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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No. 3077/2017*.*.*.*.*

<i>Communication submitted by:</i>	William Stanley Johnson (represented by counsel, Michiel Bijkerk)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Kingdom of the Netherlands
<i>Date of communication:</i>	20 July 2015 (initial submission) ¹
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure (now rule 92), transmitted to the State party on 15 December 2017 (not issued in document form)
<i>Date of adoption of Views:</i>	11 March 2022
<i>Subject matter:</i>	Difference in the amount of old age pension received by pensioners in the Caribbean and the European part of the Netherlands
<i>Procedural issues:</i>	Incompatibility <i>ratione materiae</i>
<i>Substantive issues:</i>	Discrimination on the ground of ethnic origin and other grounds; equality before the law
<i>Articles of the Covenant:</i>	2(1) and 26
<i>Articles of the Optional Protocol:</i>	3

* Adopted by the Committee at its 134th session (28 February–25 March 2022).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi

*** An Individual opinion by Committee Member Gentian Zyberi (dissenting) is annexed to the present Views

¹ Supplemented on 24 November 2015 and 18 February 2017.

1. The author of the communication is William Stanley Johnson, a national of the Kingdom of the Netherlands born in 1953 who resides in the Caribbean Netherlands on Saba Island. He claims that the State party has violated his rights under article 2(1) and article 26 of the Covenant. The Optional Protocol entered into force for the Kingdom of the Netherlands on 11 March 1978. The author is represented by counsel.

Factual background

2.1 The author resides on the Saba Island, in the Caribbean Netherlands, a Dutch overseas territory with special status, where he was born and has lived for his entire life. This territory, made up of three islands, enjoys a specific constitutional status as established in the Charter for the Kingdom of the Netherlands adopted in 2010. In that year, the Netherlands Antilles fell apart and three islands² out of the five, including Saba Island, became an integral part of the Netherlands and are currently known as the Caribbean Netherlands or BES Islands.

2.2 The author has been receiving an old age pension since 10 October 2001 in accordance with the General Pension Insurance Ordinance, which was the relevant law applicable at the time on Saba Island. The pension had been administered by the government of the Netherlands Antilles. All citizens of the Netherlands Antilles were entitled to receive an old age pension as of the age of 60.

2.3 As of 1 January 2011, i.e. after the dissolution of the Netherlands Antilles, the author received an old age pension under the General Pension Insurance Act BES (AOV BES) as per the decision of the Minister of Social and Employment Affairs. The author alleges that the amount of the allowance (524 USD at the time) is substantially lower than the amount of the old age pension allowance in the European part of the Netherlands (743.60 EUR / ca. 1076 USD at the time) under the General Pension Insurance Act (AOV). He notes that this amount does not even reach the minimum subsistence level on the island although the living costs are higher in the Caribbean Netherlands than in the European part of the Netherlands.

2.4 On 23 August 2011, the author filed a notice of objection with the Dutch Minister of Social and Employment Affairs, in which he requested to be paid a monthly pension equivalent to the amount paid to pensioners in the European part of the Netherlands. On 9 December 2011, the author's objection was rejected on the basis of article 1, section 2 of the Charter for the Kingdom of the Netherlands (the Charter), which provides for the possibility of setting up a specific legal framework in certain matters applicable only in the Caribbean islands.

