherlands explained, for instance, that one of the reasons it could not accept the idea of a general human dimension mechanism was that the High Commissioner would then lose his function as a platform or mailbox for minorities, the United States answered that this was exactly the element with which it could not

149 Heraclides, 1993, p. 101; Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Legal Adviser of the Ministry of Foreign Affairs, 22 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

150 Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 2 May 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 27 May 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Ministry of Foreign Affairs to the CSCE delegation in Helsinki, 2 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

151 Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Legal Adviser of the Ministry of Foreign Affairs, 22 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

152 *Ibidem*.

153 Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 20 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

agree.¹⁵⁴ In section 9.1.3, it was already mentioned that there were several states with similar or comparable worries. Concern was felt about whether the High Commissioner would act as an international agent for minority rights, and if so, whether that would lead to the recognition of collective rights. Moreover, anxiety existed about the question whether the High Commissioner would interfere on behalf of minorities and help them realise their political aspirations and other demands.¹⁵⁵

It was understandable that these fears existed, because the proposal that the Netherlands had initially made in Prague, was indeed very much focused on minority rights. The Netherlands' main goal was to develop an early warning instrument that might prevent future ethnic conflict, but initially, the methods it proposed to achieve that goal took the protection of minority rights as the basic point of departure. It should be recalled that the function was at first introduced as a 'High Commissioner *for* Minorities', or an Ombudsman, who 'should, in particular, act in those cases in which national systems for the protection of national minorities appear ineffective', and who should, after close scrutiny, 'bring the plight of minorities to the attention of the Committee of Senior Officials'.¹⁵⁶ It was obvious that the protection of the rights of minorities should indeed become an important aspect of the work of the High Commissioner, but it was not immediately clear from the proposal that the Netherlands realized that the attitude and demands of minorities, or their kin-states, could also cause tensions.¹⁵⁷

In this respect, the first draft mandate was not completely unambiguous either. The emphasis was very much placed on the High Commissioner's competence to receive petitions and to engage in fact-finding missions. It was made explicit that states and regional or governing bodies could also approach the High Commissioner, but the paragraph in which this was laid down, appeared quite late in the text. This made it seem a formality rather than a fundamental principle underlying the High Commissioner's mandate, especially because some other parts of the text could be read as biased towards the protection of minorities. For instance, it was determined in an earlier section of the mandate, that the High Commissioner could visit a state to obtain first hand information from all parties concerned and receive confidential information from 'any individual, group or organisation'. These words were immediately followed by a sentence that emphasized that the participating states were to refrain from any action against persons, groups, organisations or institutions on account of their contact

154 Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 6 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

155 See also: Brenninkmeijer, 2005, p. 45-46; Zaagman and Zaal, 1994, p. 107 and 109; Zaal, 1992, p. 35-36; Kemp, 2001, p. 9.

156 See the text of the statement in: Brenninkmeijer, 2005, p. 173.

157 In practice, the HCNM has indeed recognized this. See, for instance: Van der Stoel, 1999, p. 15-20.

with the High Commissioner.¹⁵⁸ It was completely justifiable to include this provision, but as it had not yet been made clear that governments or governing bodies could also be consulted during a visit, the reader was given the impression that the High Commissioner's main aim would be to obtain information from minority groups.

Another example that can illustrate that the mandate could be read as favourably disposed towards minorities, is the provision that dealt with the High Commissioner's competence to request assistance from experts. According to the draft mandate, the experts' main task would be to 'provide, within a short period of time...a more extensive and more specific advice aimed at remedying the alleged discrimination and/or rising tensions within or between participating states related to the situation of national minorities.'¹⁵⁹ Since discrimination was mentioned as a possible problem, while other possible causes for tensions resulting from the behaviour or the claims of minorities were not, this could be interpreted as an indication that the High Commissioner would be more likely to concern himself with an improvement of the situation of minorities than with other aspects that might play a role in minority-related tensions.

Perhaps these were only small details, but for several states minority issues were very sensitive, and to make the interference of an international functionary acceptable to all CSCE participating states, it was necessary to develop a mandate that made it clearer that the High Commissioner would respect the principle of impartiality, and would not identify himself with one of the parties. The Netherlands recognized there was room for improvement in this respect, and step by step, it changed its proposal to make it more obvious that the High Commissioner would not give undue preference to minorities.¹⁶⁰ One of the most important amendments made in this respect, was the inclusion of some provisions that explicitly spelled out the requirement of impartiality in different places in the text.¹⁶¹ Another crucial modification concerned the title. In the seventh draft of 2 June 1992, it was changed from 'High Commissioner for Minorities' to 'High Commissioner on National Minorities'. The preposition 'on' was considered more appropriate, because the word 'for' might suggest that the High Commissioner was on the minorities' side.¹⁶² This idea came from MRG-Director

158 Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 14 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

159 *Ibidem*.

160 Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Legal Adviser of the Ministry of Foreign Affairs, 22 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

161 See: Document entitled 'Netherlands proposal for a CSCE High Commissioner for Minorities', 12 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992. In the final mandate, these provisions can be found back in: paragraph 4 and 8.

162 The term 'minorities' was replaced by 'national minorities' to bring the title into line with the term that was used in the rest of the text, which was also the one traditionally used within the CSCE. See:

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Phillips, who had lengthy experience with minority issues and realised that the word ‘on’ might make the mandate more acceptable, while it would, in practice, not negatively influence the High Commissioner’s ability to work for minorities when this was needed.¹⁶³

Another related concern with which the Netherlands had to deal was the question of whether the post of a High Commissioner would lead to the recognition of group rights. In Prague, the Netherlands gave the impression that it proposed a mechanism that would at least come close to a complaints procedure, but it had emphasized that individual cases would not be dealt with by the High Commissioner. So, did this mean that minorities could submit petitions as a group and that the High Commissioner would, in other words, deal with collective minority rights? There were several states that were concerned about this and that sought reassurance that this would not be the case.¹⁶⁴ One of the first reactions of Belgium, for example, was that it recognized that individual rights might be exercised collectively, but that the text of the mandate should make very clear that minorities were not recognized as legal entities on their own, and that group rights did thus not exist.¹⁶⁵ The United States also pointed out that ‘rights of minorities’ were not a familiar concept within the CSCE, and that existing documents used the formula ‘rights of persons belonging to minorities’.¹⁶⁶

As was made clear in the previous chapter, the Netherlands was not in favour of collective rights either, and in reaction to the remarks by the United States, it changed the term ‘minorities’ into ‘persons belonging to minorities’ everywhere in the draft.¹⁶⁷ However, the difficulty with the latter term was that this in turn implied exactly the judicial, individual rights approach that it had initially wanted to avoid. In fact, the earliest drafts of the Minister’s speech in Prague had also used the words ‘persons

Facsimile message from the Political Affairs Section of the Atlantic Cooperation and Security Department to the delegation in Helsinki, 2 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992. See also: Brenninkmeijer, 2005, p. 72-73; Heraclides, 1993, p. 103.

163 Letter from the Director of the Minority Rights Group to the Minister of Foreign Affairs, 8 May 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Interview with A.D.J. Phillips, 15 July 2006. See also: Brenninkmeijer, 2005, p. 72-73.

164 Zaagman and Zaal, 1994, p. 106-107; Zaal, 1992, p. 35; Kemp, 2001, p. 9; Brenninkmeijer, 2005, p. 45.

165 Code-message from the Ministry of Foreign Affairs to the Embassy in Luxembourg, 26 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

166 Fax from the CSCE-delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 3 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

167 Fax from the CSCE-delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 3 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 7 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

belonging to minorities', but these had been deleted, because the Netherlands had wanted to make clear that it did not propose an individual complaints procedure.¹⁶⁸ Probably, this is why two months after the adoption of the American suggestions, most of the changes that were made were undone again.¹⁶⁹ By that time, the exact purpose and the scope of the mandate had, however, become more clear to most of the participating states, and it had become more evident that the High Commissioner would work as a neutral intermediary. Apparently, in this context states no longer worried whether terms such as 'minority issues' or 'a tension involving national minorities', which were eventually used, would attribute rights to minority groups as such.¹⁷⁰

9.4 INDEPENDENCE AND ACCOUNTABILITY

One of the most innovative elements of the Dutch proposal for a High Commissioner was that the instrument was not dependent on a participating state's initiative. An independent functionary could, without the approval of the CSO, become involved in certain questions and even had the right to enter the territory of a participating state without its consent or the prior approval of other CSCE participating states.¹⁷¹ As was mentioned in section 9.2.2, the Netherlands considered this independence a crucial element of the mandate. It was an important condition, in the first place, because the High Commissioner would not be able to respond quickly, if he were dependent on decisions by the CSCE participating states, or perhaps he would not be able to act at all.¹⁷² During the Dutch EC Presidency in the second half of 1991, it had already proven impossible to reach agreement among twelve member states, so it must have been obvious for the Netherlands that this would be even more problematic in the CSCE, where decisions could not be taken without a consensus among fifty-two participating states. A second reason the Netherlands attached so much importance to the High Commissioner's independence was related to the requirement of confiden-

¹⁶⁸ This can be concluded from a comparison between the draft of 28 January 1992 and the text that was drawn up one day later, and from the (hand-written) notes that can be found on those documents. See: Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Affairs Department of the Ministry of Foreign Affairs to the Minister of Foreign Affairs, 28 January 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, Prague 30 and 31 January 1992, part 1, period until 29 January 1992; Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Minister of Foreign Affairs, 29 January 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Second meeting Council of Ministers, Prague 30 and 31 January 1992, part 1, period until 29 January 1992.

¹⁶⁹ Facsimile message from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Delegation in Helsinki, 2 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

¹⁷⁰ For the terms used, see, for example: CSCE Helsinki Document 1992: The Challenges of Change, Chapter II, paragraphs 3, 11a, or 17. Note that the term 'persons belonging to national minorities' was retained in the paragraphs 24b and 26.

¹⁷¹ Zaagman, 1994a, p. 114-115; Brenninkmeijer, 2005, p. 13-14.

¹⁷² Chigas, 1994, p. 31; Letschert, 2005, p. 54.

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tiality. It was believed that if correspondence and conversations with the High Commissioner remained confidential, the parties would be more inclined to speak freely and to make compromises. Public discussions, on the other hand, might stimulate the parties to raise their stakes and harden their attitude, thus resulting in a situation worsening rather than improving.¹⁷³

Because of these considerations, in its first draft the Netherlands presented the High Commissioner as a functionary who fulfilled his duties completely independent from the CSCE's political organs. If the High Commissioner concluded that his suggestions and recommendations were not accepted, not carried out, or did not have the desired results, or when the situation was escalating, he could consider informing the CSO but this was not obligatory.¹⁷⁴ Hence, a possible involvement of the CSO would be completely dependent upon the High Commissioner's own decision. As was explained in section 9.1.3, several states expressed the opinion that they would like to see an element of accountability included in the mandate. They wanted to ensure that the CSCE participating states would have some control or overview over the High Commissioner's work and the visits he would pay to the CSCE participating states. As a country that is traditionally reluctant to accept international mechanisms over which it has no control, the United States was one of the most vocal opponents of the great measure of independence that the mandate gave to the High Commissioner.¹⁷⁵

The Netherlands was willing to take these objections seriously, and it also realized that a better integration into the CSCE might have the advantage of an increased political legitimacy. On the other hand, it did not want to deviate from its basic point of view that the High Commissioner should be able to work according to the methods of silent diplomacy and that his decisions should not be made dependent on the approval of the CSCE participating states. The drafts of the mandates make clear that finding a right balance between independence and confidentiality on the one hand, and accountability and institutional control on the other, preoccupied the delegations in Helsinki during the entire negotiation process. In almost every new draft, there were changes in those parts of the text that were relevant to this particular question. Some-

173 Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Legal Adviser of the Ministry of Foreign Affairs, 22 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Interview with J.H.M. Pollmann-Zaal, 7 May 2004. See also: Zaagman, 1994a, p. 121; Letschert, 2005, p. 55-57.

174 See: Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 14 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

175 See, for instance: Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 20 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the CSCE-delegation in Helsinki to the Ministry of Foreign Affairs and the Embassies in London, Paris, Washington and Ankara, 14 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

times, these were only minor amendments, but they also included a number of more fundamental revisions.¹⁷⁶

The first important change in the mandate was made before the Helsinki Follow-Up Meeting had even started. Whereas the initial Dutch proposal had not said anything about the institutional relation between the High Commissioner and the CSO, the draft of 28 February laid down that the High Commissioner would be 'acting under the auspices of the CSCE Committee of Senior Officials.'¹⁷⁷ By this sentence, or by the phrase 'act under the aegis of the CSO' that was eventually used, it was made clear that the CSO bore the ultimate responsibility for the prevention of minority-related conflicts, and that the High Commissioner would, in the final analysis, be dependent on this organ for his political legitimacy. Because the CSO was not given the right to give instructions to the High Commissioner, the amendment did not, however, seriously affect his ability to act independently.¹⁷⁸

The Netherlands weighed the pros and cons of other suggestions to increase the High Commissioner's accountability to the CSCE's political organs in a comparable way. This meant that a British proposal to make the involvement of the High Commissioner in a certain issue dependent on a consensus or a consensus-minus-one decision of the CSO was not acceptable for the Netherlands, while a suggestion by the United States to envisage a special, but restricted and confidential, role for the Chairman-in-Office (CiO) was.¹⁷⁹ The proposal was that the High Commissioner would consult the CiO before paying a visit to a participating state and keep him informed of his findings on a confidential basis. The Netherlands adopted this proposal in the beginning of April.¹⁸⁰ Two months later, it was added in the proposal that the CiO could, in turn, consult, in confidence, with other parties and CSCE participating states.¹⁸¹ This way,

176 For the texts of the most important drafts, see: Brenninkmeijer, 2005, p. 128-170.

177 Document entitled 'Netherlands proposal for CSCE Commissioner for Minorities', Archive MFA, CSCE 921.353.22, file: 921.353.22 CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

178 Zaagman, 1994a, p. 119-120.

179 Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs, 27 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the Embassy in London to the Ministry of Foreign Affairs, 15 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

180 Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 6 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the CSCE-delegation in Helsinki to the Ministry of Foreign Affairs and the Embassies in London, Paris, Washington and Ankara, 14 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

181 Facsimile message from the Political Affairs Section of the Atlantic Cooperation and Security Department to the delegation in Helsinki, 2 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

the CiO and the CSCE participating states were offered an overview and a limited measure of control over the High Commissioner's activities, while at the same time, they were not given any formal powers to stop or correct him.¹⁸² In its concessions, the Netherlands did not want to go any further than this, and it rejected a later proposal by the United States to consider the High Commissioner as an *instrument* of the CiO, because he would then become dependent on the strength of the acting Chairman, who would likely be vulnerable to manipulation by, in particular, major powers.¹⁸³

The United States did not insist, and apparently it considered the confidential consultations with the CiO sufficient to guarantee accountability. However, for the United Kingdom, it was not. This country insisted on a more direct involvement of the CSO. In particular, it wanted to prevent the High Commissioner from engaging in mediation or good offices without the explicit consent of the participating states.¹⁸⁴ Therefore, it proposed that the High Commissioner would need to receive the authorization of the CSO before he could proceed from the 'early warning' phase to the 'early action' phase.¹⁸⁵ The concept of 'early action' had first been defined in the drafts of early June. Before that time, no differentiation had been made between 'early warning' and 'early action', and competences had been described in a way that did not make clear whether they were early warning or early action activities. The early June drafts changed this, and determined that early warning included fact-finding and collection of information, while anything that went further than that – discussion with the parties and the promotion of dialogue and confidence – were considered to belong to the early action phase.¹⁸⁶

182 Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 6 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992. See also: Zaagman, 1994a, p. 120-121; Brenninkmeijer, 2005, p. 61-63.

183 Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 20 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992; Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 20 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

184 Code-message from the Embassy in London to the Ministry of Foreign Affairs, 15 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs, and the Ministry of Defence, 2 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

185 Code-message from the Embassy in London to the Ministry of Foreign Affairs, 16 June, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

186 Facsimile message from the Political Affairs Section of the Atlantic Cooperation and Security Department to the delegation in Helsinki, 2 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

The suggestion that the United Kingdom made was only partially acceptable for the Netherlands. In principle, it was only prepared to give the CSO *ex post* control, and many co-sponsors shared that position.¹⁸⁷ The British proposal seemed to go further than that, because it intended to restrict the freedom of action of the High Commissioner before he had terminated his involvement. However, it appeared to be possible to find a compromise. The proposed amendment was incorporated in the mandate, but the concepts of early warning and early action were defined differently, in order to make 'light forms of mediation' by the High Commissioner possible without the CSO's approval, while a special authorization would be needed for a more prolonged involvement.¹⁸⁸ To put it more concretely, 'early warning' was now defined to include fact-finding activities as well as discussions with the parties concerned and promotion of dialogue, confidence and cooperation between them. If the High Commissioner were to conclude that there was a 'prima facie risk of potential conflict', he would issue an early warning, and only after the authorization of the CSO could he then 'enter into *further* contact and *closer* consultation with the parties concerned in view of a possible solution.'¹⁸⁹ The end-result did not add to the clarity of the mandate, and in practice, it has not worked out in the way described above, but at least, it made the proposal more acceptable for the United Kingdom.¹⁹⁰

Another concession that the Netherlands had to make in respect to the High Commissioner's independence concerned his freedom to travel. In its original proposal, the Netherlands had included a sentence that made explicit that CSCE participating states would allow the High Commissioner to enter their territory, and to travel and communicate freely. However, especially the United Kingdom and the United States had great difficulty to accept this and expressed the opinion that these freedoms should be made

187 Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Legal Adviser of the Ministry of Foreign Affairs, 22 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

188 Memorandum from one official of the Political Affairs Section of the Atlantic Cooperation and Security Department to another official of that same Section, 19 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992; Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 20 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992; Code-message from the Ministry of Foreign Affairs to the CSCE delegation in Helsinki, 22 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

189 Attachment to a facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 20 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992. [Italics, HR]

190 As was mentioned in an earlier footnote, in practice the High Commissioner has usually carried out his tasks under what would formally be the early warning stage. See: Letschert, 2005, p. 48-51; Martín Estébanez, 1997, p. 131-134.

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dependent on the explicit consent of the government concerned.¹⁹¹ The Netherlands did not even want to consider adopting such an amendment, because it would in fact boil down to giving one of the parties involved in minority-related tensions a veto-power, and would seriously injure the High Commissioner's independence.¹⁹² However, if it did not make any compromises at all, the HCNM-proposal might not be accepted by these two countries. Therefore, the Netherlands agreed to add a phrase that read: 'If the State concerned does not allow the High Commissioner to enter the country and to travel and communicate freely, the High Commissioner will so inform the CSO.'¹⁹³ When that appeared insufficient, the phrase that determined that 'the state concerned will allow the High Commissioner to enter the country and to travel and communicate freely', was replaced by another sentence, which began as follows: '*After entry*, the State concerned will facilitate free travel and communication...'¹⁹⁴

The hand-written exclamation mark in the margin of this part of the draft can probably be interpreted as an indication that the Netherlands considered this a quite far-reaching concession, which it had actually not wanted to make. This was understandable, because the mandate now left undecided the question of whether a state would need to give permission for the High Commissioner's entry into its territory. On the other hand, the Netherlands had at least succeeded in preventing the inclusion of a sentence that made it explicit that this would be the case.

191 Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Legal Adviser of the Ministry of Foreign Affairs, 22 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

192 Code-message from the CSCE-delegation in Helsinki to the Ministry of Foreign Affairs and the Embassies in London, Paris, Washington and Ankara, 14 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Attachment to a facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 20 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

193 Facsimile message from the Ministry of Foreign Affairs to the Embassy of the United States, 5 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

194 Facsimile message from the CSCE-delegation in Helsinki to the Head of the Political Affairs Section of the Atlantic Cooperation and Security Department, 22 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992. See also: Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 23 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

9.5 THE SCOPE OF THE MANDATE

9.5.1 A restriction to Eastern and Central European problems

In section 9.1.3, it was briefly indicated that the opponents of the Dutch proposal for a High Commissioner objected, in particular, because they had minority problems within their own borders with which the High Commissioner might decide to involve himself against their will. For the United Kingdom, Turkey and the United States, the idea of international interference with minority-related tensions in their society was unacceptable, and they sought guarantees that the High Commissioner would not have the freedom to address just any minority issue. The United States wanted to be sure that the High Commissioner's mandate could not be interpreted to include communal violence or minority-related civil unrest that occurred in its own country.¹⁹⁵ The United Kingdom and Turkey, on their part, wanted to avoid the High Commissioner from involving himself with their internal security problems. The United Kingdom had just gone through a period of frequent bomb explosions, terrorist actions and counter-terrorism campaigns that were related to the situation in Northern Ireland, and in which thousands of people had lost their lives.¹⁹⁶ Comparable problems existed in Turkey, where the government had to deal with Kurdish terrorist groups.¹⁹⁷

The Netherlands' proposal had never been aimed at solving these problems, and in its first draft, it could already be read that the High Commissioner would reject '[c]ommunications on tensions involving national minorities which have already developed beyond an 'early warning' stage into an overt crisis'.¹⁹⁸ However, this crucial phrase was almost hidden in the text, and in the second draft of 28 February, it was left out altogether.¹⁹⁹ To make it more obvious that the mandate would be restricted to the very early stages of a conflict only, the Netherlands re-introduced the limitation on a more prominent place in the text in the draft mandate of 7 April. Under a section with the heading 'mandate', it could now be read that the High Commissioner would 'ensure 'early warning' at the earliest possible stage and, as appropriate, 'early action' regarding tensions involving rights of persons belonging to national minorities *which have not developed beyond an early warning stage into an overt crisis*, and which, to the judgement of the [High Commissioner], *have the potential to develop into a substantial conflict affecting the international peace and stability within the*

¹⁹⁵ Brenninkmeijer, 2005, p. 66.

¹⁹⁶ *Ibidem*, p. 55-56.

¹⁹⁷ *Ibidem*, p. 66-67.

¹⁹⁸ Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 14 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

¹⁹⁹ Message from the Dutch Ministry of Foreign Affairs to the Ministries of Foreign Affairs of the EC member states, 28 February 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

CSCE.²⁰⁰ The first condition implied that long drawn-out violent conflicts, such as those of Northern Ireland, would not fall within the scope of the High Commissioner's mandate, while the latter intended to reassure the United States that he would not address the kind of tensions that occurred in that country either.²⁰¹

It was clear that this would mean that, in practice, the High Commissioner would have business only in the Eastern half of Europe.²⁰² As long as this was not said out loud, the Netherlands did not consider this a problem. Its policy was to reject proposals that aimed to confine the range of action explicitly to the newly established democracies, but it was open for suggestions that imposed such limitations on the High Commissioner in an implicit way and thought, in fact, that these needed to be carefully studied.²⁰³ Considering that the Netherlands normally proclaimed to attach great importance to the universality of human rights principles, this was not in line with its general human rights policy.²⁰⁴ It also deviated from the position that it had taken in the definition debate at the Geneva Expert Meeting of 1991, and that it would again take in the context of the deliberations on the Council of Europe's Framework Convention.²⁰⁵ So, how can this discrepancy be explained?

In the first place, it should be realized that when the Netherlands developed its ideas for a High Commissioner, its main purpose was to meet the security challenges that minority-related tensions posed to the CSCE participating states; from that perspective, the observance of minority rights was just one of the means that could be used to achieve that. Of course, the Netherlands could have chosen a different approach, in which principled human rights considerations, such as the need to guarantee the universal applicability and supervision of norms, prevailed over security interests. However, the main bureaucratic mission of the Atlantic Cooperation and Security

200 Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 7 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992. [Italics, HR]

201 Code-message from the CSCE-delegation in Helsinki to the Ministry of Foreign Affairs and the Embassies in London, Paris, Washington and Ankara, 14 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Document entitled 'NAR Oslo, 4 and 5 June 1992, Bilateral United Kingdom, High Commissioner for Minorities, issues to be raised', Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

202 See: Baehr, 2001, p. 78; Forsythe, 2000, p. 126. It should be noted that in this respect there was a similarity between this modern-time CSCE instrument and its historical predecessors that were described in section 8.1 of this book.

203 Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Legal Adviser of the Ministry of Foreign Affairs, 22 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

204 See, for instance: Baehr, Castermans-Holleman, Grünfeld, 2002, p. 9 and 21; Appendices to the reports of the Second Chamber, 1990-1991, 21 800, chapter V, no. 91, p. 33; Ministerie van Buitenlandse Zaken, 1989, p. 349-350.

205 See section 8.4 and 8.5.

Affairs Department, which took the lead with respect to the HCNM initiative, was not in the first place to promote human rights but to carry out a policy that was wise from an international security perspective, and this is exactly what it did.²⁰⁶

In an article in the *Financial Times* of 22 April 1992 that commented on the war in Yugoslavia and the Dutch initiative for an HCNM, it was argued that '[t]he need for the minority to be assured of its rights, and for the majority to be reassured that those rights do not threaten it, is as acute in Northern Ireland as in many parts of Eastern Europe.'²⁰⁷ The author of the article certainly had a point, but apparently, for the policy-makers it was not so much the naked fact of there being a potential or existing conflict related to a minority question that mattered but rather the threat that such a conflict might pose to the general security situation in Europe. Conflicts like those in Northern Ireland and Turkey were isolated situations that would not easily develop into full-scale civil war. In that sense, developments were much more unpredictable in the Eastern part of Europe, which was going through an unstable period of transition. Besides, pragmatic choices were needed, because if the mandate would not be restricted it would almost certainly be blocked by Turkey and a number of Western countries that did not want to allow an international functionary to address issues that they considered to be within the domain of their national sovereignty. Without doubt, there were Eastern European governments that had similar feelings, but, as explained before, due to the particular international circumstances of the moment they were not in a position to protest.

