

# Foreword

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It is my great pleasure to write the Foreword on behalf of the Dutch Government to this publication on the European Court of Human Rights. The volume addresses a question that is both incredibly important and extremely challenging: how to deal with the criticism of the European Court of Human Rights? Not criticism *by* the Court when it examines the quality of the legal decisions of the various member States, but criticism directed *at* the Court.

The Dutch Government remains strongly committed to the Convention mechanism. Firstly, because we believe that any criticism should be considered seriously and discussed on its merits, so that lessons can be learned if necessary and so that the Court's authority is not weakened. Secondly, because the proper functioning of the European Court of Human Rights is essential for the 'constitutional well-being' of Europe.

The former Dutch Prime Minister, Jan Peter Balkenende, spoke about this issue when he presented the International Four Freedoms Award to the Court in 2010. In his words, the Court is a unique body that has 'played a central role in strengthening democracy and the rule of law. It has ensured access to justice for every person in our vast and ancient continent. It has brought security and stability to our society. It has fully earned the respect and support of the member States of the Council of Europe.'

The future of the Court was the topic of a High Level Ministerial meeting in Brighton, United Kingdom in April 2012. The Dutch Government welcomes the fact that the British chairmanship of the Council of Europe focused on reforming the Court and tackling its backlog. The long-term effectiveness of the Convention system is under serious threat from the current backlog of cases. Political decisions concerning the reform of the Court are needed. We believe this was an excellent opportunity to strengthen the quality and legitimacy of the system. I represented the Dutch Government in Brighton and I sincerely hope we can make real progress on reform.

I would like to distinguish between two related – yet in my view separate – issues facing the Court. On the one hand there is the backlog, and on the other hand, there is the backlash, that is, the criticism. This volume deals mainly with the second issue, but let me make a few comments concerning the first issue as well.

I believe that the Court is faced with three distinct problems that need to be addressed. Firstly, the high percentage of applications the Court deems to be manifestly ill-founded or otherwise inadmissible. In cases against the Netherlands that figure is around 97 per cent. Figures for other countries differ, but they are often also above 90 per cent. In the Dutch Government's opinion, it is, therefore, crucial to examine the question of access to the Court.

Of course, I am fully aware of the reasons why the current system is based on a low threshold. Lodging an application concerning a violation of human rights should not be hindered by formalistic conditions. However, no one can deny that 97 per cent is a disturbingly high figure and that any judicial tribunal would be hard pressed to deal with such a flood of unmeritorious cases.

I am also aware that these cases are being dealt with more efficiently since the entry into force of Protocol No. 14 to the Convention in 2010. I am delighted to hear that the Court's Registry believes that it can dispose of the current backlog of manifestly ill-founded cases by 2015. However, in my opinion, that does not mean that the problem is solved. The time the Court spends processing these unmeritorious cases is time not spent on cases in which the judicial protection offered by the Court is indispensable.

So what is to be done? Firstly, we need to invest in distributing information on the case law of the Court so that applicants and their representatives know which cases are likely to be unsuccessful. I also believe that applicants and their representatives should be urged to be more cautious. Before lodging an application they should consider whether this is a sufficiently serious case that deserves examination by an international human rights tribunal. The European Court of Human Rights is not a court of fourth instance. We consider it reasonable that access to our domestic courts is regulated, so why should access to an international court be completely unrestricted? To my mind, the right of individual petition and the Court's ability to offer individuals judicial protection are cornerstones of the Convention system. But if we want to maintain the right of individual petition in the long term, I believe it is essential that we discuss the current unlimited access to the Court.

My second observation on the backlog relates to the fact that 50 per cent of the cases declared admissible by the Court are repetitive cases.

The Court was never intended to act as a fourth instance court and, at the same time, it was never intended to provide judicial protection as a first instance court either. We need to acknowledge that repetitive cases are caused by the failure to implement previous judgments delivered by the Court. We need tools – perhaps even of a financial nature – to encourage implementation. If only a few countries are responsible for 60 per cent of the Court's total workload, why should it not be possible to demand that they accept technical assistance programmes?

My third comment relates to the 30,000 or so cases currently pending before a Chamber of seven judges. These are the more complex and potentially more serious cases. Currently, the Court is able to dispose of 3000 such cases a year. That is ten years' backlog! So we need to increase the Court's general capacity to process applications.

The Court itself has indicated that the bottleneck lies within the Registry. So if you want to increase the Court's capacity to dispose of cases, you need to increase the size of the Registry. Given the current financial crisis, I accept that it will not be easy to agree on a substantial increase in the Court's budget. But I do believe there are possibilities: for example, the practice of seconding judges or other senior lawyers to the Registry for a limited time. The Netherlands has been doing this for many years and Russia is currently setting an excellent example by seconding twenty lawyers to the Registry. This practice could be extended further.

Let me now turn to the issue of backlash, which in a way is much more complicated because it is less tangible. The issue of backlash involves emotions as well as facts. Having said that, I would urge that the debate be conducted as far as possible on the basis of facts. That is why I set out a number of factual statistics in my letter to Parliament before discussing my Government's stance on the reform of the Court.

In my opinion, some of the criticism can be explained by a perception that judges – including those of the Strasbourg Court – too easily overturn decisions taken by democratically elected representatives in Parliament. Of course, judges do more than simply apply the law as the *bouche de la loi*. They also interpret the law. The judges of the Court apply the Convention rights, but in doing so they also interpret the Convention itself. They do so dynamically, because applying a Convention right that was drafted in the 1950s to a societal problem today requires that they consider the purpose of the right in question. What is more, the rights and freedoms enshrined in the Convention are necessarily cast in broad terms, so judicial interpretation is required. To my mind, this does not mean that judges are entering the political domain or making political choices. It means that they operate in a political context

and are often asked to decide on issues that have a great societal impact. My experience as a minister responsible for the proper functioning of the judiciary is that judges are well aware of their tasks and responsibilities – including the boundaries of their mandate.

Having said that, I would welcome a more intense political debate on the legal issues that come before the Court. Not only because these are matters of public interest, but also because they are worthy of political debate. You might say that the Court is finally being taken seriously. It is no longer discussed exclusively by legal experts, but in a wider political setting. That political discussion is entirely legitimate, provided that it is conducted in a respectful manner. Equally, we should avoid political debate on specific cases pending before the Court. To facilitate this respectful political discussion, the Dutch Government would urge a more active role for the Committee of Ministers. This would strengthen the dialogue between the Court and political institutions (providing the necessary checks and balances) and thereby ensure the democratic legitimacy of the Court.

As such a unique institution, the European Court of Human Rights deserves our full attention. If criticism is directed at the Court from some quarters, it needs to be discussed. This volume provides an open forum to that end. In my view, the contributions of so many distinguished judges, academics and professionals, proves the importance of this debate. Some contributions defend the Court, while others define the criticism, but all are frank, wise, nuanced and innovative, and I am pleased to recommend them to you.