Comments on the Observations by the Government of the Kingdom of the Netherlands on the admissibility and merits of Communication no. 3236/2018

in the case between

Sherrel Eldgel HANSEN

vs.

the Kingdom of the Netherlands

Introduction

Mistaken understanding of domestic constitutional law and faulty translations

1. The Observations of the Kingdom of the Netherlands (hereinafter also shortly referred to as '**the Kingdom**') are based on various mistaken premises with respect to the law and they contain a number of mistranslations. These mistaken premises and faulty translations are woven into the fabric of the Kingdom's Observations (hereinafter also shortly referred to as '**the Observations**'). Perhaps the Kingdom is not even aware of them.

   As an example we mention here the faulty translation of 'Landsverordening toelating en uitzetting' into English as '*National* Ordinance on Admission and Expulsion' (*cf.* point 33 of the Observations). Internationally, only the Kingdom of the Netherlands is recognized as an independent and sovereign state or 'nation'. So the translation 'national' suggests that this ordinance is a Kingdom Ordinance (or a Kingdom Act) applicable in all parts of the Kingdom. However, this is not at all the case. A 'Landsverordening' within the meaning of domestic constitutional law within the Kingdom, is a law (known as an 'ordinance') adopted by the Parliament of one of the three Caribbean islands of Curaçao, Aruba and St. Maarten (which are three individual *constituent* parts of the Kingdom) and is applicable *exclusively* on the island that has adopted such a law.

   This example makes it clear that to understand this case, it is important to use clear terms and translations, so that readers not familiar with Dutch constitutional law will not be confused or misled by any mistaken premises or mistranslations. Whenever relevant, HANSEN will point out when and where these mistaken premises and mistranslations occur. To point out all of them (there are very many) would take up too much space.

2. The aforementioned mistranslation is relevant in this case, as will be seen below.
   A better translation of 'Landsverordening' would be '*Federal* Ordinance'. However, this presumes that the aforementioned three constituent parts of the Kingdom are federal sub-states within the Federation (Dutch: '*Bondsstaat*') known as the Kingdom of the Netherlands. This is indeed our view. However, this view is not taken by the majority of Dutch and Antillean politicians and experts, who describe the status of these constituent parts as '*sui generis*' constituent entities (cf. point 21 of the Observations). The result of this majority view is that there is much confusion about what their real nature is. And this is to be expected, because '*sui generis*' doesn't really mean anything.

   In point 21 of the Observations the Kingdom asserts that it is not easy to put a constitutional label on the Kingdom. According to the Kingdom, it is therefore often described as a '*sui generis* legal order'. This is akin to saying that a car is a '*sui generis* thing that drives'. It obfuscates unnecessarily. Perhaps purposely.

The Kingdom continues saying in point 21 of the Observations that this '*sui generis* legal order' comprises con-federal, federal and unitary elements, without mentioning ANY con-federal element[1]. Seeing that HANSEN has explicitly posited that the Kingdom is a Federation (*not* a con-federation) and that its constituent parts are federal sub-states (Dutch: '*federale deelstaten*'), it behooves the Kingdom to mention at least ONE con-federal element to prove its case. Instead of doing so, the Kingdom follows the mistaken general view that the Kingdom of the Netherlands is a con-federation and mistranslates the Dutch description of the Kingdom's '*sui generis*' constituent entities as 'autonomous countries', thus *implicitly* but wrongly labeling them as con-federal states by two means, i.e. by 1) naming them 'countries' and by 2) labeling them as 'autonomous', which in international legal parlance is often used interchangeably with the word 'independent'.

So by labeling them as 'autonomous countries' a strong impression is created that the Kingdom is a con-federation of independent countries. Probably the writer of the Observations does indeed believe that the Kingdom is a con-federation of independent countries, because he/she has never given this question serious consideration.

However this may be, a careful analysis of the question brings to light first of all that in domestic constitutional law within the Kingdom, there is a sharp distinction between 'autonomy' and 'sovereignty'. Even the smallest municipal village in Holland has a measure of 'autonomy'. The aforementioned islands have a much larger measure of autonomy than a municipality, but their autonomy certainly does not rise to the level of an independent country or (nation-)state. Although in the Dutch language they are indeed referred to as 'autonome landen' (*literal* translation: 'autonomous countries'), this usage of the word 'land' in the Dutch text (English: 'country') does not make them, internationally speaking, independent countries (in the normal sense of this word). The word 'land' was chosen in the same way as the word '*land*' is used in the German Constitution. Germany is a federation and the constituent federal sub-states are in German also called '*land*', plural '*länder*' or '*lande*'. To translate accurately, the German plural '*länder*' should be translated into English as 'federal sub-states', not as 'countries'. For the translation 'countries' creates the wrong impression that they are independent countries. But the '*länder*' are NOT independent 'countries' in the normal sense of this word in English. They are federal constituent parts of the German Federation. They are therefore 'federal sub-states'. The only independent and sovereign '*country*' is Germany as a whole. Likewise the Kingdom. The '*autonome landen*' of the Kingdom are 'autonomous federal sub-states'. They are NOT 'autonomous countries'. And the word 'autonomous' should in this context be understood in a federal sense. Not as 'independent'.

[1] One con-federal element would be that the three islands have the right to secession. But this indeed con-federal element is derived from international law (art. 1 CCPR), not from domestic constitutional law (with the exception of Aruba, which has its right to secession also guaranteed in the Kingdom Charter).

3. For the adjudication of this present case it is very important to know what the nature of these constituent parts of the Kingdom is, for if the Kingdom is a Federation, it means that art. 12 CCPR has to be interpreted and applied in accordance with art. 50 CCPR. And the truth is that they ARE federal sub-states within the Federation known as the Kingdom of the Netherlands. Just as the Kingdom of Belgium is constituted along federal lines, so is the Kingdom of the Netherlands. But the domestic constitutional terminology and choice of words has confused many, including politicians and lawyers in the Hague.

4. The constituent parts of the Kingdom are certainly NOT con-federal states. They CANNOT be con-federal states, because a con-federation is a league between independent states. Compare the definition in Black's Law Dictionary (5th edition) of a con-federation: '*A league or agreement between two or more independent states whereby they unite for their mutual welfare and the furtherance of their common aims*'. Aforementioned three constituent parts of the Kingdom are NOT independent states or 'countries'. They are NOT '(nation-)states' nor 'countries'. They do not have their own nationality. They do NOT conduct their own foreign affairs and they are NOT responsible for their own defense (*cf*. translation of art. 3 Kingdom Charter on page 8 of the Observations enumerating some of the Kingdom's tasks and powers, which in rather peculiar domestic constitutional parlance are called 'Kingdom affairs').

   - The USA is a federation (Dutch: 'Bondsstaat'). It is ONE country consisting of 50 federal (sub-)states.
   - The EU is a con-federation, consisting of 28 independent and sovereign countries united for their mutual welfare and furtherance of their common aims (Dutch: 'Statenbond').
   - The Kingdom is a federation, i.e. ONE country consisting of 4 federal sub-states.

5. HANSEN agrees with the Kingdom's assessment (*cf.* point 21 of the Observations) that the Kingdom's constitutional order comprises a number of UNITARY elements. But is does not comprise any con-federal elements. On the contrary, the Kingdom's elements are overwhelmingly federal. *Cf*. the definition of 'Federation' in USlegal.com: *Federation is a league or union of states, groups, or peoples united under a strong central authority but retaining limited regional sovereignty. It can be a sovereign state that includes a union of partially self-governing states. In other words it means regions or individual states united by a central (federal) government. It involves an agreement between a number of sovereign states based on mutual consent. The component states in a federation are sovereign in the sense that some of the powers that are reserved to the individual states cannot be exercised by the federal or central government. The central government cannot alter the self governing status of the component states in a federation. Federations can be formed either for a small area or a large area of territory. The constitutional structure of government found under a federation is known as federalism. A federation is also known as a federal state.*

This definition is an accurate description of what the Kingdom of the Netherlands is. Of this federation the 3 islands of Curaçao, Aruba and SXM form a constituent (or integral) part. Accordingly, these islands are internationally ***not*** recognized as independent or sovereign (nation-)states. The only internationally recognized independent or sovereign nation-state (or 'country' in the normal sense of the word) is the Kingdom (of which these 3 islands form a ***constituent*** part). It therefore follows that these three constituent parts must either be classified as 'federal sub-states' or as entities even closer embedded within the Kingdom, if it is viewed – as some do – as a unitary state. If there is some (political?) reason to refuse to label them as 'federal sub-states', then call them '*sui generis entities',* if one thinks that solves the problem. But apart from the fact that this has no real meaning, it is certain that they are ***not*** independent (nation-)states (they are not 'countries' in the normal sense of the word). So the choice of the word 'land' in Dutch domestic law has given rise to tremendous confusion. It has muddied the relationships within the Kingdom. It would be very helpful if the Committee, either explicitly or implicitly (e.g. by including art. 50 ICCPR in the verdict), rules on this issue.

6. ***Conclusion***: Curaçao, Aruba and St. Maarten are either federal sub-states within the Kingdom, or their '*sui generis*' alliances within the Kingdom are even closer than the generally accepted norm for federal sub-states. They might then be seen as 'provinces', 'regions' or 'entities' with a generous measure of autonomy within a unitary state (i.e. the Kingdom). But if it is held that their alliances are even more closely embedded within the Kingdom than federal sub-states, art. 50 CCPR would apply *a fortiori*.

   And where the Kingdom in point 21 of the Observations asserts that the Kingdom Charter was accepted by the Antillean and Surinamese federal sub-states in 1954 of their own free will, we concur. We also agree that it was an expression of their right to self-determination. But nothing in the right of self-determination precludes a former colony from freely choosing a federal relationship with the former colonial motherland. As a matter of fact, historical UN-documents show that the representatives of the Netherlands Antillean islands ***knew*** that their future relationship within the Kingdom on the basis of the Kingdom Charter would be a along federal lines. *Cf.* Exhibit 8.

   IMPORTANT NOTE. If the Kingdom is a Federation, as we assert, the 'country' commonly known as 'the Netherlands' (or more clearly 'Holland') is also a federal sub-state within the Kingdom. It is true that due to its size, financial power and population-number and also due to the much weightier tasks, responsibilities and powers assigned to Holland as compared to the islands, the outside world tends to identify the Kingdom with Holland. *De facto* this is largely true, but *de jure* it is not. *De jure* the Kingdom (i.e. the federal superstructure with its own administrative, legislative and judicial organs) comprises ***four*** 'countries' (*read*: ***federal sub-states***), to wit Holland, Aruba, Curaçao and St. Maarten (*cf*. art. 1 of the Kingdom Charter, the translation of which is given in point 38 of the

Observations, albeit that the plural Dutch word '*landen*' is there mistranslated as 'countries'; as explained, the correct translation of Dutch 'landen' is 'federal sub-states').