2.5 On 17 January 2012, the author submitted an application for judicial review to the Court of First Instance of Bonaire, St. Eustatius and Saba. On 12 March 2014, the Court of First Instance rejected the author's application. In its decision the Court of First Instance made reference to the Explanatory Memorandum of the Kingdom Act amending the Charter, which sets out that in view of the factors that differentiate the islands from the European Netherlands, "it is a matter for the constant concern of the government of the Netherlands, in close cooperation with the administration of these islands, to make sure that a social level that is acceptable within the Netherlands should be reached, especially in the fields of education, public health, social security and national security. In this connection the specific local circumstances on the island should, of course, be taken into account, but in conformity with article 1 of the Dutch Constitution." As regards the purpose of such differentiation, the Court accepted that the legislator intended to prevent disruption, taking into account the competitiveness of the islands and their investment climate. The Court made reference to the broad margin of appreciation the State party has when organizing its social security regime. It further referred to the governmental agreements to keep in effect the BES islands' laws in force at the time of the transition for a period of 5 years. The Court deemed it of importance that the efforts of the legislator are directed towards the gradual introduction of the European Dutch legislation on the islands. The Court made reference to the parliamentary documents from which it appears that it has been an intentional decision not to introduce a social level equivalent to the European Dutch level, which would attract illegal migration. The Court further noted that both the AOW BES and the AOW "aim to guarantee a pension as a basic

² Bonaire, St Eustatius and Saba (BES).

provision, in which the pensioner is expected to take out an extra pension insurance or to generate extra income by arranging supplementary provision” and it concluded that the aim pursued by the AOW BES and the AOW do not differ. It also noted that whereas the AOW BES is set in accordance with the Consumer Price Index figures, the AOW is based on the minimum wage. The Court further looked at the data provided by the author regarding the amount of the minimum wage and the old age pension on the islands compared to the European part of the Netherlands and concluded that the proportion between the minimum wage in force on the islands (598 EUR) and the pension amount based on the AOV BES (430 EUR for singles or 860 EUR for couples) is in fact proportionately more favourable for pensioners than the proportion of the minimum wage (1456 EUR) and the old age pension (1064 EUR for singles or 1483 EUR for couples) in the European part of the Netherlands. In so far as the author intends to argue that the minimum wage for the BES islands is too low, the Court considered that this falls outside the scope of the case.

2.6 On 10 April 2014, the author lodged an appeal with the Common Court of Justice of Aruba, Curaçao, St. Maarten and of Bonaire, St. Eustatius and Saba (“the Common Court of Justice”). On 15 December 2014, the Common Court of Justice upheld the decision of the Court of First Instance, holding that the impugned difference of treatment has been objectively and reasonably justified. The Common Court of Justice considered that it is not the territorial origin but rather the pensioners’ residency or their contribution to public funds, out of which the old age pension is financed, which is decisive as regards the scope of the impugned laws. The Common Court of Justice did not consider that differential treatment based on these grounds should be considered to have been made indirectly on the ground of ethnicity. The Common Court of Justice further concurred with the Court of First Instance regarding its finding in relation to the aims pursued by the AOW BES. It further made reference to the information that in the European part of the Netherlands contribution to public funds amounts to approx. 25% of a person’s income, whereas on the islands, the financing of the old age pension is drawn from the public treasury. As to the author’s argument that his pension is below the minimum subsistence level, the Common Court of Justice refers to art 11 of the ICESCR, which falls outside of the scope of article 94 of the Constitution of the Kingdom of the Netherlands and that in any event, none of these laws purports to guarantee a subsistence level to pensioners.

2.7 The author submits that no other domestic remedies are available.

Complaint

3.1 The author claims that the State party has violated his rights under article 2(1) and 26 of the Covenant by granting pensioners residing in the Caribbean Netherlands, including Saba Island, an old age pension, the amount of which is substantially lower than the old age pension granted to pensioners residing in the European part of the Netherlands. He submits that article 26 of the Covenant does not allow States parties to maintain two different welfare regimes in different parts of its territory. Such a distinction constitutes discrimination on the grounds of ethnic origin and residency. He notes that Dutch citizens of Dutch Caribbean origin belong to the ethnic and cultural group of Antilleans. They are labelled as “allochtons” in the continental Netherlands and are often discriminated against by their fellow citizens. Although it is true that residents of the three islands have their own racial and linguistic characteristics, the fact that they may not be identified as a single ethnic group (but three) does not rule out the existence of discrimination, as erroneously argued by the Common Court of Justice. In support of his claim, the author refers to the concluding observations of the Committee on Economic, Social and Cultural Rights of 19 November 2010, in which the Committee stressed the obligation for the State party to ensure that “all its enactments and policies should provide for all the same level of enjoyment of economic, social and cultural rights. The principle of maximum available resources should apply to the State party and not its constituent countries individually”.³