9.5.2 A clause on terrorism

The Netherlands believed that the restriction that the High Commissioner could only involve himself in a situation in an early stage of a conflict made it perfectly clear that long existing conflicts involving terrorist violence would not fall within the scope of his mandate. On several occasions, it reassured the United Kingdom that the High Commissioner 'would have no business in Ulster'.²⁰⁸ Yet, the United Kingdom did not consider this sufficient. In determining its position, it was completely preoccupied with the situation in Northern Ireland, and before it could accept the creation of an HCNM, it wanted to be one hundred percent certain that he would not address this issue.²⁰⁹ The

206 See, for instance: Rijksarchiefdienst/PIVOT, 2000, p. 124-126.

207 Edward Mortimer, 'Nationalist enclaves in a community of fear' - In: *Financial Times*, 22 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

208 See, for instance: Document entitled 'NAR Oslo, 4 and 5 June 1992, Bilateral United Kingdom, High Commissioner for Minorities, issues to be raised', Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

209 Code-message from the Embassy in London to the Ministry of Foreign Affairs, 20 March 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the CSCE-delegation in Helsinki to the Ministry of Foreign Affairs, 27 March 1992, Archive MFA, CSCE 921.353.22, file:

United Kingdom communicated to the Netherlands that it wanted the mandate to be designed so that it would guarantee by clear wording that the High Commissioner would under no circumstances be allowed to have contacts with persons or organisations that propagate or tolerate terrorism.²¹⁰ These demands were supported by Turkey and Spain, the latter of which suffered from political violence by Basque groups in the North of its country.²¹¹

It was evident to the Netherlands that the inclusion of the kind of restriction that the United Kingdom requested could easily lead to the assumption that all members of minorities were potential terrorists, but as long as this was prevented and a careful formulation could be chosen, the Netherlands did not have major objections.²¹² On 2 June, a sentence was incorporated in the draft mandate that determined that the High Commissioner could not look into questions involving national minorities 'in situations where persons or groups of persons belonging to national minorities commit acts of terrorism, or advocate or resort to the use of violence'.²¹³ However, among the co-sponsors, there were several states that were of the opinion that the Netherlands had gone too far in its concessions to the opponents of the HCNM-proposal; they rejected the inclusion of a terrorism-clause, because it unjustly discredited minorities.²¹⁴

As an alternative, a few days later the Netherlands then suggested to formulate the clause somewhat differently and to determine that the High Commissioner would not consider national minority issues 'in situations where persons or groups of persons belonging to *parties directly concerned* commit acts of terrorism, or resort to or advocate the systematic use of force'.²¹⁵ Because of the replacement of the term

CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

210 Code-message from the Embassy in London to the Ministry of Foreign Affairs, 15 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs, and the Ministry of Defence, 2 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

211 Zaagman and Zaal, 1994, p. 108; Zaal, 1992, p. 36; Kemp, 2001, p. 10; Brenninkmeijer, 2005, p. 88.

212 Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Legal Adviser of the Ministry of Foreign Affairs, 22 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

213 Facsimile message from the Political Affairs Section of the Atlantic Cooperation and Security Department to the delegation in Helsinki, 2 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

214 Zaagman and Zaal, 1994, p. 108; Brenninkmeijer, 2005, p. 93 and 97; Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 16 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

215 Facsimile message from the Ministry of Foreign Affairs to the Embassy of the United States, 5 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992. [Italics, HR]

'national minorities' by the words 'parties directly concerned', minorities were put on a more equal footing with majorities or governmental parties in a conflict, while the word 'directly' also made it possible to discriminate between external pressure or interest groups and minority groups that were actually involved. However, this mitigated version, and a later draft that even left out the word terrorism, did not satisfy the United Kingdom. Apparently, it did not consider it a problem if the word 'national minorities' was not expressly used in this clause, but the deletion of the word 'terrorism' was not acceptable, and the United Kingdom also wanted to broaden the limitation to situations in which one of the parties *condoned* terrorism.²¹⁶

The Netherlands found itself faced with serious difficulties now. Whereas the United Kingdom, Turkey and to some extent Spain made their approval of the draft dependent on the incorporation of a strong terrorism clause, the Netherlands would lose the support of a number of co-sponsors if it gave in to these demands. With regard to the content, the Netherlands agreed with the Nordic countries, Austria, Germany and a number of others that there were important arguments against the adoption of a clause on terrorism, but from a strategic point of view, it was, on the other hand, desirable to try and get it through.²¹⁷ The Netherlands sought a way out by constant reformulations of the text, although in a situation of diametrically opposed views, this could of course solve the problems only partially. In its final form, the mandate included two paragraphs on terrorism. The first appeared in the section that described the general mandate of the HCNM, and read: 'The High Commissioner will not consider national minority issues in situations involving organized acts of terrorism.'²¹⁸ Moreover, the section that dealt with the sources of information that the High Commissioner could use, included the following sentence: 'The High Commissioner will not communicate with and will not acknowledge communications from any person or organization which practices or publicly condones terrorism or violence.'²¹⁹

Apparently, the Netherlands had tried to reach a compromise by the creation of two different clauses. It can be assumed that the use of the words 'organized acts of terrorism' in the first of the above paragraphs were intended to meet some of the concerns of the countries that were opposed to a terrorism clause. Some of them had expressed concern that the terrorism clause might be used as a general escape clause, because governments could stir up something akin to violence or terrorism, and then use that

216 Code-message from the Embassy in London to the Ministry of Foreign Affairs, 16 June, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992; Breninkmeijer, 2005, p. 95.

217 Facsimile message from the CSCE delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 20 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992; Code-message from the Ministry of Foreign Affairs to the CSCE delegation in Helsinki, 22 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992; Interview with J.H.M. Pollmann-Zaal, 7 May 2004. See also: Heraclides, 1993, p. 104-105.

218 CSCE Helsinki Document 1992: The Challenges of Change, Chapter II, paragraph 5b.

219 *Ibidem*, paragraph 25.

as an argument to stop the High Commissioner's involvement in minority issues on their territory.²²⁰ The limitation to the general mandate was now formulated in a way that implied that the High Commissioner's involvement in a situation would not be excluded in case of unorganised or random occurrences of violence or terrorism, as a consequence of which it could less easily be invoked by governments. At the same time, a broader restriction that involved any practice or public condonement of terrorism, was applied to the High Commissioner's competence to communicate and to receive information.

The United Kingdom could accept the solution, but opponents of a terrorism clause continued to express misgivings. After all, their main objection was that a link was made between minorities and terrorism, and this problem could not be solved without the complete deletion of the clause. Aware of the very likely chance that the United Kingdom, Turkey and Spain would block agreement on the High Commissioner's mandate if the clause were deleted from the mandate, and with only a few days left before the Helsinki Follow-Up Meeting would be concluded, the Netherlands tried to convince the co-sponsors to accept its proposal, but it succeeded only with great difficulty. During one of the last meetings, Austria placed the terrorism clause in the general mandate between square brackets, and this immediately provoked a reaction by Turkey, which then placed the whole draft between square brackets. After considerable pressure not to endanger the adoption of the whole proposal, Austria could eventually be persuaded to withdraw the brackets, and then Turkey did the same. The next morning, Armenia threatened to re-introduce the brackets, but eventually it was talked out of this by the Netherlands and a number of other co-sponsors.²²¹ Hence, the mandate that was finally adopted included restrictions regarding terrorism on two places in the text.²²²

9.6 CANDIDATE AND BUDGET: A HIDDEN AGENDA?

9.6.1 The selection of a candidate

In section 9.2.2, it was explained that one of the basic propositions of the Dutch draft was that the High Commissioner would be a distinguished international personality

220 Brenninkmeijer, 2005, p. 97.

221 Code-message from the CSCE delegation in Helsinki to the Ministries of Foreign Affairs and Defence, 5 July 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992; Heraclides, 1993, p. 105.

222 On the occasion of the adoption of the Helsinki Document on 10 July 1992, Austria made an interpretative statement on behalf of its own country, Germany, Denmark, Finland, Slovenia, Sweden, and Switzerland, in which it expressed the opinion that the terrorism clause would be 'applied in such a way that the effective exercise of the functions of the High Commissioner is ensured.' Armenia made a similar statement. See: CSCE Doc. HM/Journal No. 50, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992, Journals. Interpretative statements on other aspects of the mandate can also be found in this document.

with long-standing and relevant experience. Later, the expectation that he would be able to perform the function in an impartial manner was added as an explicit criterion.²²³ It was mentioned earlier in this chapter that, in hindsight, many CSCE participating states got the impression that the Netherlands had not only had a clear vision of the HCNM's profile, but also a concrete candidate. During the negotiations, the Netherlands had always said that it had not yet found a candidate, but it was thought that perhaps the Netherlands had deliberately kept silent about its intention to nominate its own former Minister of Foreign Affairs for tactical reasons. The question is whether this was indeed the case.

In the records, Van der Stoel's name was mentioned for the first time in a diplomatic message that the Dutch delegation in Helsinki faxed to the Political Affairs Section of the Atlantic Cooperation and Security Department of the Ministry of Foreign Affairs on 3 April 1992. The message reported a conversation between a representative of the Netherlands and the United States in Helsinki. Concerned about the far-reaching power that could possibly come into the hands of one single CSCE functionary, the representative of the United States had asked her Dutch colleague what kind of personality the Netherlands had in mind for the post of the High Commissioner. He had answered, *à titre personnel*, that one could think of a person of the calibre of the international mediators in the Yugoslavia-conflict, Lord Carrington and Cyrus Vance, or the Dutch former Minister of Foreign Affairs, Max van der Stoel.²²⁴ These names were, however, mentioned as examples to illustrate the profile that the Netherlands had in mind. Considering Van der Stoel's domestic reputation as one of the greatest, and most prominent, human rights authorities in the Netherlands, it is plausible that his name was one of the first to come to the mind of this Dutch diplomat.²²⁵

Actually, there are no indications whatsoever that the Netherlands had, at this point in time, developed any concrete ideas about the question of whom could be approached to fulfil the function. On the contrary, it was only in an internal memorandum of 15 June 1992 that the need to give some thoughts to the question of possible candidates was stressed.²²⁶ The reason for this was that the CSCE delegation in

223 In the final mandate, the HCNM's profile was described as follows: 'The High Commissioner will be an eminent international personality with long-standing relevant experience from whom an impartial performance of the function may be expected.' See: CSCE Helsinki Document 1992: The Challenges of Change, Chapter II, paragraph 8.

224 Fax from the CSCE-delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 3 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

225 This reputation can be illustrated, for instance, by an article in the periodical that is published by the Dutch section of Amnesty International, in which Max van der Stoel, Peter Kooijmans and Theo van Boven were referred to as the 'Big Three'. See: Willem Offenbergh, 'Het interview: Theo van Boven: We moeten één lijn vasthouden' [The interview: Theo van Boven: We must stick to one line] – In: *Wordt Vervolgd*, Vol. 36, No. 12/1, 2003/2004, pp. 14-16, see: p. 14.

226 Memorandum from the Head of the Atlantic Cooperation and Security Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry

Helsinki had got the impression that the proposal would run a better chance of being adopted if the Netherlands could suggest concrete names to other delegations, when they raised the question whom the Netherlands had in mind for the post. It was thought that if the Netherlands would be able to push the right man forward at the right time, this might result in a breakthrough in the negotiations.²²⁷ At the Ministry in The Hague, there was some brainstorming about possible names, which resulted in a short and tentative list of possible candidates. Van der Stoel's name was not included; the names on the list were those of the former Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom, Geoffrey Howe, the former Assistant Secretary for Human Rights and Humanitarian Affairs of the United States, Richard Schifter, and the former United Nations High Commissioner for Refugees and Minister of Foreign Affairs of Norway, Thorvald Stoltenberg.²²⁸

However, in the meantime the negotiations in Helsinki had gained a new momentum, and it became very likely that the proposal was going to be accepted anyway. In light of that, the Netherlands changed strategy; whereas the initial idea had been that a generally acceptable candidate could help win over the last participating states, it was now considered that it would be better to have the proposal adopted first. The introduction of any additional elements might lead to new discussions, as a result of which the consensus might crumble.²²⁹ Although this was probably the most important reason why the Netherlands tried to avoid a rapid decision about a candidate for the newly created post, it was not sheer concern about the fragile consensus that motivated the Netherlands in this respect. Another reason it preferred to postpone this matter, was that it did not like the idea that public attention might be drawn away from the initiating country – the Netherlands – and might instead focus on the country of origin of the High Commissioner.²³⁰ This proves that the Netherlands was indeed concerned with the question of how it could gain international prestige, but it also demonstrates that the Netherlands assumed that the candidate would probably not be Dutch. Hence, there

of Foreign Affairs, 15 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

227 Memorandum from the Head of the Atlantic Cooperation and Security Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 15 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992; Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 11 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

228 Memorandum from the Head of the Atlantic Cooperation and Security Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 15 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

229 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 30 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

230 *Ibidem*.

was no pre-existing plan to propose Van der Stoel's candidacy, as many CSCE participating states later supposed.

Starting from late June, in Helsinki, names of possible candidates began to circulate, but Van der Stoel's name did not yet go around. The delegation of Czechoslovakia had named its former Minister of Foreign Affairs, Jiří Dienstbier, and Spanish delegates put forward the name of the former Chairman of the European Parliament, Enrique Barón Crespo.²³¹ Two weeks later, United States' diplomats suggested, among others, former President Jimmy Carter or former Secretary of State, Cyrus Vance.²³² Although the Netherlands had initially been positive about American candidates, on second thought it preferred a European candidacy, because a person from the other side of the Atlantic Ocean might not have sufficient feeling for the complexity of the problems at hand.²³³ At this point, it occurred to the Netherlands that the Czechoslovakian President, Vaclav Havel, who was about to resign after the lost elections of June 1992, or the current Polish Minister of Foreign Affairs, Skubiszewski, would be good candidates.²³⁴ However, it soon appeared that neither of them was available, and for similar and other reasons, most other names that had been mentioned, were dropped as well.²³⁵

In the archives of the Dutch Ministry of Foreign Affairs, the possible candidacy of Van der Stoel is first mentioned in a memorandum of 20 July 1992. According to this document, his name was put forward by the German delegation in Helsinki, but it is

231 Code-message from the CSCE delegation in Helsinki to the Ministry of Foreign Affairs and the Ministry of Defence, 1 July 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

232 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 15 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 21 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

233 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 15 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the Ministry of Foreign Affairs to the Embassy in Washington, 23 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

234 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 15 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 30 June 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 2, 3 June 1992 – July 1992.

235 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 20 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

not clear whether the suggestion actually originated from that country.²³⁶ In interviews with former Minister Van den Broek, and Hannie Pollmann-Zaal, who was involved in the negotiations as a government official, it was confirmed that international selection procedures are even less transparent than other kinds of negotiations, and a country that raises a suggestion for a candidate might well have been requested to do so by another country, or personally, by the candidate.²³⁷ According to Minister Van den Broek, the Netherlands had actually made the suggestion to approach Van der Stoel, because it appeared so difficult to find a candidate from another country.²³⁸ In other interviews, this was neither confirmed, nor denied.²³⁹ In any case, the records prove that the Netherlands actively approached other countries for suggestions of other possible candidates without much result, so it is not unlikely that this is what happened.²⁴⁰

By the end of August, the only names that still circulated were those of Max van der Stoel and Jiří Dienstbier.²⁴¹ As was mentioned in section 9.1.4, the candidacy of the latter was dropped because there were indications that he would not be acceptable to all CSCE participating states, so eventually Van der Stoel was the only nominee left. It was obvious that he was qualified for the job. He had fulfilled several high positions in the Netherlands as well as internationally, and he was known for his personal interest and commitment to human rights related issues.²⁴² In principle, his nomination could count on a broad support among the CSCE participating states. The EU member states agreed to table his candidacy as a formal EU proposal.²⁴³ Czechoslovakia, which

²³⁶ *Ibidem*.

²³⁷ Interviews with H. van den Broek, 1 June 2004; Interview with J.H.M. Pollmann-Zaal, 7 May 2004.

²³⁸ Interviews with H. van den Broek, 25 May 2004 and 1 June 2004.

²³⁹ Hannie Pollmann-Zaal said that she did not know who had actually come up with the suggestion to nominate Van der Stoel, while the latter could not exactly recall which country had approached him first. He could not exclude that it had been the Netherlands, although he did not think so. See: Interview with J.H.M. Pollmann-Zaal, 7 May 2004; Interview with M. van der Stoel, 16 June 2006

²⁴⁰ Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 20 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Head of the Atlantic Cooperation and Security Affairs Department, 18 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Fax from the Ministry of Foreign Affairs to the Embassy in London, 26 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

²⁴¹ Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 17 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

²⁴² See: Kuitenbrouwer, 1999; Casteleijn and Krop, 1994. See also: Kemp, 2001, p. 19 and 27.

²⁴³ Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Head of the Atlantic Cooperation and Security Affairs Department, 11 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign

had decided not to nominate Dienstbier as an opposing candidate, also gave its full support to Van der Stoel's candidacy, and Dienstbier even sent a personal message to the CSO to make clear that he would consider Van der Stoel an excellent choice.²⁴⁴

The only country that seemed to have a problem with nominating Van der Stoel for the function of HCNM, was the United States. Paradoxically, this was because it valued him so highly: at the Directorates on Middle East Affairs and International Organisations Affairs of the United States' State Department, the idea was not liked that Van der Stoel might not continue his function as a Rapporteur on Iraq of the UN Commission on Human Rights. These Directorates felt he was most needed in that function, and they also feared that Saddam Hussein would interpret Van der Stoel's candidacy for another post as a signal that most of the pressure was off for Iraq.²⁴⁵ However, because Acting Secretary Eagleburger had already promised Minister Van den Broek his support for Van der Stoel, the instructions of the American delegation were eventually changed accordingly.²⁴⁶

9.6.2 The discussion on budget and staff

Considering the broad support that the personality of Van der Stoel could count on, it would probably not have been too difficult to reach agreement on his appointment if the suspicion that the Netherlands had not always been completely honest about the question of a candidate had been the only problem. However, as was already mentioned in section 9.1.4, the other CSCE participating states were also indignant that the EU proposal on budget and staff deviated so much from the basic assumptions in Helsinki. The HCNM's mandate contained only one briefly worded paragraph on budget. It read: 'A separate budget will be determined at the ODIHR, which will provide, as appropriate, logistical support for travel and communication. The budget

Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 17 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

244 Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Head of the Atlantic Cooperation and Security Affairs Department, 11 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the Ministry of Foreign Affairs to the Embassy in Prague, and the Permanent Representative in New York for the Minister of Foreign Affairs, 21 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

245 Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 29 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

246 Code-message from the Ministry of Foreign Affairs to the Embassy in Washington, 31 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the Embassy in Prague on behalf of the delegation to the CSO, to the Ministry of Foreign Affairs, 17 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Facsimile message from the Atlantic Cooperation and Security Affairs Department to the delegation to the CSO, the Roving Ambassador, and the Political Affairs Section of the Atlantic Cooperation and Security Department, 17 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

will be funded by the participating States according to the established CSCE scale of distribution. Details will be worked out by the Financial Committee and approved by the CSO.²⁴⁷ These sentences could be interpreted in different ways, but it seemed logical that they would be explained according to the basic points of departure that the Netherlands had communicated in Helsinki. So, when a few months later, the EU presented a budget proposal that was much more far-reaching than anything that could have been expected on the basis of these earlier assumptions, the other CSCE participating states were staggered. The proposal caused serious offence, because several delegates believed that this surprise action had consciously been prepared by the Netherlands. Had the Netherlands really followed such a shrewd strategy? Had it misled the other CSCE participating states, or were there other reasons why the EU proposal was not in line with the expectations of other delegations?

What other countries had rightly observed was that the Netherlands had consciously tried to prevent a debate on the financial aspects of its proposal in Helsinki. The first priority of the Netherlands was to reach agreement on the creation of the post of a High Commissioner, and it assumed that the budget that he needed, would somehow be found when the decision to establish the function had been taken.²⁴⁸ Anything that could further complicate the already difficult negotiations should be avoided, and therefore, the Netherlands thought it would be better if the mandate would include only a brief provision on budget and staff. The details could later be elaborated upon. The general instruction that delegates should follow when other delegations inquired about the estimated budget was to restrict themselves as much as possible to an oral explanation on some basic points of departure.²⁴⁹

As was shortly explained in section 9.1.4, the Dutch proposal was, in the first place, based on the assumption that the function would, especially in the beginning, not require a full-time commitment, and would therefore not involve major expenditures. Some modest emoluments for permanent duties and a daily allowance and reimbursement of expenses for days on which the High Commissioner was travelling for the purpose of carrying out his function, would suffice. It was also presumed that ODIHR would, without any extension of staff, have the capacity to support the High Commissioner if this was needed. Finally, it was considered reasonable that the state that provided the candidate, would pay his emoluments and salaries of any personal staff, such as a personal assistant or a secretary, which would possibly be needed in the most likely case that the High Commissioner would prefer to perform his tasks from his

247 CSCE Helsinki Document 1992: The Challenges of Change, Chapter II, paragraph 37.

248 Interview with J.H.M. Pollmann-Zaal, 7 May 2004.

249 Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Legal Adviser of the Ministry of Foreign Affairs, 22 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

current place of residence. Daily allowances and reimbursements would be paid out of the CSCE budget.²⁵⁰

When the Netherlands began preparing the follow-up of the Helsinki decision to set up the post of the HCNM, the above assumptions were indeed taken as a starting point. However, when it discussed its proposals with other EU member states, there appeared to be general criticism on the idea that the post of the High Commissioner would initially be a part-time function. Some of the partners had also expressed the opinion that, in view of the need of complete independence, salaries of the High Commissioner and his staff should be financed by the CSCE, a point of view that other EU member states could agree with.²⁵¹ In this context, the Netherlands changed its earlier approach accordingly.²⁵² In the meantime, there had been contacts between the Dutch Ministry of Foreign Affairs and Van der Stoep. In considering whether he would make himself available for the function, Van der Stoep paid serious attention to the question of whether it would be possible to really make this instrument work.²⁵³ In view of this, he made clear to the Ministry of Foreign Affairs that the availability of

250 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 20 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Fax from the CSCE-delegation in Helsinki to the Political Affairs Section of the Atlantic Cooperation and Security Department, 3 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Legal Adviser of the Ministry of Foreign Affairs, 22 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992; Document entitled 'Dossier-notes for the lunch of the Minister with the EC Ambassadors', 27 April 1992, Archive MFA, CSCE 921.353.22, file: CSCE/Main Meeting Helsinki II 1992 – High Commissioner for Minorities, part 1, February 1992 – 2 June 1992.

251 Handwritten notes on a memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 20 July 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 17 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Fax from the Ministry of Foreign Affairs to the Embassy in London, 26 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

252 Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs, 24 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

253 Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Head of the Atlantic Cooperation and Security Affairs Department, 18 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Interview with M. van der Stoep, 16 June 2006.

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sufficient assistance was a pre-condition to his accepting the job.²⁵⁴ Although the Ministry's implicit assumptions had initially been different, it followed Van der Stoel's view, and explained to the EU partners that the quantity, diversity, sensitivity and urgency of the issues involved, justified provision of sufficient support staff to the High Commissioner. Apart from a secretary, he would need at least two diplomatic or academic assistants and, possibly, one or two more in the near future.²⁵⁵ The other EU states agreed.²⁵⁶

Hence, in a few months time, the basic points of departure saw some major changes, at least insofar as the EU partners were concerned. The other CSCE participating states were unaware of this development, because the mental jumps that were made within the EU were not communicated to them before the CSO meeting of September 1992.²⁵⁷ Internally, the Netherlands half blamed the United Kingdom, which had said it would, in its capacity of EU Presidency, inform the other participating states, but which, apparently, it had not done.²⁵⁸ However, in view of the lead position that the Netherlands had taken in respect to the HCNM-proposal, it could have been expected that it would carry out some consultations of its own as well, or it could at least have contacted the United Kingdom to be informed about the state of affairs and the first reactions of other CSCE participating states. None of this was done, and the budget that the Netherlands had circulated on behalf of the EU appeared completely unacceptable.²⁵⁹

As a result of this diplomatic blunder, the Netherlands was faced with a very problematic situation. On the one hand, undertakings had been given to both the EU partners and Van der Stoel, but on the other hand, it could not be denied that there was

254 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Roving Ambassador, 14 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs, through the Roving Ambassador and the Secretary-General of the Ministry of Foreign Affairs, 24 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

255 Fax from the Ministry of Foreign Affairs to the Embassy in London, 26 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

256 Handwritten fax from the delegation to the CSO in Prague to the Head of the Atlantic Cooperation and Security Affairs Department, without a date, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

257 Code-message from the CSCE delegation in Vienna to the Ministry of Foreign Affairs and the Ministry of Defence, 29 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

258 Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Roving Ambassador and the Secretary-General of the Ministry of Foreign Affairs, 28 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the Ministry of Foreign Affairs to the Embassies in Bonn, London, and Washington, and the CSCE mission in Vienna, 1 October 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

259 Handwritten fax from the delegation to the CSO in Prague, to the Head of the Atlantic Cooperation and Security Affairs Department, without a date, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

a gap between the proposals which were the result of those pledges, and assumptions on which the decision to establish a High Commissioner on National Minorities was based. Moreover, its international reputation was at stake, because many CSCE participating states believed that the Netherlands had misled them. The seriousness of the situation was illustrated by the calling-in of the Roving Ambassador, a high level diplomat who is available for all kinds of negotiations the Ministry of Foreign Affairs is involved in, but who is usually only brought into action in very delicate matters or situations where the Netherlands runs the risk of getting into deep water.²⁶⁰

In the short run, the most problematic aspect about the course of the negotiations for the Netherlands was that, pending final agreement on the financial matters related to the post of the High Commissioner, countries that did not agree with the proposed budget did not want to make any formal decision on Van der Stoel's appointment as the first HCNM.²⁶¹ Doubts about his nomination, however, should be avoided at all costs; not only because Van der Stoel had already been approached and many countries had already given their support for his nomination, but also because the media had already announced his candidacy.²⁶² For instance, on 16 September 1992, an article in a Dutch newspaper, *de Volkskrant*, carried the headline 'Van der Stoel Candidate Commissioner Minorities'.²⁶³ When this came to the ears of the Roving Ambassador, he was, so to say, 'not amused'. In a tart comment he communicated to the Ministry back home that he was increasingly stunned by the messages it sent, and according to him, this was already the umpteenth time the Netherlands had blundered in this case since the Helsinki Summit.²⁶⁴ In view of the emphasis that had continuously been put on the confidentiality of Van der Stoel's nomination and the course that the negotiations had now taken, it was indeed very unfortunate that this had now become known to the public.²⁶⁵

260 See, for instance: Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Roving Ambassador, 14 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 16 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

261 Code-message from the Embassy in Prague on behalf of the delegation to the CSO, to the Ministry of Foreign Affairs, 17 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

262 Facsimile message from the Atlantic Cooperation and Security Affairs Department to the delegation to the CSO, the Roving Ambassador, and the Political Affairs Section of the Atlantic Cooperation and Security Department, 17 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

263 'Van der Stoel kandidaat Commissaris Minderheden' [Van der Stoel candidate Commissioner Minorities] – in: *de Volkskrant*, 16 September 1992, p. 3.

