COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION
OF HUMAN RIGHTS

Application No. 8978/80

X. and Y.
against
THE NETHERLANDS

Report of the Commission

(Adopted on 5 July 1983)

STRASBOURG

TABLE OF CONTENTS

I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the Parties to the European Commission of Human Rights.

A. The substance of the application

2. The first applicant, X., was born in 1929. He has submitted the application to the Commission on his own behalf and on behalf of his daughter, Y., the second applicant, born in 1961. In the proceedings before the Commission they are represented by Mrs. W., a lawyer practising in N.

3. In the night of 14 to 15 December 1977 the second applicant, at the time of the relevant facts 16 years of age and mentally handicapped, was assaulted and sexually abused, allegedly by Mr. B., the son-in-law of the Directress of the home for mentally defective children where she was living. The girl's father, X., who wished criminal proceedings to be instituted against the prepetrator of the assault, lodged a complaint to that effect with the police the next day. The Public Prosecutor of A. did not however initiate the criminal prosecution on the ground that the complaint had not been filed by the victim herself, as the law required (Art. 248 ter in conjunction with Art. 64 of the Penal Code). This decision was upheld on appeal introduced by the father by the Court of Appeal in A.

The applicants complain that the Netherlands' Penal Code does not offer the protection against sexual abuse of mentally defective persons over the age of 16, but incapable of determining their will as required by the Convention. They invoke in particular Arts. 3, 8, 13 and 14 thereof.

B. Proceedings before the Commission

4. The application was introduced with the Commission on 10 January 1980 and registered on 9 May 1980. The Commission proceeded to a first examination of the application on 11 March 1981 and decided in accordance with Rule 42 (2) (b) of its Rules of Procedure to give notice of the application to the respondent Government for observations on the admissibility and merits.

The Government's observations were submitted on 26 May 1981. The applicant's observations in reply were submitted on 27 November 1981. The Commission examined the application again on 17 December 1981 and declared the application admissible on the ground that the application raised substantial questions of interpretation of the Convention which were of such complexity that the determination of the issues concerned should depend on a full examination of the merits.

5. Upon communication of the decision to the Parties under Rule 43 (1) of the Rules of Procedure the Parties were given the opportunity to make additional submissions in writing on the merits of the application.

The Government submitted their observations on 20 April 1982. The applicants submitted their observations in reply on 3 September 1982. The Commission pursued the examination of the application on 13 October 1982 in the light of the Parties' above observations on the merits. It decided to request both Parties to submit supplementary observations on a number of particular questions.

These supplementary observations on the merits were submitted by the applicants on 14 and 22 December 1982.

The Government's supplementary observations were submitted on 14 January 1983.

Additional supplementary observations on the merits were submitted by the applicants on 28 February 1983.

6. Following the decision on the admissibility the Commission, acting in accordance with Art. 28 (b) of the Convention, placed itself at the disposal of the Parties with a view to securing a friendly settlement of the matter.

However, in the light of the Parties' reaction, the Commission finds that there is no basis on which such settlement could be effected.

C. The present Report

7. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session the following members being present:

MM. C.A. NØRGAARD, President
G. SPERDUTI
J.A. FROWEIN
F. ERMACORA
J.E.S. FAWCETT
E. BUSUTTIL
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
M. MELCHIOR
J. SAMPAIO
J.A. CARRILLO
A.S. GOZUBUYUK
A. WEITZEL
J.C. SOYER
H.G. SCHERMERS

8. This Report was adopted by the Commission on 5 July 1983 and is now sent to the Committee of Ministers in accordance with Art. 31 (2) of the Convention.

9. A friendly settlement not having been achieved, the object of this Report is accordingly, as provided in Art. 31 (1) of the Convention, to:

(1) establish the facts, and

(2) state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

10. Annexed to the Report, following the Commission's opinion in the case is the dissenting opinion of Mr Tenekides. A schedule setting out the history of proceedings before the Commission is attached hereto as Appendix I. The Commission's decision on the admissibility of the application forms Appendix II. The Dutch text and an unofficial translation by the Secretariat of the Commission of the provisions of the Netherlands Criminal Code referred to in the Commission's report are contained in Appendices III and IV.

The full text of the written submissions of the Parties and the documents lodged with the Commission are held in the Commission's archives and are available to the Committee of Ministers if required.

II. ESTABLISHMENT OF THE FACTS

11. This section of the Report contains a description of the facts found by the Commission on the basis of the information submitted by the Parties:

A. Relevant domestic law

12. The relevant provision of the Netherlands Criminal Code on sexual offences are reproduced, with an English translation, as Appendices IV and V to the present Report.

13. It appears from these provisions that sexual connections which are established with the use of force or threat of force constitute, as a matter of principle, a criminal offence: The law distinguishes rape (Art. 242) and sexual assault (Art. 246). It should be noted that the protection afforded by Art. 242 extends only to women.

14. The other relevant provisions in the Penal Code in this area relate to the protection of persons whose age, position of dependence or physical incapacity render it difficult or impossible for the victims to form their will or to make their will prevail. Thus, rape of girls who are under the age of 12 and of girls who are between 12 and 16 years of age constitute a criminal offence under Art. 244 and 245 respectively. Indecent assault on young persons of both sexes under the age of 16 is punishable under Art. 247. Sexual intercourse with a woman whom the offender knows to be unconscious or helpless and indecent assault of such persons are punishable under Art. 243 and 247 respectively. The sexual assault of a person whose relationship with the offender is one of dependence is punishable under Art. 249.

15. Art. 248 ter concerns the seduction of minors (i.e. below 21 years of age) of "blameless conduct" to commit or tolerate sexual acts by the use of certain means (gifts or promises) designed to overcome the mental resistance of the victim. Paragraph 2 of this provision states that prosecution of the offender can only take place on complaint of the victim itself.