As to the FACTS

7. HANSEN agrees with the Kingdom that the following facts are accurate:

   a. HANSEN is a Dutch national, born in Holland. His parents are from Curaçao. The Kingdom is inaccurate as to his date of birth, which is 18 July 1984, not June.

   b. From his birth until 2003 HANSEN lived in Holland. He registered in Curaçao in 2003. ***Dissent:*** Curaçao was *not* his habitual place of residence as of 2003, as the Kingdom asserts in point 5 Observations. The Kingdom agrees elsewhere that his habitual place of residence was Bonaire at least as of 2010, but probably earlier.

   c. One exclusion order was issued against him in 2015. [***Comment*:** An *expulsio*n order was never issued. He was expelled to Curaçao *twice*, the first time immediately upon his release from prison (although he was illegally held in prison approx. 7 days after the official discharge date), the second time approx. two weeks after his return to Bonaire].

   d. Between 2011 and 2015 HANSEN was convicted for multiple offences. [***Comment:*** The Kingdom exaggerates the seriousness of the offences. On aggregate he may have spent approx. 12 to 15 months in jail for these offences].

   e. At the moment of issuing the exclusion order HANSEN was not eligible for 'automatic admission' to Bonaire and he did not have a residence permit. [***Comment*:** 'Automatic admission' is a serious mistranslation of the Dutch term '*van rechtswege toelating*'. The latter term means that a Dutch national can obtain admission 'by operation of law'. It is a serious mistranslation to call this 'automatic admission', because there is nothing 'automatic' about it. One has to hand in a written petition. And admission is granted only if the applicant can prove that he has 1) a place to live, 2) sufficient income (a job or private means) *and* 3) can hand in a certificate of good conduct. If he complies with these three requirements, a *permit* will be granted. *Cf*. point 35 of the Observations. In point 37 and elsewhere in the Observations it is stated that Dutch nationals have 'largely free access' to the islands. This is, of course, very far from the truth. Dutch nationals have free access only as tourists (for not longer than 6 months), but their admission to the islands is severely restricted as the aforementioned three requirements make evident].

Points of agreement as to the Constitutional Structure & Admission rules

8. A. The federal sub-state 'the Netherlands' (more clearly 'Holland') consists of a territory in Europe and of the territories of the islands of Bonaire, St. Eustatius and Saba (hereinafter: '**the BES-islands**'). [***Comment***: The Kingdom labels 'Holland' as a 'country'. This is incorrect as explained in our Introduction. It is a federal sub-state within the Kingdom. The parties agree that Holland and the BES-islands form one single sub-state].

B. The parties agree that the federal sub-states of Curaçao, Aruba and St. Maarten have been granted a generous measure of autonomy. [***Comment***: Where the Kingdom declares in point 22 of the Observations that the Kingdom Charter bestows 'far-reaching' autonomy on the islands, this must be taken with a pinch of salt. Each island (federal sub-state) does indeed have its own constitution, although some parts of the Constitution of the federal sub-state Holland are also applicable in the islands. Furthermore, there is the 'Concordance-principle' of art. 39 Kingdom Charter, laying down that core legislation must be 'concordant' within the entire Kingdom. Art. 23 Kingdom Charter makes the Supreme Court, established in Holland, the highest domestic court, which has exclusive jurisdiction in these islands as well. Art. 50 Kingdom Charter confers power to the Kingdom to suspend and/or nullify laws adopted by the Parliaments of these islands. Art. 51 Kingdom Charter confers power to the Kingdom to temporarily take over (parts of) the administration of any one of these islands in certain circumstances. The latter three are some of the unitary elements in the Kingdom Charter. And there is much more in the Charter that restricts these islands' autonomy. To call such autonomy 'far-reaching' is saying a bit too much. But despite these restrictions, the measure of autonomy can still be called 'generous', but certainly not more than is customary for a federal sub-state].

C. The parties agree that all responsibilities, tasks and powers are vested in the federal sub-states of Curaçao, Aruba and St. Maarten, unless they have been explicitly assigned to the federal superstructure (i.e. the Kingdom). The Kingdom has indeed been set up this way, the powers assigned to the Kingdom having been enumerated in the Kingdom Charter. *Cf*. point 23 of the Observations. [***Comment***: This is perhaps the most characteristic element of a Federation, which once again proves our point].

D. The parties agree that within the Kingdom there is one single indivisible and uniform Dutch nationality. *Cf*. point 24 of the Observations. Accordingly, the Dutch nationality is regulated in a so-called Kingdom Act which applies in all 4 sub-federal states of the Kingdom. [***Comment***: This is one of the reasons why internal migration restrictions for Dutch nationals within the Kingdom are so many violations of articles 12 jo. 26 CCPR].

E. The parties agree that internal migration restrictions for Dutch nationals within the Kingdom have been in force for a long time. The parties agree that all four federal sub-states have the power to introduce and regulate such restrictions, according to domestic law within the Kingdom. The parties also agree that art. 3, section 1 (f) Kingdom Charter assigns the power of '*supervision*' with respect such regulations to the Kingdom, meaning that general rules concerning admission and expulsion of Dutch nationals, laid down in Federal Ordinances of Curaçao, Aruba and St. Maarten, require the approval of the Kingdom government before they can enter into force. *Cf*. point 25 of the Observations.

F. The parties agree that the federal sub-state Holland has introduced internal migration restrictions for Dutch nationals only for the BES-islands (which form an integral part of

Holland). Holland has not (yet) legislated any such restrictions for itself. Dutch nationals from all 6 islands therefore still enjoy free art. 12 CCPR rights, if they wish to settle in Holland. Dutch nationals from Holland, however, do not have free art. 12 CCPR rights, if they wish to settle on these 6 islands. *Cf.* point 26 of the Observations. [***Comment***: HANSEN posits that all such restrictions violate articles 12 and 26 CCPR].

G. The parties agree that art. 1, section 2 of the Kingdom Charter, in effect as of 10 October 2010 and art. 132a of the Constitution of the European and Caribbean Netherlands (hereinafter: '**CECN**') as of 17 November 2017 allow for differential regulations and measures for the BES-islands (i.e. in relation to Holland). This is the so-called 'differentiation clause'. *Cf.* point 27 and 28 Observations. [***Comment***: 1) To translate the 'Nederlandse Grondwet' as the 'Dutch Constitution' is misleading. It creates the wrong impression that it is the Constitution of Holland only. But on 10 October 2010 it became the **C**onstitution of the **E**uropean and **C**aribbean **N**etherlands. So as of this date the correct abbreviation is CECN. 2) To translate 'openbare lichamen' as 'public bodies' is incorrect. The BES-islands are not 'bodies'. They are '*entities*' as a corporation is an 'entity'. As of 10 October 2010 the BES-islands were set up as 'public entities' on the basis of the *general* art. 134 CECN and included in art. 1 section 2 Kingdom Charter. In November 2017 a new and extra article was inserted into the CECN to give the 'public entities' a *specific* basis in the CECN. So the islands did not get a 'constitutional basis' in 2017, as the Kingdom incorrectly asserts in points 28 and 29 Observations. They were based in the CECN as of 2010. 3) Differentiation is good and wise, as long as there is a sharp distinction between differentiation and discrimination. The clause may not become a 'discrimination clause', as, unfortunately, in certain cases it has become. *HANSEN is complaining about violations of articles 12 and 26 CCPR. If he is right, no rule in the domestic constitution (such as the Kingdom Charter and/or the CECN) can justify that*].

H. The parties agree that the Parliament of Holland passed the Admission and Expulsion (BES) Act exclusively for the BES islands, in effect as of 10 October 2010. This Act was based on the differentiation clause set out in art. 1, section 2 Kingdom Charter at the time. *Cf*. points 32 & 33 Observations. [***Comment:*** The fact that this Act was based on the differentiation clause does not mean that its provisions are in accord with the CCPR].

I. The parties agree that the Admission and Expulsion (BES) Act (hereinafter abbreviated as the '**WTU BES**' following its Dutch title) is similar to the Federal Ordinances on Admission and Expulsion of the federal sub-states of Curaçao, Aruba and St. Maarten. [***Comment*:** The fact that the WTU BES is similar to the aforementioned Federal Ordinances does not mean that its provisions are in accord with the CCPR].

J. The parties agree that art. 1a WTU BES stipulates that this Act applies *mutatis mutandis* to Dutch nationals *not* born or naturalized in the BES-islands. *Cf.* point 34 Observations. [***Comment:*** This fact does not mean that this provision is in accord with the CCPR].

K. The parties agree that Dutch nationals born in Holland, Curaçao, Aruba and St. Maarten are free to enter the BES-islands as ***tourists*** (for no longer than six months). [***Comment*:** In point 7, sub letter (e) hereinabove we have already explained that Dutch nationals ***not*** born in the BES-islands have no free admission in these islands at all. They need either a residence permit on the same conditions as an alien, or they may be admitted 'by operation of law' (which is mistranslated by the Kingdom as 'automatic admission'). There is nothing automatic about admission 'by operation of law'. The three requirements mentioned in point 35 Observations for admission 'by operation of law' have been drafted emphatically to keep Dutch nationals ***not*** born in the BES-islands out of these islands. The claim by the Kingdom in point 37 Observations that Dutch nationals ***not*** born in the BES-islands have 'largely free access' to these islands is entirely false. They are subjected to a rather complicated system of permits. Without a place to live, without work or wealth and if they have a criminal record, they are not welcome in the BES-islands. They have no free admission at all. The *justification* for this as given by the Kingdom, is to prevent an unregulated mass influx of these Dutch nationals (i.e. those born in Holland, Curaçao, Aruba and St. Maarten). In the present case the question is whether this justification can pass muster in light of articles 12 and/or 26 CCPR. That can be debated, but a system of permits based on 3 heavy requirements is NOT 'largely free access'. Nor is it 'automatic admission'. These Dutch nationals only have free access as *tourists*, as long as they don't stay longer than 6 months, *which is a restriction as well*].

Summary of the above as essentially relevant for the present case

9. It was necessary to correct and/or comment on the claims and statements made by the Kingdom, to avoid being misunderstood or giving the impression that, by not responding, HANSEN is in agreement. However, a lot of the above is not essentially relevant to get to the bottom of the real legal questions in this case. We therefore summarize as follows.

As to the Facts.

10. HANSEN is a Dutch national born in Holland. His parents are Dutch nationals originally from Curaçao. Most of his life (19 years) he lived in Holland. The Kingdom claims that he registered in Curaçao in 2003. HANSEN believes it was later, but as he has no proof of that, he will accept the Kingdom's claim on this point. He had been living on Bonaire at least since 2010. He was expelled from Bonaire in approx. March 2016. So he spent 19 years living in Holland, perhaps 7 years in Curaçao and approx. 5 years on Bonaire.

    He was declared a '*persona non grata*' (which the Kingdom calls an 'exclusion order') on 20 Nov. 2015. This decision was based on art. 16d, section 1, opening and sub letter (c) of the WTU BES. He was expelled to Curaçao following his last prison term in approx. March 2016. A couple of months later he returned to Bonaire. Approx. two weeks later he was expelled to Curaçao for the second time. Thereafter he returned to Holland.

No expulsion order was ever issued against him. He was expelled on the basis of the decision in which he had been declared a '*persona non grata*' (literally he was declared 'undesirable'; this is what the Kingdom translates as an 'exclusion order').

During his approx. 5 year long stay on Bonaire, he did not have a WTU BES residence permit. According to WTU BES rules he was not eligible to receive a residence permit 'by operation of law'. He never registered at the Civil Registry of Bonaire. While in Bonaire he remained registered in Curaçao. That is why the Kingdom claims that Curaçao was his habitual place of residence as of 2003. This is not correct. His *de jure* place of residence as of 2003 was Curaçao. His *de facto habitual* place of residence as of 2010 was Bonaire.