264 Memorandum from the Roving Ambassador to the Head of the Atlantic Cooperation and Security Affairs Department, 17 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

265 The Minister himself had stressed the confidential character of the nomination, and it had even been recommended to avoid communication by code-messages with respect to this topic. See: Memorandum

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It was of great importance to the Netherlands to solve the problems as soon as possible. As was described earlier in this chapter, the Netherlands was prepared to cover part of the costs, and to pay for a diplomatic assistant and office space. The other assistants could then be seconded by other participating states, while the HCNM's salary would be paid out of the CSCE budget.²⁶⁶ While this largely removed the financial objections against the earlier EU proposal, it did not satisfy the United States. The United States insisted the High Commissioner should be seconded by one of the participating states. The CSCE's practice of secondment of professional staff by national governments was established at the Paris Summit of November 1990, where the organisation's first permanent administrative organs (a Secretariat, CPC and ODIHR) had been created. It had been a conscious decision to do so, because it prevented the creation of new bureaucracies and reduced the costs.²⁶⁷ The United States wanted to stick to this tradition and, contrary to many other states, it was not susceptible to the argument that in view of his great responsibilities in a very sensitive area, the HCNM's complete independence would be more important than had been the case with previously established functionaries.²⁶⁸ Other aspects which the United States did not like, were the proposal that the HCNM should have a separate staff and would have his seat in The Hague; it preferred a close association with ODIHR in Warsaw, because that would make it clear that the High Commissioner was not a separate institution.²⁶⁹

from the Minister of Foreign Affairs to the Atlantic Cooperation and Security Department through the Secretary-General of the Ministry of Foreign Affairs and the Director-General Political Affairs, 18 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Political Affairs Section of the Atlantic Cooperation and Security Department to the Head of the Atlantic Cooperation and Security Affairs Department, 18 August 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Atlantic Cooperation and Security Affairs Department to the Information Department, 14 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

²⁶⁶ Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 16 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Roving Ambassador and the Secretary-General of the Ministry of Foreign Affairs, 24 September 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

²⁶⁷ Pagani, 1997, p. 329; Bloed, 1993a, p. 15.

²⁶⁸ Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 15 October 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Secure fax-message from the Embassy in Washington to the Atlantic Cooperation and Security Affairs Department of the Ministry of Foreign Affairs, 20 October 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

²⁶⁹ Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Roving Ambassador and the Secretary-General of the Ministry of Foreign Affairs, 9 October 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Secure fax-message from the Embassy in Washington to the Atlantic Cooperation

The Netherlands had intensive contact with the United States to try and convince it to accept the Dutch proposals; initially, without much success. Yet, the Netherlands, on its part, was not prepared to give in to the American demands, basically for two reasons. In the first place, concessions to the United States were likely to break the consensus among the EU member states whose support would also be needed for a decision by the CSO. In the second place, the idea that it would have to pay for the salary of the HCNM did not attract the Netherlands, especially since considerable financial concessions had already been made.²⁷⁰ Whatever the exact weight of each of these considerations, the strategy it led to was in any case one of isolating the United States. Although there were also other participating states that were critical of the Netherlands' proposals, most states were now in agreement with them and the pressure on the United States increased considerably.²⁷¹

This clearly irritated the United States. Not only was it concerned about the increasing EU bloc-formation that it saw itself confronted with, but it also took offence at the Dutch attitude, because it believed that the Netherlands had consciously prepared the 'EU coup' earlier in the negotiations.²⁷² Only after the Netherlands had shown the United States some documents that proved that the modifications originated from other EU members, such as France, Denmark and Italy, did it seem to become more favourably disposed to reaching a final compromise.²⁷³ On 18 November, the United States

and Security Affairs Department of the Ministry of Foreign Affairs, 20 October 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

- 270 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 3 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 30 October 1992, Archive MFA, DDI-DAV, July-October 1992, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the CSCE delegation to the Ministry of Foreign Affairs and the Ministry of Defence, 3 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.
- 271 Memorandum from the Head of the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 3 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the Embassy in Prague to the Ministry of Foreign Affairs, 6 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.
- 272 Code-message from the Embassy in Prague to the Ministry of Foreign Affairs, 6 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 26 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.
- 273 Code-message from the Embassy in Prague to the Ministry of Foreign Affairs, 6 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 18 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

gave up its resistance and accepted the financial modalities as proposed by the EU and the Netherlands, on the condition that the CSCE approval would only be given for the period of one year, that the budget was in one way or another linked to that of ODIHR, and that it would be made explicit that it would not set a precedent for the future structure of the CSCE.²⁷⁴ This opened the way for final agreement on the budget and staff, and the formal appointment of Van der Stoel.

The latter started his work from an office in The Hague in early 1993.²⁷⁵ Apart from the Netherlands, Sweden and Poland also seconded an assistant, and a fourth assistant was temporarily appointed with the support of a private American foundation. In addition to these diplomatic assistants, the staff included a secretary, who was seconded by the Dutch Ministry of Foreign Affairs.²⁷⁶ Hence, upon the total amount of staff members, half had Dutch nationality. This, together with the fact that the High Commissioner's Office was situated in The Hague, surely suggested a close connection between the Dutch government and the HCNM. Under Van der Stoel, support from the Dutch government remained strong indeed. The Ministry of Foreign Affairs contributed financially to some of the HCNM's conferences and projects, and provided him with copies of diplomatic messages that could be important for his work.²⁷⁷ Without a doubt, this facilitated the work of the HCHM. However, even though such close relations need not necessarily harm the High Commissioner's independence, in view of the principled position that the Netherlands defended in respect to the payment of the HCNM's salary, it was at the very least remarkable that not more distance was kept.²⁷⁸

9.7 CONCLUSION

In an overview article on the Netherlands' human rights policy, Peter Baehr has called the establishment of the post of an HCNM 'probably the most successful Dutch initiative within the OSCE'.²⁷⁹ This success could be achieved partially because of the favourable international circumstances. In preceding years, the time had not been ripe

274 Code-message from the Embassy in Washington to the Ministry of Foreign Affairs, 18 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Memorandum from the Atlantic Cooperation and Security Affairs Department to the Minister of Foreign Affairs through the Director-General Political Affairs and the Secretary-General of the Ministry of Foreign Affairs, 18 November 1992, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie.

275 Kemp, 2001, p. 19.

276 CSCE Communication no. 53, 16 February 1993, Archive MFA, DDI-DAV, November 1992 – March 1993, file: 921.353.22/dav/pn/cvse/hcnm/coordinatie; Bloed, 1993b, p. 47.

277 Kemp, 2001, p. 93-94; Interview with M. van der Stoel, 16 June 2006.

278 In this respect, note should be taken of a question that has been posed by Dutch scholar Van der Meulen in a book review on Walter Kemp's study of the HCNM work. He suggested that it would be interesting to know to what extent the close ties between the Dutch Ministry of Foreign Affairs and the HCNM led to a similarity of opinions. See: Van der Meulen, 2002, p. 227.

279 Baehr, 2000, p. 67.

for an instrument that was particularly focused on minority issues, but after the escalation of the crisis in Yugoslavia, the feeling that something must be done about minority-related conflicts in the CSCE area was particularly strong. This was especially true for the Netherlands. In the second half of 1991, it held the presidency of the EC, as a consequence of which it was closely involved in international attempts to calm down the situation and to stop the fighting. However, to the great frustration of the Netherlands, the EC was unable to make a difference, and could not prevent the situation from going from bad to worse.

For humanitarian as well as security reasons, the Netherlands considered it of crucial importance to avert comparable violent conflicts in other CSCE countries, where minority-related tensions existed. For this reason, and perhaps also because it hoped to be able to restore its damaged international reputation, the Netherlands initiated negotiations on the establishment of an HCNM. The Netherlands gave high political priority to this proposal, and the Minister of Foreign Affairs was personally involved in the matter from the beginning until the end. Minority issues and the threat of a growing number of civil wars in Europe were one of the main concerns of all European leaders in this period, but again, this was in particular true for the Dutch Minister, for whom the EC's failure to keep the situation in Yugoslavia under control had been an almost traumatic experience.

A unique aspect of the Dutch proposal was that it suggested that the HCNM would be able to act independently from the CSCE participating states. He would be able to get involved in a situation, to collect information, and even pay a visit to the territory of a state without its explicit consent or support. For the Netherlands, this was one of the most crucial aspects of the draft mandate, because it believed that the effectiveness of the instrument would otherwise be diminished considerably. Yet, for a number of other states, this was difficult to accept, and the Netherlands had to make concessions to obtain broad support for the HCNM-proposal. It was prepared to accept a certain measure of accountability to the political organs of the CSCE, but it drew a line at suggestions that were intended to give these organs the possibility to give the High Commissioner instructions or to control him.

The Netherlands also refused to meet the request of, in particular, the United States to broaden its proposal so as to include all human dimension issues. The main reasons were that the instrument would then lose its focus and that it would then be more difficult to address questions that were outside the strict scope of the human dimension. To meet the concerns of the United States and other participating states that were concerned about the idea of an instrument that was particularly focused on minority questions, the Netherlands was, on the other hand, prepared to amend its initial draft so as to make it clearer that the High Commissioner would take an independent position between the parties and would not necessarily be on the minorities' side.

Another way to meet the concerns of the proposal's most vocal opponents was to restrict the scope of the High Commissioner's mandate and to make clear that he would have no business in their territories, and would instead focus on problems that existed in the former communist states in Central and Eastern Europe. From a strict

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human rights perspective, this decision can be criticized because it is not in line with the general idea of the universality of human rights. Perhaps critical remarks can also be made about the Dutch decision that the High Commissioner would not deal with individual complaints. After all, the possibility for an individual to claim his rights is usually considered essential, also when minority issues are concerned.²⁸⁰ However, it should be realized that the main aim of the proposal was to prevent conflicts. In this context, the protection of minority rights was important only insofar as it could contribute to a better security situation, and it was not the final goal for which this instrument was developed. It is really hard to predict whether different priorities would have been set if other parts of the Dutch bureaucracy had been responsible, but what can in any case be said is that the approach that was chosen was in line with the bureaucratic mission of the Atlantic Cooperation and Security Affairs Department, which was responsible for the HCNM-proposal.

In view of the sensitivity of the topic and the intrusive elements in the HCNM's mandate, it was quite an accomplishment that the Netherlands succeeded in obtaining its adoption, especially because the consensus of all CSCE participating states was required. Apparently, it did not need encouragement from NGOs; there were almost no lobbying attempts from these organisations, but nonetheless, the Netherlands persevered in spite of many obstacles. In view of this, it was regrettable that the Netherlands made so many mistakes in the next phase, in which decisions on a candidate and budget needed to be made. At that stage, many other CSCE participating states came to believe that the Dutch motives behind the proposal had been less honourable than they had been led to believe in Helsinki. However, what these states saw as a diplomatic trick was actually a diplomatic blunder. It is true that the Netherlands continued to be associated with the HCNM, because of Van der Stoep's appointment, the establishment of an office in The Hague, and financial contributions. In hindsight, this has perhaps been favourable for The Hague's image as the 'legal capital of the world',²⁸¹ but when the Netherlands first launched the idea of a High Commissioner, it was most of all concerned with the development of an instrument that could contribute to a peaceful solution of minority-related conflicts. In spite of the imperfections in the HCNM's mandate, the Netherlands can be said to have achieved that goal.

280 In its advice on the topic of national minorities, the Dutch Advisory Committee on Human Rights and Foreign Policy did indeed raise these issues. See: Advisory Committee on Human Rights and Foreign Policy, 1996, p. 19-20 and 28.

281 Van der Wusten, 2006, p. 255-256.

CHAPTER 10

CONCLUSIONS

This study has investigated the Netherlands' policies towards the creation of international human rights instruments from the late 1970s to June 2006. The case studies that have been dealt with in this book, have demonstrated that in negotiations on such instruments the Netherlands had to determine its position on a great variety of questions, and obviously, no two cases were completely the same. Nonetheless, together they provide for a general understanding of the Netherlands' policies and the factors that have influenced its position.

The introduction of this book included a number of research questions that have been examined throughout this study. The questions were:

1. What position did the Netherlands take in negotiations on international human rights instruments, and how did the Netherlands apply in practice the general guidelines that were laid down in formal foreign policy papers?
2. Did the Netherlands actually perform the role of a 'guiding' human rights country in these negotiations, as some would seem to presume, or did it rather follow generally prevailing preferences or international trends?
3. What role, if any, did policy interests other than the aim to promote human rights play in the determination of the Dutch position in negotiations on international human rights instruments?
4. What influence, if any, did parliament, NGOs or transnational human rights networks exert on the Dutch position in negotiations on international human rights instruments?
5. What effect, if any, did the involvement of different bureaucratic institutions have on the Dutch position in such negotiations?

The conclusions drawn from the case studies are evaluated in this chapter. The first three sections are devoted to the contents and general characteristics of the Netherlands' policies, hence: questions one and two. Section 10.1 goes into the standard setting policies, and section 10.2 deals with the development of supervisory mechanisms. Section 10.3 tries to put the conclusions of the preceding sections in a broader context and tries to evaluate to what extent the Netherlands actually performed the role of a 'guiding' country, as is so often assumed. Section 10.4 to section 10.6 draw conclusions on the factors that can explain the Netherlands' policies; they deal with the third, fourth and fifth research question respectively. Some final observations conclude this chapter.

10.1 STANDARD SETTING

The Netherlands' policy principles with respect to international human rights norms reveal a dilemma in regard to the question of the desirability of further standard setting efforts. In its 1979 policy paper on human rights and foreign policy, the Netherlands' government expressed the opinion that standard setting was almost completed in the field of international human rights. On the other hand, it did not exclude the possibility that norms of a supplementary nature might still prove necessary, and it indicated that it wanted to actively participate in the elaboration of further standards. Clear and unequivocal policy choices were thus avoided. This study has made clear that this ambiguity was also reflected in the Netherlands' policy practices in the field of human rights standard setting.

Sometimes, the Netherlands sympathized with initiatives to develop further human rights standards right from the start. Cases in point are the series of non-binding UN-instruments to combat torture in the late 1970s and 1980s. When the issue of minority rights began to be taken more seriously in international organisations, the Netherlands was also positively disposed towards the creation of additional norms to meet the specific human rights needs of these groups of people. Nonetheless, more often than not, the Netherlands was cautious, or even opposed to new standard setting initiatives at first, especially if it concerned legally binding treaties. Two examples to illustrate this are the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, and the UN Convention on the Rights of the Child of 1989. In both cases, the formal argument was that the newly proposed treaty did not have any additional value because, for one reason, the text of the draft was similar to a Declaration that had already been adopted on the same issue.

In comparison, resistance to the idea of a convention on children's rights was strongest. Contrary to the prohibition of torture, children's rights were not generally accepted as a human rights topic in the Netherlands, and in the past, the Netherlands had shown itself opposed to the recognition of children's rights on several occasions: it tried to prevent the inclusion of an article on children's rights in the International Covenant on Civil and Political Rights, and it only reluctantly accepted a UN Declaration of the Rights of the Child in 1959. In the negotiations on the Convention on the Rights of the Child, the Netherlands applied a strategy of passive resistance at first, but when the negotiations gradually gained momentum it changed its attitude, and in the end it became one of the most active participants in the Working Group that drafted the Convention. The Netherlands did not want to stay behind in international developments, and when it became obvious that the Convention had a real chance of being adopted, the Netherlands felt it would be better to try and make sure the end result would be something that it could live with than to stay aloof and miss the opportunity to exert influence. Apparently, the Netherlands was satisfied with the final text, because in its policy papers the Convention on the Rights of the Child was later mentioned as an example of standard setting that had indeed been of a supplementary character.

In the negotiations on the UN Convention against Torture, the Netherlands also changed its stance in the course of the drafting process. Among policy-makers, there had always been voices in favour of this Convention, and from 1980 nongovernmental pressure tipped the balance against those who questioned the desirability of this Convention. The last three drafting years, the Netherlands even got a special role to fulfil because its delegate, Herman Burgers, was elected Chairman-Rapporteur of the Working Group that prepared the text of the Convention. It is remarkable to note that once its name became so closely associated with this treaty, the Netherlands also changed its views about the additional value of the Convention. Just like the Convention on the Rights of the Child, in hindsight it was presented as a standard setting effort that led to norms of a clearly complementary nature. Here, however, the final treaty did not differ very much from the initial draft, and insofar as there had been any changes, they caused Amnesty International to change its opinion about the Convention in the opposite direction: whereas it supported the Convention in the beginning, it had come to doubt its value in the end. This makes clear that the question of whether newly proposed norms were expected to supplement existing law not only influenced the Dutch position towards these proposals, but that it also worked the other way around: the question as to what extent it had been involved in the creation of certain standards also affected the Netherlands' judgement about their additional value.

The emphasis that was put on the question of whether a new treaty would have additional value implied that the Netherlands did not, in principle, find it useful to draft new treaties if they only repeated standards that had already been agreed upon before. That this could indeed have certain important disadvantages becomes clear from the case study on the Convention on the Rights of the Child, which demonstrated that a repetition of existing norms could not only lead to unnecessary duplication, but could also result in the drafting of standards that compared unfavourably with those laid down in previously adopted treaties. The Netherlands was not always able to convince other states that this was undesirable, and occasionally, it had an interest in a slightly diminished level of protection itself, but generally speaking, it can be said that the Netherlands tried its best to prevent the watering down of existing human rights law.

What is also suggested in the above, is that the Netherlands tended to evaluate new standard setting more positively if it added something substantial to existing human rights treaties. One way to give a proposed instrument additional value was to incorporate new rights, and this is exactly what the Netherlands aimed for in the case of the UN Convention on the Rights of the Child. It attached particular importance to the formulation of new rights that were specifically designed to meet the needs of children, and that were not included in UN Covenants. In the light of the above argumentation, this may have been the most logical thing to do, but obviously there was some tension with the Netherlands' general belief that states should be careful not to bring too many issues under the concept of human rights, because it might in the long run lead to an 'inflation' of rights. This concern was expressed in the Netherlands' policy memoranda on human rights and foreign policy. Moreover, it should not be forgotten that the idea

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that children's rights were a peripheral human rights issue had been one of the reasons why the Netherlands initially doubted the desirability of a special treaty on this topic in the first place. In spite of this, the argument that a standard setting initiative should better not be pursued because too many norms would eventually endanger the status of human rights as rights of a special category, was never raised in public, neither in this case, nor in any other. Perhaps, the reason was that it would be difficult to explain why a line should be drawn exactly at the creation of one individual standard in particular, especially if other treaties, to which the Netherlands had already committed itself, were drawn up simultaneously.

What can nonetheless be concluded is that the Netherlands was aware that there was always a danger that the establishment of new normative rules would harm human rights principles that had already been adopted, be it directly through the drafting of less protective standards, or indirectly through an increasingly broadened interpretation of the human rights concept. There were also other factors that played a role, which will be discussed later in this chapter, but in general terms one can say that this explains the general attitude of caution that was visible in the attitude of the Netherlands towards new standard setting activities.

In order to put the Netherlands' policies into perspective, it should be realized that it was not the only country that tended to focus on the adverse consequences of further human rights standard setting. Australia, for instance, took the lead in drafting General Assembly resolution 41/120, which called upon the UN member states to accord priority to the implementation of existing standards and which presented a number of guidelines that states should bear in mind whenever new standards were being developed. They included, among others, the principle that new standards should be of a fundamental character and be consistent with the existing body of international law.¹ Furthermore, statements made on behalf of the European partners also underlined that new drafting initiatives should be taken under certain conditions only.² In the context of consultations on UN standard setting activities that were organised by the Council of Europe in the late 1980s, it was even suggested by some states that the United Nations should declare a moratorium on the creation of human rights conventions.³ These suggestions, however, were not elaborated upon. Apparently, the participating states (which included members as well as Western non-members of the Council of

1 This resolution was adopted on 4 December 1986. In November 1989, a report was published by the United Nations, in which the issue of the proliferation of human rights was extensively discussed. See: UN Doc. A/44/668, p. 53-68.

2 See, for instance: Ministerie van Buitenlandse Zaken, 1991, p. 419-420; Ministerie van Buitenlandse Zaken, 1992, p. 416-417.

3 Fax from the Secretariat of the Council of Europe to the Head of the Legal and Social Affairs Division of the Ministry of Foreign Affairs, 17 October 1988, Archive MFA, VN 1985-1994, 999.232.150, file 6373; Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Strasbourg, 2 February 1989, Archive MFA, VN 1985-1994, 999.232.150, file 6374; Code-message from the Ministry of Foreign Affairs to the Permanent Representatives in New York and Geneva, 28 September 1988, Archive Ministry of Justice, unfiled records.

Europe) shied away from radical measures, and wanted to leave open the possibility of drawing up additional norms. A moratorium on further human rights standard setting would have had the disadvantage that it might inhibit states to react to changing insights and circumstances, and it is understandable that it was therefore felt to be difficult to actually draw a line. Furthermore, it was questionable whether a moratorium would be widely acceptable among UN member states.⁴ Yet, in practice, not drawing a line unavoidably meant a continuing proliferation of international human rights norms.

With respect to the Netherlands, it is relevant to note that it did speak out publicly against unlimited drafting activities in general, but as soon as concrete proposals were concerned, it was less open about its hesitations. As was mentioned, the Netherlands usually confined itself to the expression of doubts about a new instrument's additional value, while fundamental questions about the long-term consequences were not usually raised. Yet, apparently, for the government even this was considered a delicate matter, and it seemed to prefer not to draw attention to *any* objections against newly proposed human rights instruments. In the policy papers the Dutch government sent to parliament, there were always a lot of instruments included that the Netherlands was in favour of and drafting exercises that it did not, or not yet, support, usually did not receive attention. Apparently, the government was not convinced that its arguments would be understood, and afraid to be blamed by those that did appreciate the development of new international human rights norms. Taking position against a human rights treaty would of course easily be interpreted as opposition against the idea of human rights protection itself, and if the Netherlands were to reject a standard setting proposal, it would not be difficult for its proponents to picture the Netherlands as a country standing out of the community of 'civilised nations', especially if its concerns were supported by human rights violating regimes.

As a consequence, the Netherlands never went so far as to try and block the drafting of a new standard, and normally adapted its stand to those in favour of new norms when the negotiations seemed to gain momentum. Apart from the examples of the UN Convention against Torture and the UN Convention on the Rights of the Child, the cases of the Protocol on the Sale of Children, Child Prostitution and Child Pornography, and the proposed International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, which has been mentioned in the margin of this study, demonstrate this too. Hence, in spite of frequently occurring initial doubts, in the end the Netherlands has always gone with the codification flow.

⁴ Code-message from the Ministry of Foreign Affairs to the Permanent Representative in Strasbourg, 2 February 1989, Archive MFA, VN 1985-1994, 999.232.150, file 6374. See also: UN Doc. A/44/668, p. 60.

10.2 SUPERVISORY PROCEDURES

In regard to the issue of international supervision, the government's policy principles were formulated more plainly than those concerning standard setting. The Netherlands maintained that it would always lend full support to the most effective forms of supervision. It declared itself in favour of the principle that all norms should at least be supplemented with a complaints procedure. Reporting procedures were considered useful, but insufficient monitoring mechanisms. In practice, however, this basic idea was not structurally applied.

