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COMMUNICATION

In accordance with Rule 9.2. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements by The Dutch section of the International Commission of Jurists (NJCM) and the Forum Humane Execution of Life Penalties (Forum Levenslang)

In Murray v. the Netherlands (10511/10)

I. Introduction

The Dutch section of the International Commission of Jurists (NJCM) and the Forum Humane Execution of Life Penalties (Forum Levenslang) hereby respectfully submit their observations and recommendations under Rule 9.2 of the "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements" regarding the execution of the judgment of the European Court of Human rights (hereafter ECtHR or the Court) in the case of *Murray v. the Netherlands* (Application no. 10511/10, Judgment of 26 April 2016).

With this contribution, the above-mentioned associations present to you a 9.2 submission for the fourth time, in response to the three Government Action Plans by the Dutch Government of 31st of January 2017, 29th of January 2019 and 2nd of March 2021. In our previous submissions, a description of the two NGOs was included. This submission will express concerns in addition to our earlier submissions, adding new questions and remarks in response to the latest Action Plan, as well as reiterating and stressing earlier points of view.

II. Case summary

The case *Murray v. the Netherlands* concerns inhuman and/or degrading treatment on account of the de facto irreducibility of a life sentence imposed on the applicant (violation of Article 3 of the European Convention on Human Rights and Fundamental Freedoms). The applicant was convicted of murder and sentenced to life imprisonment in Curaçao and Aruba – parts of the

Kingdom of the Netherlands - in 1980, while suffering from a mental illness. The Court notably held that "the lack of any kind of treatment or even of any assessment of treatment needs and possibilities meant that (…) any request by him for a pardon was in practice incapable of leading to the conclusion that he had made such significant progress towards rehabilitation that his continued detention would no longer serve any penological purpose" (§ 125). Hence, in this case there was no need for any further assessment of the pardons system or the periodic review mechanism with a view to assessing whether the life sentence was de jure reducible.

III. General Measures

The NJCM and Forum Levenslang hereby again wish to express grave concerns about the lack of progress made by the Dutch government so far to ensure compliance with the *Murray* judgment. National ordinances have still not been implemented and the national Action Plans do not address the criticism posed in earlier Rule 9.2 submissions of the abovementioned associations. Moreover, the Action Plans only focus on implementation of measures in the Caribbean part of the Kingdom of the Netherlands. As we have argued in our previous submissions, this focus is not in line with the *Murray* judgment, as the Court has inevitably and inextricably assessed the Kingdom's policy in general, which includes the European part of the Kingdom.

The judgment in the case of Murray was issued almost 6 years ago already, but – as far as the Caribbean part of the Kingdom of the Netherlands is concerned – the government is producing Updated Action Plans that are still very unspecific and general in nature. The most recent Action Plan was issued on 2 March 2021, but again leaves several gaps as will be elaborated on further below.

For these reasons, we believe that the Dutch government has still not taken sufficient general measures to prevent violations of Article 3 of the European Convention on Human Rights (hereafter ECHR) in the case of prisoners with mental health problems serving a life sentence. Therefore, we have formulated several requests to the Committee of Ministers at the end of this submission.

1. Applicability of the obligations in all four countries

As was the case with the Action Plan of 29 January 2019, the Action plan of the Dutch Government dated 2 March 2021 is limited to actions regarding the Caribbean part of the Netherlands.

For example, in the most recent Action plan, the need to achieve adequate and specialized care for prisoners with psychiatric disorders is acknowledged by all four countries of the Kingdom of the Netherlands (the Netherlands, Curaçao, Aruba and St Maarten) (para. 10 of the Action Plan). Still, the announced approach solely focuses on improving the situation in the Caribbean countries, mostly focusing on Aruba and Curaçao, whereas the policy with respect to the execution of Murray's life penalty cannot be exclusively attributed to Aruba and Curaçao.

As addressed in our letter dating 9 March 2020, we are of the opinion that the ECtHR *Murray* judgment is applicable to all four countries of the Kingdom of the Netherlands, as the Court […] inevitably and inextricably assessed the Dutch policy, this policy being part of the criminal justice system by which Murray's penalty has been executed (page 1). We therefore expect an acknowledgement by the Dutch government that the joint detention task force will provide concrete suggestions on the treatment needs and rehabilitation of prisoners with mental illnesses throughout the whole Kingdom of the Netherlands. We would like to underline the importance of a joint effort to improve the detention system throughout the Kingdom of the Netherlands.