16. Art. 64 of the Penal Code states that where the Penal Code requires for the prosecution of a particular offence a complaint of the victim, and where the victim is below the age of sixteen or is placed under guardianship, that complaint may be lodged by the victim's legal representative in civil matters.

B. The facts of the case

17. The events which gave rise to the present application and which are not in dispute between the Parties unless where otherwise indicated, are as follows:

18. X., the first applicant, is the father of the second applicant, Y. Y was born on 13 December 1961 as the daughter of X. and his wife.

19. Y. is mentally handicapped and for that reason she has lived since 1970 in a private-run home for mentally deficient children near N.

20. It is alleged by the applicants and not disputed by the respondent Government that in the night of 14 to 15 December 1977, the day after her 16th birthday, the girl had sexual intercourse with a certain Mr. B., the son-in-law of the Directress of the children's home. Mr. B., who is married, lives with his wife on the premises of the institution, but is not employed there. The patients in the children's home are familiar with Mr. B. and call him "Oom (uncle) G".

21. It is alleged that during that night the girl was wakened by Mr. B. and intimidated by him to follow him to his room, to undress and to have sexual intercourse with him. According to the uncontested allegations of the first applicant, this event had traumatic consequences for the girl and gave rise to major mental disturbances.

22. On the next day, 16 December 1977, the first applicant reported orally to the local police to denounce the above facts, with a request for a criminal prosecution to be instituted, so as to comply with Art. 164 et seq of the Code of Criminal Procedure, which concerns the procedure for initiation of the prosecution of offences on complaint ("op klachte vervolgbare strafbare feiten"). The competent police officer received the complaint and drew up a report which the first applicant signed in accordance with the requirement of Arts. 164 and 165 of the afore-mentioned Code.

23. The complaint was worded in the following terms (translation): In my capacity as a father I denounce the offences committed by Mr. B. on the person of my daughter. I am doing this because she cannot do so herself, since, although sixteen years of age, she is mentally and intellectually still a child.

24. According to the first applicant, on a question put by the mother whether her daughter should sign the complaint herself, the police officer stated that this was impossible since she was mentally ill. According to the Government, the police officer in question had not required the girl to sign the complaint herself in view of her mental condition and he had expressed this view accordingly when he forwarded the complaint to the public prosecutor.

25. On 29 May 1978 the public prosecutor decided not to prosecute Mr. B. considering that a prosecution on the basis of Art. 248 ter was impossible, in view of the fact that the complaint had not been filed by the victim herself within the legal delay (six months), as the law required.

26. The first applicant appealed on 4 December 1978 against the above decision of the public prosecutor to the Court of Appeal in A. on the basis of Art. 12 of the Code of Criminal Procedure. Having recalled the course of events leading to the sexual assault of his daughter, he requested that a criminal prosecution be ordered.

27. In his supplementary submissions of 10 January 1979 he stressed that the position taken by the public prosecutor was in flagrant contradiction with the information given to him and his wife by the police officer, on whose information it was reasonable for him to rely. He also submitted that Art. 248 ter did not rule out that a complaint be filed by the legal representative of the victim. In his view there is a general rule that a legal representative can act on behalf of the complainant under certain circumstances and that exceptions to that rule can only be explicit which was not the case in the situation at issue.

28. A hearing took place before the Court of Appeal of A. on 19 June 1979 i.a. in the presence of inter alia the first applicant.

29. The Court of Appeal dismissed the appeal on 12 July 1979. It considered that the report drawn up by the police officer and signed on 6 January 1978 contained insufficient evidence for considering the facts in the light of Art. 242 of the Penal Code and that it was unlikely that a further examination would produce that evidence.

30. It further held that a prosecution on the basis of Art. 248 ter of the Penal Code should not be excluded a priori and that, provided that all legal requirements have been complied with, such prosecution was in general desirable, where the acts constitute a serious interference with a victim's personal freedom and integrity.

31. It pointed out however that the offence set out in Art. 248 ter of the Penal Code could only be prosecuted on complaint of the person to whose detriment the offence has been committed and that such complaint in the present case was missing. The Court observed that the father had filed the complaint on behalf of his daughter, who at the time of the relevant facts had reached the age of sixteen and was not placed under guardianship (curateele), considering that as a mentally handicapped girl she was not capable of grasping the scope of a complaint filed by her and the consequences thereof. The Court considered however that this complaint could not substitute a complaint by the girl herself as Art. 64 para. 1 of the Penal Code would require.

32. The fact that the police authorities had equally held the view that the victim could not be considered to file a lawful complaint and informed the father accordingly as a result of which the latter presumed to be entitled to file the complaint, did not alter the Court of Appeal's view. Neither could the subsequent conclusions of the police from which it appeared that the girl could not be considered capable of determing her own will as regards the propriety of a complaint, alter the Court of Appeal's view.

33. Having found that it was faced with a flaw in the law, the Court of Appeal held however that, whereas in the present case, no one could lawfully file a complaint ("nu er .. geen klachtgerechtigde is ..") it could not fill this gap by extensive interpretation of the law to the detriment of Mr. B.

34. The Court of Appeal finally expressed full understanding for the disillusion of the father as regards proper administration of justice and the difficult position as regards his daughter and recalled that it had tried to assist them in softening the consequences of the events. It noted however that the father had preferred to have the Court of Appeal pronounce itself on the criminal prosectuion requested by him. It confirmed however that a criminal prosecution without any prospect of success would necessarily have to be declared inadmissible. It consequently rejected the appeal.

III. SUBMISSIONS OF THE PARTIES

A. Article 3 of the Convention

35. The applicants submit that the sexual abuse to which applicant Y. has been subjected constitutes "inhuman and degrading treatment" within the meaning of Art. 3 of the Convention, as interpreted by the Commission and the Court. Both the Commission and the Court have made it abundantly clear that Art. 3 also covers mental suffering. They refer in this respect to the report of the Commission in the Greek case in which it has stated that the notion of non-physical torture covers the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault (Yearbook XII, p. 461) and to the Judgment of the Court in the case of Ireland v. the United Kingdom (Series A, Vol. 25, p. 65).