As to the domestic law

11. HANSEN was expelled pursuant to art. 16, section 1, opening and sub letter (c) WTU BES:

1. A foreign national may be declared a 'persona non grata'[2] by Our Minister:

c. if he has not been granted admission by operation of law or pursuant to a permit and poses a threat to public order or national security;

The translation given by the Kingdom reads:

1. An exclusion order may be imposed on an alien[3] by our Minister:

c. if he is not eligible for automatic transmission or has not been granted a residence permit, and poses a risk to public order or national security;

The Dutch text reads:

1. De vreemdeling kan door Onze Minister ongewenst worden verklaard:

c. *indien hij geen toelating van rechtswege of bij vergunning verleend heeft en een gevaar vormt voor de openbare orde of de nationale veiligheid;*

This article clearly says that only foreign nationals ('aliens') can be declared a '*persona non grata*' and/or deported (*in casu* <u>*forcibly internally displaced*</u>) on the basis of such a declaration. Within the Kingdom, however, HANSEN is not an 'alien'. Within the federal sub-state Holland (which includes the BES-islands) HANSEN is not an 'alien'. Therefore, according to domestic law, HANSEN could not have been declared a '*persona non grata'* and could not have been deported (forcibly internally displaced) to Curaçao.

However, the Kingdom claims that Dutch nationals born outside of the BES-islands are foreign nationals (aliens), or must be treated as such, pursuant to art. 1a section 1, opening and sub letter (a) WTU BES, which reads:

1. Deze wet is, met uitzondering van **hoofdstuk 2,** *van overeenkomstige toepassing op:*

a. *Nederlanders, geboren buiten Bonaire, Sint Eustatius en Saba;*

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[2] The <u>*literal*</u> translation is: 'A foreign national may be declared '*undesirable*' by our Minister'.

[3] The translation into English of the Dutch word 'vreemdeling' as 'alien' is in itself correct. We have chosen to translate this word as 'foreign national' as opposed to 'Dutch national'.

Our translation:

1. *This act, with the exception of chapter 2, applies accordingly to:*
    ***a. Dutch nationals**, born outside of Bonaire, Sint Eustatius en Saba;*

The Kingdom's translation is essentially the same as ours.

Based on this article, the Kingdom reasons that, in so far as admission and expulsion is concerned, all Dutch nationals born outside of the BES-islands are foreign nationals in these islands. The Court in First Instance in the summary proceedings rejected this point of view, because article 1 opening and sub letter (j) WTU BES defines 'foreign national' (or 'alien') as: '*anyone who does not have the Dutch nationality*'. There is a clear contradiction between this definition and art. 1a section 1, opening and sub letter (a) WTU BES, stating that Dutch nationals born outside of the BES-islands are foreign nationals in those islands. And to complete the contradiction, art. 16, section 1, opening and sub letter (c) WTU BES says that only *aliens* (not the Kingdom's own Dutch nationals) may be declared 'undesirable' (= a '*persona non grata*').

HANSEN is not an alien. And his Dutch nationality cannot (partially) be taken away from him by law declaring him to be an alien in the BES-islands, just because he was not born there. That's a violation of art. 12 jo. 26 CCPR. Nor can he by law be declared a '*persona non grata*' in a part of his own country. The words 'his own country' in art. 12, section 4 CCPR means 'the whole territory of his own country' (barring certain restrictions, for instance, for certain military or environmental areas).

The rest of article 1a WTU BES is also of some relevance for this case, but it is not necessary to quote it here. We refer to page 9 (bottom) and 10 (top) of the Observations for the translation. It is important to note that *birth* is not the only discriminatory ground. The rest of article 1a WTU BES introduces the following extra grounds:

a) No free admission to the BES-islands for *foreign nationals naturalized while outside of the BES-islands* (*cf*. art. 1a, section 1 sub letter (b) WTU BES);
b) *Parental descent* reverses the discrimination, that is to say that Dutch nationals born outside of the BES-islands nevertheless enjoy free admission to these islands, if either their father or mother was born there (*cf*. art. 1a, section 2 WTU BES);
c) *Residence* in the BES-islands also reverses the discrimination, that is to say that Dutch nationals born or naturalized outside of the BES-islands nevertheless enjoy free admission to these islands, if they were registered citizens at least one year prior to 10 October 2010 (cf. art. 1a, section 3 sub letters (a) and (b) WTU BES).

As to International law

12. The Kingdom's reservations to and explanation c.q. declaration concerning art. 12 CCPR have been correctly quoted on page 14 of the Observations. Furthermore, art. 19 of the Vienna Convention on the Law of Treaties (hereinafter: '**VCLT**') is there quoted.

However, art. 29 VCLT is also relevant, but has not been quoted. We quote it here:

Art. 29 VCLT: *'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory*'.

In this context CCPR General Comment no. 27 says the following (*cf.* point 5):
'*The right to move freely relates to the whole territory of a State, including all parts of federal States*'.

And in this context art. 50 CCPR is also very important:
'The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions'.

Important also are the following points of **CCPR General Comment 27**:
1. Liberty of movement is an indispensable condition for the free development of a person.
[***Comment***: This description **makes liberty of movement in itself a 'peremptory' norm as referred to in point 8 CCPR General Comment 24** (see below)].

2. The permissible limitations which may be imposed on the rights protected under article 12 CCPR must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.

7. Subject to the provisions of article 12, paragraph 3 CCPR the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. *It also precludes preventing the entry or stay of persons in a defined part of the territory*.
[***Comment***: HANSEN was deported to Curaçao twice, the second time after he had returned to Bonaire. This amounts to forced internal displacement. After his return to Bonaire, HANSEN's continued stay in Bonaire was in fact prevented].

11. […] Art. 12, section 3 CCPR authorizes the State to restrict the art. 12 CCPR rights *''only to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others"*. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant (*cf.* par. 18).

13. In adopting laws providing for restrictions permitted by article 12, paragraph 3 CCPR States should always be guided by the principle that the restrictions must not impair the essence of the right (*cf*. article 5, paragraph 1 CCPR); the relation between right and restriction, between norm and exception, must not be reversed.
[***Comment***: It appears to HANSEN that the WTU BES restrictions do indeed reverse the norm and the exception].

14. Article 12, section 3 CCPR clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

18. The application of the restrictions permissible under article 12, section 3 CCPR needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination.

19. The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one's own country.

21. *In no case may a person be arbitrarily deprived of the right to enter his or her own country*. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, *legislative*, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. *The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'*.

***Comment**:* In this context it is important to note that art. 12, section 4 CCPR (the right of return) is not subject to the same restrictions as sections 1 and 2. That is why there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. However, when HANSEN returned to Bonaire a couple of months after his first deportation to Curaçao, he was again deported *without any separate expulsion order*. So his right of return (art. 12, section 4 CCPR) was specifically violated. It had been his explicit wish to stay and live on Bonaire, which was emphasized by his return.

As to Reservations to the CCPR

13. The Committee's CCPR General Comment 24 is relevant in this case, particularly the following excerpts:

7. In an instrument which articulates very many civil and political rights, *each of the many articles, and indeed their interplay, secures the objectives of the Covenant*. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

8. Reservations that offend **peremptory norms** would not be compatible with the object and purpose of the Covenant. […] provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations.
[***Comment*:** If a reservation results in a violation of art. 2, section 1 and/or 26 ICCPR, such a reservation would be incompatible with the object and purpose of the Covenant, as non-discrimination is a peremptory norm. HANSEN asserts he was discriminated against].

17. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant.

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. […]The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

Admissibility and merits of the Communication

14. ***Introductory remarks***

A. If HANSEN had been born in Bonaire or had been born of Bonairean parents, the declaration as a '*persona non grata*' and his deportation to Curaçao would not have been possible on the basis of domestic law.

B. Before 2010 HANSEN enjoyed free art. 12 CCPR rights in both Bonaire and Curaçao (as well as in Holland where he was born), because at that time Bonaire and Curaçao were still constituent parts of the Neth. Antilles which was then still one constitutional entity. As he was born of Curaçaoan parents, before 2010 he enjoyed free art. 12 CCPR rights in both Bonaire and Curaçao on the basis of descent (*cf*. art. 1a, section 2 WTU BES now).

It is therefore important to realize that his free art. 12 CCPR rights were geographically limited by the constitutional changes of 2010. Since 1634 the inhabitants of all 6 Dutch Antillean islands enjoyed free admission rights on all 6 islands. This was changed in 1986 (when Aruba became a federal sub-state on its own) and in 2010, when the 'Neth. Antilles of 5' was dismantled. HANSEN was thus deprived of a fundamental right and freedom that he and all (Dutch) inhabitants of these islands traditionally enjoyed.

C. HANSEN holds that the very fact that he was treated as a foreign national in his own country and was discriminated against on the combined grounds of birth and descent, resulting in his deportation to Curaçao (and not to Holland) and thus depriving him of his art. 12 ICCPR rights, amounts to a violation of art. 7 ICCPR. Such treatment is degrading. He was not bodily harmed, but was affected emotionally. Degrading treatment does not

necessarily cause bodily harm. It causes emotional pain. And the fact that this treatment was based on domestic law does not diminish its degrading nature. In the end he had to buy a ticket to Holland, because he did not want to stay in Curaçao and his return to Bonaire had been made impossible. So his financial loss was approx. US$ 800.-.

D. Art. 12, section 3 CCPR allows for restrictions of the art. 12 CCPR rights, provided that such restrictions are necessary and do not nullify these rights. HANSEN holds that the restrictions resulting from art. 1a WTU BES do nullify his art. 12 ICCPR rights and are not necessary. Nor can the discriminatory nature of these restrictions be justified.

The distinctions between Dutch nationals set out in the WTU BES are discriminatory

15. There can be no doubt that the distinctions between the three categories of Dutch nationals set out in art. 1a jo. art. 3, section 5 WTU BES are discriminatory on the grounds of birth, descent and residence in Bonaire as of an arbitrary date (10 Oct. 2009).

    Therefore, the only two questions that need to be answered are
    A. whether the discrimination is justified and
    B. whether the reservations to art. 12 CCPR are compatible with the object and purpose of the ICCPR.

    As to point A.

16. The discrimination is not justified, because it serves no legitimate aim. The sole aim stated by the Kingdom is to protect the islands against an uncontrollable migratory influx of Dutch nationals from Holland and/or from the islands of Curaçao, Aruba and SXM.

    First of all, the Kingdom has never proved that such an uncontrollable influx would occur, neither from Holland nor from the other 3 islands. From Holland is *theoretically* possible, for its population is approx. 17 million, the BES-islands approx. 30.000. But it is not clear why inhabitants of a rich country would migrate *en masse* to a few poor islands. Migration the other way is the norm, both internationally and within the Kingdom.

    Secondly, Dutch nationals from the other 3 islands have since 1634 never caused any uncontrollable migratory influx to the BES-islands. So, if the stated aim should *in general* be considered legitimate by your Committee, it should only be considered legitimate if it provides protection against Dutch nationals from Holland, not against Dutch nationals from the other 3 islands. Seeing that HANSEN enjoyed the right to free admission and residence in Bonaire until 2010 and seeing that he is from Curaçao by descent, art. 1a WTU BES is therefore unjustifiably discriminatory against him (and all other islanders), because the migratory restrictions serve no legitimate aim in his (and their) case.

