Communications under:

Optional Protocol to the International Covenant on Civil and Political Rights

Date: 9 August 2018

I. Information on the complainant:

Name: BIJKERK First name(s): Michiel
Nationality: Dutch national Date and place of birth: 4 August 1953 in ARUBA
Address for correspondence on this complaint: Seru Grandi #80
Bonaire, Caribbean Netherlands

Submitting the communication:

on behalf of another person: YES (see below)

Details of that other person:

Name: VELASCO PARRA First name(s): Vladimir

Nationality: National of Colombia Date and place of birth: 10 August 1964 in Bucaramanga, Colombia

Address or current whereabouts: Calle 93 # 29-57 Torre 2 apto 102, Torres de Alejandria, Bucaramanga, Santander, Colombia

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

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

II. State concerned/Articles violated

Name of the State against which the complaint is directed:

Kingdom of the Netherlands (hereinafter also shortly referred to as '*the Kingdom*', formally the opposite party of the author of this communication, although it should be noted that the government of the Netherlands – 'Holland' – is the entity which actually acts as the opposite party)

Articles of the Covenant or Convention alleged to have been violated:
Art. 7 (degrading treatment), art. 8 section 2 (prohibition of servitude), art. 9, section 1 (right to liberty), art. 2, section 3, sub letter a jo. art. 14 (due process and right to good administration) and non-discrimination art. 26 of the International Covenant on Civil and Political Rights (ICCPR), these articles considered both severally and/or in conjunction.

III A. Exhaustion of domestic remedies

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

Mr. Vladimir VELASCO PARRA, now residing in Bucaramanga, Santander, Colombia, was denied a residence permit for an indefinite period of time after 5 years' residency on Bonaire, Caribbean Netherlands by decree of date 17 December 2015.

First step:
On 12 January 2016 Mr. VELASCO filed a formal written objection with the Dutch Secretary of State for Security & Justice, requesting to revoke aforesaid decree.

The objection was declared unfounded by decree of date 10 May 2016 (ex 2 with translation into English)

Second step:
On 1 June 2016 Mr. VELASCO filed a 'pro forma' administrative lawsuit at the Court in First Instance of Bonaire against the decree of 10 May 2016, petitioning the Court to either directly grant Mr. VELASCO the residence permit he had requested, or to order the Secretary of State for Security & Justice in Holland to issue a new decree in conformity with instructtions by the Court which would hopefully result in granting the requested permit to him. The 'pro forma' petition was completed by filing a supplementary petition on 24 June 2016.

The Court rejected the petition in its verdict of date 7 April 2017 (ex 3 with English translation).

Third step:
On 2 May 2017 Mr. VELASCO lodged an appeal to the 'Common Court of Justice of Aruba, Curaçao, St. Maarten and of Bonaire, St. Eustatius and Saba' (abbr. the 'Common Court of Justice' or 'CCJ'). In its judgment of date 5 December 2017 the CCJ upheld the decision of the Bonaire Court in First Instance of date 7 April 2017, so that the decision to deny Mr. VELASCO a residence permit for an indefinite period of time had become final. Attached a copy of the CCJ judgment (ex 4 with English translation).

The Court Case in First Instance and in Appeal are administrative cases. In administrative cases there is no recourse to the Supreme Court in The Hague, nor to any other (Administrative) Court in the Netherlands for an appeal in cassation, nor to any other Court on any of the Dutch Caribbean islands within the Kingdom of the Netherlands.

In other words, **ALL DOMESTIC REMEDIES HAVE BEEN EXHAUSTED**.

III B. Application to other international procedures

Mr. VELASCO has NOT submitted the same matter for examination under another procedure of international investigation or settlement.

IV. Facts of the complaint

Introduction:

1. In this case, as in two prior complaints already before your Committee, it is necessary to first outline the history of the Dutch Caribbean archipelago, formerly known as the '*Netherlands Antilles*' or '*N.A.*'. This is necessary for a correct understanding of the relationship between the various territories which make up the Kingdom of the Netherlands, especially as this relationship is confusing and is continually misapplied both within the Kingdom and internationally.

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

   Instead of granting independence to its Caribbean colonies, the Netherlands transformed itself in 1954 into the 'Kingdom of the Netherlands', in which Holland's at the time remaining two colonies (Surinam and the Netherlands Antilles) were included. Although both these ex-colonies had been granted a generous measure of self-governance, the expanded 'Kingdom of the Netherlands' remained the *sole international sovereign state*.

