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PROTECTOR OF CIVIL RIGHTS AND LIBERTIES

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ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS
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Foreword

Since the European Court of Human Rights ('the Court') was founded, its workload has steadily grown. Various changes in its procedures, most notably those laid down in Protocols 11 and 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), have thus far failed to bring sufficient relief. Debate continues about the functioning of the Court, both in the Member States of the Council of Europe and in Strasbourg itself. On 3 October 2011, Ivo Opstelten, Minister of Security and Justice, sent a letter to both Houses of the States General, giving the government's view of the Court along with proposals for improving its functioning. This letter prompted the AIV to draw up an advisory letter, in view of the Court's crucial position in the legal protection of residents of the Member States of the Council of Europe. The advisory letter was drawn up by an ad hoc committee composed of members of the Human Rights Committee, chaired by Ms W.M.E. Thomassen, the other members being Professor W.J.M. van Genugten, R. Herrmann, Professor M.T. Kamminga, Professor R.A. Lawson, and Ms H.M. Verrijn Stuart. The executive secretary was J. Smallenbroek.

The AIV adopted this advisory letter at its meeting of 4 November 2011.

Introduction

The AIV read with interest the government's position paper on the reform of the Court (annexe I).[1] The government fears that there are insufficient safeguards for the Court's long-term ability to function effectively, since the large number of cases pending before it have created a considerable backlog. The AIV shares these concerns, as it observed in its advisory report 'The Council of Europe',[2] issued in 2003. The Court and its efforts to fulfil to the best of its abilities its obligations as Europe's protector of human rights and to deal with its workload problems therefore deserve to be given vigorous support. The government's letter contains several proposals with the aim of improving the situation. The AIV agrees with the government that the principle of subsidiarity is an important pillar of the system set up under the ECHR. The Convention's protection should be offered first and foremost at national level. The Court must be a last resort. The AIV further endorses the view that the efficiency of the Court's internal operating procedures is key to reducing the workload. Where interim measures are concerned, the AIV agrees with the government that the use of the Practice Directions drawn up by the Court should be supported, and that an effort should be made to shorten the lead times of cases in which an interim measure has been indicated, by an expedited procedure (case priority). The AIV also endorses the government's desire to improve the procedure surrounding interim measures to give States an opportunity to challenge the imposition of an interim measure, and it agrees that it is important for the Court to improve the provision of information in such cases. The AIV also underscores the importance of the measures taken by the Court to help reduce its workload, such as the introduction of the 'pilot judgment procedure' and heightened supervision of the execution of the Court's judgments in cases in which it has identified structural defects in national legal systems.

Besides these points of agreement, the AIV also has a number of concerns which it wishes to draw to the government's attention. It was partly moved by criticism directed at the Court in the recent public debate, which sometimes went so far as to question the essence of its work. This advisory letter focuses primarily on the points of concern that might impede the Court in the performance of its core tasks.

The importance of the Court

In its letter, the government states that the ECHR undeniably has great significance for Europe. The AIV wishes to stress this point. The Court's task is to safeguard, as a court of last instance, respect for human rights on the part of the Member States of the Council of Europe. What is at issue here is not only safeguarding the rule of law, but also the separate importance of upholding the most essential and inalienable rights of all human beings, such as the right to respect for life, freedom from torture and inhuman treatment, the right to respect for private and family life, freedom of expression, the right to profess a faith or to profess no faith, and the right to a fair trial. However, the government focuses primarily on the Court's role as a lever in bringing about amendments to legislation and reform of national judicial systems in countries in Central and Eastern Europe, and emphasises the importance of embedding the principles of the rule of law in European countries other than

1 Letter from the Minister of Security and Justice of 3 October 2011 to the President of the Senate of the States General (32 500 V Y) and to the President of the House of Representatives (32 735, no. 32).

2 Advisory Council on International Affairs, 'The Council of Europe: less can be more', advisory report 33, The Hague, October 2003.

the Netherlands. This emphasis carries a danger of overlooking the great importance of the ECHR and the Court for Western Europe and the Netherlands itself. In the Netherlands too, the Court has played an important role, and it continues to do so. Examples include its judgments against the Netherlands that have led to improvements in the legal position of psychiatric patients committed to an institution against their will, in the right of journalists to protect their sources, and in the right to legal protection of parental ties between parents and children and their right to live together.

For the Netherlands, the Court's importance is twofold. On the one hand, it has contributed – and still contributes – to improving the protection of the fundamental rights and freedoms of the population of the Netherlands, and all those who are subject to Dutch jurisdiction. In addition, the principle of subsidiarity implies that the Dutch authorities should make it unnecessary for any member of the population to take his grievance to the Court. This helps ensure that in governance, the legislative process and the administration of justice, attention must constantly be paid to the question of whether sufficient safeguards are in place to assure compliance with the ECHR. The Court's case law provides guidelines for government authorities, legislative bodies and courts to help them interpret human rights norms. The Court's importance for the Netherlands is thus undiminished.

Interim measures

The AIV considers that the government's suggestion that the growing number of interim measures is largely attributable to the Court's backlog is not entirely correct. An interim measure is comparable to provisional relief as requested from the interim relief judge pending the outcome of the main proceedings. Most such cases involve the expulsion of an asylum seeker to a country where he fears that his life would be in danger and in which the interim measure is requested at the first stage of the proceedings. The AIV believes that the correct inference from the nature of, and increase in, the number of requests for interim measures is that asylum seekers feel compelled more frequently than in the past to apply to the Court. It should be noted that the total number of requests for interim measures has not risen sharply in recent years. In 2008 this number stood at 3,185, in 2009 it fell to 2,402, after which it rose again to 3,680 in 2010.[3] In the first ten months of 2011 only 2,220 such requests were submitted,[4] and a further decline may be expected as a result of the Practice Direction issued in July 2011, in which the Court tightened up the requirements to be met by such requests.