    Thirdly, the feared uncontrollable influx of Dutch nationals from Holland can be controlled by other less far-reaching measures, such as a quota-system. During the 8

years from 2011 until 2018 Bonaire's population increased by approx. 3.500 persons, which figure includes the birth surplus and the migration surplus from all parts of the world (mostly from Holland and Latin America, but ***negligible*** from the other 3 islands, although the quoted figures do not show their origins). There were no problems with the absorption of this number. On the contrary! The island has boomed. The highest yearly migration ***surplus*** occurred in 2013, to wit 882. There were no notable problems. *Cf.* Central Bureau for Statistics at: opendata.cbs.nl/statline/#/CBS/nl/dataset/83774NED/table

On the basis of these statistics and experience, it is safe to say that if a quota for Dutch nationals from Holland was set at 1,500 or even 2,000 per year (to be increased or decreased on a yearly basis as needed), the influx could easily be handled. With such a quota system, interested persons would not have to prove they had 1) a job or enough wealth, 2) a place to live and 3) a certificate of good conduct as is required now for these Dutch nationals (*cf.* art. 3, section 5 WTU BES on page 10 of the Observations). Under a quota-system ANY Dutch national from Holland would qualify without any discrimination, also the poor, old age pensioners and those who have no work or have a criminal record. The law should not discriminate against such groups under an assumed but unproven pretext that the BES-islands should be protected against an uncontrollable influx.

A quota-system to protect the BES-islands against too much immigration from the other 3 islands (Curaçao, Aruba and SXM) is not required as has been historically proved.

HANSEN believes that restrictions with respect to migration within the Kingdom should not be set at all. There would not be an uncontrollable influx from Holland and certainly not from the other islands. If the traditional free admission for Dutch nationals from the other three islands had not been taken away from them in 2010, HANSEN would not have been discriminated against in Bonaire. After his release from prison he would have been a free man, like any released Bonairean prisoner. When a prisoner is set free, there is always a chance that he/she will commit other crimes. But if he/she is a Bonairean, he/she is released on Bonaire anyway, even if there is an actual and credible risk of the released prisoner assaulting somebody. The Kingdom alleged that HANSEN posed such a risk, but this has not been proven in any way and has still not been proven in this Communication and cannot be proven, because when HANSEN returned to Bonaire, his stay there was long enough to assault the person the Kingdom feared he would assault (his ex-girlfriend). But he did not assault her nor anybody else. At any rate, if a released prisoner posing such a risk is the country's own citizen, the government can and should take other measures to protect the potential victim. Declaring one's own citizen a '*persona non grata*' in his own country and deporting him to another part of his own country is not a measure a democratic country is forced to use against its own citizens in such a situation, *inter alia* because it would violate art. 12 CCPR, whereas such a measure falls outside the scope of permissible exceptions under art. 12, section 3 CCPR.

Conclusion: The stated aim for the discriminatory categories in art. 1a WTU BES is not legitimate with respect to migrants from the islands of Curaçao, Aruba and SXM. If your Committee is satisfied that the stated aim is legitimate with respect to migrants from Holland, then the measure chosen to realize this aim is too restrictive, seeing that other less restrictive and less discriminatory measures are available to realize the aim.

Therefore the several categories of Dutch nationals defined in art. 1a WTU BES (in conjunction with art. 3, section 5 WTU BES) are unjustifiably discriminatory within the meaning of articles 2, section 1 jo. 26 CCPR. And these unjustifiably discriminatory categories inevitably result in confusion and multiple violations of art. 12 CCPR.

As to point B.

17. On the basis of the above-quoted sections of CCPR General Comment 24, the reservation, declaration and explanation (hereinafter collectively '**the reservations**') made by the Kingdom with respect to art. 12 CCPR are incompatible with the object and purpose of the CCPR for they offend *peremptory norms* of the CCPR. First of all, art. 12 CCPR itself is a peremptory norm, but the norm of non-discrimination and the norm set out in art. 50 CCPR (hereinafter the '**federal norm**') are also peremptory. These reservations, furthermore, limit the art. 12 CCPR rights to a greater extent than is provided for in the CCPR (*cf*. art. 5, section 1 CCPR). In other words, the reservations impair the essence of the art. 12 CCPR rights, which essence is the freedom of movement to, from and *throughout* own's own country. For Dutch nationals the entire Kingdom is their own country as is confirmed by the federal norm of art. 50 ICCPR.

If the reservations are considered compatible with the object and purpose of the CCPR and ***if*** the domestic law is held to be justifiably discriminatory, then, on the basis of domestic law, HANSEN's own country is Holland (where he was born) *including* the 3 BES-islands, which form part of Holland as of 2010. But to 'his own country' should then also be added Curaçao, because his parents are from Curaçao. According to domestic law, then, he should have had free art. 12 ICCPR rights throughout Holland (including the 3 BES-islands) *and* Curaçao and could therefore not have been deported from Bonaire to Curaçao, *for that would amount to forced internal displacement within his own country.* Nor could his right to return to the BES-islands (which is also part of his own country) have been excluded. But it was excluded, for after his return he was deported again.

When HANSEN after approx. one or two months returned to Bonaire, he was *again* deported to Curaçao (for the second time), whereas during his stay on Bonaire (approx. two weeks) he did not assault anybody, although he had enough time to do so, if he had wanted to. This proves that there never was a real and actual risk. This argument was the stick the government used to hit the dog with. In other words, it was an insincere pretext to deport him. The Bonaire authorities were sick of HANSEN, because of his repeated bad

behavior. One can understand that. But using an insincere pretext to 'get rid of him' ('*let Curaçao handle him*') is not correct. Had he been born on Bonaire, Bonaire would have handled him. Perhaps it is clear now where the discriminatory sting bites.

If your Committee should rule so as to allow what happened in this case, a door is opened to all federal sub-states within the Kingdom to deport released prisoners to other parts of the same Kingdom, i.e. if the released prisoner has any residency rights in another federal sub-state. Released felons from Holland living in Curaçao could be declared '*persona non grata*' and deported to the BES-islands or Holland. Released prisoners from Curaçao living in Holland could be deported back to Curaçao etc.

This would clearly be undesirable. The unjustifiably discriminatory categories of Dutch nationals in art. 1a WTU BES are the deeper cause that makes such a scenario possible.

By the way, HANSEN was deported direct from the Bonaire prison to Curaçao without having been given any money to at least be able to eat something or reach family-members. This fact adds to the deportation having been a violation of art. 7 ICCPR.

18. On the basis of point 1 of CCPR *General* Comment 27 it may be concluded that the art. 12 CCPR rights are in and by themselves ***peremptory norms*** and any restrictions on these rights (certainly art. 12, section 4 ICCPR) are therefore not compatible with the object and purpose of the CCPR. When HANSEN after a short while returned to Bonaire, he was *again* deported to Curaçao, whereas during this (second) stay on Bonaire he did not commit any crime and according to domestic law he should at least have had free access for 6 months as a tourist. In other words, this free access was also denied him.

    According to point 2 of CCPR General Comment 27, any restrictions/limitations on art. 12 CCPR rights may not nullify these rights. They are also governed by the *requirement of necessity*. The present restrictions resulting from the discriminatory distinctions set out in art. 1a WTU BES and resulting from the reservations do not completely nullify the art. 12 CCPR rights. But they seriously impair them. And we have already argued above that the restrictions are not necessary, certainly not between the 6 Caribbean islands .

    According to point 19 of CCPR General Comment 27 the right of a person to enter one's own country *implies the right to remain* in one's own country. According to point 21 a person may ***in no case*** be arbitrarily deprived of the right to enter his/her own country. '*Arbitrarily*' in this context means that all state actors must respect this right. HANSEN was, however, not allowed to enter (which implies remain) in his own country after he returned to Bonaire. *This establishes beyond doubt that his art. 12 CCPR rights (certainly art. 12, section 4 CCPR) were violated*.

    Conclusion: The reservations to art. 12 CCPR are incompatible with the object and purpose of the CPPR, for they offend peremptory norms of the CCPR, such as

articles 2, section 1, 12, 26 and 50 CCPR. The consequence of this is that the reservations are severable, in the sense that the CCPR will be operative for the Kingdom without benefit of the reservations (*cf*. point 18 of CCPR General Comment no. 24).

The short and simple essence and truth of this case

A. The Kingdom is a Federation. Art. 50 CCPR stipulates that all CCPR rights extend to all parts of federations without any limitations or exceptions. Therefore, discriminatory distinctions among Dutch nationals are not permissible within the whole Kingdom, unless justified. Any reservations to the CCPR to support such distinctions are incompatible with the object and purpose of the CCPR and are therefore severable.
B. If the sole stated aim for the discriminatory distinctions are deemed to be justified to protect the BES-islands against migration from Holland, they are likewise justified to protect the islands of Curaçao, Aruba and SXM. But this aim cannot justify such distinctions to protect the former 6 Neth. Antillean islands against inter-island migration.

Concluding remarks

19. In point 69 of the Observations the Kingdom states that the distinctive categories of Dutch nationals in art. 1a WTU BES are justified, because art. 132a CECN allows for differential laws in Holland and the BES-islands. We comment as follows.

    First of all, there is a distinction between differentiation and discrimination. If differential laws have a discriminatory effect (violation of arts. 2, section 1 and/or 26 CCPR), the differentiation clause of art. 132a CECN does not justify the discrimination, despite the fact that the possibility to enact differential laws between Holland and the BES-islands has been laid down in the mutual Constitution of the federal sub-state of Holland and the BES-islands (CECN). *No constitutional provision in any country can justify discrimination*.

    Secondly, the distinctive categories between Dutch nationals within the Kingdom involve not only Holland and the BES-islands. The other 3 islands (Curaçao, Aruba and SXM) are also involved. A similar differentiation clause as art. 132a CECN is not included for the other 3 islands in the Kingdom Charter, nor in the Constitutions of the 4 federal sub-states within the Kingdom. So what would be the Kingdom's justification for differential admission laws with respect to the federal sub-states of Curaçao, Aruba and SXM?

20. HANSEN begs the indulgence of the Committee for having been repetitive and somewhat emotional in these Comments. Many times Dutch politicians have attempted to introduce in Holland the restrictions to free admission and residence as set out in art. 1a jo. 3, section 5 WTU BES (and similar restrictions in the Federal Ordinances on Admission and Expulsion of the federal sub-states of Curaçao, Aruba and SXM) in order to keep out of Holland Dutch nationals born on these islands who wish to settle in Holland. So far they have failed. However, if these discriminatory distinctions persist against Dutch nationals

from Holland, so as to protect the islands against immigration from Holland, the day will come when the above-referred Dutch politicians will succeed. After all, introducing these same restrictions in Holland would only be reciprocal. Holland can claim that it, too, wants to be protected against immigration by Dutch nationals from the Caribbean.

This should be prevented. If the Committee rules that these distinctions are unjustifiably discriminatory and that the reservations are therefore incompatible with the object and purpose of the CCPR, this will be prevented. It would introduce a new élan of cooperation within the Kingdom and would affect other CCPR rights as well, especially if the Committee would rule that the Kingdom is indeed a federation, consisting of the four federal sub-states of Holland, Curaçao, Aruba and SXM, so that art. 50 CCPR applies fully.