36. As to the question whether the treatment in question has attained the level of severity which makes it fall within the scope of Art. 3, the applicants point out that the sexual abuse to which the second applicant has been subjected has had traumatic psychological consequences for her, which continued to produce their effect on her, such as a state of anguish, lack of security, loss of self-confidence and confidence in others, sleeplessness, nervousness and tensions. Consequently the sexual assault of the applicant falls within the concept of "inhuman and degrading treatment" of Art. 3 of the Convention.

37. The Government leave it to the Commission to decide whether in its view the facts of the present case are covered by Art. 3 of the Convention.

B. Article 8 of the Convention

38. The applicants consider that the right to respect of private life as guaranteed by Art. 8 of the Convention includes all those rights which are referred to by the concept of "privacy". They refer in this respect to Resolution No. 428 (1970) adopted by the Parliamentary Assembly of the Council of Europe in which it has described that concept as follows: "The right to privacy consists essentially in the right to live one's life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non revelation of irrevelant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially".

39. The right to respect for private life consequently includes the right to sexual self-determination and the prohibition of interference with physical integrity. This implies a positive obligation incumbent on the State to ensure the effective protection of this right.

40. Referring to the Marckx case, the applicants further consider that the right to respect of family life, as guaranteed by Art. 8, includes the right to respect of the legal relationships existing within that family. This means that parents must be in a position to submit to the courts sexual abuse of their children in particular where the children are minors and the father is their legal representative.

41. The Netherlands criminal law does not offer adequate legal protection in general against sexual assault of women and in particular of mentally handicapped persons over the age of 16. The description in the Netherlands penal law of rape and sexual assault (Art. 242 and 246) refers to physical violence or threat thereof as a means of establishing sexual connections. Consequently, it is necessary for the victim to submit evidence of physical violence, such as ecchymosis or fracture of bones, for an action on the basis of these provision to be successful. The psychological consequences of a sexual assault, which can be traumatic, are not given any probative value according to the applicants. The limited protection offered by the Penal Code is also illustrated by the fact that according to Art. 242 women cannot be raped in wedlock.

42. According to the applicants the other provisions in the Penal Code in this area offer equally insufficient protection. They do not provide sanctions against physical violence as such, but against particular sexual connections established with persons who by their age, position of dependence or physical incapacity, are not sufficiently capable of letting their will predominate.

43. Moreover the incapacity of the victim to determine her will is, according to constant case-law of the Supreme Court, to be interpreted as physical incapacity, the provisions referring to unconsciousness ("onmacht") (cf. Arts. 243 and 247). This leads to the striking result that the sexual connections established with a mentally handicapped girl falls outside the protection offered by the Penal Code, while a physically handicapped girl who is subjected to the same treatment benefits from legal protection.

44. As regards the facts of the present case, the applicants point out that, had the second applicant been below the age of 16 or above the age of 16 but placed under guardianship, the parent, in his capacity of legal representative, could have lodged with some prospect of success a complaint of sexual assault on the basis of Art. 248 ter of the Penal Code which does not require proof of physical violence. As the girl has however already reached the age of 16 (even if only since one day) the complaint under the present law had to be lodged by the victim herself, who in view of her mental condition was incapable of assessing the necessity of such a step or grasping the consequences thereof.

45. The applicants stress that the inadequate protection continues after the age of 21, since only if the person concerned is placed under guardianship ("curatele") the legal representative is entitled to file a complaint on behalf of the victim on the basis of Art. 284 ter of the Penal Code. The applicants are further of the opinion that the circumstances of the present case contain all the other material elements required by that provision, namely an abuse of "a dominant position arising out of the particular facts of the case" ("uit feitelijke verhoudingen vloeiend overwicht") and an "inducement" ("bewegen") of the victim to submit to the sexual connection.

46. As to the question whether the protection required by Art. 8 of the Convention is afforded by the availability of a civil action for tort on the basis of Art. 1401 in conjunction with Art. 1407 of the Netherlands Civil Code, the applicants point to a number of obstacles with which the plaintiff would be faced. In particular the plaintiff would have to submit evidence on the four major elements of Art. 1401, namely wrongfulness, fault, damage and a causal relationship between damage and act. In the absence of a criminal judgment, this would imply an investigation into the case without the means available to criminal investigation. It is moreover impossible to assess the damage caused to the second applicant in material terms.

47. The applicants also point to other inconveniences of an emotional nature, of a civil procedure in view of the burden of proof which rests on the plaintiff and the length of these proceedings. In the course of the proceedings the plaintiff is regularly confronted with the offender and is furthermore required to play an active part in the procedure, such as for instance participating in the hearing, while the respect of Art. 8 of the Convention implies primarily a task for the authorities and not for the person concerned himself.

48. The applicants further point out that the aim sought by a claim for damages is quite different from the question at issue in the present case. A compensation for immaterial damage does not correspond to the complaints about the Government's failure to protect mentally handicapped girls against interference with physical integrity and the discrimination therein.

49. The applicants stress the essential difference between the functions of criminal and civil law and, in particular, the fact that criminal law primarily protects the general public interest while the civil action for tort protects in the first place the interests of the individual. Sexual offences such as rape, indecent assault and incest have since time memorial been qualified as serious interferences with the public legal order.

50. The applicants further point out that criminal legislation derives its protectionist character from the specific description in the code of punishable facts while civil procedures available after the facts do not provide that protection. The idea that the existence of a civil action would be sufficient would render the whole criminal law superfluous.

51. The Government consider that Art. 8 of the Convention is applicable to the present complaint. It is generally accepted in case law and literature on the Convention, that the terms of Art. 8, para. 1 cover the rights of each individual to moral and physical integrity and, in principle, the right to sexual self-determination.