3.2 Furthermore, the author disputes the position of the Court of First Instance endorsed by the State party that the impugned difference in treatment is justified by legitimate aims,

³ Concluding observations of the Committee on Economic, Social and Cultural Rights concerning the Kingdom of the Netherlands, adopted on 19 November 2010 (E/C.12/NL/CO/4-5), para. 5.

notably a) to keep the welfare provision at a level “suitable for the region” in order to prevent an influx of immigrants to the Island; b) to prevent “economic disruption”; c) to prevent weakening the Island’s business sector’s competitiveness; d) to avoid having to raise taxes on the Island. The author notes in this respect that the aim to avoid the influx of South-American migrants to the Island is not a legitimate aim but is more a fear on the part of the State party. Moreover, the number of migrants has sufficiently increased also in the continental Netherlands, which did not lead to the reduction of the allowance of old age pensioners just to make the welfare system less appealing. As regards the alleged disruption of the economy of the Caribbean Netherlands, the author notes that this argument rests on a false premise. In fact, the equalization of old age pension allowances in the Caribbean Netherlands would inject ca. 27 million USD/ per year into its economy at minimal costs on the side of the contributors. He claims that if the burden of additional contributions required by the equalization were shared between the contributors of the European part of the Netherlands and the Caribbean Netherlands, each contributor would only need to pay ca. 0.37 USD more than before. Consequently, taxes would not have to be raised either. The author further notes that in any event, since 2010, the economy of the Caribbean Netherlands is not independent from the European part of the Netherlands, therefore the alleged aims pursued by the interference that relate to the economic threat of the Island alone do not hold true. Such a position erroneously suggests that the European and Caribbean Netherlands are two separate constitutional entities, which interpretation contradicts the provisions of the Charter for the Kingdom of the Netherlands.

3.3 Lastly, the author submits that old age pensions are financed from premium contributions levied on the working population of the State party as well as from other sources of public funds. Since 2010, the working population of the Caribbean Netherlands pays such premium directly to the Dutch government, which is then redistributed among the old age pensioners of the islands. Furthermore, they also pay an income tax and other forms of taxes directly to the Dutch government. Consequently, they have a fair part in bearing the burden of payable contributions to the public funds and the present complaint is not to take advantage of the prosperous welfare system of the European part of the Netherlands.

State party’s observations on admissibility and the merits

4.1 On 15 June 2018, the State party submitted its observations on admissibility and the merits. As to the issue of admissibility, the State party holds that article 2 is not applicable to the present case because the Covenant does not provide for the right to an adequate pension. It does not contest, however, that the complaint is admissible under article 26 of the Covenant, but asserts that the author’s claims are without merit for the reasons explained below.

4.2 Regarding the constitutional status of the Island, the State party notes that until 10 October 2010, the Kingdom of the Netherlands consisted of three countries: the Netherlands Antilles (Curacao, St Marteen, Bonaire, St Eustaius and Saba), Aruba and the Netherlands. Since 10 October 2010, the Kingdom consists of four countries: Aruba, Curacao, St Marteen and the Netherlands. The islands of Bonaire, St Eustatius and Saba are now part of the Netherlands, which consists of the Caribbean part and the European part. Therefore, the islands of Bonaire, St Eustatius and Saba became part of the Netherlands on 10 October 2010. They have the status of public entities pursuant to article 134 of the Dutch Constitution. Their status is broadly similar to that of Dutch municipalities. The State party recalls that Article 1, paragraph 2 of the Charter for the Kingdom of the Netherlands states that rules may be laid down and other specific measures may be taken in view of special circumstances that fundamentally distinguish these public entities from the European part of the Netherlands.⁴

4.3 The State party notes that at the time of the constitutional change, a decision was made to retain the BES islands’ social security system in order to prevent them from being confronted with major legislative changes. This was laid down in administrative agreements with the authorities of the BES islands before the transition and extended to the provisions

⁴ This clause has been rescinded and is now included in article 132a, paragraph 4 of the Constitution of the Kingdom of the Netherlands.

of the General Old Age Insurance Act BES applicable on the BES islands and the General Old Age Pension Act applicable in the European part of the Netherlands.