21. It is understandable that HANSEN's case is not the most sympathetic one. After all, he has indeed behaved badly on Bonaire. Nevertheless, this does not affect the principle that is involved here. The principle is that nobody's human rights should be violated and nobody should be discriminated against. And 'nobody' includes ex-convicts.

    But, in conclusion, we give a more 'sympathetic' (but sad) example of what this kind of discrimination leads to. It concerns a recent case, in which a foster mother who had been entrusted by the Court with the care of a Dutch child born in Curaçao from Curaçaoan parents. The child has lived with the foster mother as of a couple of days after her birth. When the foster child was approx. 11 years of age, the foster mother decided to move to Bonaire, where the mother's father was born, so she had free admission and residence rights there. However, her foster daughter did not. The foster child was therefore denied free admission and residence in Bonaire and to this day she lives there (with her foster mother) without any residence permit. She was denied admission 'by operation of law' (which the Kingdom euphemistically calls 'automatic admission'). She could not comply with the art. 3, section 5 WTU BES requirements. The Immigration offered to give her a residence permit as an alien, which the foster mother refused to accept, because her daughter is not an alien. Up to today's date the child basically lives on Bonaire as an undocumented alien. Officially she has no health insurance provided by the government, because she cannot be registered at the Civil Registry. This is the case of Cicilia/Brunken vs. State Secretary of Justice & Security, *cf*. exhibit 9. The government has verbally promised not to deport her, because that would violate the best interests of the child. But the WTU BES does not give her protection against deportation to Curaçao.

    Hopefully this example will make it clear why this discriminatory nonsense should stop, if not within the whole Kingdom (in conformity with our primary petition), then at least among the 6 Caribbean islands (in conformity with our subsidiary petition).

    Bonaire, 19 July 2019,
    On behalf of Sherrel Eldgel HANSEN, Mr. M. Bijkerk, attorney-at-law

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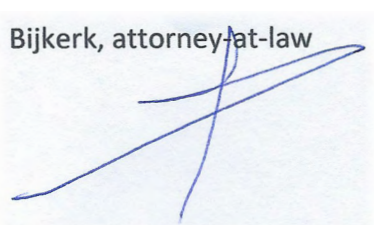

Exhibit 8

Speech Prime Minister Jonckheer of the Netherlands Antilles before the United Nations Trusteeship Committee on 24 November 1955

but in requesting the Netherlands to continue transmission of information on Surinam this illustrious organization would clearly refuse to recognize the new status of Surinam; such a decision would be in complete contradiction with the purpose of this organization which strives to promote the attainment as soon as possible of autonomous governments for non-self-governing territories.

You will allow me, Mr Chairman, to state here that Surinam holds the view that the Netherlands in ceasing the transmission of information has respected, defended and supported our feelings of legitimate self-esteem.

Bijlage 16

Rede van de heer Jonckheer in de Trusteeshapscommissie op 24 november 1955

Es para mí — en mi calidad de representante del pueblo de las Antillas Neerlandesas — un altísimo honor y una honda statisfacción el comparecer ante esta dignísima Asamblea, en la que vienen a ser analizados, con altruistas propósitos, todos los problemas que preocupan la mente de los pueblos y sus gobernantes, a fin de consolidar un mundo mejor.

Obedece mi presencia ante vosotros el propósito esencial de traer a esta Asamblea, con claridad, exactitud y precisión, la situación real y vívida que, conforme a la estructura del nuevo Reino Neerlandés, existe en las Antillas Neerlandesas.

Antes de proseguir, empero, deseo declarar que ante esta Asamblea formo parte de la delegación de ese nuevo Reino que voluntariamente decidimos fundar Holanda, Surinam y las Antillas Neerlandesas, pero que, al emitir mis conceptos sobre el asunto que he venido a tratar, represento — en mi calidad de Primer Ministro de las Antillas Neerlandesas, respaldado por una inmensa mayoría de los electores de estas islas — la voluntad absoluta del pueblo que habita estas Antillas, tal como expresada el 15 de noviembre del año pasado en sufragio universal, secreto y libre.

Es obvio que si no prevaleciera la situación que fué creada como consecuencia de la libre determinación de nuestros respectivos pueblos que integran el nuevo Reino Neerlandés — situación en que impera una absoluta equivalencia y mutuo respeto como Gobernantes Independientes — yo no hubiera querido ni podido asumir la representación del Pueblo Antillano que ahora ostento ante vosotros.

Y es en nombre de ese pueblo, por cuyo deseo me encuentro ante vosotros, en nombre de ese pueblo, cuya libérrima voluntad represento, en nombre de ese pueblo que ve en vosotros — como integrantes de este organismo internacional — los justos protectores de sus derechos, que vengo a suplicaros: atención para el mensaje que os dirijo, comprensión por el concepto que sostengo y equidad y objetividad en la emisión de vuestro juicio.

Cabe señalar en primer lugar que la Charta Constitucional de este nuevo Reino, que oportunamente fué presentada a esta Insigne Organización y en la cual quedaron estipuladas constitucionalmente las relaciones entre mi país y las otras dos partes integrantes, fué el resultado de la libre determinación de los pueblos que conjuntamente constituyen el nuevo Reino.

Con respecto a la historia y geografía, población y otros aspectos de las Antillas Neerlandesas, tales como su evolución económica, su standard social, enseñanza pública, libertad de cultos, etc., no juzgo necesario extenderme, pues supongo que todos habréis tomado nota del contenido de nuestra publicación THE NETHERLANDS ANTILLES (A Short Survey) que ante la Comisión 73e fué presentada por la Delegación Neerlandesa. Pero sí quisiera ocupar brevemente vuestra atención para daros una idea de la evolución que en el orden político se ha realizado en mi país, a partir del año 1937 en que por primera vez hizo uso del derecho del voto una parte de la ciudadanía.

En 1937 este derecho fué otorgado con las siguientes restricciones:
Primero: Unicamente pudieron votar aquellos ciudadanos que poseían ciertas condiciones en cuanto a propiedades y capacidad intelectual.
Segundo: El Congreso consistía de 15 miembros, de los cuales los electores elegían únicamente 10, mientras que los 5 miembros restantes eran nombrados por el Gobernador.

Contra este sistema de gobierno colonial, se produjo en el año 1945 un despertar político que exigió el cumplimiento de las promesas expresadas en el celebre mensaje de la entonces Reina Guillermina desde el exilio en Londres en 1942 y la lucha que libramos culminó en una más amplia y democrática organización política que resultó en una reforma constitucional en que se extendió el parlamento a 21 miembros — todos electos por el pueblo — y se introdujo el sufragio universal para todo hombre y mujer de 23 años de edad en adelante y sin restricción de ninguna especie.

Paralelamente con la influencia del pueblo, por medio del derecho del voto, en la vida pública y los asuntos del Estado, crecieron naturalmente las actividades políticas y surgieron como consecuencia lógica en nuestra institución democrática, varios nuevos partidos que ahora estan representados en el parlamento.

Ahora, bien, no es más que natural que en esa línea de ascenso de nuestra evolución política, en que se estableció la institución democratica de nuestra pueblo, hayan surgido las rivalidades naturales entre las diversas agrupaciones políticas en lo relativo a divergencias en los programas de principio y convicciones ideológicas, pero en medio de ese laberinto de oposición y lucha resaltan dos puntos recalcados enfáticamente por todos y cada uno de los partidos políticos:
Primero: la adquisición de una completa independencia con relación a los asuntos internos del país.
Segundo: el deseo de — no obstante la ya dicha independencia — continuar formando parte — libre y autónoma — del Reino Neerlandés.

No es de extrañar por lo tanto, que, unidos por estos propósitos, compareciéramos todos los partidos políticos ante una Conferencia de Mesa Redonda de cuyas deliberaciones — que se prolongaron durante casi 7 años — obtuvimos la cristalización de los ideales que sustentábamos solidariamente.

Con el fin de poner bien en claro nuestra posición en el nuevo Reino, quisiera citar y explicar algunos puntos sobresalientes de la Carta Constitucional del Reino, con los cuales espereo demostrar la trascendencia que reviste este asunto no digamos ya para los Países Bajos, sino para nosotros los Antillanos que somos los que hemos luchado y los que — gracias naturalmente a la comprensión con que Holanda reconoció nuestros derechos, pero gracias también a la lucha tenaz que libramos por nuestras justas reclamaciones — nos sentimos hoy pueblo libre y autónomo, desligados de las antiguas ataduras del coloniaje.
Primero: Convinimos voluntariamente, por propia convicción y de común acuerdo constituir un Reino en el cual los países integrantes Holanda, Suriname y las Antillas Neerlandesas tienen cada uno completa independencia y autodeterminación en todos sus asuntos de incumbencia interna.

En este respecto es muy importante señalar que todo lo concerniente a los asuntos económicos, sociales y educacionales, sobre los cuales exige el artículo 73*e* de la Carta de las Naciones Unidas informaciones de la Madre Patria cuando se trata de territorios dependientes, son cuestiones que sin restricción alguna atañen a la libre determinación del pueblo de las Antillas Neerlandesas.
Segundo: Dentro del marco de los principios de derecho establecidos, aceptados y aplicables para con todo el Reino, atendemos los tres países nuestros intereses de incumbencia común y nos prestamos asistencia mútua en pie de absoluta equivalencia.
Tercero: Estos intereses de incumbencia común han sido estipulados en la Carta Constitucional del Reino y comprenden sólo aquellos asuntos que de por sí, en virtud de que atañen directamente a la posición internacional de todo el Reino, tienen que ser atendidos por las autoridades centrales en todo estado de índole federal.
Cuarto: No obstante que el artículo tercero de la Carta Constitucional establece que los asuntos referentes a las Relaciones Exteriores son de incumbencia general del Reino, hemos convenido las siguientes importantes restricciones con el fin de hacer más amplia la independencia interna:

a. El Reino no podrá comprometer a las Antillas en convenios internacionales de carácter económico o financiero, si el Gobierno Antillano, exponiendo las razones que lo asisten, se declarara en desacuerdo con tal convenio.

b. El artículo 31 estipula que, salvo disposición en contrario por Ley del País:
1. Quedarán los residentes de las Antillas Neerlandesas exentos de todo servicio en las fuerzas armadas, así como del cumplimiento de los servicios civiles obligatorios.
2. No podrá el llamado a filas ser enviado fuera del País sin su sonsentimiento.

c. El contenido del artículo 35 acentúa aún más nuestra absoluta independencia económica y financiera — y con ello toda ausencia de colonialismo — estipulando que la contribución en los gastos de incumbencia común del Reino tiene que ser el resultado de una decisión por UNANIMIDAD de las partes integrantes, o sea que la contribución de las Antillas *no* podrá ser fijada sin nuestro voto favorable.