52. The question arises however to what extent Art. 8, para. 1 can be interpreted as imposing a positive obligation on Contracting Parties to ensure the enjoyment of the rights referred to in that provision to its citizens in their mutual relationship, and if so, to what extent does the State dispose of a margin of appreciation to comply with this provision?

53. In determining the limits of this discretionary power the question must also be put to what extent the legislator must in concreto take into account the social climate and public opinion. The Government wonder whether the mere fact that according to national criminal law certain acts committed under certain circumstances cannot be prosecuted implies a shortcoming on their behalf in respect of their obligation to take positive action in favour of the citizens ("zorgplicht") arising out of their obligations under Art. 8 of the Convention.

54. Decisive for the question whether the physical integrity of a person has been interfered with is the element of free will or the use of violence. This is particularly clear in legislation in most Western European States covering sexual offences amongst adults. The freedom of each citizen to self-determination of his sexual life is automatically limited to the extent that the individual is obliged to respect the same freedom of his co-citizens. This explains, according to the Government, why on so few occasions cases have been brought to test whether the statutory rules governing relations beteween adults in private satisfy the provisions of Art. 8.

55. However it is generally accepted that it is necessary for the legislator to set rules in order to protect those citizens whose ability of self-determination in respect of sexual advances of others is insufficient, such as young people, persons who by reason of mental or physical disability are deemed unable to determine their own will or manifest it and persons who are committed to the care and supervision of others and are dependent on them. In this area it is more difficult for the legislator to set rules in order to safeguard the physical integrity of the persons concerned since it carries the risk of an unacceptable interference by the State in the right of the individual to respect for his sexual private life under Art. 8 of the Convention..

56. The above raises the question whether Art. 8 is applicable amongst third parties ("Drittwirkung"). However, for a Convention right to be applicable amongst third Parties it is necessary that its contents are unequivocal and not subject to a divergence of opinion in the different Member States. This is the case for that part of legislation on sexual offences which concern sexual offences committed against the free will of the victim. However, where this element lacks, views vary from time and place. Although there may be general consent about the need to protect the above-mentioned personae miserabiles views on the scope of this protection vary.

57. The Government emphasise furthermore that criminal law can never provide absolute protection for the rights to respect for private life. By the sanctions it imposes, the Government can place emphasis on certain norms which citizens are required to respect. However, provisions of the criminal law must be strictly interpreted and certain acts, however censurable, are not covered by these provisions. The Government further point out that, moreover, criminal prosecution in the Netherlands is founded on the principle that the public prosecutor must decide whether such prosecution is appropriate in a particular case ("opportuniteitsbeginsel") and does not give the citizen a subjective right to prosecution.

58. As regards the question whether the Netherlands Government has failed in its above-described duty to legislate within the margin of appreciation left to it, the Government recalls that according to the Netherlands Penal Code every sexual connection established with a mentally handicapped person is an offence where:

a) the offender uses forces or threatens with it (Arts. 242 and 246), or

b) the victim is below the age of 16 (Arts. 244, 245 and 247), or

c) the offender is under an obligation of special care towards the victim (Art. 249).

59. Until recently it was reasonable to believe that the above legislation offered sufficient protection for the mentally handicapped persons, since it was presumed that mentally handicapped over the age of 16 were normally placed in specialised institutions, in which case protection against sexual offences was offered by the above-mentioned Art. 249 of the Penal Code. However in the light of the evolution of concepts on treatment of those persons, which encourages their participation in the life of the community, there is according to the Government ground to reconsider the degree of protection offered to them. It is in this context that an Advisory Committee or legislation on sexual offences had made proposals in 1980 to the Minister of Justice. The same Committee had pointed out that a balance had to be struck between on the one hand the need to protect the socially disabled and on the other hand the need to avoid that this category of persons became "untouchable".

60. Although the Netherlands Government admit that Art. 8 protects the integrity of a person and his right to sexual self-determination and although the Government do not exclude that Art. 8 applies - to a limited extent - amongst third persons, the Government deny that the Netherlands criminal law as applied to the present facts do not meet the requirements of Art. 8.

61. The facts of the case are exceptional. The second applicant was sexually abused while she was in the care of an institution. Sexual advances by any member of the staff of the institution would have been a criminal offence under Art. 249. However, the offence had allegedly been committed by a person not on the staff of the institution. If force had been used, the act would have been defined as rape under Art. 242 of the Penal Code, but there was no evidence of force. The victim was just too old to permit prosecution of the offender for

sexual assault of a person under the age of 16 (Art. 247). If there were to be any gap in Dutch criminal law at all, it is the fact that it does not cover sexual connections without the use of force or the threat of force, with mentally handicapped persons of 16 years or over who either do not live in an institution or, if they do, are the victim of an offender who is not employed by the institution. This is not a situation which could be easily foreseen. Indeed, this inadequacy only became evident with this rather exceptional case. In the view of the Netherlands Government there is no question here of an evident failure on the part of the legislature and certainly not of a violation of Art. 8 of the Convention.

62. The Government while expressing understanding for the fact that the father chose to rely on Art. 248 ter of the Criminal Code, since the other provisions as demonstrated could not apply, regret however that this provision has been given such emphasis in the context of the present case, in view of its historic aim and purpose. This provision, introduced in 1911 with the aim to reinforce criminal legislation in the area of sexual offences was designed to protect young women "of blameless conduct" below the age of majority (21) against "seduction". In order to meet criticism levelled against the introduction of such a provision, it had been added that such prosecution could only be initiated on complaint of the victim. The public prosecutor observes however a cautious policy in this area, since there is a serious risk that improper motives underlie such a complaint, such as for example thwarted expectations. The Government explain that the above mentioned advisory Committee has recommended the abolition of this provision, since it no longer meets the standards of present day society. Moreover, in the light of its history and context, this provision canot be considered applicable to the facts of the present case. This is particularly highlighted by the terms "seduction" and "blameless conduct", employed in this provision, which can hardly have been conceived for the purpose of protecting the mentally handicapped.