First of all, the Netherlands did not easily accept complaints procedures if economic and social rights were concerned. Like other countries, the Netherlands repeated the mantra of the indivisibility, interdependence and equal importance of the different categories of rights on several occasions. In practice, economic and social rights received less attention than other rights, but as the case of the Convention on the Rights of the Child has demonstrated, the Netherlands did not consider these rights unimportant either. As compared to the United States it was clearly prepared to accept and promote a higher level of protection, and in the Council of Europe, it appeared to be prepared to accept all provisions of the European Social Charter. On the other hand, the Netherlands also felt that economic and social rights were of a different category; they were, so to say, of equal importance, but not equal. The Netherlands denied the justiciability of social and economic rights, which means that it held the view that these rights do not grant direct entitlements to the individual that can be invoked before a court. The government believed that contrary to the rights in, for instance, the International Covenant on Civil and Political Rights, internationally recognized economic and social rights should therefore be seen as policy objectives rather than as directly enforceable obligations.

Naturally, this point of view also had some consequences for the kind of supervisory mechanisms the Netherlands was willing to lend its support to. At the time the two UN Covenants were drafted, the Netherlands had, together with other Western countries, resisted the incorporation of all rights in one convention. In the Council of Europe, it had also fully agreed with a separation of the two categories of rights in two treaties, and when proposals to add some economic and social rights to the European Convention for the Protection of Human Rights and Fundamental Freedoms were raised in the late 1970s, the Netherlands strongly resisted this. The main reason was that it did not want complaints to be lodged and ruled upon by an independent court in the field of economic and social rights. At first, the Netherlands had objections against the design of a separate complaints procedure under the European Social Charter too, when this was suggested as a part of the reform process in the 1990s, but in the course of the negotiations it changed its mind and started to help draft what would eventually become the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints. The Protocol was modelled on the ILO's special Freedom of Association complaints procedure system, which meant, among others, that it was a collective complaints procedure. Only certain workers' and

employers' organisations and NGOs could submit a petition; individual complaints were not possible. For the Netherlands, this was a precondition for its support.

It should be noted though that the Netherlands supported, and even advocated the adoption of individual complaints procedures for a couple of UN Conventions that included civil and political as well as economic and social rights; namely, the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 and the Convention on the Elimination of All Forms of Discrimination against Women, to which a complaints protocol was added in 1999. On the other hand, the Netherlands has, up to now, not made a clear choice in favour of a complaints protocol to the International Convention on Economic, Social and Cultural Rights, which is currently under discussion in the United Nations. As will be further explained in section 10.4, this has to do with the fact that the two treaties that were mentioned first, deal with non-discrimination. As a consequence, complainants are only able to raise questions about discrimination in the field of economic and social rights, and not about the level of protection as such.

General reluctance to accept the justiciability of economic and social rights was also a reason for the Netherlands to reject the incorporation of complaints procedures under the UN Convention on the Rights of the Child. This, however, was not the only argument. Whereas human rights treaties normally deal with the rights of individuals that are in a direct relationship with the state, in the case of children this relationship is both direct and through their parents. In this triangular relationship, a communications procedure would be much more difficult to apply, and ultimately, it might lead to a juridification of the relation between the child and its parents. This was something that the Netherlands wanted to avoid. Hence, apparently, doubts about the desirability of complaints procedures do not occur in the field of social and economic rights only. This becomes even more clear if one also includes the question of minority rights. In the case of the High Commissioner on National Minorities, an individual complaints procedure was considered undesirable, among others because a sound legal basis for such complaints was lacking. However, as its policies in the negotiations on minority rights instruments in the Council of Europe show, the Netherlands did not consider it desirable to create such a legal basis either. In respect to minority issues, it preferred a political and more flexible approach, and it did not favour the idea of standards that the individual could invoke as directly applicable rights before a court or a semi-judicial supervisory body.

All in all, the UN Convention against Torture is the only case dealt with in this study that demonstrates a clear and unconditional commitment in favour of the establishment of complaints procedures on the part of the Netherlands. The Netherlands attached importance to their inclusion, and in regard to the interstate complaints procedure, it proposed that it would be of a mandatory character, and not of an optional character as the Swedish draft indicated. Furthermore, the cases of the Optional Protocol to the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against

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Women, which were referred to in the margins of this study, prove that efforts in support of complaints procedures were not exceptional for the Netherlands, but it is clear that there are also several human rights issue areas that the Dutch government has not seen fit for supervision by a complaints procedure.

In the case of the UN Convention against Torture, the Netherlands aimed at the most effective forms of supervision in other ways as well. It resisted communist bloc attempts to replace the Committee against Torture's competence to make 'comments and suggestions' by a more restricted formulation of 'general comments', which, contrary to the original formulation, would not provide for many possibilities to address individual countries. The Netherlands was also strongly opposed to Soviet attempts to erode the inquiry procedure that could be invoked if the Committee received reliable and well-founded indications of the occurrence of a systematic practice of torture on the territory of a state party, and it insisted that this procedure should be mandatory. It only reluctantly agreed with a Byelorussian proposal for an opt-out clause in the final stages of the negotiations.

In fact, the Netherlands had even preferred to go much further than this system of post facto enquiries, especially because it felt that the Convention would not otherwise add much to existing instruments. Contrary to many other states, it did not expect much from the establishment of a system of universal jurisdiction. As the state where the act of torture had been committed would not be very likely to cooperate, it expected problems with furnishing proof if torturers were prosecuted in states that did not have any link with the act of torture whatsoever. Its conviction that torture should therefore be prevented from entering the sphere of international criminal law determined the position of the Netherlands already at the time of the drafting of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1975, and it was still very important when a Convention was eventually drawn up.

According to the Netherlands, the preventive mechanism of regular visits that had been proposed by Swiss Jean-Jacques Gautier was more likely to make the combat against torture more effective, and therefore it proposed to incorporate it as an integral part of the Convention. This proved to be far too ambitious, but in the Council of Europe a similar system was adopted only a few years later, and in the 1990s, the issue also recurred on the UN agenda in the form of a Costa Rican proposal for an Optional Protocol to the UN Convention against Torture. The Netherlands approved of the idea of a European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, but in light of the strong feelings the Netherlands had demonstrated in regard to the system of preventive visits during the negotiations on the UN Convention against Torture, it is remarkable to note that it did not show any particular enthusiasm now. And although the Netherlands tried its best to secure the strongest possible provisions in the negotiations on the later discussed Optional Protocol to the UN Convention against Torture, it must also be noted that it had reservations about the desirability of the project at the same time. In terms of budget

and manpower, the Protocol would put a considerable burden on the UN Human Rights Office in Geneva, and the Netherlands also had objections against possible overlap with the European system.

The policy papers of the Dutch government do not indicate great concern about the proliferation of supervisory procedures, and its efforts to create a Special Rapporteur on Torture just one year after a Convention had been adopted on the same matter illustrate that in the 1980s, the Netherlands did indeed prefer overlap to gaps when it came to supervision of fundamental human rights norms. The first signs of discomfort with the accumulation of control machinery became visible in the field of reporting. The growing amount of reporting procedures put an increasing burden on the Dutch national bureaucracy. It was because of this that the Netherlands did not want to accept a reporting frequency of less than once every five years in the case of the UN Convention on the Rights of the Child, and that it submitted proposals for an alternative reporting cycle under the European Social Charter. The Netherlands' hesitation to ratify the Protocol to the UN Convention against Torture can also be explained as a sign that the Dutch government has begun to consider the growing amount of supervisory systems as a problem. The fact that the Netherlands was opposed to the proposal to create a separate supervisory committee for the newly drafted International Convention for the Protection of All Persons from Enforced Disappearances points in that direction, too.⁵

The independence of supervisory procedures was a matter in regard to which the Netherlands' behaviour was more consistent than with respect to the issues discussed thus far. In the negotiations on the CSCE High Commissioner on National Minorities, for the Netherlands, the independence of this functionary was one of the central elements in the mandate. It had to make concessions, because its proposal could only be adopted by consensus, but it tried to restrict the involvement of the CSCE's political organs to a minimum, and to ensure that the High Commissioner could pay visits to the territory of a state without having to ask its government for permission. The condition of unrestricted possibilities for state visits was also important to the Netherlands in the negotiations on the Protocol to the UN Convention against Torture. Other instances where the Netherlands took a position in favour of an independent supervisory organ were the UN Convention against Torture, the UN Convention on the Rights of the Child, and the Framework Convention for the Protection of National Minorities. Furthermore, it should be noted that the Netherlands also consistently argued in favour of financing supervisory procedures from the budget of the international organisation in the context of which it had been developed. In this regard, the CSCE High Commissioner on National Minorities and the UN Convention on the Rights of the Child are clear cases in point.

⁵ Appendices to the reports of the Second Chamber, 2005-2006, no. 152, p. 327-328; UN Doc. E/CN.4/2006/57, p. 18. See also: UN Doc. E/CN.4/2005/WG.22/CRP.11/Rev.1.

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In regard to monitoring the implementation of social and economic rights, the Netherlands was a bit more careful with the removal of political elements from the procedure, although it must be added that it was prepared to go further than several other states. This is most evident from the position it took in the negotiations on the Protocol Amending the European Social Charter and the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints that were adopted in the first half of the 1990s. The Protocols were meant to reform the monitoring mechanism of the European Social Charter so as to make them more effective and influential. In principle, the Netherlands was positively disposed towards these initiatives, and it supported the formulation of a clearer division of tasks between the Governmental Committee and the Committee of Independent Experts. Yet, it disapproved of suggestions to delete the state-controlled Governmental Committee, or to change it into a tri-partite organ, in which employers' and workers' organisations could participate similar to the way they could in the ILO. At first, it also wanted to keep the Governmental Committee involved in the newly proposed complaints procedure, but in the course of the negotiations, it reconsidered its position and reached the opposite conclusion. From that moment, it belonged to the strongest opponents of inclusion of the Governmental Committee in this procedure. Nonetheless, a political element remained in the procedure, and an elimination of the role of the Committee of Ministers was not even discussed. The Netherlands instead concentrated on ways to improve its functioning in the supervision of the Charter. Therefore, it was strongly in favour of reforms that were aimed at the removal of the procedural obstacles that stood in the way of the adoption of recommendations to individual countries by the Committee of Ministers as a part of the reporting procedure.

In comparison with the position of the Netherlands in discussions relating to the measure of independence granted to the supervision of the European Social Charter, Dutch initiatives towards the creation of an independent Committee on Economic, Social and Cultural Rights in the United Nations were more in line with its general preference for independent supervisory organs. At the time of the drafting of the International Covenant on Economic, Social and Cultural Rights, the Netherlands had already manifested a preference for an independent expert committee to advise ECOSOC, as was proposed by Italy. However, this did not encounter much support among other states, and eventually, it was decided that the responsibility to monitor this Covenant would be granted to ECOSOC. The Netherlands was not satisfied with the functioning of the Sessional Working Group of government representatives though, and in the first half of the 1980s, it tried its best to replace this Working Group with an independent supervisory organ. Even though the differences with the position taken in regard to the monitoring mechanisms of the European Social Charter should not be exaggerated – after all, the Netherlands did not propose to completely detach the Committee from ECOSOC either – its active involvement in the realisation of a reporting system for the International Covenant on Economic, Social and Cultural Rights that was comparable to that of the International Covenant on Civil and Political

Rights shows that its attachment to a political stage in the procedure was less predominant here than in the case of the European Social Charter.

The comparatively strong attitude of caution in the reforms of the European Social Charter can also be seen in the Netherlands' dual position in regard to the question of the role of NGOs. It agreed with the general analysis that a greater involvement of workers' and employers' organisations and NGOs that were active in the fields covered by the Charter could improve the functioning of the European Social Charter, but on the other hand, it must be noted that the Netherlands was reluctant to allow unrestricted participation of international NGOs with consultative status to the Council of Europe. This was most evident in the negotiations on the Collective Complaints Protocol, in which the Netherlands proposed to limit access to the procedure to international NGOs that had been put on a list drawn up particularly for that purpose. The Netherlands agreed that the Governmental Committee was the right organ to decide upon the acceptance of NGOs that applied to be included in the list, and if other states had insisted on the exclusion of these NGOs from the complaints procedure, the Netherlands would have been able to accept that too. In none of the other case studies did the Netherlands display negative feelings about NGO-involvement; it thus seems to have been the exception rather than the rule.

Generally speaking, the Netherlands can be said to have lived up to its commitment to develop effective supervisory procedures, especially where the independence of the monitoring organs was concerned. However, it must be noted that the amount of energy it was prepared to devote to the issue differed from case to case and that the qualification of effectiveness was not always interpreted in the same way. Contrary to its own policy principles, it did not always stimulate the adoption of complaints procedures. This kind of mechanism was, according to the Netherlands, not suitable for monitoring the standards set in the field of children's rights and minority rights. It also found it difficult to accept communication procedures in the realm of economic and social rights, but at least it was able to support them under certain conditions. The Netherlands can be said to have applied double standards in particular where economic and social rights were concerned. This is most of all illustrated by its position in regard to the reforms of the European Social Charter. Contrary to all of the other cases dealt with in this study, the Netherlands was not willing to take an independent supervisory procedure as a point of departure in the negotiations. At the same time, it should be noted that none of the other countries involved was in favour of such a procedure; as compared to some other countries, the Netherlands certainly did not take a minimum position.

10.3 A LEADING HUMAN RIGHTS COUNTRY?

It is evident from the previous two sections and from the case studies described in this book, that the Netherlands was an active participant in international discussions concerning newly proposed human rights instruments. It is possible that the four case

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studies chosen for in-depth research give a somewhat biased picture in this regard, as one of the selection criteria was the availability of sufficient research material. Yet, the smaller case studies that were dealt with in the introductory chapters to each theme demonstrate that the Netherlands was also very active in regard to many other instruments. Even though the level of activity may have varied, a situation in which the Netherlands did not send a representative to negotiations on new international human rights instruments hardly occurred, and most of the time, this also meant an active participation in the discussions. The Netherlands' active engagement with the further development of international human rights systems, and especially the attention that it devoted to questions of effectiveness and possible consequences for existing standards and procedures, demonstrate that the Netherlands believed that international human rights instruments could contribute to a worldwide protection of human rights, and that it was prepared to make an effort to realize that ideal.

In negotiation processes, the Netherlands was, in principle, flexible in its choice of 'partner countries'. The question of which states the Netherlands sought cooperation with was in the first place determined by the question of whether their position was similar to that of the Netherlands. There were of course states that the Netherlands preferred not to be associated with; the Latin American dictatorships' support for its arguments against the incorporation of a system of universal jurisdiction in the UN Convention against Torture was, for instance, experienced as rather uncomfortable, because it was obvious that these countries' views were far from based on humanitarian considerations. Yet, otherwise the Netherlands tried to make coalitions with whichever country that took the same position.

Without a doubt there were countries with which the Netherlands was more likely to share opinions than others. In the CSCE and the United Nations, these were, in the first place, other Western countries. Insofar as this can be determined without access to primary EU sources, it was the Western group in the broader sense of the word rather than the European partners in particular that played a role in preparatory consultations in regard to the UN Convention against Torture and the UN Convention on the Rights of the Child. There were the regular meetings in the margin of the UN Commission on Human Rights, but most remarkably, more extensive consultations were organised in the context of the Council of Europe. This offered Scandinavian countries, which had not yet joined the (what was then still called) EC, the possibility to participate as well, and other Western countries, e.g. the United States, Canada or Australia were invited to these meetings too.

There are indications that coordination with the EU partners has gained in importance since the establishment of a Common European Foreign and Security Policy in 1991. This was one of the reasons the Netherlands explicitly aimed for EU proposals in the talks about the establishment of a High Commissioner on National Minorities, and in the final stages of the negotiations on the Optional Protocol to the UN Convention against Torture, the EU member states also tabled a common text-proposal. On the other hand, it must also be noted that the EU countries have continued to take

diverging positions in several treaty negotiations. For instance, the attempts of the Netherlands to reach agreement in the EU on the matter of the High Commissioner on National Minorities failed because of the strong resistance from, among others, the United Kingdom and France. Further examples can be found in the cases of the Optional Protocol on the Involvement of Children in Armed Conflict and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, on which there was no agreement among the EU member states either.

In spite of the generally good relations between the United States and the Netherlands, it must be noted that these states did not often share the same opinion in this field of policy. It is well known that the United States is traditionally more cautious of binding itself to international law than the Netherlands, and this also showed in discussions on international human rights instruments. Sometimes, it defended less protective standards than the Netherlands would like to see, which was the case, for instance, with the article on children in military conflict in the UN Convention on the Rights of the Child, and a number of economic and social rights in that same treaty. Yet, most of all, there were differences of opinion about the organisation of international supervision. Contrary to the Dutch preoccupation with effective supervisory procedures, the United States usually aimed at their restriction. Contrasting views in regard to the Optional Protocol to the UN Convention against Torture or the High Commissioner on National Minorities exemplify this, and in the discussions about the funding of the latter and the monitoring Committee of the UN Convention on the Rights of the Child, the Netherlands and the United States were diametrically opposed to each other as well.

A country with which the Netherlands cooperated on more than one occasion was Sweden, one of the countries that has indeed often been called 'like-minded'. In the late 1970s and early 1980s, the Netherlands and Sweden formed a close duo in the international struggle against torture. That this really meant something for the Netherlands is demonstrated by the fact that it supported the Swedish resolution in favour of a UN Convention against Torture, even though it was actually not in favour. Another example where Sweden and the Netherlands collaborated is that of the article on children in military conflict during the negotiations on the UN Convention on the Rights of the Child. Furthermore, it should be noted that the Dutch proposal for the establishment of a CSCE High Commissioner on National Minorities was in line with an earlier suggestion by Sweden. Nonetheless, there were also many issues on which the Netherlands and Sweden did not agree. Apart from the question of the desirability of the UN Convention against Torture, clear examples are the question of universal jurisdiction that was raised in the context of that convention, and the 'straight-eighteen' rule that was under discussion in the negotiations on the Optional Protocol on the Involvement of Children in Armed Conflict.

In this study, the question of whether there were any countries in particular that exerted influence on the direction of the Netherlands' policies has not been investigated, although one can imagine that the Netherlands was more likely to be influenced by

other Western states, or states that it considered 'like-minded', than by others. In more general terms, it can, however, be concluded from this study that the Netherlands tended to follow the generally prevailing preferences or international trends in negotiations on new human rights standards. As was explained in section 10.1, the Netherlands was at first, reluctant to accept the initiatives for a UN Convention against Torture and a UN Convention on the Rights of the Child, but once it had changed its position, its measure of involvement increased considerably, as a consequence of which the Netherlands was in the end still regarded as one of the countries that had played a leading role in the drafting of these conventions. This supports James Kennedy's statement that, generally speaking, the Netherlands overzealously conformed to international trends rather than creating them, as the original concept of the Netherlands as a 'guiding' country suggests.⁶ Even in relation to the question of standard setting in the field of minority rights, where the Netherlands did not show any initial hesitation, one can conclude that the Netherlands' policies followed international trends; after all, it was not before the 1990s that it started to pay serious attention to the issue of minority rights. Yet, in relation to the struggle against torture, one qualifying remark must be made. Even though it may initially not have been the intent of the Netherlands to start drawing up new international human rights standards, it was one of the first countries that wanted to put the issue of torture on the international agenda, even before the coup in Chile.

What should, however, be noted is not only that the Netherlands tended to go with the flow in respect to the key question of whether certain international standards should be developed, but also that it was exactly this inclination to conform to international trends that enabled the Netherlands to influence the debate on the contents of these documents. In respect to the drafting of individual articles, the Netherlands was more successful in realizing the ambition to play a leading role, and less inclined to silently follow generally prevailing preferences. There were different factors that determined the Dutch position on draft provisions that were discussed, but undeniably, reflections on how it could best contribute to the strengthening of international human rights law constituted at least one element that was taken into account. The Netherlands' efforts to prevent a weakening of existing human rights norms, and its wish to change the Polish draft for a children's rights convention into a more comprehensive document clearly demonstrate this. Moreover, if the Netherlands accepted and supported the creation of a new treaty, this could create an opening for the establishment of more effective supervisory procedures, to which the Netherlands also attached great importance.

It is difficult to assess to what extent the idea of the Netherlands as a 'guiding' country should also be moderated in regard to the question of international supervision. In any

⁶ Kennedy, 1995, p. 53-54 and 81. Other authors have made similar remarks in relation to the Netherlands' economic and security policies. See: Hellema, 2001, p. 400; Rozemond, 1983, p. 21-22; Bot, 1984, p. 47.

case, the ideas that it propagated in this respect, were less ambiguous than in the field of standard setting. Its main policy principle was to aim at effective supervisory mechanisms, and in general, the Netherlands can be said to have tried to win other states for this position in negotiations that concerned the international supervision of human rights. In the case of the UN Convention against Torture and the CSCE High Commissioner on National Minorities, the Netherlands can, in this respect, even be seen as a driving force in the negotiations. In other cases, this was less evident. For instance, in the deliberations on the ESC reforms, the Netherlands did not initially have very clear-cut ideas on some important questions that were discussed.

Sometimes, the Netherlands could perhaps also have shown a higher level of commitment, and it should also be remarked that the qualification of effectiveness was interpreted differently for each individual case, but on the other hand, it is important to recognize that the Netherlands usually belonged to those states opting for the most effective variants under discussion. For instance, it is true that the Netherlands was not prepared to exclude the Governmental Committee from the reporting procedure under the European Social Charter, but on the other hand, it did advocate a clearer division of tasks between this Committee and the Committee of Independent Experts, and it was ready to diminish state control, which was something several other states considered too far-reaching. Neither can its hesitation concerning the Optional Protocol to the UN Convention against Torture be interpreted as a deviation from the general principle of effectiveness, because the Netherlands obviously felt that if the Protocol were drafted anyway, it should at least be as effective as possible. The only obvious example where the Netherlands did not belong to the vanguard of states that approved more effective supervision is that of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

In respect to the issues discussed above, this study has not brought to light any clear differences between the late 1970s and early 1980s, during which the Dutch ambition to fulfil a special role in the world is said to have been at its peak, and later years, in which the public debate was perhaps less dominated by idealistic overtones. Recapitulating, it can be concluded that the Netherlands can, to a certain extent, be said to have played a leading role in negotiations concerning international human rights instruments during the whole period under discussion. Generally speaking, it was actively involved in drafting processes, and with respect to the issue of supervision, it usually defended a position of more effective mechanisms. However, one should be careful not to exaggerate this role. Especially in regard to standard setting and the incorporation of new themes in the human rights debate, the Netherlands' policies can to a large extent be characterized as an adaptation to international trends rather than as an implementation of its own views.

In addition, it should be noted that the ideal of a 'guiding' human rights country presumes a policy that is based on, or at least dominated by, human rights considerations. As the Netherlands' policies were obviously not inspired by humanitarian motivations only, this is another reason to qualify the idea that the Netherlands has

acted as a ‘guiding’ country. Similar to, for instance, the country policies that it applied in the field of human rights, the Netherlands’ policies concerning the development of international human rights instruments can be depicted as the result of a set of influences, and the aim to protect and promote human rights was only one of them. Some of these influences pushed the Netherlands in the direction of further standard setting and more effective supervisory procedures; others rather pulled it away from this. This is further discussed in the sections that follow.

10.4 OTHER POLICY INTERESTS

An important policy interest that usually pulled the Netherlands away from the acceptance of new and more specific norms or more effective supervisory mechanisms, was its aim to try and restrict ‘sovereignty costs’ that could result from international human rights instruments. In respect to standard setting, this meant that it wanted to avoid the drafting of norms that were contradictory to its own laws and policies. For instance, one reason the Dutch government was hesitant to agree with the idea of drawing up special rights for children was that it feared this would affect the privacy of the family sphere, which was considered a basic value in Dutch society, on which many of its own policies were based. To mention some further examples, the Netherlands also kept a watchful eye on draft provisions in the UN Convention on the Rights of the Child relating to issues that concerned family reunification and other aspects of its immigration policies, and in the context of the negotiations on the Optional Protocol on the Involvement of Children in Armed Conflict, the Netherlands resisted the idea that the age limit for voluntary recruitment into the army should be raised to eighteen years, because it wanted to retain the freedom to recruit seventeen-year-olds. A few years earlier, it had been its own proposal to raise the age limit, but the threshold it had had in mind was sixteen years and not eighteen, which was beyond its own domestic standards. In regard to the question of the sale of children, child prostitution and child pornography, a similar situation occurred; during the drafting of the UN Convention on the Rights of the Child, the Netherlands had supported some generally formulated provisions in relation to these issues, but it was not in favour of a more detailed elaboration that was likely to be in contradiction with its liberal policies as to sexual activity of minors.

In respect to international supervision, the Netherlands was particularly wary of sovereignty costs if it expected that a loss of state control over the interpretation and application of the rules could result in major financial costs, especially if these were deemed unpredictable. The government preferred to keep its freedom to make its own policy decisions about the allocation of the national budget, and it certainly did not want to lose control over government expenditure. In this regard, the ‘article 26-affair’, which was described in chapter 5, caused a real trauma. The unexpected financial consequences that followed from this non-discrimination article when it was applied in court in combination with a reference to certain social rights, caused a shock in the Netherlands, and it was always kept in mind as a situation that should be avoided at

all costs. It is this fear of undesirable financial consequences that has been determinative for the Netherlands in its attitude towards the creation of complaints procedures, especially in the area of social and economic rights. The Netherlands was prepared to accept them, but only insofar as possible financial consequences would be restricted. This is why it was able to support an individual complaints procedure under the International Convention on the Elimination of All Forms of Racial Discrimination and the UN Convention on the Elimination of All Forms of Discrimination against Women, but not under the International Covenant on Economic, Social and Cultural Rights. The former only put states under an obligation to guarantee that there is no discrimination in the enjoyment of human rights, but they do not provide any minimum standards that states should meet. Hence, if the Committee's or a national court's jurisprudence indicates that the Netherlands is discriminating in the field of economic and social rights, it is possible to avoid major financial consequences by lowering the standards to the level of protection enjoyed by the least protected group of people that was said to be discriminated. This is indeed what the Netherlands did in the article 26-case, mentioned above. As the rights in the International Covenant on Economic, Social and Cultural Rights have to be achieved progressively, the same kind of measures would not be possible under that treaty.

