COMMUNICATION UNDER:

Optional Protocol to the International Covenant on Civil and Political Rights

Date: 20 July 2015

I. Information on the complainant:

Name: BIJKERK	First name(s): Michiel
Nationality: Dutch nationality	Date and place of birth: 4 August 1953, in ARUBA
Address for correspondence on this complaint:	Seru Grandi #80 Bonaire, Caribbean Netherlands
E-mail address: Telephone:	abogado.bijkerk@gmail.com 00599 – 796 2650
Submitting the communication on behalf of another person:	YES (see below)

Details of that other person:

Name: JOHNSON	First name(s): William Stanley
Nationality: Dutch nationality	Date and place of birth: 22 Sept. 1941 on SABA
Address or current whereabouts:	Wall Street #7, The Level, SABA, Caribbean Netherlands

The undersigned (author) is acting with the knowledge and consent of the above-mentioned person, evidence of which is provided in the attached power-of-attorney, signed and dated by Mr. William Stanley JOHNSON (see also copy of his passport).

SEE ATTACHED POWER-OF-ATTORNEY (ex 1 with passport)

II. State concerned/Articles violated

Name of the State against which the complaint is directed:

KINGDOM of the NETHERLANDS

Articles of the Covenant alleged to have been violated:

Art. 2, section 1 and art. 26 of the International Covenant on Civil and Political Rights

III. A. Exhaustion of domestic remedies

Steps taken by or on behalf of the alleged victim to obtain redress within the State concerned for the alleged violation (the description below of the steps taken is brief as this will be explained in more detail under the next heading: 'Facts of the Complaint'):

Mr. William Stanley JOHNSON, residing in the *Caribbean* part of the Netherlands, applied for Old Age Pension on 13 June 2011 to the Dutch Minister of Social and Employment Affairs in The Hague, the Netherlands, via the Minister's offices in Saba, Caribbean Netherlands.

Mr. Johnson's petition was granted, but the monthly pension granted to him amounts to about half of what is paid by the Dutch government in the *European* part of the Netherlands (herein sometimes also referred to as 'Holland'). Mr. Johnson holds that he is entitled to receive a pension at the same level as is paid to pensioners in Holland. To redress this, Mr. Johnson took the following 3 steps, with which he has exhausted all possible domestic remedies.

First step:
On 23 August 2011 Mr. Johnson filed a formal written objection with the responsible Dutch Minister of Social and Employment Affairs, requesting to be paid a monthly pension as of 1 January 2011 at the level paid to pensioners in the *European* part of the Netherlands, i.e. Euro 743.60 (in 2011) instead of the amount he had been granted (in 2011) at US$ 524.-.

The objection was rejected by Ministerial decree of date 9 December 2011.

Second step:
On 17 January 2012 Mr. Johnson filed an administrative Court Case against the Minister concerned at the competent Court of First Instance of Saba, petitioning the Court (briefly summarized) to order the Minister to raise his pension to an amount equal or equivalent to the amount he would be entitled to if his place of residence was in the *European* part of the Netherlands ('Holland') instead of the *Caribbean* part of the Netherlands (namely the three islands of Bonaire, St. Eustatius and Saba, collectively also known as the 'BES-islands').

At the request of Mr. Johnson this Court Case was treated by the Court of First Instance in Bonaire, Caribbean Netherlands, which Court rejected Mr. Johnson's petition by Judgment of date 12 March 2014.

Third step:
On 10 April 2014 Mr. Johnson lodged an appeal to the 'Common Court of Justice of Aruba, Curaçao, St. Maarten and of Bonaire, St. Eustatius and Saba' (abbr. the 'Common Court of Justice'). In its judgment of date 15 December 2014 the Common Court upheld the decision of the Court of First Instance, so that the discrepancy between the pensions paid in the *Caribbean* part of the Netherlands as compared to the *European* part of the Netherlands, persists.

The Court Cases in First Instance and in Appeal are administrative cases. In administrative cases there is no recourse to the Supreme Court in The Hague for an appeal in cassation, neither in the Caribbean part of the Netherlands, nor in the European part of the Netherlands. In other words, **ALL DOMESTIC REMEDIES HAVE BEEN EXHAUSTED**.

III B. Application to other international procedures

Mr. Johnson has <u>NOT</u> submitted the same matter for examination under another procedure of international investigation or settlement.

IV. Facts of the complaint

Introduction:

1. To explain the complaint clearly, it is necessary to first outline the history of the Dutch Caribbean archipelago formerly known as the '*Netherlands Antilles*'.

2. Since 1634 this archipelago was a Dutch colony. In 1954 the islands (6 in all) were granted a generous measure of autonomy within the framework of the post-war decolonization process. The U.N. General Assembly gave its fiat to the constitutional arrangement set up at the time for the 'Netherlands Antilles', but it should be noted that this semi-autonomous entity or territory was never granted full *independence*.

   Instead of granting independence to its Caribbean colonies, the Netherlands transformed itself in 1954 into the 'Kingdom of the Netherlands', in which its former two colonies (Surinam and the Netherlands Antilles) were included. Although both these ex-colonies had been granted a generous measure of autonomy, the expanded 'Kingdom of the Netherlands' remained the <u>*sole international sovereign state*</u>.

   This transformation was set out in a new Kingdom Act, entitled the 'Statute for the Kingdom of the Netherlands', in Dutch shortly referred to as the 'Statuut', in English usually referred to as the 'Kingdom Charter' (hereinafter the '**Kingdom Charter**').

   In 1975 Surinam obtained full independence. The Kingdom Charter was amended to exclude Surinam, because it no longer formed part of the Kingdom of the Netherlands. Ever since, Surinam has been an international sovereign state on its own.

   After Surinam's exit, the Kingdom of the Netherlands consisted of the following 2 'countries': 1) the Netherlands and 2) the Netherlands Antilles. Now although the Kingdom Charter does refer to the Netherlands Antilles as a 'country', it should be emphasized that it never was an international sovereign state. It has always formed a part of the Netherlands (before 1954) and later of the Kingdom of the Netherlands.