63. As a matter of principle, the Government consider that the requirement of complaints is inappropriate where it concerns mentally handicapped persons, in view of the fact that it is not clear whether such complaint reflects the will of the person concerned. The idea that a complaint should be brought by the parent guardian or custodian seems unrealistic since it may be in the interests of the latter that the facts are not brought to the attention of the judicial authorities. In this respect the Government point out that the majority of cases of sexual abuse of mentally handicapped persons are those committed by persons who are in close relationship to the victim. In such circumstances, the complainant could be subject to serious pressure by the offender. In other words, where the requirement of a complaint would seem appropriate in cases of "seduction"", it does not fit in with the facts of the present case.

64. Finally, the Government point out that the age limit of 21 years contained in that provision seems even more out of place in criminal legislation designed to protect the mentally handicapped.

65. The above shows, in the opinion of the Government that Art 248 ter is wholly inapplicable to the facts of the present case. The additional protection for the mentally handicapped, which is necessary, can not be obtained by an extension of the field of application of this provision.

66. According to the Government the four following actions can be brought before the Dutch courts on behalf of the injured party on the basis of Art 1401 of the Civil Code in conjunction with Article 1407 thereof:

a) an action for financial damages against the offender to compensate any physical and/or moral damage. (According to established case-law of the Supreme Court (N.J. 1943, 455) compensation may cover both.)

b) an application to the court for an injunction prevent the repetition of the tort. Such an order could be reinforced by the imposition of a fine in case the offender does not comply with the order. It could take the form of banning the offender from the home or its vicinity. The Government quote examples where such orders have been issued (N.J. 1972, 165 and N.J. 1975, 359).

c) an action as referred to under a) but simultaneously directed against the Directresss of the Home where the second applicant was staying. If the court considered joint libability established, the Directress could be ordered to pay damages.

d) an application as referred to under b) extended to the Directress. The court could order her to refuse the offender access to the home or its vicinity in the future.

C. Article 13 of the Convention

67. The applicants are of the opinon that they have been denied an effective remedy within the meaning of Art. 13 of the Convention and refer in this respect to the Commission's constant case-law. The access to the Court of Appeal of A. on the basis of Art. 12 of the Code of Criminal Procedure did not constitute an effective remedy, since the Court decided that the parents were not competent to bring a complaint in the circumstances of the case, even though the victim herself could not be considered capable of doing so and decided that in the circumstances of the case it was incapable of following up the complaint.

68. The Government disagree with the applicants on this point. They raise the question of principle whether the individual has a right to criminal legislation being applied in those areas where Articles 1 to 12 of the Convention impose a duty on the legislator to protect its citizens against interference with these rights by third persons. An unconditional affirmative answer to his question would in their view be incompatible with the nature of criminal law which is principally concerned with the protection of public interest.

69. The Dutch procedural criminal law, and in particular Art. 12 of the Code of Criminal Procedure which gives the individual, who has an interest in the prosecution, the right to complain to the court of appeal against the failure to prosecute, offers a procedural guarantee for the correct application of criminal law. The fact that this remedy has not been successful in the present case, cannot be construed as an absence of an effective remedy. The Government emphasise that procedural criminal law can offer guarantees for proper administration of criminal law, but no right to prosecution to the victim. Art. 12 of the Code of Criminal procedure therefore satisfies the requirements of Art. 13 of the Convention.

70. The Government are further of the opinion that it is doubtfull whether Art. 13 covers the more general question whether the Netherlands' criminal legislation falls short in the protection of subjective rights arising out of Art. 8. Where neither the contents nor the scope of the indirect effect of Art. 8 on third parties are clearly defined, nor consequently the task of the legislator, the

national judge would be required to perform a task which he could hardly perform without usurping the constitutional powers of the national legislator. Only if it were evident that by this omission by the national legislator material damage arises or could arise, could a claim for damages on the basis of Art. 1401 of the Civil Code for unlawful negligence by the legislator be brought. This would, in the opinion of the Netherlands' Government, be an inappropriate remedy for this legal issue.

D. Article 14 of the Convention

71. The applicants are of the opinion that the interference with their rights under Art. 3 and 8 of the Convention also amounts to discrimination within the meaning of Art. 14 of the Convention. Referring to the European Court's judgment in the Belgian Linguistic Cases, they point out that for Art. 14 to be applicable it is irrelevant whether the breach is a result of positive action or failure to act by the Government. The protection afforded is unequal since in cases, like the present one, the interference with the sexual integrity of the second applicant remains without sanction as a result of a flaw in the law, while under other circumstances criminal sanctions can and will indeed be imposed. It may be justified for the legislator to stipulate that only persons of a certain age shall be capable of lodging a complaint but this justification ceases to exist where it would lead to the result that persons who have reached that age but have limited mental faculties would enjoy no protection whatsoever. On the contrary, the differential treatment called for consists of additional procedural safeguards to protect the interests of persons, who, on account of their mental disabilities, are not fully capable of acting for themselves.

72. The Government contend that it is self-evident that statutory provisions designed to protect the individuals against sexual advances of others must be differentiated according to the vulnerability of the person who requires the protection and according to the specific nature of the concrete interests to be protected. An issue of discrimination could only arise where there is no objective and reasonable justification of the measure and where it is disproportionate to the aim sought. The fact that in this area the protection concerning mentally handicapped differs from that concerning young persons which in turn differs from that concerning adults does not amount to discrimination. Referring to their submissions under Art. 8 of the Convention the Government deny that the protection afforded to the mentally handicapped is significantly inferior to the protection afforded to others.

73. As regards more in particular Art. 248 ter of the Penal Code, the Government explain that the requirement of complaint contained in that provision is to be seen in the light of the serious repercussions which public criminal proceedings can have for the victim. Only, where this provision is applied to circumstances for which it has not been designed, can the above requirement appear to be arbitrary. The fact that in the present case criminal proceedings could not be validly brought cannot therefore be regarded as discrimination prohibited by Art. 14.