4.4 Regarding the differences of the two system, the State party informs that the retirement age in the Caribbean Netherlands is 65 years of age and no increase is expected in the near future, whereas in the European part of the Netherlands the pension age is being increased gradually from 65 years to 67 years of age until 2021. Furthermore, both pensions are calculated on the basis of the minimum wage applicable in the respondent part of the Netherlands. In addition, while the amount of the AOV BES pension does not depend on civil status (70 % of the minimum wage), in the European part of the Netherlands pensioners receive only 50% of the net minimum wage if they are married compared to single persons who receive 70 % of the net minimum wage. In the European part of the Netherlands, before 1 January 2015, pensioners were entitled to a partner allowance if they had a younger partner with a low income or no income at all. This was abolished in 2015, however, income support of 24.93 EUR is paid on a monthly basis. Furthermore, beneficiaries receive a holiday allowance in May. In the Caribbean Netherlands there is a cost-of-living allowance supplementing the AOV BES pension, which is linked to the price level of the islands and pensioners are also entitled to a Christmas allowance. Partner allowance may also be granted if the pensioner's partner has not yet reached the retirement age provided that the couple's income does not exceed a certain amount.

4.5 Regarding the alleged violation of article 26 of the Covenant, it is submitted that although States parties are not required to enact legislation to provide for social security, if the State party enacts such a law, it must comply with article 26 of the Covenant.⁵ The State party confirms that the amounts of old age pension granted under AOV BES and AOW are indeed different. However, as explained above, these old age pensions cannot be compared because there are major differences in the socioeconomic situation and legislative framework of the respective parts of the Netherlands. As explained above, both allowances are linked to the local minimum wage, which is lower in the Caribbean Netherlands for economic reasons, which difference is understandably reflected in the amount of the allowances. Apart from the differences mentioned above, the State party notes that no tax is deducted from the AOV BES pension, while old age pensioners in the European part of the Netherlands are subject to taxation. Furthermore, contributions in case of the former are lower than in the European part of the Netherlands. Other differences that favor the recipients of the AOV BES pension include the existence of partner allowance and the extra cost-of-living allowance for beneficiaries in Saba. The State party further notes that the author has been receiving the AOV BES pension since 2001 when the minimum pension age was 60 years of age on the Island. In contrast, in the European part of the Netherlands he would have been entitled to a state pension only from the age of 65. The State party further notes that the AOV BES pension does enable its recipients to provide for themselves. For those who are unable to do so, there is a safety net in the form of various payments and allowances. Lastly, the amount of the AOV BES pension is linked to the consumer price index and apart from the inflation adjustment, pensioners on the Saba island have received a policy-based pension increase of over 18% since 2013.

4.6 In view of the foregoing, the State party deems that the impugned difference in the amount of the old age pensions does not constitute discrimination because pensioners of the BES islands and those of the European part of the Netherlands are not in comparable situation and do not require equal treatment. The differentiation is based on reasonable and objective criteria. The State party further underlines that the legislature enjoys a broad margin of appreciation regarding its socioeconomic policies. It refers to the judgment of the European Court of Human Rights in *Andrejeva v. Latvia*,⁶ in which the Court ruled that a difference in treatment may be justified by the need to protect the respective country's economic system. It repeats that the impugned difference in treatment aims to prevent economic disruption with due regard to the competitiveness of the islands and the business climate in the region. Higher pensions would attract people to the islands, which is non-desirable. The State party therefore

⁵ The State party refers to *Broeks v. the Netherlands* (CCPR/C/29/D/172/1984), 172/1984, para 12.4.