Financial considerations were also an important reason the Netherlands rejected individual complaints procedures, while it was, on the other hand, prepared to accept collective complaints mechanisms in the ILO and under the European Social Charter, and perhaps under the International Covenant on Economic, Social and Cultural Rights. It wanted to preserve the idea that economic and social rights are not directly applicable so individuals would not be able to make claims for restitution. Other aspects of its relatively careful attitude in regard to the supervision of economic and social rights can also be explained by its fear of unexpected budgetary consequences. Its opinion that the Governmental Committee should continue to play a role in the reporting procedure under the European Social Charter followed, for instance, from the idea that the Committee of Independent Experts gave interpretations to the Charter that states had never intended to bind themselves to, and that did not take sufficiently into account economic realities that states were confronted with.

From the above, one might conclude that the Netherlands was not willing to bear any sovereignty costs, but this would be a too one-sided picture of reality. In the first place, the Netherlands was, on occasion, prepared to adapt its laws to newly proposed standards. In this regard, raising the minimum age for voluntary recruitment into the army from sixteen to seventeen years can be mentioned as an example. Furthermore, it should be realized that a loss of autonomy is inherent in the creation and acceptance of any international human rights instrument, even if it seems to be in conformity with domestic rules at first. Apart from the fact that a supervisory organ may interpret the norms in a way that had not been anticipated, the treaty may also exclude certain policy options for the future. It is striking that the Netherlands as a rule did indeed try to avoid the adoption of instruments that were likely to challenge existing policies or

laws within its borders, but that it did not hesitate to accept far-reaching obligations or commitments that might restrict the policy choices of future governments. Occasionally, this may even have been the intention of the drafters, as was the case with the Framework Convention for the Protection of National Minorities; according to the so-called ‘purple’ coalition government of the labour party PvdA, the liberal party VVD and the party Democrats 1966 (D66), which ruled in the period from 1994 to 2002, the Framework Convention should not only be seen as an instrument for other countries, but could also help ensure a continuation of existing minority policies in the Netherlands, which is why it proposed a definition of the term ‘national minority’ that included not only the Frisians, but also persons legally residing in the Netherlands and belonging to one of the target groups of its integration policy.

The successive government’s decision to give a more restricted interpretation to the term ‘national minority’ can be regarded as an example of a policy choice in which maintenance of sovereignty and strong human rights protection can be considered conflicting interests. The question remains, though, whether concerns over the erosion of domestic jurisdiction can always be considered at odds with human rights considerations. This does not necessarily need to be true. Generally speaking, human rights convictions have influenced domestic policy-making in the Netherlands just as well as international policy-making, and therefore, what is proposed internationally does not automatically mean an improvement in terms of human rights protection. A clearcut example is the Netherlands’ refusal to accept an unconditional obligation to prosecute or extradite persons that were alleged to be involved in the sale of children, child prostitution or child pornography. The Netherlands wanted to avoid a situation in which its citizens could be prosecuted for something that was not prohibited under Dutch law. One could see this as an attempt to create an escape-clause, but actually the Netherlands’ aim was to protect an important constitutional principle, namely the principle of legal certainty. It would be difficult to see this as a purpose that is in contradiction with the aim to contribute to human rights protection. Likewise, the Netherlands raised credible arguments against the incorporation of the system of universal jurisdiction for torture in its domestic legal system. There were good reasons to be in favour, but the idea that it would be difficult to prosecute an alleged torturer in a fair trial, if the state concerned was not willing to assist in obtaining evidence, was certainly not unfounded.

In its policies towards the development of international human rights instruments, the Netherlands not only took domestic consequences and interests into account, but also other foreign policy interests that related, for instance, to power-politics or security questions. This was most evidently visible in its policies towards the issue of minority rights. After the end of the Cold War, minority-related conflicts broke out in the former communist bloc and other parts of the world, and it did not take long before the issue of minority rights was high on the international agenda. The Netherlands’ efforts in this field can also be traced back to these developments; concern over the situation in Eastern and Central Europe was the principal reason to support the development of

minority rights instruments in the UN and the Council of Europe, and in the CSCE the Netherlands even took the initiative for the establishment of the post of a High Commissioner on National Minorities. Hence, in principle, security interests were a factor that stimulated further development of international human rights systems, though it must be noted that the overriding importance of this security aspect could also lead to choices that were difficult to explain from a principled human rights perspective. The restrictions on the scope of the mandate of the High Commissioner on National Minorities demonstrate this.

A desire to keep control over the Eastern European situation after the fall of the communist regimes also played a role in the decision to start a reform process for the European Social Charter. The Council of Europe was seen as an organisation that could bind Eastern European states to the rest of Europe, and it was hoped that the European Social Charter could help avoid social instability in the area. This was an important precondition for starting off reforms that had previously been lacking, although it must be observed that considerations like these seem to have played a role only at the Council of Ministers' level of decision-making. For the Netherlands' representatives to the negotiations in the Charte-Rel Committee, which drafted the new instruments, these did not seem to have played any role whatsoever; as experts in international social law, they approached the matter from a narrow legal-technical point of view, and not from a broader international-political perspective. Hence, insofar as security interests played a role in the actual negotiations, they only did so in the background.

In the period before the 1990s, the same can be said of the role of the Cold War in negotiations on international human rights instruments in the UN; strategic considerations were not irrelevant for the Netherlands in the determination of its position, but they played a secondary role only. Insofar as they did influence the Netherlands' policies, it depended on the issue at stake whether Cold War considerations made it more or less likely that the Netherlands supported initiatives for new standards or supervisory mechanisms. In the case of the UN Convention on the Rights of the Child, one of the factors that contributed to the draft's negative receipt in the Netherlands was that it was so clearly presented as a communist initiative. Like all other countries, the Netherlands was influenced by the Cold War atmosphere in the Working Group that prevailed until the second half of the 1980s. However, unlike the United States, it did not seek confrontation or opportunities to raise issues to undermine the credibility of the Soviet bloc states. Concern for the legal quality and consequences of the text were at the heart of the Netherlands' policies, not Cold War strategies.

In the negotiations on the UN Convention against Torture, Cold War considerations were not a priority for the Netherlands, either. It stayed out of rethorical debates if it did not consider their outcome crucial for the value of the Convention, and concentrated on questions that it considered intrinsically relevant. It is true that its position on the supervisory mechanism was diametrically opposed to that of the Soviet bloc, but actually the United States was not so happy about the incorporation of effective mechanisms for supervision either. Hence, the Dutch insistence on more effective

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international supervision was at odds with the preferences of *both* superpowers, and not only with the Soviet Union's position. In this respect, a similar situation occurred when the Netherlands began to advocate for the creation of an independent committee to monitor the International Covenant on Economic, Social and Cultural Rights. The proposals provoked opposition from the Eastern bloc states, which of course harmed their image of self-proclaimed superiority in the field of social and economic rights. This is probably why the United States initially supported the idea. Yet, when it came to the crunch, the United States withdrew its support, while the Netherlands continued its efforts. It is possible that the vulnerability of the Soviet Union and its partner states in this particular matter encouraged the Netherlands to make suggestions in favour of a more independent control organ, but undeniably, the Dutch position was different from that of the United States. The fact that it did not pull out when a decision could finally be made shows that it really wanted to improve the supervision of this Covenant.

Apart from sovereignty interests and security or strategical-political considerations, a third interest that affected the Netherlands' policies in regard to international human rights instruments was its desire to keep a good international reputation. As the case of the CSCE High Commissioner on National Minorities demonstrates, this could stimulate the Netherlands to take an initiative of its own. The Netherlands had not launched the initiative purely to be able to make a name for itself by the appointment of a Dutchman to the post, as many suspected in hindsight, but, in a more subtle manner, the factor of reputation did play a role. After its failure to prevent the escalation of the Yugoslavia conflict as the EC presidency, the Netherlands felt the need to restore its image and to take the lead in a minority-related initiative. Although it was not the only reason the Netherlands came up with the proposal for a High Commissioner, this was at least one of the factors that inspired the Netherlands to do so.

Considerations of reputation were also an important reason why the Netherlands hardly ever opposed an initiative to draw up a new human rights instrument. It is difficult to determine whether the ideal of the Netherlands as a 'guiding' human rights country made the Netherlands more sensitive to international criticism than other countries, but what can be concluded is that the Netherlands did not like to be in a position that made it vulnerable to the suggestion that it was not willing to support the international protection and promotion of human rights. The arguments in favour of newly proposed human rights instruments were often to a large extent based on theoretical presumptions for which empirical evidence could not easily be obtained, but the same was true for arguments against, and in practice, the assumption that instruments that intended to contribute to the human rights situation in the world would also really have that effect, was usually easier to sell. As a consequence, the Netherlands normally preferred to stay aloof if it had doubts about the desirability of a proposed instrument, rather than to try and block the negotiations, even if its doubts were inspired by human rights considerations.

Fear of loss of reputation could also be a reason to change position, especially when objections against a proposed instrument or parts of its contents were exclusively based on expectations that concerned possible effects on the existing system and state behaviour, and when an adjustment would not involve too many sovereignty costs. The case of the UN Convention against Torture clearly demonstrates this. The Dutch change of attitude towards the question of universal jurisdiction and the question of the treaty's additional value can only really be explained if the reputation factor is taken into account. In respect to the former question, the Netherlands felt isolated, and this was an important reason to desist from further efforts to amend the articles concerned. Moreover, the Netherlands wanted to make a good impression as Chair of the Working Group that drafted the Convention, and continued opposition against the system of universal jurisdiction or open doubts about the value of the Convention would not have been very helpful in that regard.

All in all, it can thus be concluded that even though the actual role of the Netherlands as a 'guiding' country needs to be put into perspective, its desire to be seen as global proponent of human rights was very much alive. Generally speaking, this pushed the Netherlands in the direction of support for additional standard setting and the development of more intrusive supervisory mechanisms.

10.5 PARLIAMENT AND NONGOVERNMENTAL ACTORS

The idea that efforts to establish new international human rights instruments were a sign of humanitarian leadership was nourished by nongovernmental forces and parliament. Whereas the involvement of various policy interests could have different effects on the Netherlands' policies in the sense that they could either push it in the direction of further standard setting activities and more effective supervision or pull it away from it, the participation of NGOs or parliament usually added to the former. In the introduction it was already mentioned that NGOs have an interest in the expansion of international human rights instruments, and therefore they can be expected to be a 'pushing force' rather than a 'pulling force'. Indeed, no instances have been found of NGOs trying to convince the Netherlands to block the development of additional norms or more effective supervisory mechanisms. In this respect, a somewhat exceptional situation emerged in the final stages of the negotiations on the UN Convention against Torture, when Amnesty International appeared to have doubts about the additional value of the instrument, but the organisation never went so far as to actively lobby against its adoption.

It must be noted, however, that in some cases, the participation of NGOs was very limited or almost absent. For different reasons, there was hardly any NGO involvement in the negotiations on the mandate of the CSCE High Commissioner on National Minorities, and insofar as there were any lobby attempts at all, these did not concentrate on the Netherlands. An amendment to the title of the function was made on the suggestion of the Minority Rights Group, but otherwise NGOs did not influence the Netherlands' policies. In the case of the Protocols to the European Social Charter,

NGOs also made few contributions to the debate. The European Trade Union Confederation (ETUC) and the Union of Industrial and Employers' Confederations of Europe (UNICE) were, on the other hand, allowed to send an observer to the ad hoc Committee that drafted the Protocols. The Netherlands attached importance to the opinion of these organisations and its opposition against the inclusion of the Governmental Committee in the collective complaints procedure was most of all based on the argument that this would not be acceptable to these two organisations.

In many other instances, most notably in the UN-context, NGOs were, on the other hand, closely involved in the drafting of new international human rights instruments, and they usually exerted influence too. In the Dutch policy-making process, their opinions were normally taken into account as well. As the case of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the final position of the Netherlands in the 'straight-eighteen' discussion on the issue of children in military conflicts show, this did not always result in the adoption of their point of view, but there are also numerous examples where the NGOs did successfully influence the Netherlands' policies. For instance, Amnesty International was to a large extent responsible for the Netherlands' first adaptations in its stand on universal jurisdiction in the UN Convention against Torture. To mention another example, the Netherlands' position towards the UN Convention on the Rights of the Child was greatly influenced by the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child. Not only did it contribute to its change of mind about the desirability of the treaty, a number of Dutch text proposals also bore a visible NGO imprint, and the Dutch initiative to include an article on children in military conflict in the Convention was a direct result of the panel discussion that was organised on the occasion of the foundation of the Dutch section of Defence for Children International. Even though the Netherlands later appeared to oppose a raise in the age of voluntary recruitment to eighteen years, when that came under discussion in the context of the Protocol to the Convention, pressure on the part of parliament and the NGO Coalition to Stop the Use of Child Soldiers did at least result in an increase to seventeen years.

It is evident from the case studies in this book that the classic image of NGOs as an external force of pressure on the government is too one-sided. Often, Dutch negotiators collaborated with NGO representatives. Early initiatives to combat torture were, for instance based on a close cooperation between the Netherlands, Sweden and Amnesty International. Not only did this lead to the adoption of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it also contributed to the creation of professional codes of conduct for medical and law enforcement personnel. To illustrate how this worked: Amnesty International organised a conference on law enforcement ethics, and the Netherlands financed it and distributed the results in the UN. In spite of disagreement over a number of issues relating to the UN Convention against Torture, contacts between Amnesty International and government officials always remained close, and the fact that the Netherlands saw the need to try and seek the

organisation's support for the final draft, demonstrates that the Dutch government sometimes needed Amnesty International just as much as the other way around.

These and other examples that are described in this study confirm the idea that network-type relations often existed between NGOs and parts of the Dutch government. Undeniably, the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs, and its successor-departments, functioned as the most important 'network bastion' within the Dutch government.⁷ However, NGOs had access to other ministries and organisational units too. The case of the UN Convention on the Rights of the Child demonstrates that representatives from other ministries – here the Ministry of Justice – could also become part of a human rights network. Together with the delegates of a number of other Western European countries, the representative of the Netherlands and a number of NGO-representatives formed a group of friends that tried to cooperate closely in the negotiations on the Convention on the Rights of the Child. Sometimes, the Netherlands or another country would submit a proposal at the request of Defence for Children International or the Ad Hoc Group on the Drafting of the Convention on the Rights of the Child, but on occasion, the NGOs would also raise something at their request.

These networks did not have an exclusively domestic character. The NGOs that were involved in the drafting processes often had a national branch in the Netherlands, but contacts were not confined to these national sections, and many of the contacts between NGO-representatives and officials representing the Dutch government took place in an international negotiation setting. This means that it would be incorrect to define NGO-influence as an 'internal factor', as many studies in the field of the Netherlands' foreign policy do.⁸ Of course, this does not mean that the national sections of international NGOs did not participate in attempts to influence the Netherlands' policies. On the contrary, the examples of the question of universal jurisdiction as a means to combat torture and the topic of children in military conflict show that these national branches were sometimes particularly able to tip the scales in favour of the NGOs' point of view. Besides, it should be noted that many of the Dutch officials involved in policy-making in the field of human rights law were also members of Dutch human rights NGOs, and sometimes, there would also be an exchange of personnel between them. In this regard, it was remarkable to see that one of the leading persons in the Dutch Amnesty International's lobby for a system of universal jurisdiction was employed by the Ministry a few years later, while the Netherlands' representative to the Working Group negotiating the UN Convention against Torture later became a member of the board of the Dutch section of Amnesty International.⁹

7 The term 'network bastion' is derived from: Khagram, Riker en Sikink, p. 9.

8 See: Everts, 1985, p. 7; De Boer, 1999, p. 46-58; Malcontent, 1998, p. 14; Baudet, 2001a, p. 31; Baehr, Castermans-Holleman and Grünfeld, 2002, p. 228; Van den Berg, 2000, p. 2, 4-12 and 388.

9 Interview with J.H. Burgers, 26 March 2003; Interview with T. Kamper, 31 January 2006. In chapter 3, no mention was made of the appointment of the former lobbyist of Amnesty International, because there are no indications that it was relevant for the Dutch position in the negotiations on the UN Convention against Torture. Nonetheless, it is mentioned here, because it does seem relevant to

It has not been investigated in this study whether members of the Dutch parliament were also part of these transnational human rights networks. In any case, it seemed more common for NGOs to approach policy-makers directly if they wanted to exert influence on the development of international human rights instruments rather than to try to do so via parliament. The most notable exceptions that can be mentioned in this respect are universal jurisdiction in the negotiations on the UN Convention against Torture, and the age of military recruitment that was raised in relation to the UN Convention on the Rights and one of its Protocols. In both cases, parliament had at least some influence. Otherwise, this study confirms the conclusions of studies by Castermans-Holleman, and Malcontent and Huijboom: in this field of human rights policies, parliament does not play a particularly important role.¹⁰ On occasion, a question may furthermore be tabled in parliament, as happened e.g. with respect to the Netherlands' position towards the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, and sometimes questions concerning relating issues exerted an influence, as happened with respect to the issue of child pornography in the 1980s. Nonetheless, it can be said that on the whole, during negotiations on international human rights instruments, the direct role and influence of parliament were relatively unimportant. Perhaps it influenced the government in more indirect ways. At least, the fact that the formal policy papers that were sent to parliament included only information about deliberations on instruments that the Netherlands' government supported seems to indicate that the government anticipated parliamentary questions, but otherwise, this is difficult to prove.

Although the amount of attention for international human rights instruments also remained limited after a new international human rights instrument had been adopted, if the instrument concerned was a legally binding treaty, parliamentary involvement usually increased in the period between its adoption and its ratification by the Netherlands. Parliamentary questions usually occurred more frequently then, and oftentimes concerned the questions of whether and when to expect the government to submit a bill of approval. These were questions that were directly related to parliamentary competences, because under Dutch law, parliament has to give its explicit or tacit approval to the ratification of international treaties.¹¹ The emphasis the Netherlands put on the role of the family in the case of the UN Convention on the Rights of the Child indicates that negotiators also kept that in mind while drafting a new instrument, and generally speaking, the careful protection of its sovereign competencies can of course

illustrate that there is no absolute mental distance between governmental and nongovernmental organisations.

10 Castermans-Holleman, 1992, p. 262; Malcontent and Huijboom, 2006, p. 109-110. In interviews, this impression was confirmed as well. See: Interview with H.A.M. von Hebel, 21 December 2005; Interview with J.A. Walkate, 21 April 2004; Interview with M. van der Stoel, 16 June 2006.

11 Article 91, Constitution of the Kingdom of the Netherlands. An English translation of the Dutch Constitution can be found on the website of the Dutch Ministry of Home Affairs. See: www.minbzk.nl, accessed 11 August 2006.

also be related to the fact that parliamentary consent would always be needed before the Netherlands could bind itself to an instrument.

A final remark that can be made about the role of the Dutch parliament in the ratification process is that it seemed to have concentrated mostly on the reservations and declarations proposed by the government, and on the way it intended to deal with optional provisions, or in other words, with what could be seen as the domestic part of the development of international human rights law. Hence, insofar as elements of the ratification procedures of different instruments were taken into account in this study, they put the conclusions about the limited role of parliament in a proper perspective.

10.6 BUREAUCRATIC INSTITUTIONS

It was not only parliament that usually got involved in questions concerning the development of new international human rights instruments at a relatively late stage. Generally speaking, the same could be said about the ministers that were politically responsible for the Netherlands' policies. In this regard, the personal involvement of minister Hans van den Broek with the Netherlands' efforts to create the function of a CSCE High Commissioner on National Minorities was an exception. Negotiations and policy-making in the field of international human rights instruments were mostly a bureaucratic process. This explains why changes of government have, up to now, left hardly any marks on the Netherlands' policies in this area. The change of position in regard to the definition of the term 'national minority' is the most evident exception to this general conclusion, and perhaps the increased concern about overlapping supervisory mechanisms should also be understood as a feature of the central-right coalition of the Balkenende-governments that have been in office since 2002. However, in the period investigated in this study, the question of which Ministry was involved in the negotiations was more determinative for the policy outcomes than the question of what parties were represented in the Dutch government.

This study has revealed that questions of international human rights standard setting and the creation of international control machinery were approached differently by the ministries involved in these matters. Their bureaucratic missions differed, and as each of them assessed matters according to the logic of its own principal duties, they often represented different interests. The overall impression is that the Ministry of Foreign Affairs had less difficulty giving up sovereign rights or accepting reporting procedures or other domestic implications than the line ministries, while the latter were more ready to put the Netherlands' international reputation as a model human rights country at risk. The main reason line ministries tended to be more careful in their approach towards new or more far-reaching international human rights obligations was that they would in the end have to deal with the consequences. The opposite was, of course, true as well; the Ministry of Foreign Affairs was most frequently confronted with international pressure if the Netherlands' behaviour did not meet the expectations of other countries, and if NGOs and parliament did not agree with the Dutch position,

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the Ministry of Foreign Affairs would usually be the first ministry they would turn to. This difference in bureaucratic perspective explains, for instance, why the Ministry of Defence resisted a raise in the minimum age for recruitment into the army, while the Ministry of Foreign Affairs advocated concessions instead, and why the Ministry of Justice had difficulty accepting the Optional Protocol to the UN Convention against Torture, while the Ministry of Foreign Affairs insisted on support for this new instrument. It also makes clear why the Ministry of Foreign Affairs is more open to the idea of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, while the Ministry of Social Affairs and Employment and the Ministry of Home Affairs strongly resist it.

It is evident that it can therefore make a difference whether it is the latter or the former that takes the lead in international negotiations. The disparity in attitude towards the question of more independent mechanisms for supervision of social and economic rights can, for example, be traced back to the fact that the Ministry of Foreign Affairs was responsible for UN policies, while the Ministry of Social Affairs and Employment took the lead in respect to matters concerning the European Social Charter. It would be an exaggeration to suppose that Ministries are constantly fighting, but sometimes there can be a real struggle in which each ministry tries to get things the way it wants. An obvious case in point was the tug-of-war over the policies concerning the question of universal jurisdiction between the Ministry of Justice and the Humanitarian and Legal Affairs Section of the Ministry of Foreign Affairs. This case also illustrates that within a ministry, opinions could be divided as well, because the department led by the Legal Adviser of the Ministry of Foreign Affairs did not agree with the point of view of the officials of the Humanitarian and Legal Affairs Section, and sided with the Ministry of Justice.

Generally speaking, the 'positivist' view on international law, which emphasizes in particular the importance of the letter of the law, and its legal consequences, was more dominant in the Legal Adviser's department than in the Humanitarian and Legal Affairs Section. In the latter Section, more emphasis was, on the other hand, put on the idea of a 'progressive' development of international law, which was based on the belief that law could be used as an instrument to achieve idealistic foreign policy purposes. Considering that the Legal Adviser's main task was to give legal advice in different fields of international law and to keep the Ministry from making legal mistakes, while the mandate of the Humanitarian and Legal Affairs Section clearly made a connection between humanitarian policies and international law, this was an understandable difference. Yet, it should be noted that it was the Legal Adviser who was responsible for human rights matters in the Council of Europe, and thus also for the negotiations on, for instance, the European Convention for the Prevention of Torture. This can explain why the level of commitment was sometimes lower here than in the case of the UN Convention against Torture, where the Humanitarian and Legal Affairs Section took the lead.

It should be noted though that both departments were also confronted with a different international environment. In the UN, much of the drafting work was left to

the states parties themselves. If none of them took the lead, there were not likely to be any new international human rights instruments either. The Council of Europe's Secretariat was particularly active, and contrary to what was common in the UN or the CSCE, it also drew up text proposals and actively tried to help reach agreement. As a consequence, a state could permit itself to wait and see and still reach results, if the general attitude towards the instrument was at least positive. Furthermore, the level of NGO-involvement was lower in the Council of Europe than in the UN. NGOs could get a consultative status in both organisations, but in the Council of Europe, negotiations on new international human rights instruments usually took place behind closed doors, and NGOs did not automatically receive an observer status. Considering that NGOs usually acted as a force in favour of new initiatives in the field of human rights, their absence may have contributed to a more passive stand, not only in the Netherlands, but probably also in other countries.

Comparable remarks can be made in regard to the Foreign Affairs division that was responsible for the negotiations on the CSCE High Commissioner on National Minorities. The relatively strong emphasis on the security aspect of the proposal naturally followed from the bureaucratic mission of the Atlantic Cooperation and Security Affairs Department. Some policy choices, in particular those relating to the scope of the High Commissioner's mandate, can be criticized from a principled human rights perspective, but from a more pragmatic security perspective, it was understandable that these choices were made. Besides, it should be noted that the mandate could only be adopted by consensus. In Working Groups or Ad Hoc Committees in the UN and the Council of Europe that were responsible for the drafting of human rights instruments, it was common to try and reach consensus too. However, in these organisations, there was always the option of sending a draft text through to the General Assembly or the Council of Ministers, where matters on which no agreement could be reached, could be decided by vote. Within the CSCE there were no such 'escape-routes', as a consequence of which a more pragmatic attitude was needed. This also explains why the Dutch position in the negotiations on the Framework Convention was much more principled than in those concerning the mandate of the CSCE High Commissioner on National Minorities, and why it could, in the former case, more easily insist on a broad definition that would also make the instrument relevant for Western European countries, while this option was explicitly excluded in the negotiations on the High Commissioner on National Minorities.