Quinto: El Ministro Plenipotenciario, nombrado por el Gobierno Antillano, a quien representa en el Gobierno Central del Reino, tiene voz y voto en el Consejo del Gobierno del Reino. Además goza de acuerdo con el art. 12 de cierto derecho de veto para con la aprobación y aceptación de toda legislación general del Reino. El Ministro Plenipotenciario tiene también — en su calidad de miembro del Gobierno del Reino — la atribución de representar a las Antillas en la Legislación General del Reino, así como el derecho de hacerse asistir por cuantos Delegados Especiales crea necesario, los cuales pueden intervenir en los debates, producir informaciones, y proponer enmiendas. Una materia determinada puede de este modo ser defendida por peritos nombrados al efecto, los que logicamente podran servir nuestros intereses en forma mucho más eficaz de lo que se podria en un organo representativo constituido sobre una base proporcional. Teniendo en cuenta los 10 miliones de habitantes de los Países Bajos y los 200 mil Antillanos que habitan nuestras islas, es lógico que optásemos por el sistema arriba mencionado y no por una representación sobre una base proporcional de habintantes,

lo cual no nos hubiera podido, garantizer permanentemente un Ministro en el Gabinete del Reino. No hay que olvidar además, que los intereses de incumbencia general que puedan ser de interés especial para nosotros están más en la esfera del Ejecutivo que en la del Legislativo, toda vez que las Relaciones Exteriores, por ejemplo debido a su naturaleza, no se canalizan por vía del Poder Legislativo. *Sexto*: Las disposiciones de la Carta Constitucional nos brinda la garantía de que, como parte libre e integrante del Reino, tenemos indiscutible intervención en toda resolución de caracter legislativo o ejecutivo, que se relacione directamente con los asuntos de incumbencia general del Reino, y en especial cuando atañe a los intereses particulares de las Antillas.

Un estudio del desarrollo político de las Antillas Neerlandesas nos revela el hecho de que nuestro pueblo ha estructurado, libre y democráticamente, un sistema propio de vida, con un gobierno propio, que se preocupa independientemente por los problemas básicos del país, los cuales se relacionan en primer lugar con las circunstancias geográficas, económicas, sociales y culturales.

Las Antillas Neerlandesas no nos hemos querido separar del Reino Neerlandés para formar un Estado así llamado independiente, ya que en la situación actual por que atraviesa el mundo no creemos que ello redundaría en el interés, beneficio y seguridad de este pequeña conglomeración social.

Concebimos que la convivencia interdependiente a base de la libre determinación de las partes integrantes del Reino, es en su propósito esencial igual que el perseguido por esta Insigne Organización, que es el de crear un sistema de convivencia interdependiente entre las naciones, con el fin primordial de garantizar a los pueblos que habitan este mundo el respeto a los derechos humanos.

¿Cual es la significación real del término constitucional „INDEPENDIENTE" en los momentos que vive nuestro mundo actual?

¿Frente a la realidad de la situación internacional que confrontamos hoy día, no es lógico pensar en la relatividad hasta de la independencia de las naciones?

En nuestro concepto, la independencia de que gozamos está fundamentada en que el pueblo del territorio que aquí represento goza hoy de absoluta democracía y autonomía. En nuestra patria existe el pleno respeto a los derechos fundamentales del hombre y se practica, como la cosa más común, la más absoluta libertad. Nosotros mismos hacemos nuestra Constitución y nuestras própias leyes y las ampliamos y enmendamos si lo juzgamos necesario.

Tenemos libertad de reunión, libertad de prensa, libertad de palabra, libertad de culto. No tenemos analfabetos. Mas del 40 % del presupesto nacional está dedicado a la enseñanza y somos un pueblo pequeño pero pacífico que sólo desea mantener cordiales y amistosas relaciones con sus vecinos y vivir en paz y con el orgullo de formar parte del concierto de naciones libres. No que este estado de cosas lo hayamos adquirido con facilidad. Hemos tenido que luchar por su adquisición y estamos contentos de que nuestros esfuerzos y nuestra lucha han sido coronados por el éxito. De ahí que no podamos juzgar compatible con nuestra situación interna, ni con las relaciones que como país libre mantenemos con las otras partes del Reino el que nuestras Antillas continuen siendo consideradas por este Organismo Internacional como aun pertenecientes a aquellos pueblos a que alude el artículo 73*e* de la Carta de las Naciones Unidas, en virtud del cual hayamos de suministrar informes sobre nuestro territorio a los Países Bajos para ser presentados a vuestro Organismo.

El artículo 73*e* fué insertado en la Carta de las Naciones Unidas con el objeto de informar las Naciones Unidas sobre el curso del desarrollo económico, social y educativo de aquellos territorios que guardan relaciones coloniales, dependientes para con la Madre Patria.

Pero nosotros, las Antillas Neerlandesas, ya no pertenecemos más a estos pueblos; ya no somos más una colonia de los Países Bajos y no queremos ser considerados como tal. Nos sentimos y somos independientes, gracias a nuestros redoblados esfuerzos por emanciparnos de los lazos coloniales, gracias a la actitud comprensiva de Holanda y gracias al estímulo de los principios establecidos en vuestra Carta de las Naciones Unidas que nos sirvió de guía y de respaldo.

¿Y ahora que somos tan felices de sentirnos emancipados, de sentirnos libres, de sentirnos independientes, tenemos ahora que luchar y arguir por que vosotros reconozcais este status de independencia y emancipacion? ¿O es que no confiais en nuestras capacidades para *volver* a tocar a vuestras puertas si algun día — lo que no creemos ni esperamos — el desenvolvimiento de nuestras voluntarias relaciones toman un giro que no concuerde con la libérrima voluntad de nuestro pueblo?

Tal duda no creo que deba existir, ya que los hechos históricos de la lucha que hemos sostenido en las Antillas Neerlandesas por nuestra independencia hablan con sobrada elocuencia, pues al decir „*volver* a tocar a vuestras puertas" usé el vocablo „volver", debido a que en 1948, cuando nos encontrábamos en los Países Bajos, formando parte de una delegación que fué a efectuar negociaciones en relación con nuestra autonomía, no vacilamos ni un momento en abandonar, en forma de protesta, las mencionadas negociaciones cuando lo creímos necesario. Regresamos a las Antillas y cuando hubimos palpado el sentimiento del gran conglomerado que hoy, después de siete años de lucha, constituye la agrupación política más grande y poderosa de las Antillas Neerlandesas, procedimos, de acuerdo con su voluntad, a enviar a la Unión Panamericana y a estas Naciones Unidas un enérgico mensaje cablegráfico, exponiendo nuestros problemas. Sabed que no es poca mi statisfacción al deciros que fuí yo quien suscribí tal mensaje. Yo creo que es obvio que, si en las entonces vigentes circunstancias, en medio de un ambiente colonial totalmente diferente al que hoy se respira en mi patria, tomamos una firme actitud y acudimos de inmediato a esta institución, hoy, con mucho más facilidad y con mucho más razón, volveríamos a actuar de tal modo, si aconteciere que fuere necesario.

Y para finalizar, lo siguiente: Nosotros en las Antillas Neerlandesas no tenemos objeción material alguna para redactar un informe sobre nuestra situación económica, social y educativa para ser sometido a vuestra institución, pues en él no veríais más que la realidad de los hechos que acabo de exponer, tales como los informamos ya anualmente a nuestro pueblo. Pero sí nos asiste una objeción moral — la cual deseo recomendar a vuestro más elevado sentimiento de consecuencia y justicia — y es que el estado de independencia que hemos obtenido sería lesionado si se continuara exigiendo las informaciones estipuladas a base del artículo 73*e* de la Carta de las Naciones Unidas.

En este respecto no hay que olvidar que nuestro adelanto político actual no se

ha cristalizado simple y únicamente como un hecho de voluntad de lo que antiguamente era el Reino de los Países Bajos. ¡No! ¡Es una consecuencia de NUESTRA LUCHA, DE LA LUCHA DEL PUEBLO ANTILLANO Y DE LA ABSOLUTA VOLUNTAD DE ESTE PUEBLO!!

Señores Delegados: Creo con lo antes dicho haberles expuesto con claridad y exactitud la verdadera situación reinante en la actualidad en las Antillas Neerlandesas. Esta, como ya dije, es el resultado de un largo período de lucha cívica, durante el cual las partes interesadas fueron compenetrándose de la existencia de realidades insoslayables que fueron para nosotros la guía principal para la consecución de nuestros ideales.

Es por ello, Señores Delegados, que el pueblo de las Antillas Neerlandesas, con cuya representación me honro, espera y tiene fé en que cuando en el caso nuestro vayáis a hacer uso del sacro derecho del voto, os inspiréis — como en casos anteriores — más en las realidades que en las teorías y, convencidos de que nuestro pueblo ha rebasado definitivamente su anterior condición, le reconozcáis su nuevo procreado status. Pues sería inconcebible que un pueblo que como el nuestro — en medio del combate de ideales efectuado con métodos violentos tan comunes como eficaces hoy día — ha preferido el camino más arduo y sinuoso de la lucha pacífica habiendo obtenido finalmentes su libertad e independencia, apoyado en los principios promulgados en la Carta de estas Naciones Unidas, se vea hoy ante la enigmática paradoja de que, ahora que se siente y se sabe libre e independiente de la antigua Holanda Colonial, tenga que luchar por obtener el reconocimiento de su nuevo estado de parte del mismo organismo, cuyos principios anti-coloniales le inspiraron.

Vertaling[1]

Het is voor mij — in mijn kwaliteit van vertegenwoordiger van het volk der Nederlandse Antillen — een uiterst grote eer en een diepe bevrediging voor deze zeer achtenswaardige Algemene Vergadering te verschijnen, waarin tenslotte, met onbaatzuchtige bedoelingen, alle problemen die de geest van de volken en hun regeerders vervullen, geanalyseerd worden, teneinde een betere wereld hecht te vestigen.

Mijn aanwezigheid hier dient het essentiële doel om voor deze Assemblée, duidelijk en exact, de werkelijke en levendige situatie af te schilderen die, in overeenstemming met de structuur van het nieuwe Nederlandse Koninkrijk, in de Nederlandse Antillen heerst.

Voor ik verder ga, wens ik echter te verklaren, dat ik voor deze Algemene Vergadering deel uitmaak van de delegatie van dit nieuwe Koninkrijk, dat Nederland, Suriname en de Nederlandse Antillen vrijwillig besloten te stichten, maar dat ik bij het uitspreken van mijn ideeën over het onderwerp dat ik zal behandelen, de absolute wil vertegenwoordig — in mijn kwaliteit van Eerste Minister van de Nederlandse Antillen, gesteund door een immense meerderheid van de kiezers dezer eilanden — van het volk dat deze Antillen bewoont, zoals op 15 november van het vorige jaar tot uitdrukking kwam bij algemeen geheim en vrij kiesrecht. Het is duidelijk, dat ik, indien niet de situatie heerste, die werd geschapen als uitvloeisel van de vrije besluitvorming van onze respectieve volken, die van het nieuwe Nederlandse Koninkrijk deel uitmaken — een situatie waarin een absolute gelijkwaardigheid heerst en een wederzijds respect zoals tussen onafhankelijke regeringen het geval is, — gewenst had noch in staat was geweest de vertegenwoordiging van het Antillaanse volk op mij te nemen, zoals ik dit nu tegenover U doe.

Het is in naam van dit volk ingevolge welks wil ik voor U sta, in naam van dit volk, welks volkomen vrije wil ik vertegenwoordig, in naam van dit volk dat in U — als leden van deze internationale organisatie — de rechtvaardige verdedigers van zijn rechten ziet, dat ik U dringend verzoek om: aandacht voor de boodschap, die ik tot U richt, begrip voor de idee, die ik verdedig en billijkheid en objectiviteit bij het uitspreken van uw oordeel.