⁶ Application no. 55707/00, judgment dated 18 February 2009.

concludes that there has been no violation of the author's rights under articles 2 and 26 of the Covenant.

Author's comments on the State party's observations

5.1 On 27 September 2018, the author submitted his comments on the State party's observations.

5.2 The author repeats that the State party's arguments rest on the false premise that the BES islands, constitutionally speaking, are separate from the European part of the Netherlands. Indeed, by the integration of the BES islands into the Netherlands in 2010, the State party assumed full responsibility for the social and economic development of the islands. The author adds that the BES islands have no separate economy given that at least 85% of tax revenues collected on the islands flows directly into the budget of the Netherlands in the Hague. Furthermore, the BES islands no longer have separate legislative powers. Acts of higher hierarchy such as the AOB BES, which is at the heart of the present complaint, are adopted by the Dutch Parliament. In this respect, the author notes that even though social and economic circumstances do indeed differ between the respective parts of the State party, it is precisely the responsibility of the State party to eliminate such differences, which should not be used as an excuse for leaving behind the Caribbean Netherlands. Furthermore, the cited administrative governmental agreements should not create obstacles because these agreements were not concrete enough and have not been enacted by law. In any event, the Dutch authorities applied undue influence on the politicians of the BES Islands who were not on equal footing so the agreements should be considered null and void.

5.3 The author further submits that contrary to what the State party argues, the situation of old age pensioners in the European part of the Netherlands and on the BES islands is essentially the same. They have the same expenditures and needs (rent, alimentation, transportation etc.) and they are therefore in a comparable situation. As regards the rest of the alleged differences, the author submits that even though it is true that the pension age is two years lower in the Caribbean Netherlands, this properly reflects the difference in life expectancy. Furthermore, the State party's argument that the minimum wage is lower in the Caribbean Netherlands, which is duly reflected in the amount of old age pensions, is misleading.⁷ This argument would only be convincing if the social minimum would also be substantially lower in the Caribbean Netherlands, or to put it differently, if the minimum wage corresponded to the social minimum on the islands. However, minimum wage is in fact far below the social minimum on the islands, whereas in the European part of the Netherlands minimum wage is above social minimum⁸. Since the social minimum has not been taken into account to the same extent when setting the minimum wage in the respective parts of the State party's territory, the State party's position explained by the difference in minimum wage cannot justify the impugned differentiation in terms of the pension allowances.

5.4 The author further notes that the State party failed to provide evidence that the premium payment obligation is indeed higher in the European part of the Netherlands. Even if this argument holds true, the State party has the power to change this regulation instead of using it as an excuse for not equalizing the pensions.

5.5 Lastly, the author informs that in response to the Regioplan survey mentioned above, the State party has announced some concrete measures to be taken in order to address the anomalies detected as regards the social and economic rights of the residents of the BES islands. Accordingly, the State party has pledged to grant an allowance on top of the AOV BES pension for single persons as of 1 January 2020. Although the author welcomes the action plan, it notes that such a plan remains vague and as long as no action is implemented, he wishes to maintain his complaint before the Committee.

⁷ Minimum wage in the continental Netherlands in 2018: 1578 EUR (ca. 1862 USD) vs. on Saba Island: 984 USD.

⁸ The author submits the following figures: Social minimum in the continental Netherlands in 2018: 997 EUR (ca. 1176 USD) for single persons and 1424 EUR for couples (1680 USD) vs. on Saba Island: 1537 USD for single persons and 2065 USD for couples. Figures taken from Regioplan survey, published in June 2018.

5.6 As regards the allegedly legitimate aims cited by the State party in its observations, the author refers back to his arguments presented in his initial complaint that refute the lawfulness of such aims.

5.7 In view of the foregoing, the author is of the position that he has been subjected to differential treatment by the State party, which has not been justified on objective and reasonable grounds.

