

# Summary

## The CEAS at work

### Findings relating to the function of the Commission for the Evaluation of Closed Criminal Cases [Commissie Evaluatie Afgesloten Strafzaken, CEAS] 2006-2008

#### Definition of the problem and study questions

The purpose of this study is to evaluate the performance of the Commission for the Evaluation of Closed Criminal Cases (CEAS)<sup>375</sup> during the first two years of its existence. The CEAS was established following unrest in political circles and in the media that arose after the judicial errors in the Schiedam park murder case and the publication of the report by Advocate-General (A-G) F. Posthumus.

The task of the CEAS is to 'examine, by means of an investigation, whether severe shortcomings arose in the investigation, prosecution and/or presentation of evidence at a court session in a specific criminal case, which prevented the court's impartial evaluation of the case. For constitutional reasons, the role of the judiciary is not taken into consideration for the purposes of this investigation.'

The current evaluation was promised to the House of Representatives [*Tweede Kamer*] by the Minister of Justice at the time of the foundation of the CEAS in 2006. The evaluation focuses on answering the following three questions:

- 1 To what extent has CEAS adequately fulfilled its task, in particular:
  - In what way has the CEAS Access Committee selected criminal cases for investigation from those put forward? (of the Decree establishing the CEAS, article 4)
  - In what manner have the CEAS 'committees of three' carried out the investigation into potential serious shortcomings (as understood from article 2 of the Decree establishing the CEAS)?
  - To what extent do the activities of the Access Committee and the CEAS committees of three qualify as independent, objective, comprehensible, timely and 'conclusive'?
- 2 What are the conditions under which the CEAS has operated and to what extent have these conditions turned out to be adequate or inadequate?
- 3 What can be learnt from the experiences with the structuring and operation of the CEAS in respect of an investigation in preparation of a possible retrial within an (adapted) retrial scheme?

This study can be characterised as a process evaluation. The working methods of the Access Committee were reconstructed on the basis of studies of the Access Committee's files at the offices of the National Office of the Public Prosecution Service [*Parket-Generaal*] and interviews with

375 More commonly referred to as 'Posthumus II'.

the chairman and the secretariat. More specific research by the three committees of three was reconstructed on the basis of the reports, work files and interviews with all members. A number of key informants were interviewed about the general aspects relating to the creation of the CEAS and its intended operation.

### **The selection of proposed cases: the Access Committee**

The Access Committee, an agency of the CEAS, consists of an independent chairman and two members, one of whom, an A-G, comes from the Public Prosecution Service [*Openbaar Ministerie*, OM]. In respect of the proposals submitted, the role of the Access Committee is to evaluate whether the CEAS is competent to investigate the case and whether it concerns an investigation within the meaning of the Decree establishing the commission. The Decree establishing the CEAS specifies three requirements (in article 4) that the proposal must satisfy for it to qualify for investigation. Hereinafter, we will refer to *the admissibility of a request*. Each of the three requirements in article 4 of the Decree establishing the CEAS forms an *essential precondition* for admissibility.

A request is only admissible if:

- 1 a written and sufficiently substantiated request is submitted by any of the following professionals involved in the case: an (ex) official from an investigating authority, the Public Prosecution Service, the Netherlands Forensic Institute (NFI) or an expert who has analysed the case and dedicated a scientific publication to it; and if
- 2 the criminal case in question resulted in an irrevocable sentence in relation to one of the facts of the case
- 3 ..which, according to the legal definition, carries a prison sentence of twelve years or more and/or the rule of law was severely affected by the crime.

Furthermore, the Decree establishing the CEAS specifies that for constitutional reasons, the role of the judiciary remains outside of the scope of consideration. This regulation served as a further (substantive) admissibility criterion.

In the evaluative investigation, the way in which these requirements have been applied by the Access Committee was assessed.

#### *In practice*

During the study period, the Access Committee dealt with thirty-six requests out of a total of thirty-eight that were submitted. A significant number of these were found to be 'obviously inadmissible'. The majority of these were requests made by the persons convicted.

Nine of these requests were submitted by scientific researchers, recognised as such by the Access Committee. In contrast to what was expected, no explicit requests were received from professionals (officials and ex-officials of the investigating authorities, from the Public Prosecution Service or from the NFI). Fourteen requests related to irrevocably concluded criminal cases, and ten requests satisfied the third criterion for admissibility concerning the severity of the case, according to the Access Committee.