Het past hier in de eerste plaats erop te wijzen, dat de Grondwet van dit nieuwe Koninkrijk, die aan deze illustere organisatie werd toegezonden en waarin de betrekkingen tussen mijn land en de andere twee integrerende delen werden omschreven, het resultaat was van de vrije wil van de volken, die tezamen het nieuwe Koninkrijk vormen.

Wat betreft de geschiedenis en geografie, bevolking en andere aspecten van de Nederlandse Antillen, zoals haar economische ontwikkeling, haar sociale standaard, openbaar onderwijs, vrijheid van godsdienst etc. acht ik het niet nodig uit te weiden, daar ik veronderstel dat U allen zult hebben kennis genomen van de inhoud van onze publicatie „The Netherlands Antilles" (A Short Survey) die in de Commissie inzake Rapportage door de Nederlandse delegatie werd aangeboden. Maar ik wens toch een ogenblik op uw aandacht beslag te leggen om U een idee te geven van de evolutie, die in politicis in mijn land heeft plaats gehad sinds het jaar 1937 toen een deel van de burgerij voor de eerste maal gebruik maakte van het stemrecht.

In 1937 werd dit recht toegekend onder de volgende beperkingen:

1e. Alleen die burgers konden stemmen, die aan zekere voorwaarden voldeden van eigendom en intellectuele bekwaamheid.

2e. Het Congres (de Staten) bestond uit 15 leden, waarvan de kiezers slechts 10 kozen, terwijl de 5 overige leden door de Gouverneur werden benoemd.

Tegen dit systeem van koloniale regering kwam in het jaar 1945 een politiek ontwaken op, dat de vervulling eiste van de beloften uitgedrukt in de beroemde boodschap van de toenmalige Koningin Wilhelmina tijdens haar ballingschap in Londen in 1942 en de strijd die wij voerden culmineerde in een ruimere meer democratische politieke organisatie, die een constitutionele hervorming tengevolge had waarbij het parlement tot 21 leden werd uitgebreid — allen gekozen door het volk — terwijl het algemene stemrecht werd ingevoerd voor iedere man en vrouw van 23 jaar en ouder, zonder enige beperking.

Parallel aan de invloed van het volk in het openbare leven en de staatszaken, door middel van het stemrecht, groeiden natuurlijk de politieke activiteiten en doken als logisch gevolg in dat democratische bestel verscheidene nieuwe partijen op, die nu in het parlement vertegenwoordigd worden.

[1] Bij de vertaling is zoveel mogelijk de hand gehouden aan de door de spreker gebruikte woorden, uitdrukkingen en zinsconstructies.

Exhibit 9

Judgment Common Court of Justice of Aruba, Curaçao, St. Maarten and of Bonaire, St. Eustatius and Saba of date 22 November 2018

between:

Cicilia/Brunken vs. State Secretary of Justice and Security

Gemeenschappelijk
Hof van Justitie

BON2018H00004
Datum uitspraak: 22 november 2018

GEMEENSCHAPPELIJK HOF VAN JUSTITIE VAN ARUBA, CURAÇAO, SINT MAARTEN EN VAN BONAIRE, SINT EUSTATIUS EN SABA

Uitspraak op het hoger beroep van:

C.G.D. Cicilia, in haar hoedanigheid van voogd van de minderjarige
E.M. Brunken,
appellante,

tegen de uitspraak van het Gerecht in eerste aanleg van Bonaire, Sint Eustatius en Saba, zittingsplaats Bonaire van 31 januari 2018 in zaak nr. BON201700405, in het geding tussen:

appellante

en

de staatssecretaris van Justitie en Veiligheid.

Procesverloop

Bij beschikking van 9 september 2016 heeft de staatssecretaris voor de minderjarige op de voet van artikel 3, derde lid, van de Wet toelating en uitzetting BES (Wtu BES) een verklaring verstrekt waaruit blijkt dat zij van rechtswege toelating tot verblijf in de openbare lichamen heeft (hierna: vvr), geldig tot 24 februari 2017.

Bij beschikking van 21 februari 2017 heeft de staatssecretaris het door appellante daartegen gemaakte bezwaar ongegrond verklaard.

Bij uitspraak van 31 januari 2018 heeft het Gerecht het door appellante daartegen ingestelde beroep ongegrond verklaard.

Tegen deze uitspraak heeft de appellante hoger beroep ingesteld.

De staatssecretaris heeft een verweerschrift ingediend.

Het Hof heeft de zaak ter zitting behandeld op 5 oktober 2018, waar appellante, vertegenwoordigd door mr. M. Bijkerk, advocaat, vergezeld door G. Cicilia en de staatssecretaris, vertegenwoordigd door mr. P.J. de Graaf, werkzaam bij de Immigratie- en Naturalisatiedienst Caribisch Nederland, zijn verschenen.

Overwegingen

1. De toepasselijke wettelijke bepalingen zijn opgenomen in de bijlage bij deze uitspraak, die daarvan deel uitmaakt.

2. De minderjarige is op 23 augustus 2005 in Curaçao geboren. Zij wordt sinds haar geboorte verzorgd en opgevoed door appellante die zelf in Bonaire is geboren. In 2016 hebben appellante en de minderjarige zich metterwoon in Bonaire gevestigd.

3. In de beschikking van 21 februari 2017 heeft de staatssecretaris zich op het standpunt gesteld, dat de vvr bij wijze van uitzondering aan de minderjarige is verstrekt voor de duur van 6 maanden, omdat appellante niet beschikt over voldoende middelen van bestaan voor haar en de minderjarige. De minderjarige heeft daarmee meer gekregen dan waarop aanspraak bestaat. Appellante moet op de voet van artikel 3, vijfde lid, van de Wtu BES beschikken over voldoende middelen van bestaan. Volgens paragraaf 1.9.3.3. van hoofdstuk 3 van de Circulaire toelating en uitzetting Bonaire, Sint Eustatius en Saba (Ctu BES) geldt in dit geval een normbedrag van US$ 1.680,00 per maand (hierna: het middelenvereiste).

4. Het Gerecht heeft overwogen dat de uitzondering, bedoeld in artikel 1a, tweede lid, van de Wtu BES, zich in dit geval niet voordoet en die wet op de minderjarige van toepassing is. Appellante is niet de moeder van de minderjarige, maar haar voogd. Het Gerecht heeft onderschreven dat tussen appellante en de minderjarige gezins- en familieleven bestaat, bedoeld in artikel 8 van het Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden (EVRM), maar dat brengt niet met zich dat geen onderscheid mag worden gemaakt tussen een ouder en een voogd van een minderjarige, aldus het Gerecht. Het Gerecht is appellante onder verwijzing naar de uitspraak van

11 maart 2016 (War BES 2016/7 en 8) voorts niet gevolgd in het standpunt, dat artikel 1a, tweede lid, van de Wtu BES buiten toepassing moet blijven omdat de minderjarige anders als vreemdeling wordt behandeld door de Staat waarvan zij onderdaan is. Verder heeft het Gerecht, overwogen dat de door appellante ingeroepen verdragsbepalingen er evenmin toe nopen dat aan de minderjarige een vvr moet worden verstrekt en het middelenvereiste in een geval als dit niet mag worden gesteld. Als appellante voor de minderjarige een verblijfsvergunning aanvraagt, kan in die procedure worden beoordeeld of de door haar ingeroepen verdragsbepalingen worden geschonden indien de minderjarige geen verblijf bij appellante wordt toegestaan, aldus het Gerecht.

5. Appellante betoogt dat het Gerecht ten onrechte heeft overwogen dat de Wtu BES op de minderjarige van toepassing is. Het Gerecht heeft niet afdoende gemotiveerd waarom de artikelen 93 en 94 van de Grondwet, artikel 9, eerste lid, van de Wet administratieve rechtspraak BES (War BES), de artikelen 3 en 10 van het Verdrag inzake de rechten van het kind (IVRK), de artikelen 7 en 12 van het Verdrag inzake burgerrechten en politieke rechten (IVBPR) en artikel 8 van het EVRM er niet aan in de weg staan dat de bepalingen van de Wtu BES op de minderjarige van overeenkomstige toepassing zijn. Het Gerecht heeft ook ten onrechte overwogen dat appellante een verblijfsvergunning voor de minderjarige moet aanvragen. De staatssecretaris kan op de voet van artikel 3, tweede lid, van de Wtu BES, bij algemene maatregel van bestuur bepalen dat de categorie waartoe de minderjarige behoort van rechtswege wordt toegelaten. Het Gerecht heeft voorts verzuimd dit geval te beoordelen in het licht van de staatkundige verhoudingen, waarin de BES-eilanden integraal onderdeel van Nederland zijn en in dit geval ongerechtvaardigd onderscheid wordt gemaakt tussen BES-Nederlanders en andere Nederlanders, aldus appellante.

6. Ter beantwoording ligt de vraag voor, of het Gerecht terecht tot het oordeel is gekomen dat de Wtu BES op de minderjarige van overeenkomstige toepassing is, zij geen aanspraak kan maken op verstrekking van een vvr en appellante voor de minderjarige een verblijfsvergunning moet aanvragen, waarbij als vereiste geldt dat zij aan het middelenvereiste moet voldoen.

6.1. Ter zitting heeft appellante desgevraagd verklaard dat de vader noch de moeder van de minderjarige in Bonaire, Sint Eustatius of Saba is geboren. Appellante is ook niet de moeder van de minderjarige, maar belast met de voogdij over haar. De uitzondering van artikel 1a, tweede lid, van de Wtu BES, doet zich derhalve niet voor. Dat gezinsleven bestaat tussen appellante en de minderjarige is niet relevant voor de toepassing van die bepaling. Uit de tekst noch uit de geschiedenis van de totstandkoming van die bepaling kan worden afgeleid dat aan de term vader of moeder als bedoeld in die bepaling een andere betekenis moet worden toegekend dan de juridische of biologische ouder. De Wtu BES geeft de staatssecretaris voorts niet de bevoegdheid om de kring van personen op wie die wet niet van toepassing is, uit te breiden. Nu de uitzondering van artikel 1a, tweede lid, van de Wtu BES, zich in dit geval niet voordoet en niet in geschil is dat de uitzondering van artikel 1a, derde lid, van die wet niet van toepassing is, is de Wtu BES op de voet van artikel 1a, eerste lid, aanhef en onder a, van overeenkomstige toepassing op de minderjarige.

6.2. De minderjarige maakt geen aanspraak op toelating van rechtswege als bedoeld in hoofdstuk 4 van de Wtu BES, gelezen in samenhang met hoofdstuk 4 van het Besluit toelating en uitzetting BES. De staatssecretaris is niet gehouden om een kind waarover door een derde de voogdij wordt uitgeoefend,

zoals de minderjarige, op de voet van artikel 3, tweede lid, aan te merken als behorend tot de categorie die van rechtswege is toegelaten. Dat voor de minderjarige een vvr met beperkte geldigheidsduur is verstrekt, maakt evenmin dat zij aanspraak kan maken op toelating van rechtswege voor langere duur dan haar eerder is toegestaan. Daarbij wordt in aanmerking genomen dat de staatssecretaris bij het verstrekken van de vvr voor de minderjarige, heeft gemotiveerd dat de vvr bij uitzondering in dit geval voor bepaalde duur aan de minderjarige is verstrekt.