The AIV would further note that there has indeed been a sharp increase in the number of requests for interim measures directed against the Netherlands, and that this number is relatively high. While the number of applications submitted against the Netherlands averages about one per cent of the total, the Netherlands' share of requests for interim measures rose, in the period from 2008 to 2010, from 1.3% to 10%. In the first ten months of 2011, the total number of requests fell to 224 (which translates into an annual rate of approximately 270), but the Netherlands' share is about the same as last year. Furthermore, a growing number of the requests for interim measures directed against the Netherlands

3 See <http://www.echr.coe.int/NR/rdonlyres/91C30C84-EFAF-4979-BBD6-C730D6380196/0/ART_39_TABLEAU_EN.pdf>.

4 As of 18 October 2011, data requested from the office of the President of the Court.
For figures up to and including June 2011, see <http://www.echr.coe.int/NR/rdonlyres/43F2D6A8-8034-4271-9498-AD9EAC707FB6/0/ART_39_TABLEAU_PAR_PAYS_EN.pdf>.

were granted, rising from 18% in 2008 to 45% in 2010. However, in the first ten months of 2011, this proportion fell to 14%.[5] In view of the subsidiary nature of the Court's role – which the government rightly emphasises – the question arises of whether the policy and procedures that are in place at national level to enable asylum seekers to object to expulsion are sufficiently 'Strasbourg-proof'. The AIV considers that further research is called for into the causes of the relatively high number of requests for interim measures, and of successful requests, against the Netherlands, not only to improve the legal protection of asylum seekers, but also to help reduce the Court's workload. Without any such further research, the government's proposals for improving the procedure relating to interim measures appear inadequate.

Subsidiarity

The government emphasises that the Court is a subsidiary mechanism. In this connection it also refers to the subsidiary nature of the ECHR. The latter point is incorrect, in the view of the AIV. The ECHR is not subsidiary in nature; quite the contrary. It enshrines the human rights that are seen as universal and that Europe has undertaken to observe and protect. It is true that the Court, as Europe's supervisory body, is a subsidiary mechanism in the sense that the point of the ECHR is that states should themselves ensure compliance with it, and it is only if someone is unable to have his grievance heard in his own country that his application to the Court will be deemed admissible.

The government takes the view that the Netherlands adequately fulfils its protective task: 'The principle of subsidiarity [implies that] it is necessary to ensure that the Convention's *acquis* is adequately protected at national level. The Government considers that this obligation is fulfilled in the Dutch legal order.' The AIV has already qualified this assertion in relation to interim measures granted against the Netherlands. It should also be borne in mind that the social context in which the ECHR is applied is constantly changing. For instance, while today it may seem that adequate safeguards are in place to assure the right to the protection of privacy, future technological advances may strain that protection and require a new balance to be struck between all the interests involved. It is not possible to rule out beforehand the possibility that new regulations may place a strain on fundamental rights and freedoms. Very recently, a judgment went against the Netherlands because the application of the leave-to-appeal system in criminal cases that was recently introduced (art. 410a, Code of Criminal Procedure) was deemed, in the case at hand, to be in breach of Article 6, paragraph 1 in conjunction with Article 6, paragraph 3 (c) of the ECHR.[6] The legislator had undoubtedly failed to foresee the specific circumstances that arose in this case. Given that society is constantly changing, it will always remain possible that a Dutch national may find himself in a dire predicament, that he fails to obtain a hearing in his own country, and that he may apply to the Court and find the Court on his side. It will always remain necessary to examine critically whether sufficient protection of human rights is built into the Netherlands' own national rules and procedures, so that there is no need to resort to Strasbourg. This critical scrutiny of national decisions and regulations is a fitting application of the principle of subsidiarity and can help to reduce the Court's workload.

5 Ibid.

6 European Court of Human Rights, 22 February 2011, Lalmahomed v. the Netherlands, no. 26036/08 (Section 3).

The Court's case law

The AIV would question the government's comments regarding the quality of the Court's case law. The government argues that this case law must be clear and consistent, that the Court should in principle not depart from its previous decisions, and that where it does so, in exceptional cases, it should clearly explain its reasons. The government also emphasises the need for consistency in awarding just satisfaction under Article 41 of the ECHR, and intends to draw these matters to the Court's attention. The importance of these principles is beyond question. However, these remarks, and the intention of drawing these matters to the Court's attention, give the impression that the government believes that the Court is insufficiently aware of these important principles and that it does too little to take measures and create instruments, where necessary, to resolve and prevent problems. The letter unfortunately fails to go into specifics, and the AIV fears that unsubstantiated criticism of this kind will in no way promote the government's desired objective, namely to ensure that the Court functions well.

In addition, the government invokes the principle of subsidiarity in support of its view that the Court should not, in principle, take into account any facts that postdate the completion of the proceedings before the national courts, and that the Court should also, in principle, respect the decision of the national (judicial) authority on the facts or the competing interests, unless the decision is manifestly unreasonable. As regards taking new facts into account, the AIV agrees that establishing the facts should in principle be left to the national courts. It is clear from the case law that the Court takes the same position. The Court does allow for exceptions, however, in the case of absolute human rights, that is, the right to life (Article 2) and freedom from torture and inhuman or degrading treatment (Article 3). Where these are at stake, the Court holds that it is not bound by the facts established by the national authorities.[7] Indeed, it should be added that taking new facts and circumstances into account may be to the advantage of the respondent State in such cases, namely if the situation in the country of origin has improved in the meantime. For instance, in 2004, the Court ruled – partly on the basis of an improvement of this kind – that for the Netherlands to expel asylum seekers to Sri Lanka was not incompatible with the ECHR.[8] Whether it is necessary and desirable to take new facts and circumstances into account in cases relating to the absolute human rights referred to above is a decision that – in the view of the AIV – should be the prerogative of the Court and should come under its responsibility, so that the Court can form an independent conclusion as to whether or not there has been any violation of human rights.