   It was therefore above referred to as a 'semi-autonomous entity'. We hold that the relationship between the Netherlands and the Netherlands Antilles has always been a FEDERAL one. This is a disputed point, but no matter how this is argued, in 1954 no new international sovereign states were created, so that the Kingdom of the Netherlands can NEVER have been a confederation of closely cooperating sovereign states. It must have been something else. As said, we hold that it was a FEDERATION.

The Neth. Antilles was granted a generous measure of 'self-governance' in 1954, but no more than what is possible within the framework of a federal system. The Kingdom Charter, therefore, is the constitution of the federation called the 'Kingdom of the Netherlands'. After Surinam's exit, it consisted of 2 federal states, i.e. the Netherlands and the Netherlands Antilles, each based on its own federal state constitution.

3. The federal view with respect to the NATURE of the Kingdom of the Netherlands is not, however, the view held by the majority. The *general* view is that there was an *associative* relationship between the Netherlands and the Netherlands Antilles. This is understood to be *more* than just federal. This view is derived from the fact that the Kingdom was created within the framework of the post-war decolonization process.

4. Although the above discussion has relevance for the complaint at issue (as will be seen later), we must first return to the history of the Netherlands Antilles. In 1954 this semi-autonomous entity consisted of the following 6 Caribbean islands: Curaçao, Aruba, Bonaire, St. Maarten, St. Eustatius and Saba.

   In 1986, however, the island of Aruba chose to exit from the Netherlands Antilles, but remained within the Kingdom as a separate 'country' (i.e. a separate *federal state*, as we see it). Following Aruba's exit, the Netherlands Antilles continued to function, but consisted thereafter of just 5 islands (also known as the 'Antilles of 5'). This lasted until 10 October 2010. On this fateful day (also referred to as: **'10-10-10'**) the 'Antilles of 5' was dismantled, after which the Netherlands Antilles ceased to exist.

   Following the dissolution of the 'Antilles of 5', Curaçao and St. Maarten chose to follow Aruba's example and are now separate 'countries' (or federal states) within the Kingdom, whereas the islands of Bonaire, St. Eustatius and Saba (also referred to as '**BES**') were constituted as an ***integral part*** of the Netherlands (or Holland). These 3 '**BES**-islands' are now formally known as the 'Caribbean Netherlands' ('CN').

5. This introduction now makes it possible for the lay person to understand art. 1 of the Kingdom Charter (ex. 2). See below a translation into English of the text as of 2010:

   Article 1 Kingdom Charter
   1.*The Kingdom consists of the [following] countries: the Netherlands, Aruba, Curaçao and Sint Maarten.*
   2.*Bonaire, Sint Eustatius and Saba each form an integral part of the Netherlands. For these islands regulations may be stipulated and other specific measures may be taken with a view to their economic and social circumstances, their great distance from the European part of the Netherlands, their insular nature, small surface-area and population, geographic circumstances, climate and other factors which render these islands fundamentally distinct from the European part of the Netherlands.*

   Note: The Dutch word 'land' has been translated as 'country' (*cfm*. the majority view). However, as explained above, a better translation would be 'federal state'.

6. The factors mentioned in art. 1, section 2 of the Kingdom Charter are very similar to the ones mentioned in art. 349 of the Treaty on the Functioning of the European Union ('TFEU'; ex. 3), laying down some principles for the EU's 'outermost regions'.

   In the TFEU-article these factors are mentioned to justify granting these regions extra aid and assistance, because it is recognized that '*the permanence and combination*' of these factors '*severely restrain their development*'. This provision makes it possible, for instance, to grant these regions a preferential tax regime.

   By contrast, the factors mentioned in the Kingdom Charter are abused to justify the introduction of laws, regulations and measures which *discriminate* against the ethnic Antillean people residing in the BES-islands as compared to the people residing in the European part of the Netherlands (Holland). This is the essence of the complaint.

7. Note! This is NOT a hateful indictment of 'neo-colonialism' against the Netherlands. This is a '*test case*'. It is recognized with appreciation that the Dutch government in The Hague has NOT turned its back on the BES-islands. On the contrary, it has adopted the islands and in its way does take good care of them. However, this does not mean that we should remain silent where our government is violating human rights.

   In this connection it is suggested that this case should really be settled amicably. Because the *principle* of differentiation as laid down in art. 1 section 2 of the Kingdom Charter in itself is good and wise. However, it should not be abused to justify discrimination. A settlement would be quite possible in the form of a 'Protocol of Interpretation', in which a non-discriminatory application of the differentiation-clause is formulated. Mr. Johnson is open to this suggestion.

The complaint in broad strokes:

8. The abuse of the differentiation-clause set out in article 1, section 2 of the Kingdom Charter, namely to justify the application of *discriminatory* measures and policies in the BES-islands, became apparent immediately in 2011 (when most laws under the new regime following **'10-10-10'** entered into force).

   As a citizen of Saba Mr. Johnson began to receive Old Age Pension (known as '**AOV**' in Dutch) as of 1 October 2001 under the Netherlands Antillean law applicable at the time. Following the integration of the BES-islands into the European part of the Netherlands (Holland) in 2010, his AOV-pension was raised as of 1 January 2011, but it remained far below the Old Age Pension paid to pensioners in Holland.

   Mr. Johnson could not agree with that and petitioned the competent Minister to grant him a pension at the same or at least the **equivalent** level as is paid to citizens in Holland (of which his island had become an integral part in 2010). However, his petition was rejected by the Dutch government in The Hague (ex 4) and it was subsequently also rejected by the Courts (in first instance and in appeal ex 5 & 6).

The entire argumentation put forward by the Dutch government during these Court proceedings makes it clear that its objective is to *intentionally* maintain the socio-economic level of the BES-population at a substantially lower level than is prevalent in the European part of the Netherlands (Holland). This also holds true for the level of public services and facilities provided by the Dutch government in the BES-islands.

All arguments put forward by the Dutch government will be discussed below. Here we suffice by referring to a document issued by the Dutch Parliament dating from 2011 (quoted in section 3.10 in the government's Response in First Instance, ex 7), stating that the government aims to maintain public services in BES at a level '*suitable for the region*' (i.e. the *Caribbean* region, much *lower* than in Holland).

9. This is the essence of the complaint. Mr. Johnson wishes to receive his pension ('**AOV**') at the (European) Dutch level (approx. double of what he receives now). His claim is based *firstly* on the fact that his island now forms an integral part of Holland (i.e. since 2010). And *secondly* because the pension he now receives is far below the minimum subsistence level.