State party's additional observations

6.1 On 4 December 2018, the State party submitted additional observations on the merits of the complaint.

6.2 The State party contests that, constitutionally, there is no distinction between the Caribbean the European part of the Netherlands. It refers back to article 132a, paragraph 4 of the Constitution, which allows for specific measures to be taken precisely in view of special circumstances that fundamentally distinguish the BES islands from the European Netherlands. As an example, the State party refers to section 209 of the Public Bodies Act, which requires the Dutch government to consult public bodies in the Caribbean part of the Kingdom when drafting certain types legislation and policy frameworks that relate exclusively to public bodies. The State party further contests that there is no separate economy in the European and the Caribbean part of the Netherlands. Trade flows, movement of workers and transport links on and between these islands show that the Caribbean part is located in a different environment and the structure of its pension system must be viewed in this distinct socioeconomic context.

6.3 Lastly, the State party notes that although it is striving to improve the socioeconomic security of residents of the Caribbean Netherlands, the absorptive capacity of the BES islands' economy and their implementation capacity need to be taken into account in the process and cannot be achieved at once.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the author's claim that he has exhausted all effective domestic remedies available to him. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

7.4 Regarding the author's claim under article 2 of the Covenant, the Committee notes the State party's position that it is not applicable to the present case because the Covenant does not provide for the right to an adequate pension. The Committee recalls that article 2 can be invoked by individuals only in conjunction with other articles of the Covenant and cannot, in and of itself, give rise to a claim under the Optional Protocol.⁹ Accordingly, the Committee considers that it is precluded from examining this part of the communication for lack of sufficient substantiation pursuant to article 2 of the Optional Protocol.

7.5 The Committee considers that the author's allegations under article 26 of the Covenant, have been sufficiently substantiated for the purposes of admissibility and proceeds with their consideration on the merits.

⁹ See, for example, *X v. Norway* (CCPR/C/115/D/2474/2014), para. 6.3.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, as required under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's claim under article 26 of the Covenant that it is wrongful that the old age pension granted to him in the amount of 524 USD as a resident of the Saba island under the AOV BES is not equivalent to the pension granted to residents of the European Netherlands under the AOV. He argues that he is in a comparable situation to pensioners residing in the European part of the Netherlands and that he has been treated unequally on the basis of his place of residence and ethnicity without the State party providing any objective and reasonable justification for such a differential treatment.

8.3 On the other hand, the Committee notes the State party's position that one cannot compare the pensions granted under the cited legislation applicable in the Caribbean and the European part of the Netherlands owing to differences in the regional-economic situation of these territories. The State party further refers to a number of differences between the pensions granted under the AOV and AOV BES, such as the basis for their calculation, the extra allowances they may be supplemented with, whether they are subject to taxation, the source of their funding and the contributions thereto.

8.4 The Committee recalls that the right to social security is not protected by the Covenant, and considers that it is thus incompetent *ratione materiae* to consider any alleged violations of that right pursuant to articles 2 and 3 of the Optional Protocol. However, when domestic laws provide for a social security system including pension, it could indeed entail a breach of the Covenant if the relevant legislation or its application is based on discriminatory grounds in violation of article 26 of the Covenant.¹⁰

8.5 In its assessment, the Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26 of the Covenant. A differentiation, which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds, does not amount to prohibited discrimination within the meaning of article 26.¹¹ Furthermore, any determination about discrimination requires a comparison with persons who are "similarly situated". In the Committee's view, determining whether the situations of the old age pensioners in the two categories are *de facto* the same or different requires assessing the facts, which is a matter for the domestic courts.¹² In the Committee's opinion, the information brought before it do not reveal that the author is in a situation that is *de facto* similar to that of the old age pensioners under the personal scope of the AOV applicable in the European Netherlands, and which would justify his argument that he is entitled to an equal old age pension allowance.