IV. OPINION OF THE COMMISSION

Points at issue

74. The principal points at issue under the Convention are as follows:

As regards the second applicant

1. Whether her right to respect for private life under Art. 8 of the Convention has been breached by reason of the fact that the Netherlands legislation does not offer the possibility of having criminal proceedings instituted against the person who allegedly sexually abused her.

2. Whether the gap in the Netherlands legislation mentioned under 1 above also amounts to a breach of Art. 3 of the Convention which prohibits inhuman or degrading treatment.

3. Whether the applicable legislation was discriminatory within the meaning of Art. 14 of the Convention.

4. Whether an "effective" remedy before a national authority "as referred to in Art. 13 of the Convention was available to the applicants in respect of the above alleged breaches of the Convention.

As regards the first applicant

5. Whether his right to respect for family life under Art. 8 of the Convention has been breached by reason of the fact that his attempts to institute criminal proceedings against the person whom he suspected of having sexually abused his daughter failed and whether this also violated his rights under Art. 13.

I. On Article 8 of the Convention in respect of the second applicant

75. Art. 8 of the Convention is in the following terms:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

76. There can be no doubt in the Commission's view that the events which gave rise to the present application pertain to the sphere of private life within the meaning of the above provision. Indeed, the physical and moral integrity of an individual is covered by the concept of private life. This has been implied in both the Commission's and the Court's case law on this provision (cf. for instance Eur. Court H.R., case of Dudgeon, judgment of 22 October 1981, Series A, No. 45, para. 39).

77. It is further not in dispute between the Parties to the present application that the second applicant has been subject to sexual abuse and that her right to respect for private life within the meaning of the above provision is at issue.

78. The applicants complain of the fact that Netherlands law did not provide either of the applicants with the possibility to instigate criminal prosecution; and that, in the circumstances, prosecution by the prosecuting authorities acting ex officio was also not possible. This is not disputed by the Government.

79. The question arises whether the Government's obligation to secure the respect for the private life of the second applicant entails an obligation on the part of the Government to take positive action.

80. In respect of "family life", equally included in Art. 8, the European Court of Human Rights has held in the Marckx case:

> "By proclaiming in paragraph 1 the right to respect to family life, Article 8 signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2 ... Nevertheless, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life." (Eur. Court of H.R.,Marckx case, judgment of 13 June 1979, Series A, No. 31, para. 31)

80. In the Commission's view, the above reasoning can be transferred to the concept of "private life". In the sphere of private life, as defined above, it is generally accepted in the Contracting States that some degree of regulation is required in order to protect all members of society and in particular those who for reasons of lack of maturity, mental disability or state of dependence, are especially vulnerable and incapable of protecting themselves.

81. Since in the area of sexual behaviour the element of consent is normally decisive for determining whether a particular behaviour should or should not fall within the criminal sphere the impossibility for the above category of persons to form or express their will calls for protective measures on behalf of the authorities which go beyond what is required with regard to persons who are in full possession of their physical and mental capacities.

82. The Dutch Penal Code is clearly based on this principle: Having stipulated that sexual connections established with the use of force or threat thereof constitute a criminal offence: rape (Art. 242) and indecent sexual assault (Art. 246), all further provisions in the Penal Code in the field of sexual offences concern the protection of persons who for reasons of their age, dependence or physical incapacity are not or not sufficiently capable of imposing their will.

83. Thus, sexual intercourse with a girl below the age of 12 and between the age of 12 and 16 are defined as criminal offences in Arts. 244 and 245 respectively. The second sub-clause of Art. 247 protects young persons of both sexes below the age of 16 against indecent assault. Furthermore Art. 243 concerns sexual intercourse with a woman whom the offender knows to be in a state of unconsciousness

("onmacht")* while the first sub-clause of Art. 247 relates to indecent sexual assault of a person in such state of unconsciousness. Art. 249 is designed to offer protection to those persons who are in a position of dependence vis-à-vis the person who sexually assaults them. It concerns connections with minors, who in their capacity as child, pupil or otherwise are subject to the offender's care, education or control and furthermore connections between officials and their hierarchical inferiors and also between staff members of institutions and persons who are nursed or detained therein. Finally, Art. 248 ter protects minors of "blameless conduct" against "seduction" to sexual connections by means designed to break the mental resistance of the minor concerned.

84. As regards the last Article, the Commission notes that the Netherlands Government have submitted convincing arguments which show that Art. 248 ter was neither intended nor suited to cover cases of the kind at issue in the present case.

85. There not being any other criminal legal provision applicable to the present case, it follows that the system of criminal legal protection afforded to particularly vulnerable members of Dutch society is incomplete in that persons in the situation of the second applicant are excluded from its scope. The Government concede that there is a "gap" in the law in this respect.

86. It is true that Contracting Parties dispose of a wide discretionary power as regards the choice of means of complying with obligations arising out of the Convention, which in their opinion are best adapted to protect the relevant interests and that criminal legislation is not the only way for a State to comply with its obligation under Art. 8.

87. The applicants however have submitted that civil legal remedies (such as are provided by Art. 1401 and 1407 of the Netherlands Civil Code) are inadequate because of the cumbersome and time consuming nature of the procedure and argue that criminal law by virtue of its deterrent character is a particularly adequate means of protecting the sexual integrity of persons who are in an especially vulnerable position and that only protection of this nature can fulfil the exigencies of Art. 8 in this case.

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* The Commission notes that the Netherlands' Supreme Court has interpreted the concept of "onmacht" as relating solely to physical helplessness.