   Mr. Johnson argues that the Dutch government is discriminating against him (i.e. is violating art. 2, section 1 and 26 ICCPR), because it has refused to raise his pension to the level paid to pensioners in Holland. In response, the Dutch government has denied that its refusal is discriminatory, arguing that art. 1, section 2 of the Kingdom Charter provides the constitutional basis for this *admittedly* unequal treatment.

   However, for unequal treatment to be justified, it must serve a 'legitimate aim', it must be proportional and it must be suitable. This is a severe test, because 'equality before the law' is fundamental. It is the second foundational pillar of democracy!

   Bearing this in mind, it is clear that a general constitutional basis in itself can NOT be a 'legitimate aim' and can therefore NOT justify discrimination. A constitutional basis to discriminate is an anomaly; it is akin to a general constitutional basis to commit murder. This simply will not do.

10. It is widely known that the Dutch government fears it will be confronted with an influx of illegal South-American migrants and/or refugees, if the welfare level in the BES-islands is too high. However, this constitutes *fear*, not a 'legitimate aim'.

    In its Judgment of 12 March 2014 the Court of First Instance has ruled that the Dutch government's argument that 'economic disruption' must be prevented, *does* constitute a 'legitimate aim'. This judgment presumes that there is a reasonable chance that the BES-economy would indeed be disrupted, if pensions were to be equalized. However, it has NOT at all been proved that this is likely. On the contrary, this is very *unlikely*. As will be seen hereafter (see *infra* section 13), equalization of pensions will inject approx. US$ 27 million into the BES-economy at minimal extra cost for the premium contributors, thus *stimulating* the BES-economy considerably!

A few remarks about the applicable legislation in the Caribbean Netherlands (BES-islands)

11. Since 2010 ('10-10-10') the following categories of laws are applicable in BES:

    1) Treaties (the International Covenant on Civil and Political Rights applies in BES).
    2) Kingdom Acts (these laws are applicable in all parts of the Kingdom).
    3) Laws enacted by the Dutch Parliament in The Hague, drawn up especially for the BES-islands. These laws comprise about 80% of all BES-legislation. Many of these laws are similar to the Netherlands-Antillean laws that were in force before 2010.
    4) Island Ordinances regulating minor local matters, passed by the 3 islands' legislative bodies. These ordinances comprise about 20% of all BES-legislation.

    The following 3 Dutch laws (passed by the Parliament in The Hague) are of vital importance in the present case.

    A) The Constitution ('Grondwet') of the Netherlands (Holland) has since 2010 also become the Constitution of the BES-islands (ex 8). These islands have been constituted as so-called 'Public Entities' of Holland based on art. 134 of this Constitution.
    B) The Dutch Law entitled '**AOV**-BES' (= General Pension Insurance Act BES, regulating Old Age Pension for the *Caribbean* part of the Netherlands, i.e. the BES-islands; ex 9).
    C) The Dutch Law entitled '**AOW**' (= General Old Age Pension Act, regulating Old Age Pension for the *European* part of the Netherlands; ex 10).

12. Special attention is drawn to art. 1 of the Constitution of the Netherlands (Holland), which is now also the Constitution of the BES-islands:

    Article 1
    All persons who are in the Netherlands, shall be treated equally in equal situations. Discrimination on the basis of religion, philosophy of life, political conviction, race, sex or any other criterion, is not permitted.

    In 2010 the 3 BES-islands legally became an integral part of the country known as 'the Netherlands' in Europe (or shortly 'Holland'). It follows that this primordial article of the Dutch Constitution (i.e. the principle of **equality** as expressed in article 1) is applicable in the BES-islands also without any limitation or exceptions.

The merits of this case (complaint in more detail, argumentation and formulation of the petition). The essence of the complaint is: Mr. Johnson is the victim of discrimination

13. Mr. Johnson holds that the government of his country (i.e. the government of Holland) is discriminating against him without any reasonable justification. To redress this, he hereby submits this '*test case*' to the UN Human Rights Committee.

    The AOV-pension which Mr. Johnson and all pensioners in the Caribbean Netherlands (BES-islands) receive, amounts to about half of the basic AOW-pension paid to pensioners in the European Netherlands (Holland). The discrepancy varies somewhat depending on the Euro/US$ exchange rate.

    The full AOV-pension in 2015 for the island of Saba amounts to US$ 634.- per month. Mr. Johnson is married and his wife receives the same amount. So together they

receive US$ 1,268.-. In the European Netherlands the basic AOW-pension for a married couple is Euro 1.531,90 (at exchange rate 1.13 in June 2015 = US$ 1,731.-).

The two Pension-systems (AOV and AOW) are *not* the same. For instance, in the European Netherlands there are various other benefits, which do not exist in the Caribbean Netherlands. But that aside, it is a fact that the pensions in the Caribbean Netherlands (BES-islands) are substantially *lower* than in the European Netherlands (Holland), whereas the cost of living in the BES-islands is much *higher* than in Holland.

A study done in 2014 by the Dutch "Nationaal instituut voor Budgetvoorlichting (NIBUD)' indicates that the AOV-pension for *Bonaire* is far below the subsistence-level (ex 11). This level has been calculated at US$ 1,853.- for a married couple of AOV-pensioners in *Bonaire*. For Saba such a study has *not* been done. But it is clear that pensions in Saba are also far below the subsistence-level. In fact even more so.

Even more so, because the 'AOV-BES' Act includes a provision granting pensioners living in Saba an extra allowance to compensate for the fact that the cost of living in Saba is higher than in Bonaire (art. 7b 'AOV-BES' Act; *cf.* ex 9).

Total expenditure in European Netherlands (Holland) for AOW in 2013 = € 32.7 **billion.** (see: http://www.svbkennisplatform.nl/kennisbank/a1140_Kerncijfers-2013-Sociale-Verzekeringswetten). *Cf.* ex 12.

In the Caribbean Netherlands (BES-islands) there are approx. 4.500 AOV-pensioners. Equalization of the AOV-pension to the AOW-pension will therefore cost less than 1 *pro mille* extra! For, 4.500 X appr. $ 500.- per person X 12 months = US$ 27 **million**.