8.6 The Committee observes in this connection that in the constituent parts of the Kingdom of the Netherlands there is not always a uniform approach to legislation in particular areas as set out by article 132a, paragraph 4 of the Constitution. Whether or not the author can claim a right derived from legislation may accordingly depend on the geographical scope of the impugned law and the author's location at the time. For the Committee, in so far as there exists a difference in treatment of old age pensioners under the General Old Age Pension Act and the General Old Age Pension Act BES, that difference is not to be explained in terms of personal characteristics, such as ethnicity, but on the place of residency where the individual has been insured. This permits legislation to duly consider regional differences and characteristics of an objective and reasonable nature. In addition, it is hard to draw any genuine comparison between the position of pensioners living in the Caribbean and the European part of the Netherlands also in view of the range of economic and social factors which apply in these areas. Thus, the value of the pension may be affected by any one or a combination of differences in, for example, inflation and exchange rates, comparative costs of living, statutory retirement age, basis for and other constituent

¹⁰ See, *Broeks v. the Netherlands* (CCPR/C/29/D/172/1984), para. 12.4. See also, Human Rights Committee, general comment No. 18 (1989).

¹¹ See, e.g. *Idřiška (Olga) Jünglingová v. the Czech Republic* (CCPR/C/103/D/1563/2007), para. 7.2.

¹² See, e.g. *Daniel Abad Castell-Ruiz et al. v. Spain* (CCPR/C/86/D/1164/2003), para. 7.2.

parts of the old age pension allowance, economic growth, social security arrangements and taxation systems.

8.7 The Committee further underlines the complexity of the issue at stake and takes note of the detailed analysis of the domestic courts as to the lawfulness of the impugned laws. The Committee reiterates that it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.¹³ This holds particularly true when it comes to general measures of economic or social strategy and complex macroeconomic issues.

8.8 The Committee therefore considers that the current constitutional status of the author's place of residence alone, as established by the Charter for the Kingdom of the Netherlands in 2010, is not sufficient to place the author in a relevantly similar position to all other pensioners living in the European Netherlands. With due regard to the above-mentioned circumstances, any apparent difference in treatment had, in any event, been objectively and reasonably justified.

9. In the light of the above, the Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not reveal a violation of article 26 of the Covenant.

¹³ See e.g. *Lin v. Australia* (CCPR/C/107/D/1957/2010), para. 9.3.

Annex

Individual opinion by Committee member Gentian Zyberi (dissenting)

Introduction

1. I am not agreed with the Committee's finding of a non-violation of Article 26 of the Covenant (para. 9). In my view, the State party has not adequately addressed the inequality in the amount of old age pension received by pensioners in the Caribbean and the European part of the Netherlands, which negatively affects the author. While some of these differences can be explained objectively, the general situation and that of the author demonstrate that the State party's obligation to ensure substantive equality under Article 26 has not been upheld in the case at hand. After recalling briefly some facts and explaining the position of the Committee with regard to Article 26, I provide my arguments concerning the violation of Article 26.

2. The population of the Caribbean Netherlands, composed of Bonaire, Saint Eustatius, and Saba (BES islands), is about 27 thousand persons.¹ The State party notes that at the time of the constitutional change, a decision was made to retain the BES islands' social security system in order to prevent them from being confronted with major legislative changes (para. 4.3).

Formal and substantive equality under Article 26

3. The principles of equality and non-discrimination are an essential part of the Covenant, embedded in several of its provisions. Article 26 provides an autonomous right, prohibiting discrimination in law or in fact in any field regulated and protected by public authorities.² The practice of the Committee with regard to Article 26 is quite extensive.³ As the Committee has pointed out, besides prohibiting any discrimination under the law and guaranteeing to all persons equal and effective protection against discrimination on any ground,⁴ the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions that cause or help to perpetuate discrimination prohibited by the Covenant.⁵

4. While I agree with the State party that the legislature enjoys a broad margin of appreciation regarding its socioeconomic policies and social security (para. 4.6),⁶ the aim of those policies and measures have to reflect closely the principles of equality and non-discrimination. While Article 132a of the Constitution of the Kingdom of the Netherlands allows for establishing rules and taking other specific measures in view of special circumstances that fundamentally distinguish the public bodies that constitute the Caribbean part of the Netherlands from the European part of the Netherlands, this article has to be read in light of Article 1 that emphasizes equality and non-discrimination and Article 20 that concerns social security and the distribution of wealth within the country.