The AIV also believes that the government's comment that the Court should in principle respect the decision of the national (judicial) authority on the competing interests, unless the decision is manifestly unreasonable, reflects insufficient respect for the independence of the courts. After all, it is the Court's primary task to establish whether interests were weighed at national level in a way that infringes on an individual's fundamental rights or freedoms. In making this assessment, the Court certainly accords national bodies a certain

7 European Court of Human Rights, 4 December 1995, Ribitsch v. Austria, no. 18896/91, 336.

8 European Court of Human Rights, 17 February 2004, Venkadajalasarma v. the Netherlands, no. 58510/00 (Sect. 2), in legal consideration 67: '... the Court cannot ignore the very real progress that has been made which has led to a substantial relaxation of the previously precarious situation of Tamils arriving or staying in Colombo, as confirmed by the most recent country report compiled on Sri Lanka by the Netherlands Ministry of Foreign Affairs...'.

'margin of appreciation', but applies as the lower limit the criterion that the weighing of interests may not fall below a minimum standard in terms of the protection of human rights. The Court's mandate, under the terms of the ECHR, includes interpreting the ECHR and enforcing these minimum standards.

The government's comments about the subsidiarity principle prompt the AIV to emphasise that this principle does not mean, here in relation to the Court's case law, that the Court is bound by the assessment of the national authorities when deciding whether there has been a breach of the rights enshrined in the Convention. Indeed, the purpose of the ECHR is precisely that the Court should arrive at its conclusion independently of those authorities.

In this connection, the AIV wishes to point out that in all proceedings before the Court, States have considerable influence on the way in which the facts are established by the Court and on the considerations that the Court takes into account in a specific case. For States are given ample opportunity to submit written observations on their position, the context, national case law, and the interests at stake, and in important cases they are also able to clarify certain matters orally. In these ways, individual States exert considerable influence on the quality of the Court's decisions.

The AIV also wishes to point out that the government does not seem to be entirely consistent in its approach to the principle of subsidiarity. While its letter calls on the Court to do justice to its subsidiary role and to leave more to the national authorities, in the case involving the political party SGP, the government has failed to heed a ruling on the ECHR handed down by the national court of last instance pending the Court's decision on the matter.[9] This is completely at odds with the principle that the national authorities must themselves safeguard human rights and that the Court has a subsidiary role.

The role of the Committee of Ministers

The government's position includes a comment on the role of the Committee of Ministers. The AIV believes that it is essential for the Committee to take a more active role. Although the letter supports the idea of the Committee playing an active role, the question arises of in which areas it should become more active.[10] Since this is not clarified in the letter, the point might give rise to misunderstanding. After all, although a healthy dynamic in interaction between the Court and the Member States of the Council of Europe is indispensable, the Court's primary mission is to arrive at a conclusion, independently of these States, on whether human rights have been respected in the case brought before it. If the Court finds in favour of an individual, and against the State in which this person is resident, the State will not always be pleased. This is inherent in the system of protection that has been adopted. The Court's task, in a sense, is to criticise those in power, and it must retain this role. It is important to avoid a situation arising in which the Committee of Ministers issues guidelines to the Court – for example concerning the interpretation of the ECHR and the margin of appreciation – that are at odds with the Court's task of independent assessment as mandated by the ECHR.

9 Letter from the Minister of the Interior and Kingdom Relations to the President of the House of Representatives of 8 April 2011, 28481 no. 8. Given its religious convictions, the *Staatkundig Gereformeerde Partij* (SGP) does not allow women to stand as its candidates in elections to representative assemblies. *Staatkundig Gereformeerde Partij* v. the Netherlands, application no. 58369, lodged 6 October 2010.

10 See also Advisory Council on International Affairs, 'The Council of Europe: less can be more', advisory report no. 33, The Hague, October 2003.

The AIV now wishes to draw attention to a policy area in which the Committee of Ministers – and the Netherlands within the Committee – must play an active role. Under Article 46 of the ECHR, the Committee of Ministers is responsible for supervising the execution of the Court's judgments. It is essential that Member States should be prepared to call each other to account, at meetings of this Committee specifically concerned with human rights, regarding the proper execution of the Court's judgments. In practice, this will seldom be necessary: it is reasonable to assume that Member States will faithfully fulfil their obligations under the ECHR such as may arise from a judgment by the Court. But this does not alter the fact that to ensure that the system functions well, it is important for Member States to play an active role and to be prepared to exert pressure, where necessary, on Member States that are procrastinating, for instance, in amending their legislation. This applies not only to countries in Central and Eastern Europe, but also, for instance, to countries such as Italy and the United Kingdom.[11]

Access to the Court

The right of individual petition is an essential feature of the system of human rights protection set up under the ECHR. Easy access to the Court should be part of this. In the view of the AIV, the obstacles that the government wishes to put in place to restrict access to the Court constitute a threat to the right of individual petition and are therefore undesirable. The AIV believes that solutions to the workload problem should preferably be sought in improving the efficiency, where possible, of the processing of the numerous ill-founded applications and of internal operating procedures. Any proposals aiming to reduce the Court's workload, in the AIV's view, must take full account of the fact that these are not ordinary court proceedings but proceedings brought to decide whether an applicant's human rights have been violated. Unrestricted access to the Court is paramount here.