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

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

   After Surinam's exit, the Kingdom of the Netherlands consisted of the following 2 territories: 1) the Netherlands (also known as 'Holland') and 2) the Netherlands Antilles. Now, although the Kingdom Charter refers to the Netherlands Antilles as a 'country' (the actual word used in Dutch is 'land'), it should be emphasized that it never was a 'country' in the normal sense of an independent sovereign state. It has always formed an integral part of the Netherlands (before 1954) and thereafter an integral part of the Kingdom of the Netherlands.

   It was therefore above referred to as a 'semi-autonomous *entity*'. We hold that the relationship between the Kingdom and the Netherlands Antilles has always been a FEDERAL one. This is a disputed point, but no matter how this is argued, in 1954 no

new international sovereign states (no real 'countries') were created, so that the Kingdom can NEVER have been a confederation of closely cooperating sovereign states. It must have been something else. As said, we hold that it was a FEDERATION.

Our opinion is supported by many cogent arguments. And even from the birth of the Netherlands Antilles in 1954 it was known to the Antillean representatives who expressed their opinion at the U.N., that the basic nature of the Neth. Antillean constitutional system was federal within the Kingdom. We quote Mr. Gorsira in his speech (1955) to the Committee overseeing the Reporting obligation on Non-Self-governing Territories: *"[…] si hacemos un estudio comparativo de nuestro estado constitucional actual con el existente en otros países, tendremos que concluir en que, nuestro sistema se asimila en muchos asperdsctos al sistema federal".* (ex 5).

English translation of quotation: *"[…] if we make a comparative study of our present constitutional status with those of other countries, we would have to conclude that our system in many aspects resembles a federal system"*.

Elsewhere in his speech Mr. Gorsira waters down his assessment of the federal nature of the Neth. Antilles' constitutional system, implying that it may be seen as a con-federal system. But one can't have it both ways. It is either a confederation of 3 independent sovereign countries, or it is one sovereign state consisting of various federal states. If the choice of the word 'country' in the Kingdom Charter is understood to mean that the Neth. Antilles had become an independent country (an internationally recognized sovereign state), then three key questions arise:

1) Why did there never exist an Netherlands Antillean nationality? Natives of the Netherlands Antilles have always had the Dutch nationality. A Neth. Antillean nationality and a Neth. Antillean passport have never existed. Why? The answer is found in art. 3, section 1, sub letter c) of the Kingdom Charter, which reads: […] '*Kingdom affairs shall include: the Dutch nationality*', meaning that the Neth. Antilles does ***not*** have its own nationality. All Antilleans have the Dutch nationality.

2) Why did the Netherlands Antilles never conduct their own foreign affairs and why did the Netherlands Antilles never have a seat in the U.N. General Assembly? The answer is found in art. 3, section 1, sub letter b) Kingdom Charter, which reads: […] '*Kingdom affairs shall include: foreign relations',* meaning that the Kingdom government handled foreign affairs, not the Neth. Antilles.

3) Why was the Netherlands Antilles never in charge of its own defense? Why were the Dutch armed forces always responsible for the defense of the Neth. Antilles? The answer is found in art. 3, section 1, sub letter a) Kingdom Charter, which reads: […] '*Kingdom affairs shall include: maintenance of the independence and the defense of the Kingdom'*, meaning that the Kingdom government was responsible for defense, not the Neth. Antilles.

Clearly, the Kingdom of the Netherlands was and is the only internationally recognized independent and sovereign state, its constituent parts being semi-autonomous entities within that sovereign state. We hold that the nature of these semi-autonomous entities was and is federal, because sovereign states have a nationality, conduct foreign affairs and are responsible for their own defense. Without these three, a territory can be a federal state, or a province, or a municipality of a sovereign state, but it cannot be a sovereign state itself.

It cannot be a 'country'.

This is not to say that the Neth. Antilles was not content with its status in 1954. On the contrary. On the whole, it was content. And in hindsight the population was very wise to accept it. The only point we are making here is that the Neth. Antilles never was a 'country' in the normal sense of this word, i.e. a sovereign independent state. It never was that. This means that the Kingdom of the Netherlands could never have been a confederation (= a close alliance between independent sovereign states).