88. The Commission does not consider it necessary to examine the relative merits of civil and criminal law in this regard nor to express itself on theoretical issues regarding the deterrent effect of criminal law for the following reason:

89. It is beyond doubt that the Netherlands legislator does in fact consider that criminal law is an important means of protecting the sexual integrity of individuals. It has elaborated, as set out in paras. 82 and 83 above, an almost comprehensive system of criminal legislation in this area. The only gap in this protection of which the Commission has been made aware in the present application regards persons in the situation of the second applicant.

90. The Commission thus notes that the Dutch legislator has opted for a system of criminal law protection in this field, which seems to cover all the cases where protection is required, with the exception of situations like that of the second applicant.

Conclusion

91. In the light of the preceding considerations, the Commission unanimously concludes that the second applicant's right to respect for private life under Art. 8 of the Convention has been breached.

2. On Article 3 of the Convention in respect of the second applicant

92. The applicants allege that the mental suffering as a result of the sexual abuse of which the second applicant has been a victim constitutes inhuman and degrading treatment within the meaning of Art. 3 of the Convention. The Government take no particular stand on this issue.

93. The Commission has no reason to doubt, and the Government have not contested this allegation, that the second applicant, as a result of the events, was subject to mental suffering. It is true that, according to the constant case-law of the Commission and the Court, mental suffering leading to acute psychiatric disturbances falls into the category of treatment prohibited by Art. 3 of the Convention (cf. Eur. Court H.R., Case of Ireland v. United Kingdom, judgment of 18 January 1978, Series A, Vol. 25, para. 167).

94. However, the Commission does not consider it necessary to establish whether the mental suffering inflicted on the second applicant was of such a nature and had reached such a degree of intensity as to bring it within the scope of the above provision, since in any event the preliminary question whether the Netherlands Government could be held responsible for such treatment must be answered in the negative.

95. In reaching this conclusion, the Commission found it necessary in the present case to distinguish the issue under Art. 3 clearly from the issue under Art. 8. In the latter, it has held that the failure by the Netherlands legislator to include a particular category of especially vulnerable persons in an otherwise comprehensive system of criminal legal protection of the sexual integrity of vulnerable persons constituted a violation of the Convention. However, sexual abuse and inhuman or degrading treatment - even though they may overlap in individual cases - are by no means congruent concepts. The "gap" in the law relating to the protection of the sexual integrity of vulnerable persons cannot therefore be assimilated to a "gap" in the protection of persons against inhuman or degrading treatment.

Conclusion

96. In the absence of a close and direct link between the above mentioned failure by the Netherlands' legislator with regard to the protection of the sexual integrity of vulnerable persons on the one hand and the field of protection covered by Art. 3 of the Convention on the other, the Commision concludes, by fifteen votes against one, that Art. 3 has not been violated in the present case.

3. On Article 14 in conjunction with Arts. 8 and 3 of the Convention in respect of the second applicant

97. The applicants consider that the distinction made by the legislator between the different categories of persons who require special protection against sexual abuse, in that that special protection is denied to persons who find themselves in a situation of the second applicant, while others benefit from such protection, amounts to discrimination prohibited by Art. 14 of the Convention. The Government reject the allegation of discrimination.

98. The Commission has however just concluded (cf. para. 91 above) that it was precisely the differential treatment which resulted in the persons in the situation of the second applicant being kept aloof from the special protection which constituted, in itself, a breach of Art. 8 of the Convention.

99 . The Commission therefore finds that no separate issue arises under Art. 14 of the Convention either in conjunction with Art. 8 of the Convention or with Art. 3 of the Convention.

4. On Art. 13 of the Convention in respect of the second applicant

100. The applicants claim that there has been a breach of Art. 13 of the Convention because the respondent Government failed to provide an effective remedy against interference with the rights of the second applicant under Art. 8 of the Convention in the sense that neither the second applicant in person nor the first applicant on her behalf could instigate criminal proceedings against the alleged perpetrator of the sexual abuse.

101. The Commission is of the opinion that it cannot be deduced from Art. 13 that there must be a remedy against legislation as such which is considered not to be in conformity with the Convention (cf. Commission's report in Applications Nos. 7601/76 and 7806/77, Young, James and Webster v. the United Kingdom, para. 177, p. 38).

102. The Commission has already found that the violation of Art. 8 of the Convention established above results from a gap in the relevant legislation. Consequently, no separate issue under Art. 13 of the Convention arises.

5. On Art. 8 and Art. 13 of the Convention in respect of the first applicant

103. The first applicant also alleges that the Netherlands legislation in this area affecting the second applicant's rights under the Convention fails to secure his own right to respect for family life within the meaning of Art. 8 of the Convention, by reason of the fact that under Dutch law he was unable to instigate

prosecution on the basis of Art. 248 ter of the Code of Criminal Procedure against the person whom he accused of having sexually abused his daughter. However, the Commission has already pointed out that the above provision was not germane to the point at issue in the present application (cf. para. 84).

104. On the other hand, the flaw in the law has already been considered by the Commission in the context of the allegations of the second applicant.

105. Consequently, the Commission finds that no separate issue arises in respect of the first applicant's right to respect for family life under Art. 8 and Art. 13 of the Convention by reason of the fact that his attempts to institute criminal proceedings against the person whom he suspected of having sexually abused his daughter failed.

VI SUMMARY OF THE COMMISSION'S CONCLUSIONS AND FINDINGS

106. As regards the second applicant

1. [In the light of the preceding considerations] the Commission unanimously concludes that the second applicant's right to respect for private life under Art. 8 of the Convention has been breached (para. 91).

2. In the absence of a close and direct link between the above-mentioned failure by the Netherlands' legislator with regard to the protection of the sexual integrity of vulnerable persons on the one hand and the field of protection covered by Art. 3 of the Convention on the other, the Commission concludes, by fifteen votes against one, that Art. 3 has not been violated in the present case (para. 96).

3. The Commission [therefore] finds that no separate issue arises under Art. 14 of the Convention either in conjunction with Art. 8 or with Art. 3 of the Convention (para. 99).