The government favours the introduction of a new filtering mechanism, which would basically involve the filtering work being done by members of the Registry staff. The AIV endorses the basic principle that a good filtering mechanism is needed to weed out the large number of ill-founded applications. The Court itself has already taken numerous measures in this direction. The entry into force of the 14th Protocol to the ECHR introduced the possibility of having applications that are manifestly ill-founded disposed of by the Court sitting in single-judge formation. Whether more far-reaching filtering mechanisms are needed will necessarily depend in part on the results achieved with the introduction of this single-judge formation. But any filtering mechanism, in the view of the AIV, will have to meet the standards of the independent and impartial administration of justice. Although members of the Registry undoubtedly play a vital role in preparing judicial decisions, the final responsibility for those decisions must rest with the Court.

The AIV wishes to express its concern regarding three of the government's proposals for restricting access to the Court. These are imposing fines on applicants who have submitted a manifestly ill-founded application on more than one occasion, the idea of imposing disciplinary measures against lawyers in situations where the submission of applications can be regarded as an abuse of law, and the introduction of fees.

The first of these proposals constitutes a threat to the right of individual petition. An applicant who believes that his fundamental rights have been violated has the right to complain. For an individual applicant, it will often be difficult, if not impossible, to estimate

11 European Court of Human Rights, 6 October 2005, Hirst v. United Kingdom (no. 2) [GC], no. 74025/01, 2005-IX.

his chances of success. It is for the Court – not the applicant – to decide whether or not an application is well-founded. The applicant has no control over the outcome of the proceedings, and the only way of avoiding a fine would be for him to refrain from submitting an application.

The AIV further takes the view that threatening lawyers with disciplinary or other measures is an improper and inappropriate instrument for reducing the Court's workload. A threat of this kind might deter lawyers from giving legal assistance to someone who is wholly convinced that his or her fundamental rights have been violated. It should also be borne in mind that such a measure could not be introduced unilaterally by the Netherlands; it would have to be implemented in all 47 Member States of the Council of Europe. It is by no means impossible that the authorities in some of these Member States might take advantage of this new measure to gag lawyers. The proposed measure might make lawyers reluctant to take cases on and restrict access to the Court for individual applicants in an irresponsible way, especially if the introduction of mandatory legal representation is also being considered. Even without resorting to disciplinary measures there are ways of impressing upon lawyers that they have a responsibility not to place the system under unnecessary strain. The AIV believes that existing Dutch disciplinary law contains enough safeguards and that it is therefore unnecessary to introduce new rules to be enforced by disciplinary proceedings.[12]

Regarding the third proposal – the introduction of court fees – the AIV takes the view that such a measure must not be allowed to restrict access to the Court for, most notably, the most vulnerable people, such as detainees and asylum seekers, or for representatives of small and medium-sized enterprises, and that those of limited means should therefore have to be granted exemption, as applies in the Netherlands. The AIV would add that the government adopts the position, in its proposal for the introduction of court fees, that in view of the widely differing standards of living among the High Contracting Parties, the fees payable would have to differ from country to country. This would most probably involve high administrative costs. It would therefore be necessary to establish whether the administrative costs of collecting the fees are outweighed by the intended result.

Accession of the EU to the ECHR

The Lisbon Treaty provides for the accession of the European Union to the ECHR. On earlier occasions, both the States General and the government have expressed their support for such accession, which would close a gap in Europe's system of legal protection. Now the government is advocating, in the letter under review, that the conditions for accession to the EU must be elaborated 'as accurately and in as much detail as possible'. The question arises of why so much detail should be necessary at this stage, after the negotiations between the EU and the Council of Europe have been concluded. All the conditions that the government mentions in its letter are either laid down in existing texts or have been the subject of consensus for some considerable time in the negotiating process. The letter fails to make clear which points need to be addressed in greater detail, in the government's view. Nor does it make clear which elements of the internal EU rules – which have yet to be adopted –

12 Section 46, Counsel Act (*Advocatenwet*): 'Advocates shall be subject to disciplinary proceedings in respect of any act or omission contrary to the due care that they are obliged, as advocates, to exercise in respect of those whose interests they are representing or should be representing, in respect of any breach of the regulations of the Dutch Bar Association or in respect of any act or omission not befitting a conscientious advocate. Such disciplinary proceedings shall take place at first instance before the Disciplinary Boards and on appeal before the Disciplinary Appeals Tribunal, from which no further appeal lies.'

are so important that the Netherlands should make its approval of the accession agreement itself contingent on them. Taking all these factors into consideration, the AIV would therefore advise the government to hold firm to the approach adopted previously on this dossier, and to support the accession process without qualification.

Annexe I

Letter from the Minister of Security and Justice to the President of the House of Representatives

Date: 3 October 2011

Subject: Government's position on the reform of the European Court of Human Rights and on the European Union's accession to the European Convention on Human Rights

On 14 April 2011 the Permanent Committee for Security and Justice of the House of Representatives requested information about the position taken by the Netherlands during the Izmir Ministerial Conference on the Future of the European Court of Human Rights about the procedures of the Court, the margin of appreciation of Member States and the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. On 19 April 2011, during the plenary debate on the European Union, the Minister of Foreign Affairs undertook to send a more detailed position paper to the Senate. A similar undertaking was given by the Minister to the House of Representatives at a meeting on 14 June 2011 with the House's committee on the EU. Reference may also be made to two motions passed on this subject in the Senate, namely a motion tabled by senator Bemelmans-Videc and others (Senate 32.500 V, B) and a motion tabled by senator Engels and others (Senate 32.500, O). Mention should also be made of two deferred motions tabled in the House of Representatives by members of parliament Cörüz and Omtzigt (House of Representatives 32.500 VI, no. 29) and the motion tabled by member of parliament Voordewind (House of Representatives 32.735, no. 11). In this letter the Minister of Foreign Affairs and I should like to inform you of the Government's position on the reform of the European Court of Human Rights ('the Court') and the European Union's accession to the European Convention on Human Rights ('the Convention').