10.7 FINAL OBSERVATIONS

Summarizing the conclusions in this chapter, the Netherlands' policies concerning the development of international human rights instruments can be depicted as the result of a set of influences. Human rights considerations were important, but were definitely not the only factor that determined the Netherlands' position in international negotiations. There were different interests at stake, and there were different actors involved that represented these interests; some were pushing the Netherlands in the direction of

further standard setting and more effective supervisory procedures, others were pulling it away from this.

Sovereignty costs generally drew the Netherlands away from the acceptance of new international human rights obligations and more intrusive supervision, especially if financial costs were involved. Security and strategical-political interests sometimes worked as a push-factor, but they could also stand in the way of support for new initiatives or a more principled human rights approach. Concern for its international reputation was likely to push the Netherlands in the direction of additional or more demanding norms or supervisory procedures, in particular in situations where other countries appeared to be willing to accept them too. Nongovernmental actors had a great influence on the Netherlands' interpretation of what would constitute a good international reputation. They usually showed themselves in favour of further development of normative standards and more effective international supervisory procedures, as a consequence of which their influence worked as a push-factor. Insofar as it was directly involved in debates concerning international human rights instruments, the same can be said of parliament. At the Ministry of Foreign Affairs, and in particular the Humanitarian and Legal Affairs Section and its successor departments, susceptibility for reputation factors was greater, while the restriction of sovereignty costs carried more weight for the line ministries. Hence, the involvement of the latter tended to work as a pull-factor rather than a factor pushing into the direction of more international regulations, whereas the Ministry of Foreign Affairs was more likely to add to the pushing forces instead. Although other bureaucratic units could sometimes become part of transnational advocacy networks too, this was most evidently the case for the Humanitarian and Legal Affairs Section and the departments that took over its duties after the Ministry's reorganisation.

The exact policy outcomes were dependent on the combination of the above factors. Their respective influence would differ from case to case. When there were no sovereignty costs involved, this was, for instance, likely to tip the scales in favour of the forces pushing the Netherlands into the direction of further standard setting and more effective supervisory mechanisms, even if there were arguments against it from a human rights perspective, but as soon as sovereignty costs started to become involved, the situation was different, especially if one of the line ministries was taking the lead. To give another example, when nongovernmental actors remained silent, or did not succeed in coordinating their efforts, this diminished the strength of the pushing factors, while in case of their participation in the debate, they could, on the other hand, also tip the balance towards a greater willingness to participate in the development of international human rights instruments. This has unavoidably led to inconsistencies in the Netherlands' policies, and sometimes also in the human rights beliefs on which they were based. The overall impression is thus not one of a 'guiding' human rights country with a clear and long-term policy vision on the development of international human rights instruments, but rather that of country continuously adapting to the circumstances. Of course, the Netherlands had some general ideas about the issue of human rights standard setting and the creation of international supervisory

mechanisms, and especially with regard to the second of these questions, these were also visible in its policy practices. At the same time, the crucial terms 'effectiveness' and 'additional value' were not always interpreted in the same manner, and especially in regard to the issue of norm creation, in the end the Netherlands tended to go with the flow. With respect to the issue of international monitoring procedures, the Netherlands was more consistently trying to implement its ideals, but at the same time, one may wonder whether this was not due to the direction in which the flow was heading anyway.

'Legalization' is the trend in international relations, and proposals for new human rights instruments follow in rapid succession.¹² Sometimes, the reasons a proposal is being made is particularly clear; the boost of minority rights discussions in the 1990s was, for instance, clearly inspired by the tragic events in former Yugoslavia and elsewhere in the world. Yet, at other times there is no immediate cause for the initiation of new drafting exercises. A government, an NGO or an international official or organ makes a proposal, negotiations are started and the process simply gains a life of its own.¹³ The case study of the UN Convention on the Rights of the Child has illustrated how such momentum can be gained. It should be realized that, generally, new initiatives aim at new or more specific and far-reaching standards or improved supervision. If a state's basic assumptions are in line with these tendencies, it is of course much easier to play a leading role. As the Netherlands' doubts about a further proliferation of international human rights instruments concentrated on the standard setting component, while it was in principle favourably disposed towards the development of stronger supervisory procedures, it is only logical that it was less difficult to act as a 'guiding' country in that regard. If the Netherlands is indeed going to take a more critical attitude towards the proliferation of supervisory procedures as well, it will be difficult to continue to play this role, at least as long as the international trends continue to point in the direction of further expansion.

12 On the legalization of world politics, see: Goldstein, Kahler, Keohane and Slaughter, 2000, p. 388; Kahler, 2000, p. 682; Abbott and Snidal, 2000, p. 456; Keohane, Moravcsik, Slaughter, 2000, p. 457.

13 See also: UN Doc. A/44/668, p. 63; Kamminga, 1996, p. 47-48.

SAMENVATTING (DUTCH SUMMARY)

In de periode na de Tweede Wereldoorlog is er zowel op wereldwijd als op regionaal niveau een groeiend aantal verklaringen, verdragen en toezichtprocedures tot stand gekomen op het terrein van de rechten van de mens. Bestaande normen, zoals vastgelegd in de eerste, algemene mensenrechtenverdragen, werden verder uitgewerkt, aangevuld met nieuwe normen, en toegespitst op specifieke groepen mensen die extra kwetsbaar zijn voor mensenrechtenschendingen. Ook werden er nieuwe mechanismen ontwikkeld om het toezicht op de naleving en implementatie van de overeengekomen normen te verbeteren.

Vanwege het dynamische karakter van internationale mensenrechtensystemen, is het begrip 'mensenrechteninstrument' moeilijk te definiëren. In deze studie wordt daarom een pragmatische benadering gehanteerd: wanneer uit formele beleidsdocumenten blijkt dat Nederland, of veel andere landen, iets als een mensenrechteninstrument beschouwen, wordt dat in deze studie eveneens gedaan. Zoals uit de bovenstaande alinea al min of meer kan worden opgemaakt, refereert de term 'instrumenten' zowel aan de standaarden die staten hebben geaccepteerd als mensenrechtennormen als aan de procedures die zijn gecreëerd om toezicht te houden op de naleving ervan.

In 1979 verscheen er in Nederland een nota over de rechten van de mens in het buitenlands beleid, die door de regering in de gehele onderzoeksperiode werd gezien als een leidraad voor haar beleid. In deze en later verschenen nota's werd vastgesteld dat de bevordering van de rechten van de mens een wezenlijk onderdeel vormt van het Nederlandse buitenlands beleid. Meer in het algemeen bestond in de samenleving – zeker in de jaren zeventig en tachtig – ook wel het idee dat Nederland een 'gidsland' zou moeten zijn, dat een leidende rol zou moeten spelen op weg naar een wereld van vrede, rechtvaardigheid en menselijke waardigheid voor allen.

Er zijn verschillende wetenschappelijke studies verschenen die ingaan op de vraag hoe Nederland in zijn beleid ten aanzien van andere landen reageerde op schendingen van de rechten van de mens. Tot nog toe is echter weinig tot geen aandacht gegeven aan het Nederlandse beleid inzake de ontwikkeling van internationale mensenrechteninstrumenten, terwijl dit volgens formele beleidsdocumenten door de regering wel als een belangrijk onderdeel van het Nederlandse mensenrechtenbeleid moet worden gezien. Deze studie beoogt in die leemte te voorzien.

Uit beleidsdocumenten over de rechten van de mens en het buitenlands beleid valt af te leiden dat de Nederlandse regering in principe positief stond ten opzichte van internationale mensenrechteninstrumenten. Waar het ging om de ontwikkeling van nieuwe normen leek zij echter een wat tweeslachtige houding aan te nemen. Enerzijds stelde zij dat het leeuwendeel van de normstellende arbeid voltooid was, en dat ge-

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waakt moest worden voor een voortgaande proliferatie van normen; anderzijds gaf de regering aan dat ze wilde bijdragen aan de ontwikkeling van aanvullende normen. Ten aanzien van internationale toezichtprocedures waren de notities meer eenduidig: de regering gaf aan een groot voorstander te zijn van de totstandkoming van zo effectief mogelijke procedures. In de regel betekende dit onder meer dat rapportageprocedures niet voldoende werden geacht, en dat bijvoorbeeld klachtrecht moest worden nagestreefd. Uit de nota's kan ook worden afgeleid dat de Nederlandse regering in principe voorstander was van toezicht door onafhankelijke experts.

Beleidsprincipes en beleidspraktijk zijn echter niet per definitie met elkaar in overeenstemming. De voornaamste doelstelling van de onderhavige studie is inzicht te verwerven in de politiek die Nederland in de praktijk gevoerd heeft op het terrein van internationale mensenrechteninstrumenten. De onderzoeksvragen die daartoe gesteld worden, zijn de volgende:

1. Welke positie nam Nederland in in onderhandelingen over internationale mensenrechteninstrumenten, en hoe paste het de algemene principes die waren vastgelegd in formele beleidsdocumenten daarbij toe?
2. Vervulde Nederland werkelijk een rol als 'gidsland' in deze onderhandelingen, zoals soms verondersteld lijkt te worden, of was het eerder geneigd algemeen heersende opvattingen of internationale trends te volgen?
3. Welke rol speelden andere politieke belangen dan het doel mensenrechten te bevorderen in de Nederlandse positiebepaling in onderhandelingen over internationale mensenrechteninstrumenten?
4. Welke invloed oefenden parlement, NGO's en transnationale mensenrechtennetwerken uit op de Nederlandse positie in onderhandelingen over internationale mensenrechteninstrumenten?
5. Welke invloed had de betrokkenheid van verschillende bureaucratische instituties op de Nederlandse positie in onderhandelingen over internationale mensenrechteninstrumenten?

In deze studie wordt alleen ingegaan op instrumenten die tot stand gekomen zijn in de Verenigde Naties (VN), de Raad van Europa en de CVSE dan wel OVSE. Het accent ligt daarbij op de periode vanaf het einde van de jaren zeventig. Het onderzoek is gebaseerd op een aantal casestudies op het terrein van het folterverbod, economische en sociale rechten, kinderrechten en minderhedenrechten. Voor ieder thema is aantal kleinere casestudies verricht, waarvan er steeds één nader is uitgediept op basis van uitgebreid archiefonderzoek.

In hoofdstuk 2 en 3 wordt onderzocht hoe Nederland zich heeft gedragen in de internationale strijd tegen foltering. Het folterverbod was opgenomen in de algemene mensenrechtenverdragen van de VN en de Raad van Europa, maar halverwege de jaren zeventig gingen onder invloed van een wereldwijde campagne tegen martelingen van Amnesty International en de machtsgreep van Pinochet in Chili steeds meer stemmen

op om te komen tot een verdere uitwerking van het bestaande verbod en om het toezicht op de naleving ervan te verbeteren. Dit leidde ertoe dat er in de loop der jaren verschillende instrumenten tot stand kwamen die zich specifiek richtten op het thema foltering. Een van de belangrijkste ervan was het VN-Verdrag tegen Foltering en andere Wrede, Onmenselijke of Onterende Behandeling of Bestrafing. De Nederlandse rol in de onderhandelingen over dit verdrag komt uitgebreid aan de orde in hoofdstuk 3; overige instrumenten worden beknopt behandeld in hoofdstuk 2.

Voor Nederland was het folterverbod een van de belangrijkste mensenrechtentema's, en het besteedde hier over het algemeen dan ook veel aandacht aan. Nederland speelde een vooraanstaande rol in de totstandkoming van de Verklaring tegen Foltering van 1975, en de gedragscodes voor medisch personeel en wetshandhavers en het pakket van grondbeginselen voor de bescherming van alle personen in enige vorm van detentie of gevangenschap, die daarop volgden. Er werd daarbij vooral nauw samengewerkt met Zweden en met Amnesty International. Hoewel men op het Ministerie van Buitenlandse Zaken aanvankelijk niet van plan was geweest het onderwerp van een Speciale Rapporteur inzake Foltering op de agenda te zetten, speelde Nederland door een persoonlijk initiatief van delegatieleider Kooijmans ook bij de totstandkoming van dit instrument een leidende rol. Dat de taken van de Rapporteur enige overlap zouden kunnen hebben met het werk van het Comité tegen Foltering, dat was ingesteld om toezicht te houden op het VN-Verdrag tegen Foltering, zag Nederland niet als een probleem.

Opmerkelijk genoeg was het enthousiasme waarmee Nederland zich in de VN had ingezet voor de ontwikkeling van nieuwe instrumenten op het terrein van de strijd tegen foltering veel minder prominent aanwezig toen in de Raad van Europa het onderwerp van een Verdrag ter Voorkoming van Foltering werd behandeld. Nederland behoorde weliswaar tot de voorstanders van dit verdrag, maar legde daarvoor geen bijzondere aandacht aan de dag. Deze relatief beperkte belangstelling kan verklaard worden door het feit dat medewerkers van de Juridisch Adviseur van het Ministerie van Buitenlandse Zaken verantwoordelijk waren voor de Nederlandse inbreng in de onderhandelingen. Anders dan het geval was voor het Bureau Humanitaire en Juridische Aangelegenheden speelden mensenrechten in hun takenpakket geen bijzondere rol, en bovendien waren er minder contacten met NGO's.

Aanvankelijk had Nederland ook aarzelingen bij het idee, middels een protocol bij het VN-Verdrag tegen Foltering, een wereldwijd systeem van preventieve visitaties te creëren, maar al vrij snel schaarde het zich onder de actieve groep van voorstanders van een zo sterk mogelijk protocol. Toen het protocol in 2002 eenmaal werd aangenomen, verklaarde Nederland dat het dit als een van de belangrijkste resultaten van dat jaar beschouwde, maar toen het eenmaal op ratificatie aankwam, ontstond er een conflict tussen de Ministeries van Buitenlandse Zaken en Justitie. Terwijl de eerste voorstander was van toetreding tot het protocol, had het Ministerie van Justitie daartegen bezwaren, omdat Nederland al onderworpen was aan een vergelijkbaar toezichtstelsel van de Raad van Europa.

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Tegenstellingen tussen de voornoemde ministeries speelden eveneens een rol bij de Nederlandse positiebepaling in de onderhandelingen over het VN-Verdrag tegen Foltering van 1984. Toen Zweden in 1977 de gedachte opperde een dergelijk verdrag te creëren, was de Nederlandse reactie verre van enthousiast. Hoewel Nederland dit aan de buitenwereld niet al te zeer liet blijken, was het geen voorstander van het idee, onder andere omdat het van mening was dat de langdurige onderhandelingen die daarvoor nodig zouden zijn, het gezag van de Verklaring tegen Foltering uit 1975 zouden kunnen ondermijnen, terwijl de toegevoegde waarde van het verdrag dat door Zweden werd voorgesteld in de ogen van Nederland nihil was.

Volgens Zweden en andere voorstanders van het verdrag moest de meerwaarde ervan vooral gezocht worden in het systeem van universele jurisdictie. In Nederland waren er, met name bij het Ministerie van Justitie, tegen de invoering van dit systeem nu juist bezwaren, onder meer omdat het in de praktijk niet effectief zou zijn. Een aantal ambtenaren van het Ministerie van Buitenlandse Zaken was het met die opvatting eens, maar bij dit ministerie overheerste, vooral bij het Bureau Humanitaire en Juridische Aangelegenheden, toch de opvatting dat verzet tegen het voorgestelde systeem van universele jurisdictie onwenselijk was.

In de eerste jaren van de onderhandelingen werd de Nederlandse positie vooral bepaald door het Ministerie van Justitie, maar na een actieve lobby en de aanneming van een motie in het parlement in het voorjaar van 1980 liet Nederland de bezwaren tegen opname van universele jurisdictie in het verdrag varen. Vanaf dat moment toonde Nederland, anders dan in de jaren ervoor, ook een actieve betrokkenheid bij de onderhandelingen. Vanaf 1982 kreeg Nederland zelfs een speciale rol, doordat de Nederlandse diplomaat Jan Herman Burgers werd benoemd tot voorzitter van de werkgroep die zich bezighield met de opstelling van het verdrag.

De Nederlandse inbreng in het overleg concentreerde zich in de eerste plaats op effectieve toezichtmechanismen. De voorstellen die het naar voren bracht, werden echter niet aanvaard. Hoewel het uiteindelijke tekstvoorstel niet veel afweek van het originele Zweedse ontwerp, getroostte Nederland zich veel moeite het verdrag aanvaard te krijgen. Kennelijk zag het de toegevoegde waarde daarvan nu wel in. Opmerkelijk genoeg concentreerde de Nederlandse lobby voor het verdrag zich niet alleen op staten, ook Amnesty International, dat geleidelijk aan wat teleurgesteld geraakt was over de uitkomsten van de onderhandelingen, werd benaderd om zich toch vooral positief op te stellen ten aanzien van het verdrag.

In hoofdstuk 4 wordt een aantal casestudies behandeld die een globaal beeld geven van het Nederlandse beleid ten aanzien van sociale en economische rechten. Van belang was vooral het standpunt dat deze rechten een ander karakter hadden dan burgerrechten en politieke rechten. Terwijl de laatste zich leenden voor een onmiddellijke toepassing en door de individuele burger konden worden ingeroepen voor de rechter, was dit volgens Nederland niet het geval bij sociale en economische rechten.

Vanzelfsprekend heeft de ontkenning van de justitiabiliteit van sociale en economische rechten gevolgen gehad voor de houding die Nederland aannam in onderhande-

lingen over internationale rechtsinstrumenten die betrekking hadden op deze categorie rechten. Net als de meeste westerse landen, betoonde Nederland zich er, zowel binnen de Raad van Europa als de VN, voorstander van sociale en economische rechten op te nemen in een apart verdrag met een separaat toezichtmechanisme. Dit resulteerde erin dat de internationale controle op de naleving van deze rechten minder sterk was dan voor de klassieke rechten; er was geen sprake van onafhankelijk toezicht, en er werd niet voorzien in een klachtrecht.

In de VN zette Nederland zich in de eerste helft van de jaren tachtig wel in voor de totstandkoming van een onafhankelijk toezichtscomité voor het Internationaal Verdrag inzake Economische, Sociale en Culturele Rechten, maar toen jaren later ook de suggestie van een klachtrecht op de agenda kwam, reageerde Nederland uiterst terughoudend. In deze positie is, ondanks een lobby van de zijde van het NJCM, en recentelijk ook Amnesty International, tot op heden nog maar weinig verandering gekomen. Het Ministerie van Buitenlandse Zaken lijkt wel bereid een meer positieve houding aan te nemen, maar bij de vakministeries, die geconfronteerd zullen worden met mogelijke financiële gevolgen van een klachtrecht, leven grote bezwaren.

Wat opvalt is echter dat Nederland klachtrecht voor sociale en economische rechten niet in alle gevallen heeft afgewezen, en soms zelfs heeft bevorderd. Dit was bijvoorbeeld het geval bij het VN-Verdrag inzake de Uitbanning van Alle Vormen van Discriminatie van Vrouwen en het Internationaal Verdrag inzake de Uitbanning van Alle Vormen van Rassendiscriminatie. Doordat de bepalingen in deze verdragen echter alleen discriminatie verbieden bij de toekenning van deze rechten, en geen minimumniveau van bescherming vastleggen, zijn de financiële consequenties hiervan beperkt. Voor de ILO-verdragen heeft Nederland ten slotte ook klachtrecht erkend. Wellicht werd dit minder problematisch gevonden doordat de ILO-standaarden zoveel specifiekker zijn dan die in de VN-verdragen, maar ook is het belangrijk in te zien dat het hier om een collectief klachtrecht gaat en niet om een individueel klachtrecht.

In hoofdstuk 5 wordt aangetoond dat de vraag door wie een klacht kan worden ingediend voor Nederland van groot belang was. In dit hoofdstuk komen het Protocol tot Wijziging van het Europees Sociaal Handvest van 1991 en het Aanvullend Protocol bij het Europees Sociaal Handvest betreffende een systeem voor collectieve klachten van 1995 aan de orde. Beide protocollen kwamen tot stand als gevolg van een begin jaren negentig opgestart hervormingsproces om het Europees Sociaal Handvest nieuw leven in te blazen.

In principe kon Nederland zich wel vinden in dit initiatief. Het hechtte in eerste instantie vooral belang aan een verbetering van de bestaande rapportageprocedure, en het dacht daarbij met name aan de bevordering van tot individuele landen gerichte aanbevelingen door het Comité van Ministers van de Raad van Europa, en aan maatregelen ter verlichting van de rapportagelast. Daarnaast was Nederland eveneens bereid mee te denken over de vraag hoe overlappingen in het werk van het Regeringscomité en het Comité van Onafhankelijke Deskundigen konden worden voorkomen. Een geheel onafhankelijke procedure ging Nederland, net als de meeste andere landen, veel

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te ver, maar zolang niet de indruk werd gewekt dat het Comité van Onafhankelijke Deskundigen opereerde als een hof, was Nederland wel bereid zich in te zetten voor het voorstel het juridisch-technische oordeel of een land al dan niet aan zijn verdragsverplichtingen had voldaan over te laten aan het Comité van Onafhankelijke Deskundigen. Het Regeringscomité kon dan op basis van politieke overwegingen de beslissingen van het Comité van Ministers voorbereiden.

Aanvankelijk was Nederland geen voorstander van een klachtrecht. In de eerste plaats omdat het vond dat de aandacht niet moest worden afgeleid van de verbetering van de rapportageprocedure, maar ook omdat het de mogelijke financiële gevolgen ervan vreesde. Uiteindelijk veranderde Nederland zijn positie, maar de blijvende bezwaren tegen een individueel klachtrecht, de inzet op een aantal ontvankelijkheids-criteria, en de terughoudendheid de procedure ook open te stellen voor internationale NGO's laten zien dat Nederland beducht bleef voor ongewenste inbreuken op de nationale soevereiniteit.

In eerste instantie vond Nederland het ook geen goed idee om het Regeringscomité buiten de collectieve klachtenprocedure te houden, maar toen bleek dat ETUC en UNICE de procedure in dat geval van onvoldoende waarde achtten, wijzigde Nederland zijn standpunt, en tot het einde toe bleef het zich daarna inzetten voor een meer onafhankelijke procedure.

In hoofdstuk 6 en 7 wordt ingegaan op het Nederlandse beleid ten aanzien van het thema kinderrechten. Hoofdstuk 6 laat zien dat Nederland tot de tweede helft van de jaren tachtig geen voorstander was van aparte instrumenten voor de rechten van het kind, onder andere omdat het vond dat dit niets toevoegde aan de algemene mensenrechtenverdragen, die immers voor iedereen, en dus ook voor kinderen, golden. Aan het eind van de jaren tachtig en het begin van de jaren negentig veranderde dit echter, en het thema kinderrechten kreeg een grotere prioriteit in het Nederlandse beleid.

Dit betekende echter niet dat Nederland een onverdeeld voorstander was van alle instrumenten waartoe op dit terrein het initiatief genomen werd. Het werkte weliswaar constructief mee aan de totstandkoming van een ILO-verdrag dat de ergste vormen van kinderarbeid moest bestrijden, maar ten aanzien van het Facultatief Protocol bij het Verdrag inzake de Rechten van het Kind inzake Betrokkenheid van Kinderen bij Gewapende Conflicten nam het een meer ambivalente houding aan. Nederland was van mening dat het inderdaad goed zou zijn de minimumleeftijd waarop jongeren gerekruteerd konden worden voor het leger en voor deelname aan gewapende conflicten te verhogen, maar tot grote spijt van het Ministerie van Buitenlandse Zaken, ging het het Ministerie van Defensie te ver de minimumleeftijd voor alle vormen van rekrutering en deelname op te hogen tot achttien jaar. In verband met personeelstekorten en wervingsproblemen vond Defensie dat het mogelijk moest blijven jongeren vanaf zestien jaar op vrijwillige basis te werven. Na grote druk van de zijde van NGO's en parlement werd de leeftijdsgrens uiteindelijk op zeventien jaar gesteld, maar verder dan dat wilde het ministerie niet gaan. Ook een verbod op indirecte participatie van personen onder de achttien jaar ging dit ministerie te ver.

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Bij de onderhandelingen over het voornoemde protocol kon Nederland, ondanks een aantal specifieke bezwaren, toch wel tot de voorstanders van de totstandkoming ervan gerekend worden. Dit lag echter anders in het geval van het Facultatief Protocol inzake de Verkoop van Kinderen, Kinderprostitutie en Kinderpornografie bij het Verdrag inzake de Rechten van het Kind. Net als veel andere westerse landen had Nederland bezwaren tegen dit protocol. Het zou geen toegevoegde waarde hebben, en het gevoel heerste dat het de groep zuidelijke landen die zich voorstander van dit protocol betoonde, niet werkelijk te doen was om de bescherming van de rechten van het kind, maar dat deze landen er vooral op uit waren de westerse landen in een kwaad daglicht te stellen. Een aantal bepalingen in het ontwerpverdrag lag daarnaast voor Nederland ook erg gevoelig, omdat ze moeilijk in overeenstemming te brengen waren met de binnenlandse regelgeving.

Een casestudie die in hoofdstuk 6 niet aan de orde komt, maar daarentegen uitgebreid besproken wordt in hoofdstuk 7, is die van het VN-Verdrag inzake de Rechten van het Kind van 1989. In de eerste jaren van de onderhandelingen over dit verdrag stelde Nederland zich uiterst terughoudend op. Nederland vond dat het verdrag geen toegevoegde waarde had. Het feit dat het oorspronkelijke Poolse voorstel eenzijdig gericht was op economische en sociale rechten en vooral gesteund werd door de communistische Oostbloklanden speelde bij deze negatieve houding eveneens een rol. Omwille van de Nederlandse reputatie verzette Nederland zich niet actief tegen de totstandkoming van het verdrag en, anders dan bijvoorbeeld de Verenigde Staten, zocht het de politieke confrontatie met het Oostblok niet op, maar van actieve en constructieve deelname aan de onderhandelingen was tot 1984 ook zeker geen sprake.