This is a rough estimate, of course. The Dutch government does not publish the exact figures for BES. The estimate only goes to show that equalization of the AOV-pension to the European Dutch level would really cost very little. *If 27m. is divided equally over all contributors in both Holland and BES (+/- 6m.), each contributor would have to pay +/- $ 0.37 per month extra. This is the way it should be done*. BES and Holland are ONE.

In other words, there is no real financial impediment to equalizing the pensions!

14. NO promise has been made that the AOV-pension will *in due course* be raised to the Dutch level. On the contrary, the Dutch government holds Mr. Johnson (and the BES-pensioners in general) to an 'agreement' made with BES-representatives, stipulating that the BES-citizens may expect to receive a welfare level '***acceptable*** *within the Netherlands*' and that any raise of the AOV-pension (and other benefits) depends entirely on parameters of the BES-economy.

    Mr. Johnson, however, holds that he is entitled to an ***equivalent*** level. And he also holds that the 'agreement' reached between Dutch and BES politicians is not a law or an ordinance, passed by the Dutch or BES legislature. As a *citizen* Mr. Johnson (and BES-citizens in general) is therefore not bound by this gentlemen's agreement.

Moreover, this agreement is *immoral*, because it violates human rights (art. 26 ICCPR). Therefore, the agreement is null and void. It is also null and void, because the Dutch government applied '*undue influence*' to get the BES politicians to agree.

During the negotiations between Holland and BES (leading up to the transition in 2010) the Dutch government was the stronger party. The BES-islands had decided to exit the Netherlands Antilles and stood with their backs against the wall. The larger island of Curaçao was no longer supporting them and to integrate into Holland they needed the *good-will* of the Dutch government, which took advantage of this situation and unduly pressured the BES politicians to accept the above-referenced 'agreement'.

Argumentation: Violation of art. 26 ICCPR; also violations of other Treaty obligations

15. Mr. Johnson first draws attention to Principle VIII of UN Resolution 1541 (XV):

    Principle VIII
    Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government (ex 13).

    This is crystal clear. *Integration* of one (ex-colonial) territory into the colonial 'motherland' must be based on complete equality. The lower level of social benefits in BES as compared to Holland, and, even worse, the willful intent to maintain this lower level, clearly constitutes a violation of Principle VIII of the above Resolution.

16. It is also a violation of art. 26 ICCPR, which article does NOT allow maintaining two different levels of social benefits (such as pensions) in two distinct parts of *one single* 'country', or one single federal state. The principle of equality demands that all pensioners in that country or state shall receive an equal or equivalent amount.

    Maintaining different systems, or at any rate different *levels* of social benefits, in one single country constitutes *discrimination* on the basis of one or more of the criteria mentioned in art. 26 ICCPR. In this case: ***ethnicity*** (i.e. 'national or social origin') coupled to residency in a separate and distant part of the country's territory.

17. Other Treaty law relevant to this case can be found in art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESC), i.e. the right to an adequate standard of living. It is not acceptable that the Old Age Pension is maintained at a level *far below the subsistence level* for one part of the population (see *supra* section 13), whereas another much larger part of that same population receives a pension that is substantially higher. In a prosperous and highly developed country such as the Netherlands, this is more than unacceptable. It is shameful.

18. On 19 November 2010 the UN Economic and Social Council issued a report containing the Concluding Observations of the Committee on Economic, Social and Cultural Rights (ex 14). The report is directed to the Kingdom of the Netherlands.
In section 5 the Committee remarks:

The Committee is concerned at the unequal enjoyment of economic, social and cultural rights among the four constituent countries of the State party.

The Committee is referring to the 4 constituent 'countries' of the Kingdom of the Netherlands. i.e. the Netherlands (or 'Holland'), Curaçao, Aruba and St. Maarten. After the 10-10-10 transition as related *supra* in section 4, the Kingdom does indeed consist of these four so-called 'countries' (see art. 1 Kingdom Charter *supra* section 5).

The Committee continues:

"As the State party is accountable for the implementation of the Covenant in all its territories, the Committee urges the State party to ensure the equal enjoyment of the economic, social and cultural rights by all individuals and groups under its jurisdiction. This entails an obligation for the State party to ensure that all its enactments and policies should provide for all the same level of enjoyment of economic, social and cultural rights. Moreover, the principle of 'maximum available resources' should apply to the State party and not to its constituent countries individually. […]***".***

Note that in the underlined sentence the Committee advocates the same principle as has been suggested *supra* in section 13 for raising the AOV-pension in the BES-islands to the level of the AOW-pension in Holland. This principle holds that it is only fair that the extra cost required for equalization should be divided equally over all contributors in both Holland and BES together. If that is done, each contributor would only have to pay a negligible amount of +/- $ 0.37 per month extra to cover the extra cost.

19. Note also that the Committee is of the opinion that social/economic/cultural rights (such as Old Age Pension) should be equalized throughout the Kingdom of the Netherlands, i.e. in all 4 'countries' (which we maintain are really 'federal states' rather than 'countries').

Although we disagree with the majority view that Curaçao, Aruba and St. Maarten are 'countries', it is a fact that these entities themselves do indeed consider themselves to be separate 'countries' and maintain that their relationship with Holland (and each other) is an *associative* one and that they do NOT form an integral part of Holland, nor even an integral part of the Kingdom of the Netherlands!

We find this majority view odd. But if it is correct, it follows that the 'countries' of Curaçao, Aruba and St. Maarten are NOT entitled to equalization of social/economic/ cultural rights on the same level as in Holland, for they do not view themselves as an integral part of Holland (nor even as an integral part of the Kingdom of the Netherlands). They abhor the word 'integration'.

This (odd) majority view is based on the premise that the 'countries' of Curacao, Aruba and St. Maarten were constituted as 'countries' within the framework of the decolonization process back in 1954 when the Netherlands Antilles was formed. If this majority view is correct, then the Committee's view that all constituent parts of the Kingdom should enjoy the same level of social/economic/cultural rights must be incorrect.

However, if it is accepted that these 'countries' are really federal states and that they have been an integral part of the Kingdom of the Netherlands ever since 1954, then the Committee's viewpoint is correct. And this would be very important for the population of these islands, for if the federal view is adhered to, art. 50 ICCPR and 28 ISESC (ex 15) would entitle them to equalization of social/economic/cultural rights.