As expressed in the letter of 9 March 2020 and our submission dated 23 September 2019, we are of the opinion that the Committee of Ministers' monitoring should also relate to the European part of the Kingdom, because of four reasons: (1) all four countries have a common Supreme Court, (2) a common Charter in which it is laid down that the execution of a penalty inflicted by a judge within the Kingdom may take place in any of the countries of the Kingdom and (3) a common policy in which the protection of fundamental rights and freedoms as a matter of the Kingdom as a whole is laid down and finally (4) because the breach of Article 3 ECHR established by the ECtHR does not refer to the legal system of Aruba of Curaçao, but to the policy which led to a failure to offer treatment to Murray.

2. *De facto* reducibility

We would like to reiterate that the ECtHR established that the life sentence imposed on an individual has to be *de facto* reducible. This entails the need for domestic authorities to monitor any changes in the life prisoner's behaviour and the progress towards his or her rehabilitation, in order to be able to decide whether detention is still justified on legitimate penological grounds. The life prisoner must be realistically enabled to make progress towards rehabilitation that gives him or her hope, and there needs to be proper treatment and suitable medical supervision. *De facto* reducibility entails 3 different aspects with regard to the case of Murray, namely sufficient detention plans and monitoring of progress (A), sufficient psychiatric treatment (B) and sufficient assessment of review of sentences (C), as discussed below. Moreover, as pointed out above, *de facto* reducibility of life sentences is an obligation for the *whole* of the Kingdom of the Netherlands, including the European part. Even in the European part of the Kingdom, the circumstances of detention and review are not in line with the *Murray* judgment, as will be discussed in the fourth paragraph.

A. Detention Plans and monitoring of progress

Firstly, the lack of specificity in the Action Plans, notably the latest, on how personalized treatment plans are drawn up, how individual progress is monitored and how prisoners are able to show their growth, is striking. The current regular detention plans, that are drawn up for all detainees and not specifically for life long prisoners (hereafter: lifers), work with a 'traffic light' model review of progress. This is apparently in imitation of the European part of the Kingdom where this system was introduced in 2014. These detention plans track the detainee's behaviour and their activities. However, the Action Plan itself contains the reservation that this system only works "if the system is applied properly" (para. 30). This raises questions like: how is it assured that the system is applied properly, as it has not been functioning correctly before? And if so, what are the criteria for a lifer to get assigned a

certain colour and when can a lifer move to the 'plus' programme? What does a life prisoner need to do in order to be considered for release? The life prisoner has to be 'given hope' and be enabled to make progress, but it is still ambiguous how exactly he or she can show his or her growth, the more so if not allowed any leave until the moment of the assessment. This monitoring system is not specific enough to ensure *de facto* reducibility of a life sentence. In fact, currently there is no procedure that adequately estimates the needs of the lifer after his sentence becomes irrevocable. We urge the government to adopt a proper way of monitoring the progress to ensure compliance with the judgment.

In general, it is noteworthy that there is still almost no mention of resocialization or reintegration activities, despite the continuous emphasis on its importance in our submissions. Although the phases of detention are sometimes mentioned, apparently (based on the Action Plans submitted so far) there is only a general focus on medical treatment in the individual detention plans. The Court has, in its judgment, stressed the importance of taking part in occupational or other activities where these may benefit rehabilitation. Prisoners sentenced to life imprisonment, whose risk of recidivism is assessed to be low, should be able to take part in reintegration activities, including leave, well in time and with appropriate frequency.[1] When and under what conditions will leaves be allowed? How is a prisoner's growth and the risk that he/she poses to society assessed, if he or she is not given enough activities outside prison at some point in time? Those are valid questions that we would like to see addressed urgently.

In addition, even now it seems that many of the measures taken are at a very early stage, even though the *Murray* judgment was in May 2016. There is no mention of actual timeframes for implementation or any kind of deadline. Discussions are still taking place about making separate agreements with all stakeholders and starting to shape the resocialization as mentioned in the latest Action Plan. These discussions in themselves are certainly to be encouraged, but the fact that five years after the judgment not much more is accomplished than the exploratory phase is alarming.

B. Psychiatric treatment

Linked to the detention plans and the monitoring of personal progress, is of course the availability of psychiatric treatment, to be able to *make* progress. Reading the latest Action Plan of the Dutch government, our associations welcome the fact that both Curaçao and Aruba have psychologists and psychiatrists on call and available for visits to individuals for medical help and comprehensive psychological treatment. However, we believe this to be the bare minimum of (emergency) health care to be expected and the vital foundation on which all other suitable rehabilitative measures should be built. Moreover, in the Action Plan a numerical overview of the amount of life prisoners and prisoners detained under an order of placement in a psychiatric institution or under a hospital (TBS) order is lacking.