Background

It is undeniable that the Convention has great significance for Europe. The Court often serves as a lever in bringing about amendments to legislation and reform of national judicial systems, particularly in countries in Central and Eastern Europe. The Court has been an important catalyst in guaranteeing the rule of law throughout Europe and must continue to play this role. It should be noted in this connection that it is also in the interests of the Netherlands, including its economic interests, for the principles of the rule of law to be firmly embedded in other European countries. Ensuring that the Court functions properly is also important to the Netherlands because of the European Union's forthcoming accession to the Convention.

The Government fears that as matters stand at present the effective functioning of the Court is not sufficiently guaranteed in the long term owing to the large number of cases pending. This has created a large backlog of work, which is in turn resulting in an increase in the number of interim measures.

This general picture does not apply entirely to cases against the Netherlands. At present there are just over 1,500 cases pending against the Netherlands before the Court (which corresponds to 1% of the total number of applications in Strasbourg). Statistics from previous years show that the great majority of these applications (over 90%) are held by the

Court to be manifestly ill-founded or to be inadmissible on other grounds. Since 1 January 2007 the Court has held that the Netherlands has committed violations in ten cases. This puts the Netherlands on a par with San Marino in terms of the number of violations found by the Court. These violations mainly concern criminal law, criminal procedure and immigration law. The most recent violation in the field of social security legislation dates from almost ten years ago. The position of the Netherlands as regards the imposition of interim measures also differs from the general picture described above: in 2011 just over 140 requests for the imposition of an interim measure have been submitted by Dutch lawyers to date, of which eight have been granted (i.e. just over 5% of the total number of requests). Finally, the figures show that at present the Committee of Ministers is verifying whether the judgment has been properly executed in eight Dutch cases, which corresponds to 0.11% of the total number of cases pending before the Committee. This political decision-making body is responsible, among other things, for supervising compliance with judgments of the Court and holds plenary sessions a few times a year. Sometimes it considers cases of a politically sensitive nature, such as the case of Hirst against the UK concerning the disenfranchisement of prisoners.

Despite these statistics on Dutch cases before the Court, the Government considers that it has both a constitutional duty (article 90 of the Constitution) and a duty as a High Contracting Party to the Convention (article 1 of the Convention) to play an active role in the negotiations to safeguard the Court's long-term future. This is all the more important because the impact of the Court's judgments on the Dutch legal order is not confined to judgments given against the Netherlands itself.

These reforms must provide a solution for the large backlogs in the processing of applications so that the Court can continue to focus on the merits. These reforms also provide an opportunity to safeguard the quality of the Court's judgments. In the post-Interlaken process, of which the Izmir Ministerial Conference was part, the Government is therefore focusing on the following policy pillars: (a) strengthening the principle of subsidiarity, (b) maximising the efficiency of the Court's internal operating procedures, (c) embedding the Court more firmly in the institutional framework, (d) safeguarding the quality of the case law, (e) reflecting on the current ease of access to the Court and (f) putting greater emphasis on country-specific solutions. These points will be examined below. Finally, the Government's position on the European Union's accession to the Convention will be explained.

Embedding the principle of subsidiarity

The Court is a subsidiary mechanism that can supplement the human rights protection provided primarily at national level. The subsidiary nature of the Convention is reflected at various places in its provisions. For example, an applicant must have exhausted all domestic remedies before applying to the Court. In its case law the Court itself has also given effect to the principle of subsidiarity through what is known as the 'margin of appreciation' doctrine. This doctrine, developed by the Court itself, means that High Contracting Parties are allowed a degree of discretion in *how* they guarantee at national level the rights and freedoms enshrined in the Convention. It is not, after all, the task of the Court to harmonise the legislation of the various High Contracting Parties. The Court recognises this discretion in relation to almost all provisions of the Convention, with the exception of the rights contained in articles 2 and 3 (the right to life and the prohibition of torture respectively). The principle of subsidiarity thus reflects the shared responsibility of states and the Court to guarantee the rights laid down in the Convention.

The principle of subsidiarity has implications for both the High Contracting Parties and the Court. First, it is necessary to ensure that the Convention's acquis is adequately protected at national level. The Government considers that this obligation is fulfilled in the Dutch legal order. This is true not only of the legislative process (under the Legislative Drafting Instructions, for example, the explanatory memorandum to every bill must include a section on the bill's compatibility with the provisions of the Convention) but also of the case law of the national courts, the availability of domestic remedies and the various legal training courses. The establishment of the Netherlands Institute for Human Rights, as provided for in a bill now before the Senate, is intended to strengthen these national mechanisms. Where such national mechanisms are absent or insufficiently available elsewhere in Europe measures should be taken to strengthen them, where possible supported by EU initiatives.

Second, the principle of subsidiarity means that continued vigilance is required on the part of the Court as well in order to do full justice to its subsidiary role. For example, the Court should not, in principle, take into account any facts that postdate the completion of the proceedings before the national courts. This is because in such cases the national courts have not had the opportunity to rule on these facts. The Court should also respect the decision of the national (judicial) authority on the facts or the competing interests, unless the decision is manifestly unreasonable. How rights under the Convention are guaranteed can differ from country to country, which is no more than logical given the socioeconomic, political and legal differences that exist between the 47 countries that are party to the Convention. The Government will continue to convey this message to the Court in pending proceedings, interventions or other declarations and will act in concert with other like-minded countries in the Committee of Ministers.

The Court can also give effect to its subsidiary role by strictly interpreting and applying existing admissibility criteria. Since 2010 a *de minimis* rule has been codified in the Convention; an application is declared inadmissible if the applicant has not suffered a significant disadvantage as a result of the alleged violation of the Convention. This criterion is yet to be developed in the case law of the Court. The Government considers that the Court could do more to develop the *de minimis* case law than hitherto. This is the position currently being taken by the Government in the negotiations in the post-Interlaken process.