In a number of respects, the requirements appeared to provide significant scope for evaluation, and in this respect the term ‘scientific researcher’ required further substantiation, which gradually took shape as cases were dealt with, with the help of new terms such as ‘distance’, ‘independence’ and ‘relevant expertise’.

The Access Committee judged seven of the thirty-eight of the requests submitted by the end of February 2008 to have fulfilled all three formal admissibility requirements. Of these seven, three were referred to a committee of three for further investigation. The four remaining cases were not dealt with any further as the Access Committee judged that they could not be investigated without the role of the judiciary being taken into consideration.

From the ‘filtering’ effect, in that 8% of the requests submitted were recommended for further investigation by the Access Committee, it cannot however be concluded that the Committee applied a highly restrictive approach. The filtering-effect is rather a result of the selective characteristics of the admissibility requirements formulated in the Decree establishing the CEAS.

### **Further investigation: The committees of three**

If the Access Committee is of the opinion that a closed criminal case requires further investigation regarding potential shortcomings in the investigation and prosecution of the case, the Board of Procurators-General will establish a (temporary) committee of three from the pool of CEAS members, who will be given the task of carrying out the investigation. The three committees of three that operated during the period under review each consisted of an A-G (who was also responsible for leading the investigation), an external expert in the field of criminal law and an expert from the police.

#### *Approaches compared*

In two cases (evaluations of the Lucia de B. case and the Enschede sexual abuse case), and with the support of the Board, the Access Committee issued its opinion that further investigation was necessary, accompanying

it with specific pointers. During the evaluation of the Lucia de B. case, the committee of three limited itself to answering the six questions that had been placed before it by the Access Committee. The focus of its investigation was on the value of the experts' opinion. By contrast, during the course of the investigation into the Enschede sexual abuse case, the scope of the investigation was broadened. Not only the shortcomings provided by the Access Committee were investigated, but ultimately, the entire investigative file was checked for irregularities and defects. The committee of three began the evaluation of the Ina Post case without any pointers, and the investigation proved to be the most profound of the three CEAS investigations. The process of establishing the truth was repeated as far as possible, including the re-examination of witnesses and investigation of leads that were followed-up at the time. Despite the differences in the terms of reference and focus, the collection of data by the committees of three consisted of studying files at all times, combined with interviews with police officers involved in the case, public prosecutors in charge of the case and with experts.

Police teams were involved in the evaluation of the 'Enschede' and Post cases. These teams contributed to the cases in very different ways and the involvement of the team in the Post case must be considered the most intensive of the two. The differences in involvement can be attributed in part to the differences in terms of reference, but also partly to the extent to which, and the way in which the committees of three deployed the teams. The committees of three were, for that matter, satisfied or very satisfied with the contribution of both police teams.

In deviation from the initial structure (the A-G was to lead the investigation assisted by two members from outside of the Public Prosecution Service), the members of the committees of three on the whole fulfilled a more or less equal role in the investigation and in the drafting of the report. All expressed their general satisfaction with regard to the cooperation.

It can be concluded that the committees of three performed the duties entrusted to them pursuant to Article 2 of the Decree establishing the CEAS with great commitment. All three investigations carried out can be considered thorough and extensive. It should be noted that the investigation into the Lucia De B. case was approached in the most restrictive manner, while the investigation into the Ina Post case was the most extensive.

### **Conditions within which the CEAS has operated**

The chairman and members of the Access Committee received reimbursement for travel costs and reimbursement for their work on

the basis of the Reimbursement Decree for Advisory Bodies. Secretarial support is provided by the National Office of the Public Prosecution Service. There has been no indication that the conditions within which the Access Committee had to operate were unsatisfactory. It should, however, be noted that the CEAS is a temporary facility with a particular mission, in which considerable effort has been invested, without a great deal having been provided in return.

The members of the Public Prosecution Service that acted as chairmen of the committees of three, were released from their regular duties for part of the time they were involved in the investigation, but this was generally not sufficient to perform the further investigation. The other members, from outside the Public Prosecution Service were reimbursed on the basis of the National Travelling Costs Decree and on the Reimbursement Decree for Advisory Bodies. This amounts to a sum varying from € 135 per half-day for support staff to € 310 per half-day for members. The total number of half-days declared varies strongly, and is, according to the members themselves, not representative of the actual time spent. The intensive work carried out for the CEAS placed great demands in particular on those members who were not released from their regular duties. The members' own personal motivation was for all of them the decisive reason for their participation in the investigation.