[1] ECtHR (GK) 9th July 2013, appl. no. 66069/09, 130/10, 3896/10 (Vinter e.a./VK), NJ 2016/135, par. 60 and 61, Recommendation 2003(23) (on the management by prison administrations of life sentence and other long-term prisoners), adopted by the Committee of Ministers on 9 October 2003, par. 10, 16 and 33, Recommendation 2003(22) (on conditional release), adopted by the Committee of Ministers on 24 September 2003, par 3 and 4(a) and Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules (1 July 2020), part VIII, rule 103.8 and 104.2.

Regarding the measures taken by Curaçao, it becomes clear that, besides the availability of medical treatment by a psychiatrist and psychologist, no progress has been made since 2016. The Action Plan (para. 17) states that the psychiatrist offers a comprehensive mental health program, but it is still unspecified what this mental health program entails and how individual detention plans will be drawn up. We already raised and discussed this concern in our earlier submissions[2].

Regarding the measures in Aruba, we consider that they are already slightly more precisely formulated, but they still raise a number of similar questions as discussed above regarding the actions plans and monitoring in general. Firstly, the national ordinance to take particular account of various aspects of mental healthcare for detainees still has not formally entered into force. The implementation arrangements that are still to be approved contain, amongst others, the minimum requirements for detention plans (para. 26-27).

Our associations do support the aim of Aruba to establish a forensic psychiatrist wing at the KIA. We are very interested in the plan that was presented in January 2020, which sets out the structure and requirements of the wing. One of those requirements is that a multi-disciplinary team will be responsible for establishing individual plans for treatment. Thus, we are looking forward to how this team will respond to and address the questions posed above.

Furthermore, the Action Plan has not announced concrete measures in Curaçao or Aruba on how adequate forensic care for persons with a psychiatric disorder will be provided. In the Action Plan both a survey of options for cooperation in various areas, such as the enforcement of hospitalisation orders (TBS orders) and a report on measures to improve the detention system are announced. We welcome the initiatives of the Judicial Four Country Consultation (JVO) seeking suitable solutions for people who need forensic care. However, apart from these mentions, no concrete measures are taken to provide fitting forensic facilities for people with psychiatric disorders. This means that persons with psychiatric disorders will not receive the required care and therefore will continue to form a danger to themselves and/or to others as no treatment is offered. We, therefore, urge the Dutch government to proceed with these initiatives and follow up with practical action, such as setting up so-called TBS clinics in Curaçao and Aruba.

What is worse, the Dutch government does not (or barely) take into account the fact that life prisoners can suffer from a serious psychiatric illness from the *start* of their detention (like Murray did) or, on the other hand, suffer from a psychiatric illness that developed *during* their detention. The Action Plan states in par. 19 that 'The provision in Article 1:79 prevents the imprisonment for life of persons with psychiatric disorders', which is certainly not true.

Article 1:79 of the Penal Code of Curaçao only prevents a combination of life imprisonment and the orders referred to in Articles 1:80 (placement in a psychiatric institution) and 1:81 (hospital order or TBS order). The Penal Code of Curaçao does not prohibit the imposition of life imprisonment on a person 'with a psychiatric disorder'. Moreover, the Criminal Code in the European part of the Kingdom does not prohibit the imposition of a life penalty under such circumstances; such a ban never existed. On the contrary, it often happens that life

[2] Rule 9.2 submission NJCM, Helsinki Committee and Forum Levenslang, dated 16 July 2019, p. 5

imprisonment is imposed on a person who is suffering from a mental disorder.[3] Only when there is a lack of *all* guilt, e.g. because of intellectual disability or pathological disturbance of the mental faculties, no penalty may be imposed, encompassing also no penalty for life.

C. Assessment of reviews

Thirdly, building upon the points of sufficient detention plans, monitoring of progress and availability of psychiatric treatment, the criteria of Curaçao to assess an eventual review are not in line with the *Murray* judgment and are too vague. We support the fact that the Joint Court assesses after twenty years whether the life sentence still serves a reasonable purpose. An assessment by a court promotes the impartiality of the review and is also the preferred choice of the ECtHR.