Maximising the efficiency of the Court's internal operating procedures

In view of the Court's workload further streamlining of the operating procedures for the disposal of applications is clearly necessary. This involves a number of different aspects: (a) handling requests for interim measures, (b) filtering applications, (c) tackling the problem of repetitive applications, and (d) introducing a more flexible instrument to enable operating procedures to be modified in the future.

Interim measures

The Court may impose a freezing order where an applicant might otherwise suffer irreversible harm. Such a measure may be imposed in an individual case, but may also have a more generic effect where the Court provides some explanation of the grounds for the measure. Where this happens, the Court indicates that every case that fulfils the criteria specified by it comes within the scope of the interim measure. Interim measures are legally binding on the High Contracting Party on which they are imposed. A common example of an interim measure is a temporary ban on the expulsion of one or more persons, contrary to the intention of the respondent State. In practice, the Court makes use of this possibility only if the applicant is facing the possible risk of death or inhuman treatment.

Such a measure does not express a substantive view on the merits of the case, but merely suspends expulsion until the Court has been able to consider the merits of the case. In this way interim measures act as temporary freezing orders and are not 'judgments' of the Court. Nonetheless, the Court will impose an interim measure only after it has studied the application and concluded that there is prima facie evidence of a real risk of irreversible harm.

As noted above, there has been a sharp increase in the number of requests for interim measures. The Government therefore considers that this instrument requires further regulation, based in part on the experience gained in recent years. It therefore notes with satisfaction the updating of the Practice Directions for applicants and their lawyers of 28 July 2011. The following matters could benefit from further regulation:

- *Shortening the lead times of cases pending before the Court after imposition of an interim measure*
  In practice, it takes a long time before the Court gets around to ruling on the merits of cases in which an interim measure has been imposed. As delay can be in the interests of the applicant, this situation acts as a magnet. It would be advisable for the Court to apply Rule 41 of its Rules of Court (case priority) where it has imposed an interim measure. The procedure under Rule 41 should then be linked to a fixed term of, say, six months.
  Mechanism for a State to challenge an interim measure that has been imposed
  Under current practice, interim measures are not always imposed in defended proceedings (contrary to the principle that both sides should be heard). It is therefore proposed that a mechanism should be incorporated whereby a Member State has the opportunity to challenge the imposition of an interim measure so that the Court can take cognizance of information in the possession of the State. The Government is pleased to note that during a visit to the Court by the Minister of Security and Justice the Court expressed its willingness to introduce such a system in the future.
- *The Court should check that a request for the imposition of an interim measure is made with the consent of the applicant*
  The Court should satisfy itself that an application or request for the imposition of an interim measure is submitted with the consent of the applicant and not by the applicant's lawyer acting on his own initiative. This means that the lawyer should be able to hand over a signed declaration of consent of recent date.
- *Improved communication between the Court and Member States concerning interim measures*
  In practice, there is sometimes a lack of clear communication about interim measures. It is important both for the agencies responsible for expelling aliens and for applicants and their lawyers (who must, after all, be able to gauge whether submitting a request for the imposition of an interim measure is likely to be successful) that the provision of information about interim measures should be improved further. The Government is pleased to note that following a visit from the Minister of Security and Justice, the Court has decided that it will in future publish half-yearly figures showing how many requests for interim measures have been submitted, refused and granted, against which countries the requests were made and, in so far as the requests concern the expulsion of aliens, what the countries of origin of the applicants were.
- *Guaranteeing a coherent approach to the imposition of interim measures*
  The Government notes with satisfaction the recent initiative taken by the Court to centralise the operating procedures within its Registry. This will make it easier to pursue a consistent policy and to centralise all relevant information.

Filtering mechanism: what types of cases are handled by what judicial formations within the Court?

As noted above, over 90% of the cases submitted to the Court are held to be manifestly ill-founded or inadmissible. Protocol No. 14 to the Convention, which entered into force in 2010, introduced the possibility of having these cases disposed of by a single judge. Nonetheless, the Government believes that consideration must be given to the introduction of a new filtering mechanism to enable the Court to dispose of these cases as efficiently as possible. Some countries would favour the introduction of a new category of judges to carry out this filtering work. However, the Government would prefer this work to be performed by specially designated members of the Registry.

Tackling the problem of repetitive applications

Some 150,000 cases are currently pending before the Court. The Court has indicated that approximately 90,000 of these cases will be declared inadmissible or manifestly ill-founded. The reason why these cases have not already been disposed of is the Court's lack of capacity. Of the remaining 60,000 cases, some 30,000 concern what are known as repetitive or clone applications, in other words applications that are identical to a case in which the Court has already held that there has been a violation of the Convention. Various measures will be necessary in order to tackle the problem of clone applications of this kind effectively:

- the Government is pleased to note that the Court has itself already taken various measures in the Rules of Court by providing for a 'pilot judgment procedure' (Rule 61, which was introduced on 1 April 2011). Under this procedure the Court may give a single judgment on a point of principle, which can then be applied to many identical applications also pending before the Court;
- the Government also notes with satisfaction a recent change in how the execution of the Court's judgments is supervised, leading to greater emphasis on combating structural defects found in the national legal system;
- it will also be necessary to examine which judicial formations within the Court should be responsible for disposing of clone cases of this kind;
- finally, the Government supports the notion of introducing the concept of advisory opinions; this would make it possible for the highest national judicial authorities in a country to obtain non-binding opinions from the Court on the interpretation of the Convention. The idea behind the proposal is that a national authority could in this way test whether certain assumptions in the case law are 'Convention-proof' and in this way avoid a situation in which many individual applications about the same subject are submitted to the Court. The Government considers that such a system would help to strengthen the principle of subsidiarity still further. After the Court has given an opinion the national (judicial) authorities could apply the opinion in their own legal system, taking account of their own legal, social and political backgrounds.