20. This discussion is relevant for all of the islands of the former Netherlands Antilles.

    BUT it should be noted that the BES-islands DO unequivocally form an integral part of the Netherlands (or Holland) as of 10-10-10. Therefore there can be no doubt as to the obligation of Holland to equalize social/economic/cultural rights for the BES-islands, as Mr. Johnson is asking for in this present case, i.e. equal pension rights.

    Please note that in the present case Mr. Johnson is petitioning for equalization of his pension rights within *one single 'country*', i.e. Holland of which the BES-islands form an integral part since 2010. If Holland is a 'country' within the Kingdom, then the BES-islands form an integral part of this 'country'. If Holland is a federal state within the Kingdom, then the BES-islands form an integral part of this federal state. Either way, Mr. Johnson's pension rights must be equalized.

21. The Vienna Convention on the Law of Treaties (VCLT, ex 16) is also relevant in conjunction with art. 26 ICCPR.

    Art. 26 VCLT obliges Treaty-parties to comply with treaty obligations in good faith. The Dutch government does not act in good faith by invoking a *private* agreement with BES-*politicians* (*cf.* section 14 *supra*) to discriminate against BES-*citizens*.

    Art. 27 VCLT prohibits Treaty-parties to invoke internal law as justification for failure to perform a treaty. The Dutch government may therefore NOT invoke art. 1, section 2 of the Kingdom Charter as justification for not complying with art. 26 ICCPR.

    Art. 29 VCLT stipulates that a treaty is binding upon a Treaty-party in respect of its *entire territory,* barring certain exceptions. NO such exceptions apply for the BES-islands in relation to art. 26 ICCPR. Therefore, art. 26 ICCPR applies equally in the *entire* territory of the Netherlands (i.e. in the European *and* the Caribbean part).

    The argument can be made that art. 26 ICCPR does NOT obligate the Dutch government to equalize the Old Age Pension in the other 'countries' within the Kingdom (i.e. the islands of Curaçao, Aruba and St. Maarten). But this argument definitely does *not* hold good for the BES-islands, which have become an ***integral part*** of the European Netherlands ('Holland') in 2010. This is a legal fact.

During the domestic proceedings this fact has NOT been disputed by the Dutch government. The Court of First Instance confirms it [*cf.* section 4.10 of the Judgment of date 12/3/2014 (ex 5), where the Court confirms that: *'Eiser is ingezetene van Nederland'* = The claimant is a resident of the Netherlands (Holland)].

Detailed discussion of the specific criteria on which the discrimination is based

22. In section 4 of its Judgment of date 15 December 2014 (ex 6) the appeal-court (the Common Court of Justice) determined that Mr. Johnson's case constitutes an 'equal situation' within the Netherlands (Holland). In terms of art. 1 of the Dutch and BES Constitution (*cf. supra* section 12) this means that Mr. Johnson is in principle entitled to equal treatment, which is precisely what he has been petitioning for all along.

    The Common Court also confirms that Mr. Johnson, residing in Saba, is a resident of the Netherlands (which country comprises both Holland and BES). The Court also confirms that Mr. Johnson does NOT receive equal treatment. However, the Common Court rejected Mr. Johnson's petition, because it holds that the unequal (discriminatory) treatment is objectively and reasonably justified.

    In other words, there is no longer any dispute between the parties about the fact that the situation between AOV-pensioners in the BES-islands and AOW-pensioners in Holland is the same (the Common Court has determined that this is so). The only remaining point of contention then is the question whether or not the unequal treatment is objectively and reasonably justified.

    Unequal treatment is permitted, if it is objectively and reasonably justified. This is the case, if the discrimination serves a specific and stated 'legitimate aim' and meets the requirements of proportionality (is proportional) and subsidiarity (is suitable). The Common Court holds that the discrimination is justified. Mr Johnson disagrees.

23. Mr. Johnson holds that the Dutch government is discriminating against him on the basis of his ***ethnicity,*** i.e. his 'national or social origin' (art. 26 ICCPR) in conjunction with his residency in a remote territory of the Netherlands. Sometimes there is a confluence of discriminatory criteria, making it hard to separate one from the other.

The criterion of 'ethnicity' is the connecting thread; combination of grounds

24. Ethnicity (i.e. being of a distinctive 'national or social origin') is one of the grounds mentioned in art. 26 ICCPR. Ethnicity is a *personal* characteristic. Ethnicity, like race, is not something one can freely choose. One is born into it. It is therefore a ground which requires weighty justification for it to be acceptable or justifiable.

    Mr. Johnson belongs to the ethnic group known in Holland as 'Antilleans'. This group consists of persons born in the former Netherlands Antilles, or persons who have lived there for a long time. Mr. Johnson was born on the island of Saba in the Netherlands Antilles and has lived there all his life. He is therefore an Antillean or Saban Antillean.

25. Definitions of 'ethnicity' differ. The Encyclopedia Britannica defines it excellently:

    *"**Ethnicity*** refers to the identification of a group based on a perceived cultural distinctiveness that makes the group into a "people". This distinctiveness is believed to be expressed in language, music, values, art, styles, literature, family life, religion, ritual, food, naming, public life, and material culture. This cultural comprehensiveness—a unique set of cultural characteristics perceived as expressing themselves in commonly unique ways across the socio-cultural life of a population—characterizes the concept of ethnicity. It revolves around not just a "population", a numerical entity, but a "people", a comprehensively unique cultural entity".

    The Encyclopedia Britannica continues: "The concept of ***ethnicity*** contrasts with that of ***race***, which refers to the perceived unique common physical and biogenetic characteristics of a population. The criteria used to characterize a group—whether comprehensive unique cultural characteristics or biogenetic ones—determine whether the group is regarded as an ethnic or a racial group. In the late 20th century and at the turn of the 21st century, "Irish" was considered an ethnic label, while "white" was a racial one".