The worrying aspect is one of the criteria for the assessment. Article 1:30 of the Penal Code of Curaçao, concerning life penalties, stipulates that the judge must carry out a review after 20 years, thereby taking into account 'the position of the relatives of the victim and of the victims themselves'. This factor lies outside the scope of what the prisoner can influence. Moreover, this factor is highly biased in nature and therefore subjective. Because of this, a lifelong prisoner has no fair chance to be released despite his best efforts. It is a 100% retributive criterion that is not apt - at least not alone - to achieve the review that has to take place according to the *Murray* judgment. That criterion is 'whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds'. (*Murray* par 100, *Vinter* par 119). This criterion in the Penal Code of Curaçao, in combination with the lack of an actual re-integration program, diminishes the prospect of release for the prisoner to a minimum. This means that Article 1:30 CC is not in line with the *Murray* judgment.

In par. 22 (Action Plan) the shortcoming of the retribution-criterion is acknowledged. It does not explain, however, how the *Murray*/*Vinter* criterion relates to the criteria mentioned here, among which 'personal growth'. If 'personal growth' is to be used as a criterion for the review of a life sentence with a view to release, the action plan does not point out how such growth will be measured. There is also no clarification for the meaning of the 'reference points'. As we pointed out earlier (submission dd 23 September 2019, page 5, par. 3, the first dot, under no 3), in the Dutch prison system a tool to measure the growth of the prisoner, a so-called 'monitoring system', is lacking.[4]

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[3] van Hattum, W. (2017). Plaatsing van levenslanggestraften in het gevangeniswezen: Het huidige beleid in het licht van Murray vs. Nederland. *Nederlands Juristenblad NJB*, *92*(41), 3000-3006. [2181].

[4] The objectives and origins of the Monitoring procedure may be deduced from the judgment of the European Court of Human Rights in the case *Vinter* v. *UK* and the international sources referred to in this judgment (pars 60-64). (See also the English version of Forum Levenslang monitoring procedure, written by the forensic behavioural experts of the Forum Levenslang) and already attached to our submission of 23 September 2019: "*Objectives of the monitoring Procedure*".
In *Vinter v.VK* the Court explained that a life sentence only satisfies the requirement of humanity, if during the execution of the penalty at a certain moment there is an evaluation to establish 'if any changes in the life prisoner are so significant and such progress towards rehabilitation has been made that continued detention can no longer be justified'.

Moreover, Curaçao states that in order to have a meaningful review of a life sentence, the Joint Court will use procedural guidelines and a specific work plan specifying the role of, amongst others, the life prisoner. This work plan will outline in more detail the criteria for evaluation and reference points (para. 20-22). Our associations wholeheartedly encourage this approach but are saddened to see that the work plan is still to be drawn up 5 years after the ECtHR judgment. This means that at this point in time, it is still unclear for life prisoners serving their sentence in Curaçao how their progress is evaluated. It also means that resocialization and reintegration are not sufficiently taking place yet, despite the Court's judgment and the repeated calls for action by our associations.

D. The European part of the Kingdom of the Netherlands

Since 1986, no lifelong prisoner had been released in the European part of the Kingdom of the Netherlands, which highlights the missing prospect of release in the European part. However, in 2021, the Dutch civil courts may have proven that there might be a prospect of release after all. In January and May 2021, two of the lifelong prisoners that had been detained for the longest period were pardoned after resp. 38 and 33 years.[5] Initially, the Minister for Legal Protection did not implement the courts' recommendations to release the prisoners and continued the penalty. The courts eventually ruled that the Minister had no legal grounds anymore to continue the execution. That took more than 25 individual legal battles against the State over 8 years. Consequently, he pardoned them, but stated at the same time that he had tried his best to continue the execution of the sentence, despite the lack of legitimate grounds for further detention.[6] This letter shows the ongoing reluctance of the Dutch Government to comply with the *Murray* judgment in ensuring a *de facto* prospect of release for lifelong prisoners.

The pardons are definitely a step in the right direction, but it does seem that the Minister only grants a pardon after the prisoner initiates countless procedures. Furthermore, it also appears that the courts have to rule again and again that the Minister should proceed in offering a perspective of release by granting leave before granting a pardon. According to the courts, there were no legitimate penological grounds to continue the execution. Nonetheless, the Minister reasoned otherwise. These procedures cost a lot of precious time spent in prison, and, even worse, result in disproportionate anxiety and insecurity for the prisoners concerned.