The committees of three had unrestricted access to the case files and essential documents for the purpose of the investigation. In addition, the members were able to conduct any interview they deemed necessary. However, the committees of three were not authorised to summon people to appear and hear them under oath. The lack of such authority did not pose any real problems in practice, however, as ultimately, the required cooperation was always granted. There were, nevertheless, some situations in which this authority would have been useful. The quality of the administrative and secretarial support provided to the committees of three was inconsistent. In view of the temporary nature of the CEAS, the committees of three were understanding of the restrictions they experienced. The support could nevertheless have been expanded by the addition of facilities such as meeting and interview rooms, the release of employees from their regular duties and the inclusion of relevant expertise, according to some members.

### **Assessment of the work of the CEAS**

The operation of the CEAS was evaluated on the basis of a number of requirements.

### *Independence*

Third parties that are not CEAS members should not be able to co-determine which cases do and which do not qualify for further investigation, or how said further investigation should be structured and carried out. The following aspects of the CEAS' operation demonstrated that this requirement was met.

- The Access Committee was headed by an independent, authoritative chairman.
- The chairman of the committees of three, an A-G, was not permitted to have had any involvement in the criminal proceedings that are the object of further investigation.
- CEAS members were disqualified from participation if 'any form of involvement' was deemed to exist.
- The Board of Procurators-General at all times formed an independent opinion regarding the recommendations of the Access Committee and on the basis thereof decided how to proceed. In practice, the Board never found reason to deviate from the Access Committee's recommendations.
- The Access Committee and all committees of three were able to carry out their work with a great degree of freedom, without any evidence of interference from the Public Prosecution Service. Decisions from the committees of three (including later in the process) with regard to the focus of the investigation were supported by the Board without exception.

The only form of improper influence on the work of the CEAS might be found in the position of the *person submitting* the initial request for the further investigation of a case. In two of the three investigations (those relating to Lucia de B. and the Enschede sexual abuse case) they played a significant role in the formation of the terms of reference and the handling of the investigation. It did not become apparent, however, that this had any negative effect on the execution or results of the investigation.

### *Impartiality*

The question to what extent the CEAS' activities were carried out *impartially*, follows naturally from the assessment of the independence of the CEAS' activities

- In so far as could be ascertained, both the Access Committee and the committees of three performed their duties in accordance with the letter and the spirit of the objectives and requirements set out in the Decree establishing the CEAS. No motives (such as covering up errors by the Public Prosecution Service or the police) were pursued that are incompatible with the aims for which the CEAS was founded.

### *Comprehensibility*

The work of the CEAS (both the Access Committee and the committees of three) must be carried out in such a way that the arguments underlying decisions and motivation in the decision making process are clear and understandable, not only to the interested parties, but also for the public at large. The following characteristics of the work carried out by the CEAS have contributed to its comprehensibility:

- The Access Committee and the committees of three invested considerable effort into providing the recommendations and reports with clear explanations, which makes them accessible to third parties.
- The Access Committee provided an explicit opinion on the applicability of all three requirements in by no means all requests. This was due to the fact that each of the three requirements themselves already being a requisite for admissibility. Nevertheless, the Access Committee at times also oversubstantiated its decisions. This was mainly done to provide a more broadly formulated and therefore more satisfactory response, and, moreover, to formulate an interpretation of the relevant requirement that could be applied to future requests.
- Although the three reports are not equally exhaustive or detailed, the approach adopted in all cases was adequately set out. The committee of three responsible for evaluating the Post case accounted for its approach in the most precise and comprehensible manner. The working methods and reports of the other two committees of three were less comprehensible with regard to certain aspects.

### *Timeliness*

The term ‘timeliness’ refers to the extent to which the CEAS published the reports (from the committees of three) and recommendations (of the Access Committee) without undue delay. Timeliness lies between the two extremes of exercising the required degree due care on the one hand, and, on the other hand, dealing with the case sufficiently promptly with a view to the waiting interested parties.

- The Access Committee proceeded expeditiously, whereby, in the first three months of 2007, it introduced a ‘fast-track procedure’, which led to a reduction of the lead times of the requests.
- The delivery term of each of the reports issued by the committees of three was exceeded by between four and twelve months. The thoroughness of the reports and the degree of care with which they were drawn up are the main reason for this delay, followed by problems of a technical nature.

*'Conclusiveness'*

To what extent did the Access Committee and committees of three succeed in the task assigned to them in accordance with the Decree establishing the CEAS?