6.3. Dat de Wtu BES op de minderjarige van toepassing is en zij niet behoort tot een categorie die van rechtswege is toegelaten, brengt op zichzelf niet met zich dat de door appellante ingeroepen verdragsbepalingen zijn geschonden. Uit de uitspraak van het Hof van 1 september 2017 (ECLI:NL:OGHACMB:2017:103) volgt dat het onderscheid dat in de Wtu BES wordt gemaakt tussen van de BES-eilanden afkomstige Nederlanders en andere Nederlanders gerechtvaardigd is ter bescherming van de kleine, sociaal-economisch kwetsbare samenlevingen van de BES-eilanden tegen een ongecontroleerde instroom van niet van die eilanden afkomstige Nederlanders en vreemdelingen.

6.4. Het vorenstaande brengt met zich dat appellante voor de minderjarige op de voet van artikel 6, eerste lid, van de Wtu BES, een verblijfsvergunning behoeft. Het Gerecht heeft terecht overwogen dat in de procedure over de aanvraag tot verlening van een verblijfsvergunning kan worden beoordeeld of de vereisten waaraan de minderjarige moet voldoen om in aanmerking te komen voor verlening van een verblijfsvergunning, niet mogen worden gesteld omdat anders de door appellante ingeroepen verdragsbepalingen worden geschonden. Aan die beoordeling komt het Hof in deze procedure niet toe. Als de staatssecretaris de minderjarige op enig moment wil uitzetten kan daartegen evenzeer in rechte worden opgekomen. Ook in dat verband kan worden beoordeeld of de voorgenomen uitzetting in strijd is met de door appellante ingeroepen verdragsbepalingen.

6.5. Het betoog faalt.

7. Het hoger beroep is ongegrond. De aangevallen uitspraak dient te worden bevestigd.

8. Voor een proceskostenveroordeling bestaat geen aanleiding.

Beslissing

Het Gemeenschappelijk Hof van Justitie van Aruba, Curaçao, Sint Maarten en van Bonaire, Sint Eustatius en Saba:

bevestigt de aangevallen uitspraak.

Aldus vastgesteld door mr. E.A. Saleh, voorzitter, en mr. A.W.M. Bijloos en mr. J.Th. Drop, leden, in tegenwoordigheid van mr. M.J.C. Beerse, griffier.

w.g. Saleh	w.g. Beerse
voorzitter	griffier

Uitgesproken in het openbaar op 22 november 2018

BIJLAGE

Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden

Artikel 8

1. Een ieder heeft recht op respect voor zijn privé leven, zijn familie- en gezinsleven, zijn woning en zijn correspondentie.
2. Geen inmenging van enig openbaar gezag is toegestaan in de uitoefening van dit recht, dan voor zover bij de wet is voorzien en in een democratische samenleving noodzakelijk is in het belang van de nationale veiligheid, de openbare veiligheid of het economisch welzijn van het land, het voorkomen van wanordelijkheden en strafbare feiten, de bescherming van de gezondheid of de goede zeden of voor de bescherming van de rechten en vrijheden van anderen.

Verdrag inzake de rechten van het kind

Artikel 3

1. Bij alle maatregelen betreffende kinderen, ongeacht of deze worden genomen door openbare of particuliere instellingen voor maatschappelijk welzijn of door rechterlijke instanties, bestuurlijke autoriteiten of wetgevende lichamen, vormen de belangen van het kind de eerste overweging.
2. De Staten die partij zijn, verbinden zich ertoe het kind te verzekeren van de bescherming en de zorg die nodig zijn voor zijn of haar welzijn, rekening houdend met de rechten en plichten van zijn of haar ouders, wettige voogden of anderen die wettelijk verantwoordelijk voor het kind zijn, en nemen hiertoe alle passende wettelijke en bestuurlijke maatregelen.
3. De Staten die partij zijn, waarborgen dat de instellingen, diensten en voorzieningen die verantwoordelijk zijn voor de zorg voor of de bescherming van kinderen voldoen aan de door de bevoegde autoriteiten vastgestelde normen, met name ten aanzien van de veiligheid, de gezondheid, het aantal personeelsleden en hun geschiktheid, alsmede bevoegd toezicht.

Artikel 8

1. De Staten die partij zijn, verbinden zich tot eerbiediging van het recht van het kind zijn of haar identiteit te behouden, met inbegrip van nationaliteit, naam en familiebetrekkingen zoals wettelijk erkend, zonder onrechtmatige inmenging.
2. Wanneer een kind op niet rechtmatige wijze wordt beroofd van enige of alle bestanddelen van zijn of haar identiteit, verlenen de Staten die partij zijn passende bijstand en bescherming, teneinde zijn identiteit snel te herstellen.

Artikel 10

1. In overeenstemming met de verplichting van de Staten die partij zijn krachtens artikel 9, eerste lid, worden aanvragen van een kind of van zijn ouders om een Staat die partij is, voor gezinshereniging binnen te gaan of te verlaten, door de Staten die partij zijn met welwillendheid, menselijkheid en spoed behandeld. De Staten die partij zijn, waarborgen voorts dat het indienen van een dergelijke aanvraag geen nadelige gevolgen heeft voor de aanvragers en hun familieleden.

2. Een kind van wie de ouders in verschillende Staten verblijven, heeft het recht op regelmatige basis, behalve in uitzonderlijke omstandigheden, persoonlijke betrekkingen en rechtstreekse contacten met beide ouders te onderhouden. Hiertoe, en in overeenstemming met de verplichting van de Staten die partij zijn krachtens artikel 9, eerste lid, eerbiedigen de Staten die partij zijn het recht van het kind en van zijn of haar ouders welk land ook, met inbegrip van het eigen land, te verlaten, en het eigen land binnen te gaan. Het recht welk land ook te verlaten is slechts onderworpen aan de beperkingen die bij de wet zijn voorzien en die nodig zijn ter bescherming van de nationale veiligheid, de openbare orde, de volksgezondheid of de goede zeden, of van de rechten en vrijheden van anderen, en verenigbaar zijn met de andere in dit Verdrag erkende rechten.

Verdrag inzake burgerrechten en politieke rechten

Artikel 7

Niemand mag worden onderworpen aan folteringen, of aan wrede, onmenselijke of vernederende behandeling of bestraffing. In het bijzonder mag niemand, zonder zijn in vrijheid gegeven toestemming, worden onderworpen aan medische of wetenschappelijke experimenten.

Artikel 12

1. Een ieder die wettig op het grondgebied van een Staat verblijft, heeft, binnen dit grondgebied, het recht zich vrijelijk te verplaatsen en er zijn verblijfplaats vrijelijk te kiezen.
2. Een ieder heeft het recht welk land ook, met inbegrip van het eigen land, te verlaten.
3. De bovengenoemde rechten kunnen aan geen andere beperkingen worden onderworpen dan die welke bij de wet zijn voorzien, nodig zijn ter bescherming van de nationale veiligheid, de openbare orde, de volksgezondheid of de goede zeden of van de rechten en vrijheden van anderen en verenigbaar zijn met de andere in dit Verdrag erkende rechten.
4. Aan niemand mag willekeurig het recht worden ontnomen naar zijn eigen land terug te keren.

Wet administratieve rechtspraak BES

Artikel 9

1. Beroep kan worden ingesteld ter zake dat de beschikking in strijd is met:
a. een algemeen verbindend voorschrift;
b. een algemeen rechtsbeginsel.
2. Indien het eerste lid, onderdeel b, toepassing heeft gevonden, wordt in de uitspraak aangegeven welk algemeen rechtsbeginsel geschonden is geoordeeld.

Wet toelating en uitzetting BES

Artikel 1a

1. Deze wet is, met uitzondering van hoofdstuk 2, van overeenkomstige toepassing op:
a. Nederlanders, geboren buiten Bonaire, Sint Eustatius en Saba;
b. (...).

2. In afwijking van het eerste lid, is deze wet niet van overeenkomstige toepassing op Nederlanders die op dan wel in Aruba, Curaçao, Sint Maarten of het Europese deel van Nederland zijn geboren of de Nederlandse nationaliteit hebben verkregen, indien en voor zover deze wet niet op de vader of de moeder van toepassing is.

Artikel 3

5. Eveneens hebben van rechtswege toelating tot verblijf Nederlanders, bedoeld in artikel 1a, die meerderjarig zijn en beschikken over:
a. (...), en
b. huisvesting en voldoende middelen van bestaan om in hun levensonderhoud te voorzien, overeenkomstig bij of krachtens algemene maatregel van bestuur te stellen regels.

Artikel 6

1. Vreemdelingen die in de openbare lichamen verblijven en die niet bij of krachtens artikel 3 of 5a zijn toegelaten tot verblijf, behoeven een verblijfsvergunning voor bepaalde of onbepaalde tijd.

Circulaire toelating en uitzetting Bonaire, Sint Eustatius en Saba

Hoofdstuk 3. Toelating bij vergunning verleend

1.9.3.3. Voldoende middelen van bestaan

Hoofdregel:

Middelen van bestaan zijn voldoende, als het bruto-inkomen ten minste gelijk is aan de door Onze Minister vast te stellen bedragen (zie artikel 9, eerste lid, aanhef en onder c, WTU-BES en artikel 5.33 BTU-BES). Voorkomen moet worden dat na verlening van een verblijfsvergunning aanspraak gemaakt kan worden op onderstand of een andere uitkering die gefinancierd wordt uit publieke middelen.

Beleidsregels:

1. Algemeen bij verblijfsdoelen

Als uitgangspunt geldt dat voor de beperkingen zoals opgenomen in paragraaf 1.2 middelen van bestaan aan te merken zijn als voldoende als het inkomen ten minste gelijk is aan het bruto-inkomen per maand op grond van de Wet minimumloon BES.

De inkomsten uit arbeid in loondienst mogen met andere zelfstandige en duurzame inkomsten (bijvoorbeeld inkomsten uit arbeid als zelfstandige) worden samengevoegd om te voldoen aan het toepasselijke normbedrag.

2. Verblijf in het kader van 'gezinshereniging' of als 'gepensioneerde/rentenier'

Van het uitgangspunt wordt afgeweken voor de beperking in het kader van 'gezinshereniging' en in het kader van verblijf als 'gepensioneerde of rentenier'.

Middelen van bestaan worden aangemerkt als voldoende als het bruto-inkomen minimaal USD 1.680 per maand is.

Bij aanvragen van of ten behoeve van (voor)kinderen die niet in de openbare lichamen geboren zijn, moet daarnaast, als aanvullende financiële zekerheid, het volgende normbedrag worden bijgeteld:

a. kinderen tot de leeftijd van 6 jaar USD 140 bruto per maand per kind;

b. kinderen in de leeftijd van 6 tot 12 jaar USD 200 bruto per maand per kind;

c. kinderen van 12 jaar en ouder USD 280 bruto per maand per kind.

Voorkinderen zijn kinderen die zijn geboren uit een eerder huwelijk of een eerdere relatie van een ouder, die in de openbare lichamen of daarbuiten daarna een nieuwe (huwelijkse)relatie is aangegaan.