26. There is no doubt that this definition describes Mr. Johnson (and Antilleans in general). Being 'Antillean' is NOT a matter of race, but of cultural heritage. The ethnic group of Antilleans within the context of the Kingdom of the Netherlands traces its heritage to 1634 when the islands later known as the 'Netherlands Antilles' became part of the Netherlands, first as a Dutch colony and since 1954 as a federal state or (if you will) a 'country' within the Kingdom. Most Antilleans live in the Dutch Caribbean region, but many live in the Netherlands (Holland) where they are known and treated as a distinct ethnic group. They are a 'people' culturally speaking. They have the Dutch nationality, but have their own language (Papiamentu), music, values, art, styles, literature, family life, food, naming, public life, and traditions.

27. Most Antilleans are Roman-Catholics, at any rate Christians, but this religion is expressed and experienced quite differently than in highly secularized Holland.

    Antilleans have developed their own language, called 'Papiamentu'. Papiamentu is widely spoken in all 6 Dutch Caribbean islands, although on the 3 Windward Islands (St. Maarten, Saba and St. Eustatius) the majority commonly speak English.

28. Antilleans come in all colors and races, but the majority are of negroid origin (less so in Saba and Aruba). But apart from racial and linguistic characteristics, it may be considered self-evident that Antilleans have formed their own distinct common culture during 4 centuries of common history in the Dutch Caribbean.

29. In Holland ethnic Antilleans are officially labeled as 'allochthons', i.e. persons originating from other countries or regions, despite the fact that they have the Dutch nationality and originate from within the Kingdom of the Netherlands. Antilleans are often discriminated against in Holland. The Dutch Internet Dictionary 'woordenboek.nl' gives the following examples of 'ethnic minorities': "foreigners from Mediterranean countries, people from Surinam, *Antilleans* and Moluccans".

30. The Common Court of Justice notes that each of the 3 BES-islands has its own distinct characteristics. Although this is obviously true, the Court's conclusion that therefore 'Antilleans' cannot be classified as one single ethnic group, is irrelevant. For this only implies that instead of one ethnic group, there are three. It is just as unjustifiable to discriminate against three ethnic groups as it is to discriminate against one.

31. The reality is that all Dutch nationals originating from the Dutch Caribbean have in common that they belong to the ethnic cultural group known as 'Antilleans'. The constitutional changes in 2010 have not changed this to any appreciable degree.

32. The discrimination grounds in Mr. Johnson's case have a 'double standard', so to speak. Residency is the objective undisputable ground, but ethnicity is the subjective hidden ground. This subjective ground is hard to prove, but it is there. It is therefore fair to say that an inextricable combination of *both* grounds applies in this case.

33. It should be noted that Mr. Johnson does not expect immediate *equality* of his pension. He holds that there should be a process of *equalization* of his pension to an *equivalent* level as in Holland. And considering the minimal financial effort that this would entail if the extra expenditure is divided among all contributors in Holland and BES *collectively* (as was demonstrated herein above, *cf.* section 13), he also holds that equalization can be implemented within a *short* period of time, e.g. 2 years. However, the Dutch government has categorically refused to equalize Mr. Johnson's pension. Not now, nor in due course. That is why the Court was petitioned to set a time frame for equalization, but the Court also rejected this petition.

34. Although BES-pensioners have the right to emigrate to Holland where they can live at a much higher social-economic level, old age pensioners should not be placed in a position where they have to make such a hard, unrealistic and unreasonable choice.

Can discrimination be justified, seeing that art. 1, section 2 of the Kingdom Charter allows for differentiation of legislation between Holland and BES?

35. The Dutch government claims that the constitutional basis set out in art. 1 section 2 of the Kingdom Charter – allowing for differentiation in legislation between Holland and BES –, justifies the *admitted* existing discrimination between pensioners in Holland and BES. This is similar to the South African government justifying apartheid based on its 1983 Constitution, which included a clause for a particular form of apartheid.

    This will not do, because by its very nature a *generally* worded constitutional basis allowing legislative differentiation cannot be a *specific* 'legitimate aim', which is required to justify specific discriminatory legislation or measures within one and the same country. If the BES-islands were separate 'countries' – as Curaçao, Aruba and St. Maarten claim to be –, one might perhaps argue differently. But this is NOT the case for BES, which became an *integral part* of the Netherlands (Holland) in 2010.

36. In section 17 of the Petition of January 2012, submitted to the Court of First Instance in BES, a section of the Explanatory Memorandum relating to art. 1, section 2 of the Kingdom Charter is quoted. It reads: "*The inhabitants of the 3 [BES-]islands are entitled to equal protection by the Dutch Constitution as the inhabitants of the European part of the Netherlands, including the principle of equality as laid down in article 1 [of the Dutch Constitution]*" (*cf. supra* section 12). See ex 17.

    Further down it reads: "*Of course, equal cases [situations] shall be treated equally, as prescribed by art. 1 of the Dutch Constitution" (in other words, 'like cases are to be treated alike')*. As said, the Common Court of Justice has already determined (*cf. supra* section 22) that the situation of pensioners in BES and in the Netherlands is equal. Considering that the Explanatory Memorandum says that like cases must be treated alike, one would think the Court would have awarded Mr. Johnson's petition. But the Court didn't, because it holds that the admitted discrimination is justified.

    Mr. Johnson's viewpoint is that differentiation in legislation between BES and the Netherlands in itself is not a bad thing, because the islands are situated in an entirely different hemisphere and are surrounded by different cultures. It is precisely in this remote and different environment that the islands developed their own typically Netherlands-Antillean culture. But with respect to *human needs* (such as old age pension) the situation in the BES-islands and the Netherlands is, of course, alike. There is good reason, therefore, to identify a number of distinguishing factors in art. 1 section 2 of the Kingdom Charter, on the basis of which differentiation in legislation between BES and the Netherlands is allowed. HOWEVER this does NOT justify discrimination on the grounds of ethnicity in conjunction with residency when this results in lower welfare and lower human rights standards for the inhabitants of BES. It does not justify a discriminatory application of social/economic/cultural rights.

The way in which the social security pension schemes of 'AOV' and 'AOW' are financed

37. The AOV-pension system, as well as the Dutch AOW-pension system, are financed by levying premiums from the working population. These premiums are then *directly* paid through to the old age pensioners. During the course of time subsidies drawn from public funds have been added, because the premiums alone did not cover all expenses. Nevertheless, both AOV and AOW are NOT financed as 'normal' pension plans, in which *voluntary* contributions are paid to accumulate capital, out of which after a number of years pensions are paid to the individuals who have contributed.