Toen de onderhandelingen vanaf 1984 door een verbeterd internationaal klimaat en de totstandkoming van een coalitie van NGO's die zich wilden inzetten voor het verdrag aanzienlijk meer vaart kregen, veranderde echter ook de Nederlandse positie. Feitelijk maakte Nederland vanaf dat moment deel uit van een transnationaal netwerk van non-gouvernementele en gouvernementele actoren die zich actief inzetten voor de totstandkoming van het verdrag. NGO's hadden daarbij niet alleen invloed op de Nederlandse houding ten aanzien van het verdrag als zodanig, maar ook op de inhoudelijke standpunten die ten aanzien van afzonderlijke verdragsbepalingen werden ingenomen. Het parlement speelde vooral op indirecte wijze een rol, doordat de Nederlandse vertegenwoordiger in de werkgroep waarin werd onderhandeld over de verdragstekst, rekening moest houden met de binnenlands-politieke verhoudingen. Vooral bij de christelijke partijen in het parlement werd groot belang gehecht aan het gezin als fundament van de samenleving, en mede daarom achtte de Nederlandse vertegenwoordiger het van groot belang dat in het verdrag ook voldoende aandacht werd besteed aan de rol van de ouders.

In de onderhandelingen legde Nederland daarnaast veel nadruk op de noodzaak bepalingen op het terrein van economische en sociale rechten aan te vullen met burgerrechten en politieke rechten, en met speciaal voor kinderen ontwikkelde rechten. Nederland waakte er daarbij wel steeds voor dat er geen bepalingen werden aangenomen

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men die in strijd waren met de Nederlandse wet- en regelgeving. Vooral vanuit het Ministerie van Justitie werd dit soevereiniteitsbelang nadrukkelijk in de gaten gehouden. Dit bleek bijvoorbeeld uit de Nederlandse positie ten aanzien van ontwerpartikelen die betrekking hadden op migratie, sociale zekerheid en het gescheiden detineren van jeugdigen en volwassenen.

Nederland vond het echter eveneens van groot belang dat de artikelen in dit nieuwe verdrag geen afbreuk deden aan bestaande internationale regelgeving. Het zette zich er bijvoorbeeld voor in dat het ontwerpartikel over godsdienstvrijheid geen zwakkere afspiegeling vormde van hetgeen al was vastgelegd in het Internationaal Verdrag inzake Burgerrechten en Politieke Rechten, maar de pogingen bleven zonder resultaat. Ook bij de onderhandelingen over het artikel inzake kinderen in militaire conflicten speelde een dergelijk probleem. Nederland had het initiatief genomen hierover een bepaling op te nemen, maar per abuis werd in eerste lezing een tekst aangenomen die minder bescherming bood dan al bestaande regels van het humanitair oorlogsrecht. Samen met onder andere Zweden en Zwitserland deed Nederland nog de nodige pogingen de gemaakte fouten te herstellen, maar het was daarin niet succesvol.

Terwijl Nederland zich bij het Verdrag tegen Foltering had sterk gemaakt voor meer verregaande vormen van internationaal toezicht op de naleving van de regels, was dit bij de onderhandelingen over het Verdrag inzake de Rechten van het Kind veel minder het geval. Nederland hechtte wel aan een onafhankelijk toezichtsorgaan, maar het was er geen voorstander van naast een rapportageprocedure nog een klachtrecht op te nemen. Dit had te maken met het feit dat het verdrag ook sociale en economische rechten bevatte, maar ook met het gegeven dat er bij de realisatie van kinderrechten, anders dan normaal het geval is bij mensenrechten, niet alleen sprake is van een relatie tussen de rechthebbende en de overheid, maar ook tussen kind en ouders. Over het algemeen was Nederland geen voorstander van een juridificatie van de relatie tussen ouders en kind, en een klachtrecht werd mede daarom onwenselijk geacht.

In de loop van de jaren negentig groeide, onder invloed van een toenemend aantal interstatelijke conflicten, de internationale aandacht voor rechten van minderheden. In hoofdstuk 8 wordt onderzocht hoe Nederland hier tegenover stond. Het hoofdstuk laat zien dat ook in Nederland de bereidheid zich in te zetten voor de ontwikkeling van internationale instrumenten ter bescherming en bevordering van de rechten van minderheden vooral vanaf dat moment groeide. Vanaf het begin van de jaren negentig droeg Nederland in de VN een steentje bij aan de aanneming van de Verklaring inzake de Bescherming van Nationale en Etnische, Religieuze en Linguïstieke Minderheden, en ook in de Raad van Europa en de CVSE stelde het zich positief op ten aanzien van de daar genomen initiatieven.

Uitgangspunt bleef voor Nederland wel dat mensenrechten gericht moesten zijn op het individu, en voor de erkenning van collectieve minderhedenrechten voelde het dan ook niet veel. Typisch was daarnaast dat Nederland voorstander was van een brede invulling van de term 'nationale minderheid', en ernaar streefde minderhedenrechten ook van toepassing te laten verklaren op 'nieuwe minderheden', zoals vluchtelingen

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of gastarbeiders. Nederland bracht dit standpunt naar voren in de CVSE, en ook tijdens de onderhandelingen over het Kaderverdrag voor de Bescherming van Nationale Minderheden dat werd opgesteld in de Raad van Europa.

Bij de onderhandelingen over dit laatstgenoemde verdrag speelde Nederland een vooraanstaande rol, en in een aantal opzichten bepleitte het een meer verregaand verdrag dan de meeste andere landen wensten. Nederland was niet alleen voorstander van een bredere definitie van het begrip ‘nationale minderheid’ – een standpunt waarop het jaren later bij de ratificatie overigens weer terugkwam toen het verklaarde dat Nederland het Kaderverdrag alleen zou toepassen op de Friezen – maar ook was het voorstander van een meer onafhankelijke toezichtsprocedure. Nederland ging daarin overigens niet zover dat het ook een klachtrecht of betrokkenheid van het Europese Hof voor de Rechten van de Mens zou willen erkennen, en daarom was het, net als de meeste landen, geen voorstander van het idee culturele rechten vast te leggen in een protocol bij het Europese Verdrag tot Bescherming van de Rechten van de Mens en de Fundamentele Vrijheden.

Hoewel dit in de uitwerking van een en ander niet altijd zichtbaar was, werden internationale rechtsinstrumenten die betrekking hadden op minderhedenrechten mede tot stand gebracht vanuit veiligheidspolitieke overwegingen. Een instrument waarbij dat het meest duidelijk naar voren kwam, was de functie van de Hoge Commissaris inzake Nationale Minderheden, die in 1992 tot stand kwam in de toenmalige CVSE. De Nederlandse bijdrage aan het onderhandelingsproces dat daaraan vooraf ging, staat centraal in hoofdstuk 9.

Het initiatief om deze functie te creëren kwam van Nederland, en de directe aanleiding daartoe was het uitbreken van de burgeroorlog in het voormalige Joegoslavië. In heel Europa waren er gevoelens van onmacht en frustratie dat het niet gelukt was escalatie van dit conflict te voorkomen, maar voor Nederland gold dat des te meer door de grote betrokkenheid die het als EG-voorzitter had gehad bij de internationaal-diplomatieke pogingen de gemoederen in Joegoslavië tot bedaren te brengen. Nederland hoopte dat de instelling van de functie van een Hoge Commissaris zou kunnen bijdragen aan het voorkomen van soortgelijke conflicten in de rest van Europa. Naast veiligheidspolitieke en humanitaire redenen speelde waarschijnlijk de wens het door een mislukt EG-voorzitterschap beschadigde imago op te poetsen ook een rol.

Een belangrijk element van het Nederlandse voorstel was dat de Hoge Commissaris inzake Nationale Minderheden in grote mate onafhankelijk van de CVSE-staten zou moeten kunnen opereren. Nederland verwachtte dat een dergelijke onafhankelijkheid bepalend zou zijn voor de effectiviteit van het instrument. Om het voorstel ook voor andere landen acceptabel te maken, moest Nederland wel concessies doen, en enige controle op de Hoge Commissaris toelaten, maar het probeerde deze te beperken. Voor Nederland was het ook belangrijk dat het voorstel voor een Hoge Commissaris inzake Nationale Minderheden niet werd verbreed naar de gehele menselijke dimensie, zoals de Verenigde Staten wensten. De focus zou dan verloren kunnen gaan, en bovendien

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zouden vraagstukken die wel relevant waren voor minderhedenkwesties, maar die niet binnen de menselijke dimensie vielen dan buiten het mandaat komen te vallen.

Om de tegenstanders van een Hoge Commissaris inzake Nationale Minderheden tegemoet gekomen, werd duidelijk in de mandaattekst opgenomen dat de Hoge Commissaris onpartijdig diende te zijn, en niet moest worden gezien als een internationaal pleitbezorger van minderheden. Daarnaast werden er beperkingen opgenomen, die bemoeienissen van de Hoge Commissaris met etnische spanningen in de Verenigde Staten, en al bestaande conflicten in Noord-Ierland, Turkije en Spanje uitsloten. Het mandaat werd daardoor in feite beperkt tot de voormalige communistische landen in de oostelijke helft van Europa. Vanuit een mensenrechtelijk perspectief kunnen deze concessies worden bekritiseerd, maar de keuzen zijn wel te begrijpen vanuit praktisch oogpunt en vanuit de veiligheidspolitieke benadering, die centraal stond in de bureaucratische opdracht van het Bureau Politieke Aangelegenheden van de Directie Atlantische Samenwerking en Veiligheidszaken, dat binnen het Ministerie van Buitenlandse Zaken verantwoordelijk was voor de onderhandelingen.

Dat Nederland de totstandkoming van de functie van Hoge Commissaris uiteindelijk geaccepteerd kreeg, kan beschouwd worden als een hele prestatie. Achteraf is door andere landen wel beweerd dat de Nederlandse inspanningen vooral voortvloeiden uit reputationele overwegingen. Hoewel de wens mooie sier te maken met het initiatief tot een Hoge Commissaris tot op zekere hoogte wel een rol speelde, was het echter niet zo dat Nederland al van te voren bepaald had dat de functie vanuit Den Haag zou moeten worden vervuld door de Nederlandse oud-minister van Buitenlandse Zaken, Max van der Stoep. Nederland had tijdens de onderhandelingen over het mandaat op dit punt geen dubbele agenda.

In hoofdstuk 10 worden de bevindingen uit de eerdere hoofdstukken samengebracht, vergeleken en verwerkt tot een aantal algemene conclusies over het Nederlandse beleid ten aanzien van de ontwikkeling van internationale mensenrechteninstrumenten.

Wat betreft de normstelling wordt geconcludeerd dat de Nederlandse beleidspraktijk niet minder dubbelslachtig was dan de beleidsprincipes, die in de inleiding werden beschreven. Soms was Nederland meteen al positief over nieuw tot stand te brengen normen, maar meestal lag de nadruk, vooral waar het juridisch bindende instrumenten betrof, vooral op de directe en indirecte nadelen die daaraan verbonden konden zijn. Er werd door de regering in beleidsnota's in meer algemene zin wel uitdrukking gegeven aan dergelijke bezwaren, maar als het om concrete voorstellen tot verdere normstelling ging, werden hoogstens voorzichtige twijfels over de toegevoegde waarde van het betreffende instrument naar voren gebracht, en na verloop van tijd paste Nederland zijn mening omtrent de wenselijkheid van het normstellende initiatief gewoonlijk aan die van de voorstanders aan.

Ten aanzien van het internationale toezicht op de naleving van mensenrechtennormen stelde Nederland zich in zijn beleidsnota's op het standpunt dat zo effectief mogelijke procedures moesten worden nagestreefd. Volgens het formele standpunt betekende dit dat in de regel niet kon worden volstaan met een rapportageprocedure,

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maar het idee van een individueel klachtrecht stuitte bij Nederland in de praktijk dikwijls op bezwaren. Dit was niet alleen het geval bij economische en sociale rechten, maar ook op het terrein van minderhedenrechten en kinderrechten. Toch zou het onjuist zijn te concluderen dat Nederland zich in de praktijk niet inzette voor meer effectieve vormen van internationaal toezicht, want in veel gevallen deed het dit namelijk wel. Vooral aan de onafhankelijkheid van de procedure werd vrijwel altijd veel waarde gehecht, en zelfs in het geval van de hervorming van het Europees Sociaal Handvest, behoorde Nederland in ieder geval nog tot de groep van landen die bereid was de controle van de verdragsstaten op de procedure te verminderen.

Welke positie Nederland ook innam ten aanzien van voorstellen voor nieuwe internationale mensenrechteninstrumenten, belangstelling voor de discussies die ermee samenhangen toonde het vrijwel altijd. Het feit dat het zich daarbij steeds afvroeg of en hoe het betreffende instrument het bestaande systeem zou kunnen versterken, laat zien dat Nederland oprecht van mening was dat internationale mensenrechteninstrumenten een bijdrage konden leveren aan het ideaal van een wereldwijde bescherming van de rechten van de mens. Desondanks moet de gedachte dat Nederland op het internationale toneel de rol van gidsland vervulde in belangrijke mate gerelativeerd worden. Vooral wat betreft normstelling bestond het beleid voor een groot deel uit aanpassing aan internationale trends. Daarnaast impliceert het gidslandconcept ook dat het beleid, op zijn minst in overwegende mate, wordt bepaald door mensenrechtelijke overwegingen. In werkelijkheid speelden echter ook diverse andere factoren een rol. Het beleid dat in de onderzochte periode gevoerd werd, was het resultaat van een hele reeks aan invloeden; sommige stimuleerden Nederland verdergaande normen en meer effectief toezicht te accepteren, andere weerhielden het daar juist van.

Wanneer het soevereiniteitsbelang in het geding kwam, werkte dit gewoonlijk als een remmende factor. Nederland wilde de vrijheid behouden het eigen beleid te bepalen, en de eigen regels vast te stellen. Dit betekende dat Nederland steeds alert was dat er geen internationale standaarden werden vastgesteld die in strijd waren met eigen beleid en regelgeving, en dat het geneigd was controle te willen behouden op het toezicht als het vreesde dat de regels zouden kunnen worden geïnterpreteerd op een wijze die het onwenselijk achtte. Toch was het niet zo dat Nederland helemaal geen soevereiniteitsverlies accepteerde. Af en toe bleek het bereid binnenlandse wetgeving aan te passen, en daarnaast werden door binding aan internationale rechtsregels ook bepaalde beleidsmogelijkheden voor de toekomst uitgesloten.

Veiligheidsbelangen en politiek-strategische belangen konden, afhankelijk van de situatie, werken als een stimulerende of remmende invloed. Tot de jaren negentig ging het hierbij met name om de invloed van de Koude Oorlog. Deze kon de positie die Nederland innam in onderhandelingen over nieuwe mensenrechteninstrumenten weliswaar mede bepalen, maar de vraag hoe de communisten een hak te zetten was, in ieder geval binnen de VN, toch zeker niet primair bepalend. Na de val van de Muur was vooral de zorg hoe de stabiliteit in de oostelijke helft van Europa kon worden bewaard medebepalend voor de houding van Nederland ten aanzien van de verdere ontwikkeling van het internationale mensenrechtensysteem. De steun aan instrumenten

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ter bescherming van de rechten van minderheden vloeide hier voor een belangrijk deel uit voort.

Het belang een goede internationale reputatie te behouden, werkte per definitie in het voordeel van verdere normstelling en meer effectieve toezichtsprocedures. Soms was de wens de Nederlandse naam hoog te houden een van de redenen zelf een initiatief te nemen, maar ook als Nederland moest reageren op een voorstel van een ander land, weerhielden reputationele overwegingen Nederland er, indien het bezwaren had, meestal van zich al te afwijzend uit te laten. Uiteindelijk leidde de wens het Nederlandse imago geen schade toe te brengen er normaliter ook toe dat Nederland eventuele bedenkingen tegen een nieuw mensenrechteninstrument na verloop van tijd liet varen, en uiteindelijk voorstander werd van ieder initiatief.

De idee dat van een mensenrechtenlievend land een positieve houding kan worden verwacht ten aanzien van de ontwikkeling van nieuwe normen en procedures ter bescherming van de rechten van de mens, en dat een meer kritische houding daarentegen dus als een bewijs van het tegendeel kan worden gezien, werd onder andere gevoed door NGO's. NGO's waren niet bij alle onderhandelingsprocessen betrokken, maar wanneer zij wel betrokken waren, werd door de Nederlandse beleidsmakers over het algemeen serieus naar hen geluisterd. NGO's waren dan ook in staat invloed uit te oefenen op het Nederlandse beleid. In verschillende gevallen ontstond er een transnationaal mensenrechtennetwerk, waarin vertegenwoordigers van NGO's samenwerkten met beleidsambtenaren.

Voor zover er sprake was van parlementaire invloed op de Nederlandse positiebepaling in onderhandelingen over internationale mensenrechteninstrumenten, had deze een stimulerende werking op verdergaande normstelling en meer effectief toezicht. Indirecte invloed van het parlement kan niet worden uitgesloten, maar de directe invloed van het parlement was over het algemeen vrij beperkt. Alleen zodra de ratificatie aan de orde kwam, groeide de parlementaire bemoeienis.

Voor de Nederlandse opstelling in onderhandelingen over internationale mensenrechteninstrumenten was het sterk bepalend welk ministerie de leiding had. Betrokkenheid van de vakdepartementen werkte meestal remmend, doordat deze ministeries vanuit hun bureaucratische opdracht meer rekening moesten houden met de binnenlandse gevolgen van acceptatie van nieuwe normen en meer krachtige toezichtsmechanismen. Mogelijk soevereiniteitsverlies woog voor deze ministeries dus zwaarder dan voor het Ministerie van Buitenlandse Zaken, dat op zijn beurt veel meer geneigd was rekening te houden met de gevolgen die een negatieve houding zou kunnen hebben voor de Nederlandse reputatie. Binnen het Ministerie van Buitenlandse Zaken gold dit vooral voor het Bureau Humanitaire en Juridische Aangelegenheden. De betrokkenheid van dit bureau, en de afdelingen die zijn taken na de organisatorische veranderingen van het ministerie overnamen, werkte daarom dus juist ten gunste van meer normen en sterker internationaal toezicht.

Doordat er diverse belangen in het spel waren, die op hun beurt werden gerepresenteerd en verdedigd door verscheidene actoren, verschilden de beleidsuitkomsten van geval tot geval. Dit leidde soms tot inconsistenties in het beleid, en ook in de veronder-

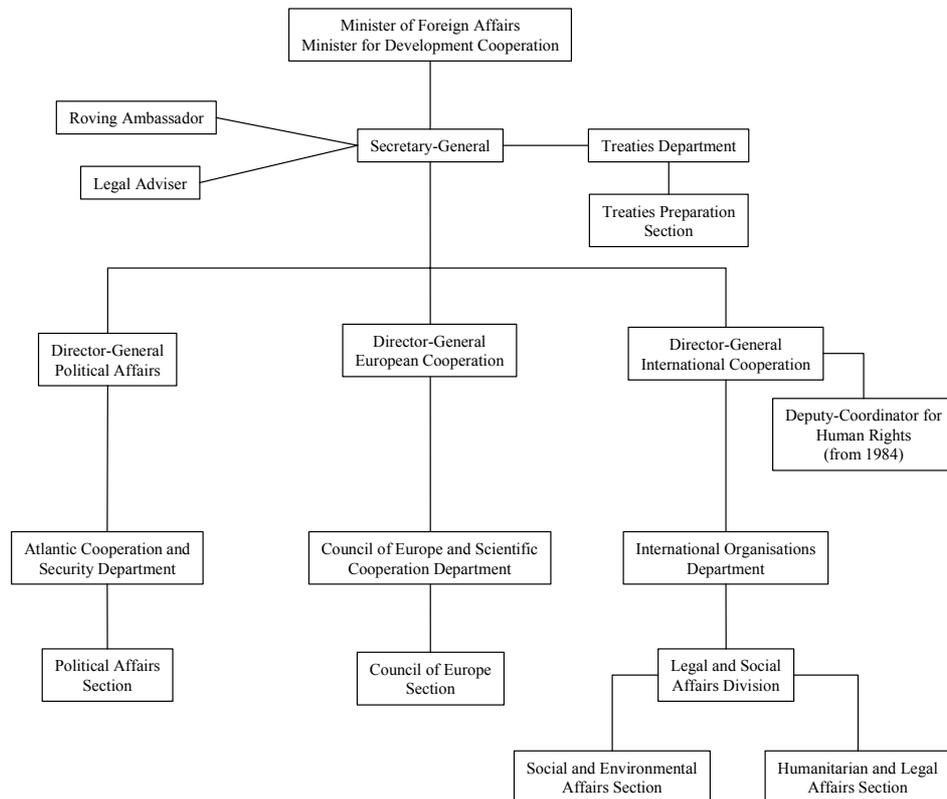
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stellingen die daaraan ten grondslag lagen. Concluderend kan gezegd worden dat Nederland over het algemeen eerder gezien moet worden als een land dat zich steeds aanpaste aan de omstandigheden dan als een gidsland met een consistente langetermijnvisie op de ontwikkeling van het internationale mensenrechtensysteem.

ANNEX 1

ORGANISATIONAL CHART OF THE MINISTRY OF FOREIGN AFFAIRS¹

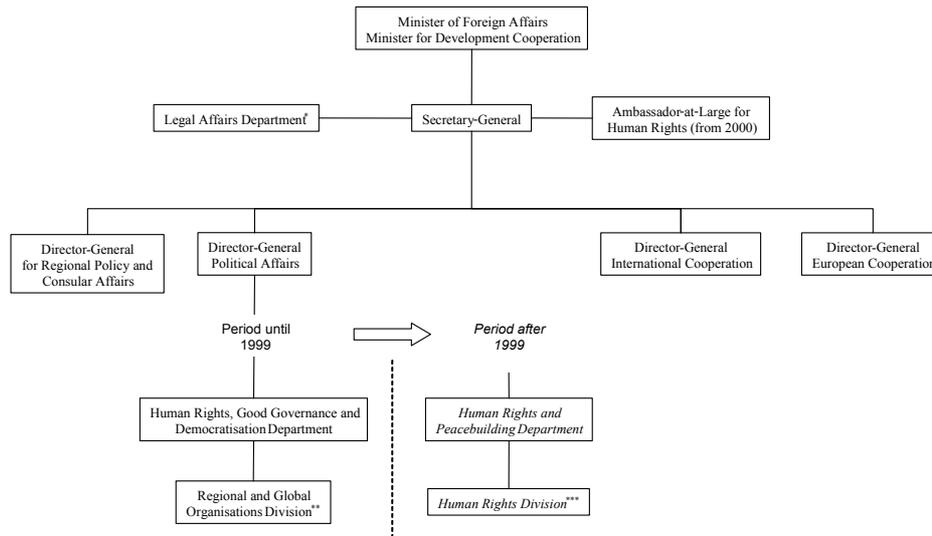
A. The period until 1995



¹ This overview only contains information on the departments and sections that are mentioned in this study.

Annex 1

B. The period after 1995



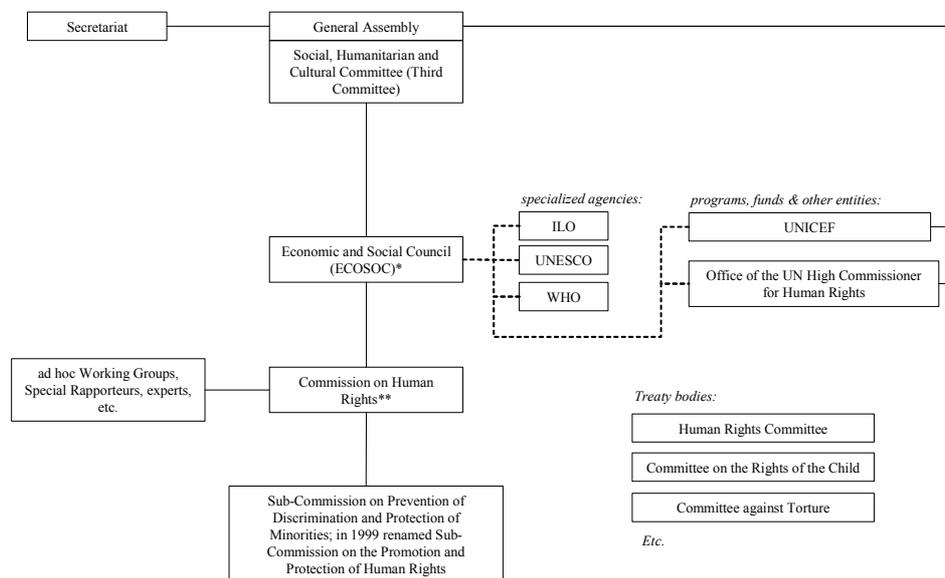
* This Department took over the duties of the staff of the Legal Adviser in respect to the development of international human rights instruments.

** This Division took over the duties of the Humanitarian and Legal Affairs Section in respect to the development of international human rights instruments.

*** This Division took over the duties of the Regional and Global Organisations Division in respect to the development of international human rights instruments.