Flexible instrument for organisational and procedural provisions

To enable the necessary reforms to be carried out more quickly and effectively it should be possible in future for procedural provisions of the Convention to be amended more easily (i.e. without the need to draw up a protocol that is subject to a separate ratification procedure in all High Contracting Parties). Such an instrument (a statute), for which a basis must be created in the Convention, could include both provisions that are currently part of the Convention and provisions that now form part of the Rules of Court. Such a statute would thus make it possible to adopt rules concerning interim measures, as outlined above.

Embedding the Court more firmly in the institutional framework

In every legal order the courts form part of a system of checks and balances. This is no different in the case of the supervision mechanism under the Convention. Political decision-making in the Council of Europe takes place within the Committee of Ministers (CM). The CM has the power to supplement and/or clarify the rules of the Convention by means of official CM decisions, for example recommendations to the Member States in response to political events in a country or answers to questions from the Parliamentary Assembly of the Council of Europe (PACE) about, say, religious freedom or general political guidelines concerning LGBT rights. In its present case law the Court regularly refers to CM decisions. The CM also has the job of supervising the execution of the Court's judgments. To ensure the democratic legitimacy of the Court the Government wishes to avoid a situation in which the Court functions in isolation. Dialogue between the Court and the Member States should be promoted in various ways. This will help to minimise the distance between the Court and political and social reality in the Member States.

The Netherlands proposes to promote this dialogue by advocating a more active role for the CM. Such a role would strengthen the dialogue between the Court and the political institutions (checks and balances), thereby ensuring that the Court is in closer touch with current developments. The CM should, of course, take care not to express an opinion on matters that are still sub judice. And, just as at national level, the political institutions will also have to observe a degree of restraint in order to ensure the Court's judicial independence.

Naturally, there is a role for PACE in the conduct of this dialogue. There could also be periodic consultations between the Court and the Agents of the various High Contracting Parties on matters of a procedural nature. Finally, such a dialogue could also be conducted by intervening in pending proceedings against other countries, so that the Court could take account of the Dutch position as well when arriving at its decision.

Safeguarding the quality of the case law

To enable applicants to properly gauge their chances of success and allow the national authorities (legislature, executive and judiciary) to implement the Convention's acquis as effectively as possible at national level in accordance with the principle of subsidiarity, the case law of the Court should be clear and consistent. For the sake of legal certainty it is important for the Court not to depart from its own previous decisions. If the Court does decide not to follow precedent in exceptional circumstances, it should clearly explain its reasons for doing so. Similarly, consistency in the award of just satisfaction under article 41 of the Convention is necessary in order to prevent this provision from acting as a magnet for applications. The Government will continue to bring these matters to the attention of the Court, for example through the periodic consultations that take place between the Court and the Agents of the Member States.

The quality of the case law is inevitably dependent on the quality of the judges. The Court too has indicated the need for vigilance here. The procedure for the appointment of new judges to the Court consists of two stages. A High Contracting Party itself nominates three candidates, but the appointment is made by the Council of Europe's Parliamentary Assembly (on which the Netherlands is represented by seven members of the Senate and seven members of the House of Representatives).

The national selection procedure in the Netherlands, in which the Cabinet decides on the appointment after the job vacancy has been published and a committee of three independent members (including the President of the Supreme Court and the Vice President of the Council of State acting in those capacities) has made a recommendation, is recognised as European best practice. The Government will provide other countries with information and recommend that similar procedures be adopted. The Netherlands will participate in a working group in which information about these best practices is exchanged between the Member States of the Council of Europe.

The Government notes with satisfaction that the procedure for the appointment of judges at European level has now been strengthened. Recently, a screening panel has been established (which includes former judges of the Court) to assess candidates for judicial office before PACE makes an appointment. The Netherlands will closely monitor the work of both the screening panel and PACE: candidates who do not fulfil the conditions in that they lack adequate relevant experience or do not – in view of their present position – have the requisite independence to become a judge should be rejected.

Ease of access to the Court

The present system is based on the notion that there should be easy access to the Court: applicants can submit a complaint to the Court in their own language, are not required to have legal representation and do not have to pay a court fee for use of the Court's services. It is debatable whether this system is still tenable. Over 90% of all applications are dismissed by the Court as manifestly ill-founded or held to be inadmissible on other grounds. The Court was not established to spend the great majority of its time on complaints that do not belong before a European institution designed to function as a last safety net. The Court should not be required to give judgments in cases that serve only a secondary interest. What is therefore needed is a mechanism to cause applicants to pause and reflect before they submit an application to the Court. One possibility would be to introduce a realistic fee, although certain categories of case would have to be exempted as is the case in national legal systems. In view of the widely differing standards of living between the High Contracting Parties, it will also be necessary to differentiate from country to country. The fee should be refunded to applicants whose application is not among the 90% of manifestly ill-founded cases.

For the reasons mentioned above the Government has taken note with interest of the initiatives to regulate access to the Court. For example, the Government supports the Court's proposal to introduce mandatory legal representation for applicants. Similarly, it takes a positive view of Germany's proposal to fine applicants who submit manifestly ill-founded complaints on more than one occasion.

Finally, the Government proposes to examine at national level too whether disciplinary measures can be taken against lawyers in situations where the submission of applications can be regarded as an abuse of law.

Country-specific solutions

A factor that should be taken into account in searching for solutions to the problems confronting the Court is that no fewer than 60% of the applications to the Court come from just five countries, namely Italy, Romania, Russia, Turkey and Ukraine. The Government wishes to investigate the feasibility of a more country-specific approach in order to stem the flow of complaints from these five countries. The Council of Europe should do more to focus

the provision of technical assistance on these countries and make it more obligatory. Where applicable, the Council of Europe could base itself on EU instruments such as the European Neighbourhood Policy (ENP).