    This is important to note, because since 2010 the working population of the BES-islands now also pays premiums directly to the Dutch government in Holland, which premiums are then paid through by the Dutch government to the BES-pensioners.

    Furthermore, since 2010 all BES-citizens now also pay Income tax and various other taxes (such as VAT), directly to the Netherlands (Holland). In other words, the BES-

islands are fairly contributing to the public funds of the Dutch government in The Hague, so that BES cannot be accused of 'sponging', if BES-pensions are equalized.

Is there objective and reasonable justification for discriminating against Mr. Johnson and – by extension – against all BES-pensioners?

38. The Dutch government has put forward the following arguments to justify its stance:
A) The BES-welfare level must be kept at a level that is 'suitable for the region';
B) To prevent an influx of (illegal) immigrants, lured by a high welfare-level in BES;
C) To prevent disruption of the BES-economy;
D) To prevent weakening of the BES business sector's competitiveness;
E) To prevent having to raise taxes in BES.

39. Discrimination is justified, if it serves a ***specific legitimate aim***, if it is ***proportional*** and if the stated legitimate aim cannot be achieved by ***other less drastic measures***.

Keeping a part of one's own population *intentionally* poor ('suitable for the region'), obviously cannot by itself be a 'legitimate aim'. If the population is kept poor to prevent an influx of (illegal) immigrants, this may be *opportune*. But it is not a *legitimate* aim. It is not legitimate to require of BES pensioners to accept having to live far beneath the subsistence level just to prevent an influx of immigrants.

Moreover, why should this sacrifice be required only of BES-pensioners? Why not require this same sacrifice of pensioners in Holland as well? After all, immigrants are flooding to Holland even more than to the BES-islands! Here the hidden discrimination ground of ethnicity suddenly pops up. It is not required of pensioners in Holland, because, well, the great majority of them are not ethnic Antilleans!

40. The arguments sub D) and E) are connected. Presumably the Dutch government here argues that higher pensions entail higher premiums in BES. The BES business sector would have to pay a part of that, because AOV-premiums are paid partly by employers, partly by employees. This increases '*the cost of doing business*', which would weaken the competitiveness of the BES business sector.

However, this argument is based on the *erroneous* premise that all extra cost to finance the equalization of BES-pensions would have to be borne by BES alone. That premise is false. It is much more reasonable and it is in fact fair and correct to divide the extra cost among ALL employers and employees in Holland ***and*** in BES together. For since 2010 these two form one single country (or one federal state, depending on one's viewpoint). If the extra costs are thus divided equally among all contributors in both Holland and BES *together*, premiums would have to be raised by less than 1 pro mille (cf. *supra* section 13), a mere $ 0.37 per contributor per month. Nobody would really notice! However, for BES-pensioners it would be tremendous relief!

Financing the extra cost as indicated, also means that taxes would NOT have to be raised! This means that the discrimination is in any case *disproportional*!

41. The argument sub C) that disruption of the economy must be prevented, does not hold good for the same reason as explained in the previous section. Since 2010 the BES-islands do not have a separate economy anymore. The economies of BES and Holland have merged. They are ONE. Not only in theory; in practice too!

    About 90% of taxes in BES are collected by the Dutch government (i.e. by a Dutch government department taking orders directly from The Hague). The collected taxes are deposited in the coffers of the Dutch government in Holland. The Dutch government then directs and pays for the upkeep of its overseas government department in BES, called 'RCN' (= 'Rijksdienst Caribisch Nederland').

    During these proceedings the Dutch government has tried to argue that Holland and BES are two separate constitutional entities, each having its own separate economy. However, the Court has rejected this (*cf. supra* sections 21 and 22). And art. 1 of the Kingdom Charter also clearly shows that BES has been *integrated* into Holland.

    Therefore, the argument sub C) against equalization of BES-pensions in order to prevent economic disruption, does *not* hold good, because the required *minimal* premiums increase of +/- 1 *pro mille* ($ 0.37 per contributor per month) will not and cannot disrupt the (larger) economy of BES and Holland together.

    In any case, here too, the discrimination against BES-pensioners is *disproportional*!

42. If the argument sub C) *intends to imply* that equalization of BES-pensions will have an effect on other social benefits (such as child benefit and rent subsidy) and perhaps also on the minimum wage, Mr. Johnson refers to the Judgment of the Court of First Instance (of date 12 March 2014, section 4.27, ex 5), where the Court has ruled that such a question falls outside of the scope of the present case.

    It is obvious and intended that a judgment in this principled '*test case*' will have an effect on other social benefits. However, there are many ways such problems can be solved. There is no need for the UN Committee to pre-empt them.

A few remarks on the Common Court's Judgment of date 15 December 2014.

43. The Common Court of Justice refers to the case 'Andrejeva vs. Latvia' (ECtHR 18 February 2009, no. 55707/00, section 89). Mr. Johnson comments as follows.

    Art. 14 of the European Convention of Human Rights ('**ECHR**') is similar to art. 26 ICCPR. The European Court for Human Rights ('**ECtHR**') states in section 82: "*Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article".*

    In section 84 the ECtHR states that the *burden of proof* is on the government to show that any instance of discrimination is objectively and reasonably justified.

In section 89 the ECtHR states that a Member-State has a broad margin of appreciation in the field of social security. But the ECtHR also states that in the Andrejeva vs. Latvia case there was no *"reasonable relationship of proportionality" ,* so that Latvia was nevertheless found to have violated art. 14 ECHR.

This is relevant in Mr. Johnson's case, because the discrimination against BES-pensioners is in any case *disproportional! Cf. supra* sections 40 and 41.

Note also that the facts in the Andrejeva vs. Latvia case were entirely different from the present case. Latvia had just obtained independence from the Soviet-Union and was struggling with severe financial difficulties in setting up its own social security system. Despite these difficulties, the ECtHR found that the Latvian discriminatory measure was disproportional. Holland does not face any such extreme difficulties.

44. The Common Court also refers to the case 'Stec *et al*. vs. UK' (ECtHR 12 April 2006, no. 65731/01, section 52). Mr. Johnson comments as follows.

Section 52 reads: "*The scope of this margin will vary according to the circumstances, the subject matter and the background (…). As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention*".