Thus, the current course of events does show that granting a pardon does occur in the European part of the Kingdom of the Netherlands, but only after many long and costly civil and administrative proceedings, which all have to be initiated by the prisoner. This fact, plus the incredible amount of uncertainty whether a pardon will be granted after all these procedures, ultimately diminishes the true meaning of a *de facto* prospect of release.

In 2017, in response to the *Murray* judgment, the Minister announced plans to introduce a procedure for every lifer whose sentence has become irrevocable one year previously. This procedure entails conducting a multidisciplinary research for the purpose of tuning the care to their needs during their detention. Up until 2021, the research had been done on only a few of the 42 lifers. A lifelong prisoner whose sentence became irrevocable in 2005 and who has been detained since 2002 only qualified for such a screening in this year. Now, 5 years after the

[5] Kamerstukken II, 2020-2021, 29492, nr. 240 & Kamerstukken II, 2020-2021, 252, nr. 242.
[6] Letter of the Minister for Legal Protection to parliament 29452, nr.240, 20 January 2021, see appendix I.

Murray judgment, there is still years of backlog concerning these necessary researches. Bearing in mind the principle of the prospect of release, it is not in correspondence with paragraph 105 and 106 of the *Murray* judgment to not identify timely what is needed in the sense of medical care and/or treatment.

Furthermore, according to the rules established in 2017, a life prisoner has no right to re-integrate and is not allowed any form of re-integration leave for the first 25 years of his detention (Article 4-2 Besluit Adviescollege Levenslanggestraften). For many lifers, e.g. prisoners who are over 50 years at the time they are incarcerated, this rule deprives them of all hope to return to society one day.

We would like to see that the Minister for Legal Protection truly acts in accordance with the *Murray* judgment, meaning that he offers lifers the possibility to rehabilitate themselves. Furthermore, we would like to see that the Minister releases prisoners when there are no legitimate penological grounds anymore to keep them detained. The Minister needs to take these actions before these prisoners lose the possibility to (physically or psychologically) adjust themselves to free society. We would like to stress that this does not entail "litigating until the courts give no other option but to grant a pardon". It looks like the judicial branch takes their constitutional duty to 'save' the Dutch pardon system, but we would also recommend that the executive power would do its duty in that regard too. Therefore, we would like to see concrete measures on how to improve the implementation of the *Murray* judgment in the next Action Plan regarding the European part of the Kingdom as well. We do not see how the action plan can legitimately only focus on measures taken in Aruba and Curaçao and how the above-mentioned circumstances are to be left unaddressed.

IV. Concluding remarks and recommendations

In conclusion to this submission, we call upon the Committee to ask the Netherlands to submit a sufficiently comprehensive Action Plan to address *all* issues identified by the ECtHR and addressed in this letter and the issues addressed in our previous submissions. It is important and urgent that concrete measures are taken and implemented *now*, to prevent further violations hindering the *de facto* reducibility of life sentences, in particular for mentally ill prisoners.

We request the Committee to urge the Netherlands to improve their upcoming Action Plan, which should:

- Be more rigorous and precise and should clearly indicate the next steps forward;
- Provide for measures to ensure a *de facto* prospect of release and a possibility of review of current and future life sentences in the whole of the Kingdom of the Netherlands and make them compatible with Article 3 of the Convention;
- Set out a concrete timeframe for implementation of the plans as mentioned in the Action Plan;
- Respond to the earlier criticism by our associations, such as the issues raised concerning the European part of the Kingdom of the Netherlands;
- Ensure that detainees in need start receiving appropriate individual treatment shortly after their sentence becomes irrevocable;

- Ensure that all lifers are sufficiently monitored in order to track and show their progress and have a chance at a successful assessment of their review;
- Include data or a numerical overview of the amount of life prisoners and prisoners detained under an order of placement in a psychiatric institution or under a hospital (TBS) order, to gain insight into how many lifers are confronted with the Action Plan.

Lastly, considering the seriousness of the violations of the ECHR that were established in the *Murray* judgment, the shortcomings of the Action Plan as identified in this letter and earlier letters, the extensive period of time in which the judgment has been pending implementation, and the major complex and structural problems in the detention facilities in the Caribbean part of the Kingdom of the Netherlands, we consider that the use of the enhanced procedure is appropriate for this case.

Appendix I:

I. Letter of the Minister for Legal Protection to parliament 29452, nr 240, 20 January 2021 (translated in English by Forum Levenslang)

Sincerely,

Dr. W.F. van Hattum

President Forum Levenslang

p.p. Monique Steijns LLM

Chair NJCM