- The Access Committee correctly applied the formal admissibility requirements as established in the Decree establishing the CEAS. It cannot, however, be ruled out that the substance of some cases were not settled conclusively. The fact that police officers did not (clearly) submit cases also gives rise to doubt the conclusiveness of the investigation.
- The committees of three worked 'conclusively' in the sense that all three investigations were thorough and extensive.
- In general, conclusions regarding the refutation or confirmation of identified shortcomings were adequately substantiated.
- None of the committees of three was fully conclusive with regard to the question of whether a particular case should be considered for a retrial procedure.
- All three committees of three were of the opinion that the restriction that the investigation was not to include the role of the courts formed an artificial limitation that was very difficult to maintain. This meant that a number of potential shortcomings could not be investigated fully.

**Evaluation or retrial?**

The work of the Access Committee and the further investigations carried out by the committees of three have shown that two competing visions regarding the role of the CEAS. On the one hand, there is the evaluative role, which focuses on learning from mistakes made during investigations. This role is most prominent in the reports on the Post case. On the other hand, there is the investigative role to determine whether a retrial should be considered. As has become apparent from interviews, this role is represented in the Access Committee's vision, namely the selection of those cases that may have led to an 'unsafe conviction'. It is also a prominent feature of the report on the 'Lucia de B.' case. The experiences of the committees of three have shown that each of the two roles demands a particular type of investigation. Investigations in which establishing the truth<sup>376</sup> plays a central role are necessary in

<sup>376</sup> In this context, the term 'establishment of the truth' must be interpreted in a broader sense than is customary in discourse in the field of criminal law, in which the term refers to determining whether the facts that have been put forward can be proved by legal means. The broader scientific definition that is used here refers to the correct reconstruction of a series of facts and occurrences. In cases in which the establishment of the truth is specifically concerned with a possible retrial, this will be referred to as 'retrial investigation'.

investigations aimed at identifying ‘unsafe convictions’ and the court’s opinion cannot be disregarded. The evaluative function demands investigation of the technical and professional quality of the work of both the police and the Public Prosecution Service, with the aim of learning from mistakes and subsequently improving the quality. The selection of cases intended for investigation should therefore be conducted on a broader basis and should not just focus on cases that ended in a conviction. Techniques such as benchmarking and visitation are applicable in this regard.

### **Building blocks for organising the retrial investigation**

Active investigation of any new facts, with a view to an improved establishment of the truth in the criminal case (retrial investigation), may become part of a renewed retrial process in the future. The following suggestions can be made, based on the experiences described and analysed in this report, with regard to future retrial investigations.

#### *Access to a retrial investigation*

The accessibility requirements of a potential permanent investigative service could be aimed more specifically at possible shortcomings in establishing the truth, which, if proven, could be considered grounds for a retrial. This means that the role of the court cannot be disregarded. Furthermore, it also means that the material accessibility requirements should be considered to be more important than the formal requirements applied by the CEAS. The general material requirement might read as follows: *A criminal case may be considered admissible for a retrial investigation if the assessment investigation gives to rise to a reasonable presumption that a retrial investigation would reveal such shortcomings, that a retrial could or should be considered on this basis.*

The implementation of an accessibility test could be assigned to a permanent service, such as a formal office.

#### *Implementing a retrial investigation*

The retrial investigation could be led by an independent and separate office. This will underline the permanent nature of the service. The office could, furthermore, be provided with the appropriate facilities, particularly those that the committees of three sometimes clearly felt to be lacking. Additionally, requirements may be set with regard to those who hold that office.

In respect of *equipping* the office, the very first requirement is a competent, well-staffed and professional *secretariat* that will be responsible for providing all logistical support, and that is also capable

of performing (file) investigations and producing preparatory paperwork. The office will preferably hold specific *powers* and have at its disposal a professional *police team* that is specialised in this form of investigative work and operates under the leadership of a specialised *Public Prosecutor*. With regard to the *qualifications* of the office, specialisation in the specific area of evaluation of the criminal cases, for retrial reasons or otherwise, is considered advisable. The experiences of the CEAS have shown furthermore that the future office should be able to stand its ground in turbulent times and to solidly perform the task for which the office was created.

With regard to the *transparency of retrial investigations*, it is noted that the investigator responsible for the retrial investigation – as is the case with conventional criminal investigations – may have to deal with the conflict between the required transparency on the one hand and the protection of the privacy of those involved and the cooperation of witnesses and informants on the other. The experiences of the CEAS have shown this can pose a real problem. In view of the specific role of retrial investigations, the choice should primarily be in favour of transparency.