Seeing that the Neth. Antilles enjoyed a generous measure of internal self-governance with a strict demarcation of tasks and responsibilities between it and the federal super-structure (known as the 'Kingdom government') and seeing that the Kingdom government only had a ***limitative*** number of tasks and responsibilities conferred to it, whilst all other tasks and responsibilities rested with the Neth. Antilles, we clearly see a federal system here, as Mr. Gorsira correctly states.

This is also the way the other representative of the Neth. Antilles, Mr. Jonckheer, saw it when informing the Trusteeship Committee (1955): *"Tercero: Estos intereses de incumbencia común han sido estipulados en la Carta Constitucional del Reino y comprenden solo 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 el estado de índole federal"* (ex 6).

English translation of quotation: *"Thirdly: Matters which are of common concern have been stipulated in the Kingdom Charter, comprising only those which, because they are directly related to the international status of the whole Kingdom, have to be handled by the central authorities in all states of a federal nature".*

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

3. To sum up our view that the Kingdom of the Netherlands is and since 1954 always has been a Federation, consider the following facts:
   A. the nationality of all citizens of the Kingdom of the Netherlands, i.e. the citizens of the Netherlands (or 'Holland') itself, Surinam (until 1975) and the Netherlands Antilles, have since 1954 always been one and the same undivided Dutch nationality;
   B. the Neth. Antilles and Surinam (until 1975) as semi-autonomous entities within the Kingdom of the Netherlands have never conducted their own foreign affairs; the Kingdom government in the Hague has always conducted all foreign affairs for the whole Kingdom (i.e. for the Netherlands itself, as well as for Surinam – until 1975 – and for the Neth. Antilles and now for Curaçao, Aruba & St. Maarten up to this date);
   C. the Neth. Antilles and Surinam (until 1975) have never had their own armed forces, nor were they responsible for the Defense of their respective territories; the Kingdom government in the Hague has always been responsible for the Defense of the whole Kingdom (including the Netherlands itself, as well as Surinam – until 1975 – and the Neth. Antilles and now Curaçao, Aruba & St. Maarten).

   A lot more may be said with respect to this issue, but we suffice here with just these three undisputable facts, which constitute at the same time the three basic prerequisites for any territory to be considered an independent sovereign state or 'country'. The Neth. Antilles and Surinam (until 1975) were never independent and sovereign states or countries. They always formed an integral part of the Kingdom of the Netherlands, which always functioned as the Federal Superstructure.

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

The gradual dismantlement of the Neth. Antilles

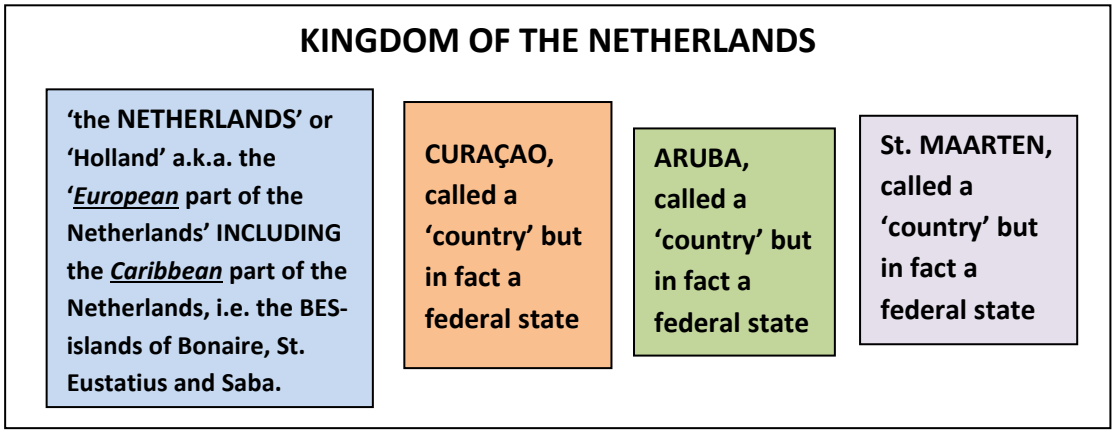
5. Although this discussion about the Nature of the Kingdom has relevance for the complaint at issue (as will be seen later), we must first return to the history of the Netherlands Antilles. In 1954 this semi-autonomous entity consisted of the following 6 Caribbean islands: Curaçao, Aruba, Bonaire, St.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

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

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

To distinguish between Holland and the BES-islands, Holland is often referred to as the 'European part of the Netherlands' and the BES-islands as the 'Caribbean part of the Netherlands'. This choice of words is aimed to make it clear that the BES-islands have legally become an integral part of Holland comparable to the Dutch islands of Texel *et al*. situated in the Wadden Sea just north of Holland.