¹ As per 1 January 2021, there were 1,918 residents in Saba, 3,142 residents in Saint Eustatius, and 21,745 residents in Bonaire, for a total of 26,805 individuals. Statistics and data retrieved from the national statistical office, Statistics Netherlands (CBS), available at www.cbs.nl/en-gb.

² See General Comment 18, Non-discrimination (thirty-seventh session, 1989), para. 12.

³ See, among others, William A. Schabas, Nowak's CCPR Commentary, 3rd revised edition (N.P.Engel, Publisher, 2019), pp. 738-794.

⁴ General Comment 18, para. 1.

⁵ General Comment 18, para. 10.

⁶ European Court of Human Rights, *Case of Andrejeva v. Latvia* (Application no. 55707/00), Grand Chamber, 18 February 2009, paras. 82-91, at paras. 83 and 89. There the court found a violation of Article 14.

Violation of Article 26 of the Covenant

5. While assessing complex macroeconomic issues is a rather difficult exercise, the Committee's analysis is extremely scant and does not stand close scrutiny. The legal test laid down in the Committee's practice is quite stringent, namely that "not every differentiation of treatment will constitute discrimination, if the *criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant*".⁷ The differentiation applied is not reasonable on at least two grounds. *First*, it follows State party's considerations of not disrupting the *competitive position and business environment* in the BES islands, when as a pensioner the author is not expected to participate in the labor market. *Second*, the use of the minimum wage as baseline for setting the level of pension in both parts of the Netherlands, notwithstanding the stark difference between them of respectively 598 Euros (Bonaire) v 1456 Euros (European Netherlands) – about 2,5 times higher in the latter case (about 245%) – even with the correction applied by the State party (para. 2.5), has resulted in much lower pensions for BES islands residents, including the author, while they are integrated within the Netherlands, often facing higher living expenses. Inequality has been perpetuated under the guise of fairness.

6. In addressing the situation in the State party, our sister Committee on Economic, Social and Cultural Rights has noted, "all its enactments and policies should provide for all the same level of enjoyment of economic, social and cultural rights. The principle of maximum available resources should apply to the State party and not its constituent countries individually".⁸ In a September 2019 report, the National Ombudsman has addressed the difficult situation of the elderly (pensioners), expressing serious concern about the pace and the manner in which the measures taken by the State authorities were being implemented.⁹ The National Ombudsman recommended that the reports and insights of the Netherlands Court of Audits, the Netherlands Institute for Human Rights, the advisory department of the Netherlands Council of State and the National Ombudsman should all be used to address the situation.¹⁰ The State party should heed this advice without any further delay.

7. While the purported aim of measures forming part of the constitutional transition of 2010 was to achieve in the Caribbean Netherlands a level of social security that is acceptable within the European Netherlands, this aim has not been achieved by the State party after more than a decade. While the State party has taken some steps over the years to remedy existing inequalities when it comes to social security, its measures have fallen short of securing an acceptable level of facilities (*aanvaardbaar voorzieningenniveau*).

8. Based on the abovementioned considerations, the State party has violated Article 26 of the Covenant, on grounds of the author's residency.

⁷ General Comment 18, para. 13 (emphasis added).

⁸ Concluding observations concerning the Kingdom of the Netherlands, adopted on 19 November 2010 (E/C.12/NDL/CO/4-5), para. 5. See also CESCR, General Comment No. 6 on the economic, social and cultural rights of older persons; CESCR, General Comment No. 19 on the right to social security.

⁹ National Ombudsman, "Focus on the elderly in the Caribbean Netherlands: A study of poverty-related problems of those entitled to AOV who live on or below the poverty threshold in the Caribbean Netherlands", September 2019, p. 26; available at www.nationaleombudsman.nl.

¹⁰ *Ibid.*, p. 27.