The Government will naturally seek to put across its views in all relevant bodies of the Council of Europe, where possible together with like-minded countries. It has noted that the Netherlands is not the only country in which these problems and the proposed solutions are receiving attention. It therefore expects that in many cases the Netherlands will not find itself isolated in the discussions. Where possible, the Netherlands will seek to work in concert with like-minded countries such as the United Kingdom, particularly in view of the latter's forthcoming chairmanship of the Committee of Ministers (November 2011 - May 2012).

Accession of the European Union to the Convention

Provision for the EU's accession to the Convention is made in article 6 of the Treaty on European Union. This reads as follows: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'

Once the EU accedes to the Convention, EU citizens will be able to refer acts of EU institutions that directly affect them to the European Court of Human Rights, after they have exhausted EU remedies. Where acts of EU Member States are based on EU law citizens will also be able to submit complaints not only against the States concerned (after exhaustion of domestic remedies) but also against the EU. The latter is, after all, responsible for the legislation on which the act is based. As a result, responsibility can be better allocated as between the member states and the EU.

Dutch position

The Dutch position is that it is important for the conditions governing the EU's accession to the Convention, as recorded in the EU's negotiating mandate, to be reflected as accurately and in as much detail as possible in the Accession Agreement and in the internal EU rules.

The Netherlands sets a number of conditions. For example, the allocation of competences between the EU and the EU Member States should not be changed by the EU's accession to the Convention. This means, among other things, that the Court of Justice of the European Union should have the opportunity to rule in advance on the precise interpretation of EU rules that are connected with applications submitted to the European Court of Human Rights. In addition, it is important to devise a co-respondent mechanism. Such a mechanism would mean that the EU could become involved as a respondent in application proceedings brought against an EU Member State concerning the application of EU law and vice versa. A provision must also be included in the internal arrangements to ensure that the Union judge who will sit on the European Court of Human Rights is experienced in applying EU law and familiar with the division of competences within the EU.

Another important point for the Netherlands is that the EU should rank as an equal with other parties in the Committee of Ministers of the Council of Europe when the Committee is discharging its duties in relation to the Convention.

Naturally, the Accession Agreement and the internal rules for the EU are closely interconnected and together form a total package. The Dutch position is that it is important for sufficient time to be taken not only to draft the Accession Agreement but also to

negotiate these internal rules. The Netherlands called on the Commission during the JHA Council of 9 and 10 June 2011 to produce new proposals for the internal rules as quickly as possible. The Netherlands will not approve the overall package until agreement exists on both the draft Accession Agreement and the internal EU rules.

The process

To arrange for the EU's accession to the Convention, the Council adopted a detailed negotiating mandate on 4 June 2010, in which the Commission was designated as negotiator for the EU. The Commission provides periodic feedback on the negotiations to the Council Working Party on Fundamental Rights, Citizen's Rights and Free Movement of Persons (FREMP). This working party is currently also discussing the internal provisions for application and elaboration of parts of the Accession Agreement within the EU.

The entry into force of Protocol No. 14, again in June 2010, has made the EU's accession to the Convention possible from the point of view of the Council of Europe. As a result, article 59, paragraph 2 of the Convention contains a provision that reads as follows: 'The European Union may accede to this Convention'. The EU's accession is being negotiated on behalf of the Council of Europe by a group consisting of seven experts from EU Member States[1] and seven experts from non-EU Member States.[2] This group of experts has been chosen from and is accountable to the Steering Committee for Human Rights (CDDH), on which all 47 Member States of the Council of Europe are represented and which is in turn accountable to the Committee of Ministers. The Council of Europe's 14 experts and the Commission have met eight times in the past year in a negotiating group chaired by Norway. The chair of the negotiating group reports to the CDDH.

Naturally, the Netherlands is closely involved in the preparation of the position taken by the Commission on behalf of the Union. As a Dutch expert was chosen as a member of the negotiating group, the same applied to the actual negotiations between the two organisations.

The negotiations on the conditions for accession started in July 2010 and were completed at expert level on 24 June 2011. The next step is for the Committee of Ministers of the Council of Europe to express a political opinion on the results of the consultations at expert level. This is expected to take place before the end of the year.

On the EU side, the Member States and the institutions under the Polish Presidency will continue to negotiate the internal EU arrangements for the application of the Accession Agreement.

The Commission and each Member State may request the Court of Justice of the EU to examine whether the draft Accession Agreement is in conformity with the EU Treaties and leaves intact the division of competences within the EU. If the Court of Justice were unfortunately to find that this is not the case, the negotiations would have to be reopened. The Commission has indicated that it will submit the Accession Agreement to the Court of Justice.

1 Finland, France, Germany, Latvia, the Netherlands, Romania and the United Kingdom.

2 Armenia, Croatia, Montenegro, Norway, the Russian Federation, Switzerland and Turkey.

The final Accession Agreement must be approved by all 47 States that are party to the Convention (including all EU Member States) and by the EU. Within the EU, the accession decision, which will also incorporate the necessary internal EU rules, must be adopted unanimously by the Council after approval by the European Parliament. Finally, the EU Member States must approve the accession decision in conformity with their own constitutional provisions before it can enter into force. This means that both the Accession Agreement and the EU approval decision will be submitted to parliament for approval.

Political context

The EU's accession to the Convention enjoys broad support within the EU. The Hungarian and Polish presidencies of the EU both indicated that they wish to make rapid progress on the Accession Agreement and the drafting of the related internal rules.

A few Member States of the Council of Europe that are not members of the EU have indicated that they do not wish to be hurried into a decision. Within the Council of Europe much importance is attached to the principle of equality between all Member States, whether or not they are also Member States of the EU. In addition, some countries have objections to what they regard as a preferential position for the EU.

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