ANNEX 2

ORGANISATIONAL CHART OF THE UNITED NATIONS¹



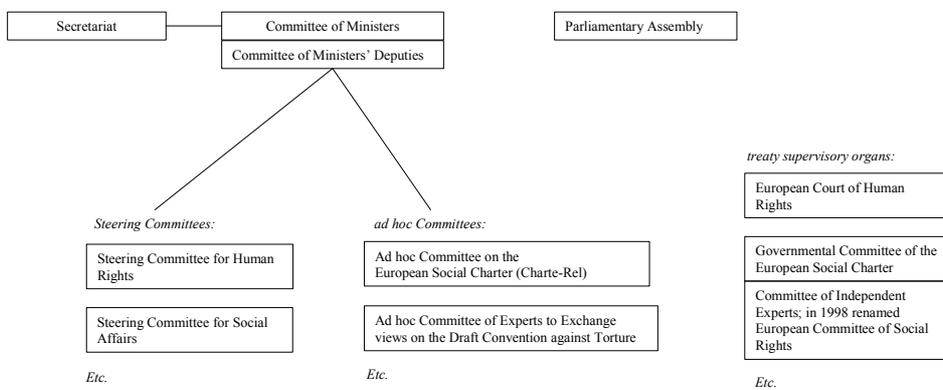
* Dashes indicate a non-subsidiary reporting relationship.

** In March 2006, this Commission was replaced by the Human Rights Council. This new organ is directly accountable to the General Assembly.

¹ This overview only contains information on the organs and institutions that are mentioned in this study.

ANNEX 3

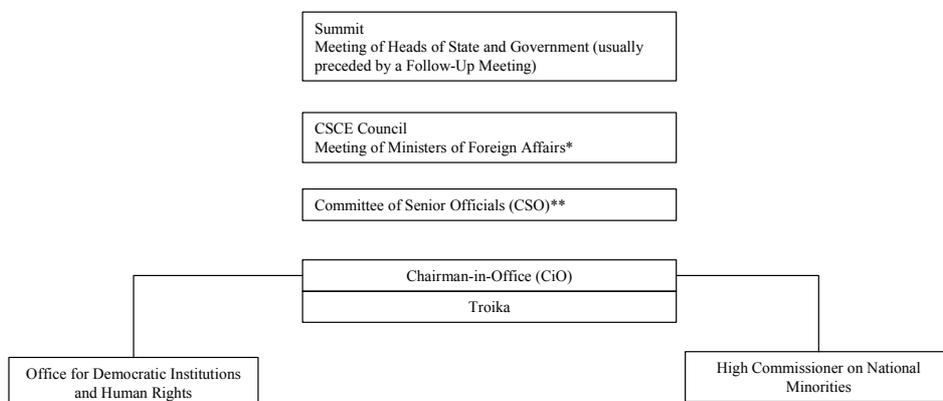
ORGANISATIONAL CHART OF THE COUNCIL OF EUROPE¹



¹ This overview only contains information on the organs and institutions that are mentioned in this study.

ANNEX 4

ORGANISATIONAL CHART OF THE CSCE/OSCE



* Starting from 1994, the Council was called 'Ministerial Council'.

** Starting from 1994, the CSO was called 'Senior Council'. Since the establishment of the Permanent Council in 1993, this organ took over most of its duties.

ANNEX 5

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1984)

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Annex 5

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
 - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - (b) When the alleged offender is a national of that State;
 - (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

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Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Annex 5

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee

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established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Six members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

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Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
 - (a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
 - (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
 - (c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;
 - (d) The Committee shall hold closed meetings when examining communications under this article;
 - (e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;
 - (f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

Convention Against Torture (1984)

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

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Article 23

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

Article 25

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

Convention Against Torture (1984)

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

- (a) Signatures, ratifications and accessions under articles 25 and 26;
- (b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;
- (c) Denunciations under article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

ANNEX 6

PROTOCOL AMENDING THE EUROPEAN SOCIAL CHARTER (1991)

The member States of the Council of Europe, signatory to this Protocol to the European Social Charter, opened for signature in Turin on 18 October 1961 (hereinafter referred to as "the Charter"),

Being resolved to take some measures to improve the effectiveness of the Charter, and particularly the functioning of its supervisory machinery;

Considering therefore that it is desirable to amend certain provisions of the Charter,

Have agreed as follows:

Article 1

Article 23 of the Charter shall read as follows:

"Article 23 – Communication of copies of reports and comments

1. When sending to the Secretary General a report pursuant to Articles 21 and 22, each Contracting Party shall forward a copy of that report to such of its national organisations as are members of the international organisations of employers and trade unions invited, under Article 27, paragraph 2, to be represented at meetings of the Governmental Committee. Those organisations shall send to the Secretary General any comments on the reports of the Contracting Parties. The Secretary General shall send a copy of those comments to the Contracting Parties concerned, who might wish to respond.
2. The Secretary General shall forward a copy of the reports of the Contracting Parties to the international non-governmental organisations which have consultative status with the Council of Europe and have particular competence in the matters governed by the present Charter.
3. The reports and comments referred to in Articles 21 and 22 and in the present article shall be made available to the public on request."

Article 2

Article 24 of the Charter shall read as follows:

"Article 24 – Examination of the reports

1. The reports sent to the Secretary General in accordance with Articles 21 and 22 shall be examined by a Committee of Independent Experts constituted pursuant to Article 25. The committee shall also have before it any comments forwarded to the Secretary General in accordance with paragraph 1 of Article 23. On completion of its examination, the Committee of Independent Experts shall draw up a report containing its conclusions.
2. With regard to the reports referred to in Article 21, the Committee of Independent Experts shall assess from a legal standpoint the compliance of national law and practice with the obligations arising from the Charter for the Contracting Parties concerned.
3. The Committee of Independent Experts may address requests for additional information and clarification directly to Contracting Parties. In this connection the Committee of Independent Experts may also hold, if necessary, a meeting with the representatives of a Contracting Party, either on its own initiative

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or at the request of the Contracting Party concerned. The organisations referred to in paragraph 1 of Article 23 shall be kept informed.

4. The conclusions of the Committee of Independent Experts shall be made public and communicated by the Secretary General to the Governmental Committee, to the Parliamentary Assembly and to the organisations which are mentioned in paragraph 1 of Article 23 and paragraph 2 of Article 27.”

Article 3

Article 25 of the Charter shall read as follows:

“Article 25 – Committee of Independent Experts

1. The Committee of Independent Experts shall consist of at least nine members elected by the Parliamentary Assembly by a majority of votes cast from a list of experts of the highest integrity and of recognised competence in national and international social questions, nominated by the Contracting Parties. The exact number of members shall be determined by the Committee of Ministers.
2. The members of the committee shall be elected for a period of six years. They may stand for re-election once.
3. A member of the Committee of Independent Experts elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor’s term.
4. The members of the committee shall sit in their individual capacity. Throughout their term of office, they may not perform any function incompatible with the requirements of independence, impartiality and availability inherent in their office.”

Article 4

Article 27 of the Charter shall read as follows:

“Article 27 – Governmental Committee

1. The reports of the Contracting Parties, the comments and information communicated in accordance with paragraphs 1 of Article 23 and 3 of Article 24, and the reports of the Committee of Independent Experts shall be submitted to a Governmental Committee.
2. The committee shall be composed of one representative of each of the Contracting Parties. It shall invite no more than two international organisations of employers and no more than two international trade union organisations to send observers in a consultative capacity to its meetings. Moreover, it may consult representatives of international non-governmental organisations which have consultative status with the Council of Europe and have particular competence in the matters governed by the present Charter.
3. The Governmental Committee shall prepare the decisions of the Committee of Ministers. In particular, in the light of the reports of the Committee of Independent Experts and of the Contracting Parties, it shall select, giving reasons for its choice, on the basis of social, economic and other policy considerations the situations which should, in its view, be the subject of recommendations to each Contracting Party concerned, in accordance with Article 28 of the Charter. It shall present to the Committee of Ministers a report which shall be made public.
4. On the basis of its findings on the implementation of the Social Charter in general, the Governmental Committee may submit proposals to the Committee of Ministers aiming at studies to be carried out on social issues and on articles of the Charter which possibly might be updated.”

Article 5

Article 28 of the Charter shall read as follows:

“Article 28 – Committee of Ministers

1. The Committee of Ministers shall adopt, by a majority of two-thirds of those voting, with entitlement to voting limited to the Contracting Parties, on the basis of the report of the Governmental Committee, a resolution covering the entire supervision cycle and containing individual recommendations to the Contracting Parties concerned.

Protocol Amending the European Social Charter (1991)

2. Having regard to the proposals made by the Governmental Committee pursuant to paragraph 4 of Article 27, the Committee of Ministers shall take such decisions as it deems appropriate.”

Article 6

Article 29 of the Charter shall read as follows:

“Article 29 – Parliamentary Assembly

The Secretary General of the Council of Europe shall transmit to the Parliamentary Assembly, with a view to the holding of periodical plenary debates, the reports of the Committee of Independent Experts and of the Governmental Committee, as well as the resolutions of the Committee of Ministers.”

Article 7

1. This Protocol shall be open for signature by member States of the Council of Europe signatories to the Charter, which may express their consent to be bound by:
 - a. signature without reservation as to ratification, acceptance or approval; or
 - b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.
2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 8

This Protocol shall enter into force on the thirtieth day after the date on which all Contracting Parties to the Charter have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

Article 9

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. the date of entry into force of this Protocol in accordance with Article 8;
- d. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Turin, this 21st day of October 1991, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

ANNEX 7

ADDITIONAL PROTOCOL TO THE EUROPEAN SOCIAL CHARTER PROVIDING FOR A SYSTEM OF COLLECTIVE COMPLAINTS (1995)

Preamble

The member States of the Council of Europe, signatories to this Protocol to the European Social Charter, opened for signature in Turin on 18 October 1961 (hereinafter referred to as “the Charter”),

Resolved to take new measures to improve the effective enforcement of the social rights guaranteed by the Charter;

Considering that this aim could be achieved in particular by the establishment of a collective complaints procedure, which, inter alia, would strengthen the participation of management and labour and of non-governmental organisations,

Have agreed as follows:

Article 1

The Contracting Parties to this Protocol recognise the right of the following organisations to submit complaints alleging unsatisfactory application of the Charter:

- a. international organisations of employers and trade unions referred to in paragraph 2 of Article 27 of the Charter;
- b. other international non-governmental organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee;
- c. representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint.

Article 2

1. Any Contracting State may also, when it expresses its consent to be bound by this Protocol, in accordance with the provisions of Article 13, or at any moment thereafter, declare that it recognises the right of any other representative national non-governmental organisation within its jurisdiction which has particular competence in the matters governed by the Charter, to lodge complaints against it.
2. Such declarations may be made for a specific period.
3. The declarations shall be deposited with the Secretary General of the Council of Europe who shall transmit copies thereof to the Contracting Parties and publish them.

Article 3

The international non-governmental organisations and the national non-governmental organisations referred to in Article 1.b and Article 2 respectively may submit complaints in accordance with the procedure

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prescribed by the aforesaid provisions only in respect of those matters regarding which they have been recognised as having particular competence.

Article 4

The complaint shall be lodged in writing, relate to a provision of the Charter accepted by the Contracting Party concerned and indicate in what respect the latter has not ensured the satisfactory application of this provision.

Article 5

Any complaint shall be addressed to the Secretary General who shall acknowledge receipt of it, notify it to the Contracting Party concerned and immediately transmit it to the Committee of Independent Experts.

Article 6

The Committee of Independent Experts may request the Contracting Party concerned and the organisation which lodged the complaint to submit written information and observations on the admissibility of the complaint within such time-limit as it shall prescribe.

Article 7

1. If it decides that a complaint is admissible, the Committee of Independent Experts shall notify the Contracting Parties to the Charter through the Secretary General. It shall request the Contracting Party concerned and the organisation which lodged the complaint to submit, within such time-limit as it shall prescribe, all relevant written explanations or information, and the other Contracting Parties to this Protocol, the comments they wish to submit, within the same time-limit.
2. If the complaint has been lodged by a national organisation of employers or a national trade union or by another national or international non-governmental organisation, the Committee of Independent Experts shall notify the international organisations of employers or trade unions referred to in paragraph 2 of Article 27 of the Charter, through the Secretary General, and invite them to submit observations within such time-limit as it shall prescribe.
3. On the basis of the explanations, information or observations submitted under paragraphs 1 and 2 above, the Contracting Party concerned and the organisation which lodged the complaint may submit any additional written information or observations within such time-limit as the Committee of Independent Experts shall prescribe.
4. In the course of the examination of the complaint, the Committee of Independent Experts may organise a hearing with the representatives of the parties.

Article 8

1. The Committee of Independent Experts shall draw up a report in which it shall describe the steps taken by it to examine the complaint and present its conclusions as to whether or not the Contracting Party concerned has ensured the satisfactory application of the provision of the Charter referred to in the complaint.
2. The report shall be transmitted to the Committee of Ministers. It shall also be transmitted to the organisation that lodged the complaint and to the Contracting Parties to the Charter, which shall not be at liberty to publish it.
It shall be transmitted to the Parliamentary Assembly and made public at the same time as the resolution referred to in Article 9 or no later than four months after it has been transmitted to the Committee of Ministers.

Additional Protocol to the European Social Charter (1995)

Article 9

On the basis of the report of the Committee of Independent Experts, the Committee of Ministers shall adopt a resolution by a majority of those voting. If the Committee of Independent Experts finds that the Charter has not been applied in a satisfactory manner, the Committee of Ministers shall adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned. In both cases, entitlement to voting shall be limited to the Contracting Parties to the Charter.

At the request of the Contracting Party concerned, the Committee of Ministers may decide, where the report of the Committee of Independent Experts raises new issues, by a two-thirds majority of the Contracting Parties to the Charter, to consult the Governmental Committee.

Article 10

The Contracting Party concerned shall provide information on the measures it has taken to give effect to the Committee of Ministers' recommendation, in the next report which it submits to the Secretary General under Article 21 of the Charter.

Article 11

Articles 1 to 10 of this Protocol shall apply also to the articles of Part II of the first Additional Protocol to the Charter in respect of the States Parties to that Protocol, to the extent that these articles have been accepted.

Article 12

The States Parties to this Protocol consider that the first paragraph of the appendix to the Charter, relating to Part III, reads as follows:

"It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof and in the provisions of this Protocol."

Article 13

1. This Protocol shall be open for signature by member States of the Council of Europe signatories to the Charter, which may express their consent to be bound by:
 - a. signature without reservation as to ratification, acceptance or approval; or
 - b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.
2. A member State of the Council of Europe may not express its consent to be bound by this Protocol without previously or simultaneously ratifying the Charter.
3. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 14

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of one month after the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 13.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of one month after the date of the deposit of the instrument of ratification, acceptance or approval.

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Article 15

1. Any Party may at any time denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall become effective on the first day of the month following the expiration of a period of twelve months after the date of receipt of such notification by the Secretary General.

Article 16

The Secretary General of the Council of Europe shall notify all the member States of the Council of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. the date of entry into force of this Protocol in accordance with Article 14;
- d. any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 9th day of November 1995, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

ANNEX 8

CONVENTION ON THE RIGHTS OF THE CHILD (1989)

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

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Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,
Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Convention on the Rights of the Child (1989)

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the

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submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; or
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety,

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public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

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Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

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2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

4. States Parties shall promote, in the spirit of international co-operation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

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2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The development of respect for the natural environment.

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2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
(a) Provide for a minimum age or minimum ages for admission to employment;
(b) Provide for appropriate regulation of the hours and conditions of employment;
(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices;
(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

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Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

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2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

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2. The Committee shall consist of ten¹ experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.
3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.
7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.
8. The Committee shall establish its own rules of procedure.
9. The Committee shall elect its officers for a period of two years.
10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.
11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.
12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights
 - (a) Within two years of the entry into force of the Convention for the State Party concerned;
 - (b) Thereafter every five years.
2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.
3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

¹ The General Assembly, in its resolution 50/155 of 21 December 1995, approved an amendment to article 43, paragraph 2, of the Convention on the Rights of the Child, replacing the word 'ten' with the word 'eighteen'.

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4. The Committee may request from States Parties further information relevant to the implementation of the Convention.
5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.
6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

- (a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;
- (b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;
- (c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;
- (d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

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Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

ANNEX 9

MANDATE OF THE HIGH COMMISSIONER ON NATIONAL MINORITIES (CSCE HELSINKI DOCUMENT 1992: THE CHALLENGES OF CHANGE, CHAPTER II)

- (1) The participating States decide to establish a High Commissioner on National Minorities.

Mandate

- (2) The High Commissioner will act under the aegis of the CSO and will thus be an instrument of conflict prevention at the earliest possible stage.
- (3) The High Commissioner will provide "early warning" and, as appropriate, "early action" at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage, but, in the judgement of the High Commissioner, have the potential to develop into a conflict within the CSCE area, affecting peace, stability or relations between participating States, requiring the attention of and action by the Council or the CSO.
- (4) Within the mandate, based on CSCE principles and commitments, the High Commissioner will work in confidence and will act independently of all parties directly involved in the tensions.
- (5a) The High Commissioner will consider national minority issues occurring in the State of which the High Commissioner is a national or a resident, or involving a national minority to which the High Commissioner belongs, only if all parties directly involved agree, including the State concerned.
- (5b) The High Commissioner will not consider national minority issues in situations involving organized acts of terrorism.
- (5c) Nor will the High Commissioner consider violations of CSCE commitments with regard to an individual person belonging to a national minority.
- (6) In considering a situation, the High Commissioner will take fully into account the availability of democratic means and international instruments to respond to it, and their utilization by the parties involved.
- (7) When a particular national minority issue has been brought to the attention of the CSO, the involvement of the High Commissioner will require a request and a specific mandate from the CSO.

Profile, appointment, support

- (8) The High Commissioner will be an eminent international personality with long-standing relevant experience from whom an impartial performance of the function may be expected.

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- (9) The High Commissioner will be appointed by the Council by consensus upon the recommendation of the CSO for a period of three years, which may be extended for one further term of three years only.
- (10) The High Commissioner will draw upon the facilities of the ODIHR in Warsaw, and in particular upon the information relevant to all aspects of national minority questions available at the ODIHR.

Early warning

- (11) The High Commissioner will:
 - (11a) collect and receive information regarding national minority issues from sources described below (see Supplement paragraphs (23)-(25));
 - (11b) assess at the earliest possible stage the role of the parties directly concerned, the nature of the tensions and recent developments therein and, where possible, the potential consequences for peace and stability within the CSCE area;
 - (11c) to this end, be able to pay a visit, in accordance with paragraph (17) and Supplement paragraphs (27)-(30), to any participating State and communicate in person, subject to the provisions of paragraph (25), with parties directly concerned to obtain first-hand information about the situation of national minorities.
- (12) The High Commissioner may during a visit to a participating State, while obtaining first-hand information from all parties directly involved, discuss the questions with the parties, and where appropriate promote dialogue, confidence and co-operation between them.

Provision of early warning

- (13) If, on the basis of exchanges of communications and contacts with relevant parties, the High Commissioner concludes that there is a prima facie risk of potential conflict (as set out in paragraph (3)) he/she may issue an early warning, which will be communicated promptly by the Chairman-in-Office to the CSO.
- (14) The Chairman-in-Office will include this early warning in the agenda for the next meeting of the CSO. If a State believes that such an early warning merits prompt consultation, it may initiate the procedure set out in Annex 2 of the Summary of Conclusions of the Berlin Meeting of the Council ("Emergency Mechanism").
- (15) The High Commissioner will explain to the CSO the reasons for issuing the early warning.

Early action

- (16) The High Commissioner may recommend that he/she be authorized to enter into further contact and closer consultations with the parties concerned with a view to possible solutions, according to a mandate to be decided by the CSO. The CSO may decide accordingly.

Accountability

- (17) The High Commissioner will consult the Chairman-in-Office prior to a departure for a participating State to address a tension involving national minorities. The Chairman-in-Office will consult, in confidence, the participating State(s) concerned and may consult more widely.

Mandate of the High Commissioner on National Minorities

- (18) After a visit to a participating State, the High Commissioner will provide strictly confidential reports to the Chairman-in-Office on the findings and progress of the High Commissioner's involvement in a particular question.
- (19) After termination of the involvement of the High Commissioner in a particular issue, the High Commissioner will report to the Chairman-in-Office on the findings, results and conclusions. Within a period of one month, the Chairman-in-Office will consult, in confidence, on the findings, results and conclusions the participating State(s) concerned and may consult more widely. Thereafter the report, together with possible comments, will be transmitted to the CSO.
- (20) Should the High Commissioner conclude that the situation is escalating into a conflict, or if the High Commissioner deems that the scope for action by the High Commissioner is exhausted, the High Commissioner shall, through the Chairman-in-Office, so inform the CSO.
- (21) Should the CSO become involved in a particular issue, the High Commissioner will provide information and, on request, advice to the CSO, or to any other institution or organization which the CSO may invite, in accordance with the provisions of Chapter III of this document, to take action with regard to the tensions or conflict.
- (22) The High Commissioner, if so requested by the CSO and with due regard to the requirement of confidentiality in his/her mandate, will provide information about his/her activities at CSCE implementation meetings on Human Dimension issues.

Supplement

Sources of information about national minority issues

- (23) The High Commissioner may:
 - (23a) collect and receive information regarding the situation of national minorities and the role of parties involved therein from any source, including the media and non-governmental organizations with the exception referred to in paragraph (25);
 - (23b) receive specific reports from parties directly involved regarding developments concerning national minority issues. These may include reports on violations of CSCE commitments with respect to national minorities as well as other violations in the context of national minority issues.
- (24) Such specific reports to the High Commissioner should meet the following requirements:
 - they should be in writing, addressed to the High Commissioner as such and signed with full names and addresses;
 - they should contain a factual account of the developments which are relevant to the situation of persons belonging to national minorities and the role of the parties involved therein, and which have taken place recently, in principle not more than 12 months previously. The reports should contain information which can be sufficiently substantiated.
- (25) The High Commissioner will not communicate with and will not acknowledge communications from any person or organization which practises or publicly condones terrorism or violence.

Parties directly concerned

- (26) Parties directly concerned in tensions who can provide specific reports to the High Commissioner and with whom the High Commissioner will seek to communicate in person during a visit to a participating State are the following:

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- (26a) governments of participating States, including, if appropriate, regional and local authorities in areas in which national minorities reside;
- (26b) representatives of associations, non-governmental organizations, religious and other groups of national minorities directly concerned and in the area of tension, which are authorized by the persons belonging to those national minorities to represent them.

Conditions for travel by the High Commissioner

- (27) Prior to an intended visit, the High Commissioner will submit to the participating State concerned specific information regarding the intended purpose of that visit. Within two weeks the State(s) concerned will consult with the High Commissioner on the objectives of the visit, which may include the promotion of dialogue, confidence and co-operation between the parties. After entry the State concerned will facilitate free travel and communication of the High Commissioner subject to the provisions of paragraph (25) above.
- (28) If the State concerned does not allow the High Commissioner to enter the country and to travel and communicate freely, the High Commissioner will so inform the CSO.
- (29) In the course of such a visit, subject to the provision of paragraph (25) the High Commissioner may consult the parties involved, and may receive information in confidence from any individual, group or organization directly concerned on questions the High Commissioner is addressing. The High Commissioner will respect the confidential nature of the information.
- (30) The participating States will refrain from taking any action against persons, organizations or institutions on account of their contact with the High Commissioner.

High Commissioner and involvement of experts

- (31) The High Commissioner may decide to request assistance from not more than three experts with relevant expertise in specific matters on which brief, specialized investigation and advice are required.
- (32) If the High Commissioner decides to call on experts, the High Commissioner will set a clearly defined mandate and time-frame for the activities of the experts.
- (33) Experts will only visit a participating State at the same time as the High Commissioner. Their mandate will be an integral part of the mandate of the High Commissioner and the same conditions for travel will apply.
- (34) The advice and recommendations requested from the experts will be submitted in confidence to the High Commissioner, who will be responsible for the activities and for the reports of the experts and who will decide whether and in what form the advice and recommendations will be communicated to the parties concerned. They will be non-binding. If the High Commissioner decides to make the advice and recommendations available, the State(s) concerned will be given the opportunity to comment.
- (35) The experts will be selected by the High Commissioner with the assistance of the ODIHR from the resource list established at the ODIHR as laid down in the Document of the Moscow Meeting.
- (36) The experts will not include nationals or residents of the participating State concerned, or any person appointed by the State concerned, or any expert against whom the participating State has previously entered reservations. The experts will not include the participating State's own nationals

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or residents or any of the persons it appointed to the resource list, or more than one national or resident of any particular State.

Budget

- (37) A separate budget will be determined at the ODIHR, which will provide, as appropriate, logistical support for travel and communication. The budget will be funded by the participating States according to the established CSCE scale of distribution. Details will be worked out by the Financial Committee and approved by the CSO.

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¹ This bibliography is designed in a manner that makes it possible for non-Dutch readers to find back the names of the authors. This means that surnames like 'De Boer', or 'Van den Berg' are not listed under the 'B', as most Dutch-speaking readers would expect, but under the 'D' and the 'V' respectively.

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- Mr. A.P.M. Coomans, active member of NJCM from 1992, specialized in economic, social and cultural rights, interviews: 7 July 2004 and 14 June 2006 (by telephone).
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¹ This index is designed in a manner that makes it possible for non-Dutch readers to find back the names of persons mentioned in this book. This means that surnames like 'De Boer', or 'Van den Berg' are not listed under the 'B', as most Dutch-speaking readers would expect, but under the 'D' and the 'V' respectively.

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