4. The Commission has already found that the violation of Art. 8 of the Convention established above results from a gap in the relevant legislation. Consequently, no separate issue under Art. 13 of the Conventiton arises (para. 102).

As regards the First applicant

5. /Consequently/, the Commission finds that no separate issue arises in respect of the first applicant's right to respect for family life under Art. 8 and Art. 13 of the Convention by reason of the fact that his attempts to institute criminal proceedings against the person whom he suspected of having sexually abused his daughter failed (para. 105).

Secretary to the Commission

(H. C. KRÜGER)

President of the Commission

(C. A. NØRGAARD)

Dissenting opinion of Mr Tenekides with regard to Article 3 of the Convention

I do not share the view of the majority of the Commission that Art. 3 has not been violated in the present case.

I should recall, first of all, that the Commission did not doubt, and the Government did not contest this allegation, that the second applicant, as a result of the events, was subject to mental suffering (para. 93 of the Report). According to the constant case-law of the Commission and the Court, mental suffering leading to acute psychiatric disturbances falls into the category of treatment prohibited by Art. 3 of the Convention (cf. Eur. Court H.R., Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, Vol. 25, para. 167).

The Commission, however, did not consider it necessary to establish whether the mental suffering inflicted on the second applicant was of such a nature and had reached such a degree of intensity as to bring it within the scope of Art. 3, since they answered in the negative the preliminary question whether the Netherlands Government could be held responsible for the suffering concerned (para. 94).

The Commission reached this conclusion by distinguishing the issue under Art. 3 from the issue under Art. 8. In the latter, the Commission unanimously held that the failure by the Netherlands legislator to include a particular category of especially vulnerable persons in an otherwise comprehensive system of criminal legal protection of the sexual integrity of vulnerable persons constituted a violation of the Convention. The Commission held, however, that because sexual abuse and inhuman or degrading treatment are not congruent concepts (even though they may overlap in certain cases), the "gap" in the law relating to the protection of the sexual integrity of vulnerable persons could not be assimilated to a "gap" in the protection of persons against inhuman or degrading treatment (para. 95 of the Report). In the absence of a close and direct link between the above-mentioned failure by the Netherlands legislator with regard to the protection of the sexual integrity of vulnerable persons on the one hand and the field of protection covered by Art. 3 of the Convention on the other, the Commission concluded that Art. 3 had not been violated (para. 96).

Since the Commission, for the above-mentioned reasons, did not consider it necessary to establish whether the mental suffering inflicted on the second applicant fell within the scope of Art. 3, I am not in a position to reach a definitive conclusion on this question. Assuming, however, that the mental suffering was of such a nature and did reach such a degree of intensity as to bring it within the scope of this Article, I do not believe that one could exculpate the Netherlands Government on the grounds accepted by the Commission.

Assuming that such suffering was caused, I cannot accept that the issue under Art. 3 can be distinguished so clearly from the issue

under Art. 8 as the Commission maintains. First of all, I believe that, given the absolute character of the protection contained in this provision which, as the Court has emphasised, makes no provision for exceptions and from which, under Art. 15 para. 2, cannot be derogated even in the event of a public emergency threatening the life of the nation (cf. Eur. Court of H.R., Case of Ireland v. United Kingdom, Judgment of 18 January 1978, Series A, Vol. 25, para. 163), the reasoning adopted by the Court in the Marckx case in regard to Art. 8 is all the more valid in regard to Art. 3 and that this provision therefore does not merely impose a negative, but also a positive obligation on the State.

In cases in which sexual abuse has caused mental suffering of such a nature and degree of intensity as to fall within the scope of Art. 3, the "gap" in the law which makes it impossible to prosecute the perpetrator of the abuse therefore relates equally to Art. 3 as it does to Art. 8. This link could only be held to be insufficiently close and direct to lead to a violation if it could be said that the right not to be subjected to torture, inhuman or degrading treatment required protection through the criminal law less than the right not to be subjected to sexual abuse. I do not believe that that could be maintained. On the contrary, the choice of criminal law as a means of protection is, in my view, even more obvious as regards Art. 3 than as regards Art. 8. I therefore hold that, if the suffering inflicted on the second applicant was of such intensity as to fall within the scope of Art. 3, the failure by the Netherlands legislator to allow criminal prosecution of the perpetrator of the sexual abuse equally amounted to a violation of that Article.

APPENDIX I

HISTORY OF PROCEEDINGS

Item	Date	Note
Introduction of the application	10 January 1980	
Registration of the application	9 May 1980	
Examination of Admissibility		
Commission's deliberations and decision to invite the Government to submit observations on the admissibility and merits of the application (Rule 42 (2)(b) of the Rules of Procedure	11 March 1981	MM. Fawcett, President Sperduti Nørgaard Kellberg Opsahl Frowein Jörundsson Trechsel Kiernan Klecker Melchior Carrillo
Receipt of Government's observations	26 May 1981	
Receipt of applicants' reply	27 November 1981	
Commission's deliberations and decision to declare the application admissible	17 December 1981	MM. Nørgaard President Sperduti Kellberg Jörundsson Trechsel Kiernan Melcior Sampaio Carrillo Gözübüyük Wietzel Soyer Schermers

Examination of the merits

Government's observations on the merits	20 April 1982	
Applicants' submissions in reply	3 September 1982	
Commission's deliberation and provisional votes on the merits	13 October 1982	MM. Nørgaard Frowein Fawcett Busuttil Kellberg Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Gözübüyük Weitzel Soyer Schermers
Applicants' supplementary submissions on the merits	14 and 22 December 1983	
Government's supplementary submissions on the merits	14 January 1983	
Commission's deliberations and votes on the merits of the case	6/7 May 1983	MM. Nørgaard President Sperduti Frowein Ermacora Fawcett Busuttil Tenekides Trechsel Kiernan Melchior Sampaio Carrillo Gözübüyük Weitzel Soyer Schermers
Commission's adoption of the report	5 July 1983	