Like race and sex, ***ethnicity*** is a so-called 'hard' discrimination ground, requiring '*very weighty reasons*' to justify. Mr. Johnson holds that the Dutch government has not shown any such 'very weighty reasons' in his case.

45. The Common Court also refers to the case 'Carson *et al.* vs. UK' (ECtHR 16 March 2010, no. 42184/05, sections 73 en 80). Mr. Johnson comments as follows.

The circumstances in the Carson-case are precisely *the opposite* of those in Mr. Johnson's case. Carson et al. had ***left*** the UK to take up residence in *foreign countries*, namely South-Africa, Canada or Australia. They claimed to be the victims of discrimination, because the UK refused to uprate their pensions for inflation. There is no comparison with Mr. Johnson's case, who since 2010 has *integrated* into Holland and is now living in ***the same country*** as pensioners in Holland. However, pensioners in Holland receive a much higher pension than pensioners in BES.

If the Common Court *intended to argue* that the ECtHR has ruled that 'residency' is not a 'hard' or personal discrimination ground, it must be noted that this is factually incorrect. In 'Carson vs. the UK' the ECtHR in fact ruled that "*place of residence constitutes an aspect of personal status for the purposes of Article 14*" (*cf.* section 71).

Moreover, in Mr. Johnson's case the question as to 'residency' is irrelevant, because since 2010 he has resided in *the Netherlands*. He does *not* live in a foreign country, as did Carson. Neither does he live in another 'country' or another 'federal state' within the Kingdom of the Netherland. He lives in the Netherlands (Holland) itself! Moreover,

he claims that the Dutch government is discriminating against him on the grounds of *ethnicity* ***and*** *residency* combined in a remote region of Holland, i.e. the BES-islands.

Formulation of the Petition to the UN Committee

46. Mr. Johnson requests your honors of the UN Committee for Human Rights to declare that he is the victim of discrimination and he requests your Committee to order the Kingdom of the Netherlands to effect that his AOV-pension be raised within a reasonable period of time to a level that is equal or equivalent to the level of the Dutch AOW-pension paid to pensioners in Holland.

    Equalization can be effected in two ways. ***Either*** the two separate systems have to be merged into one single system with equal pensions and benefits for all residents of the Netherlands (Holland) and of BES, ***or*** the systems as such remain distinct, but the AOV-pension in BES is raised to the *level* of the Dutch AOW-pension in the Netherlands, whereas other benefits included in the AOW-Act are inserted in the BES AOV-Act.

    Mr. Johnson understands that sometimes circumstances may cause that discrimination can only be eliminated gradually. That is why from the outset he has always suggested *alternatively* that the Court should determine that equalization should take place step by step during a reasonable period to be set by the Court.

    Considering the minimal extra cost required to raise the AOV-pension to the level of the Dutch AOW-pension, Mr. Johnson holds that two (2) years would be reasonable. In the present case this would be two years after 2011. In other words: as from 2013.

    Therefore, Mr Johnson requests your Committee to order the Kingdom of the Netherlands to effect forthwith that the AOV and AOW pension systems either be merged completely into one identical system, but in any case that the AOV-pension paid to him be raised to the level of the Dutch AOW-pension, which entails also paying compensation to him for the difference between the AOV- pension and the AOW-pension he has lost as from January 2013.

    Finally, Mr. Johnson requests your Committee to award the costs of this lawsuit to him for having had to engage professional legal assistance.

    This Communication was drawn up by Mr. Johnson's counsel
    in First Instance and in Appeal,
    Bonaire, 20 July 2015
    Mr. M. Bijkerk LL.M.

V. Checklist of supporting documentation (copies, not originals, to be enclosed with your complaint):

- Written authorization to act (if you are bringing the complaint on behalf of another person and are not otherwise justifying the absence of specific authorization): Exhibit 1

- Decisions of domestic courts and authorities on your claim (a copy of the relevant national legislation is also helpful):

Exhibit 2: Copy of Dutch text of introductory articles of the Kingdom Charter;
Exhibit 3: Copy of art. 349 of Treaty on the Functioning of the European Union ('TFEU');
Exhibit 4: Copy of Ministerial decree of date 9 December 2011 rejecting Mr. Johnson's written objection directed to the Dutch Minister of Social and Employment Affairs;
Exhibit 5: Copy of Judgment of date 12 March 2014 issued by the Court of First Instance in Bonaire, Caribbean Netherlands;
Exhibit 6: Copy of Judgment of date 15 December 2014 issued by the Common Court of Justice (appeal-court).

- Any documentation or other corroborating evidence you possess that substantiates your description in Part IV of the facts of your claim and/or your argument that the facts described amount to a violation of your rights:

Exhibit 7: Copy of section 3.10 of the Dutch government's Response in First Instance;
Exhibit 8: Copy of introductory articles of the Constitution ('Grondwet') of the Netherlands (Holland), which has since 2010 also become the Constitution of the BES-islands;
Exhibit 9: Copy of relevant articles of the Dutch Law entitled '**AOV**-BES' (= General Pension Insurance Act BES, regulating Old Age Pension for the BES-islands, also known as '**WAOV-BES**');
Exhibit 10: Copy of relevant articles of the Dutch Law entitled '**AOW**' (= General Old Age Pension Act, regulating Old Age Pension for the European part of the Netherlands);
Exhibit 11: Copy of study done in 2014 by the Dutch "Nationaal instituut voor Budgetvoorlichting (NIBUD)' indicating that the AOV-pension for *Bonaire* is far below the subsistence-level;
Exhibit 12: Copy of Web-page indicating total expenditure in European Netherlands or 'Holland' for AOW (Old Age Pension) in 2013;
Exhibit 13: Copy of Principle VIII of UN Resolution 1541 (XV);
Exhibit 14: Copy of Report of date 19 November 2010 issued by the UN Economic and Social Council directed to the Kingdom of the Netherlands;
Exhibit 15: Copy of art. 50 ICCPR and art. 28 ISESC;
Exhibit 16: Copy of the Vienna Convention on the Law of Treaties;
Exhibit 17: Copy of sections of the Petition of January 2012, submitted to the Court of First Instance, quoting a section of the Explanatory Memorandum relating to art. 1, section 2 of the Kingdom Charter.