Graphically, the situation as of 10 October 2010 ('10-10-10') is as follows:



The Kingdom of the Netherlands
consisting of 4 territorial entities Holland, Curaçao, Aruba and St. Maarten

6. This introduction now makes it possible for the lay person to understand art. 1 of the Kingdom Charter. See below a translation into English of the text as of 10 October 2010 up to and including October 2017 (section 2 was rescinded in 2017):

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

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

7. Recently (November 2017) the process of integration of the BES-islands into the European part of the Netherlands (i.e. Holland) has been consolidated by removing art. 1 section 2 from the Kingdom Charter and including a new article 132a in the Constitution ('*Grondwet*') of the Netherlands (Holland). This Grondwet ('basic law') will hereinafter be referred to as the 'Constitution of the European and Caribbean Netherlands' or '**CECN**', for as of 2010 it is also the 'basic law' for the BES-islands.

   Below a translation into English of the text of art. 132a of the Constitution of the European and Caribbean Netherlands or CECN:

   Article 132a Constitution of the European and Caribbean Netherlands
   1. By law other territorial public entities than provinces and municipalities may be instituted and abolished in the Caribbean part of the Netherlands.
   2. Articles 124, 125 and 127 up to and including 132 shall apply accordingly to these [other] public entities.
   3. In these public entities elections for an electoral college shall be held to elect the First Chamber. Article 129 applies accordingly.
   4. For these islands regulations may be stipulated and other specific measures may be taken with a view to the special circumstances which render these islands fundamentally distinct from the European part of the Netherlands.

   With this article now enshrined in the CECN, there cannot be a shadow of a doubt that the BES-islands form an integral part of Holland. This was already so as of 10 October 2010 as explained above, but now that the article in the Kingdom Charter referring to the BES-islands has been extracted there-from and has been enshrined in the CECN, something that was already a fact has now been unmistakably confirmed. The fact that each BES-island is commonly referred to as a 'special' municipality of *Holland*, is correct.

   Although we claim that the islands of Aruba, Curaçao and St. Maarten form an integral part of the Kingdom of the Netherlands (*note*: *not* of the Netherlands or 'Holland') and that the relationship between the Kingdom and these islands is *not* associative in the sense of con-federal, but is also *integral* in the sense of *federal*, there are still many who disagree with this view. And this dispute has not been settled yet. But for the BES-islands there cannot be any doubt any longer that they form an integral part of *Holland*.

Relevance to the present complaint of the above historical outline

8. We argue that the right to good administration as laid down in art. 41 of the EU Charter of Fundamental Rights is applicable in the BES-islands, seeing that these islands now form an integral part of the Netherlands (i.e. of 'Holland'), as has been explained above. As the Kingdom (only for Holland, not for Curaçao, Aruba and St. Maarten) is an EU-member state and as the BES-islands form an integral part of Holland, this fundamental right should be applied in the BES-islands as well.

   Although the BES-islands have not yet been formally recognized as an integral part of the European Union, this does not invalidate the argument that the aforementioned EU Charter must be deemed to be applicable in the BES-islands. Because, if it were not, this

would mean that Holland applies a double standard towards the citizens of these islands, i.e. a high European standard for citizens residing in Holland and a lower standard for citizens residing in the BES-islands. This would be discriminatory and cannot be. So the conclusion must be that art. 41 of the EU Charter of Fundamental Rights is applicable in the BES-islands*, if not formally, at least analogously*.

In this case various general principles of good administration play an important role. All these principles are implied in the fundamental right to good administration enshrined in art. 41 of aforesaid EU Charter.

These general principles of good administration are defined in the Dutch General Act on Administrative Justice. In the BES-islands a different law applies, known as the Act on Administrative Justice for the BES-islands (Dutch abbrv: '**WarBES**'). In the latter Act these principles have not been defined separately, but it is generally accepted that these principles are implicit in the reference to 'general principles of justice' as referred to in art. 9 WarBES, which reads:

1) Beroep kan worden ingesteld terzake 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.

Translation into English:
1) An administrative decree is open to judicial review if it violates:
a. a generally binding regulation; [note: this basically means: 'any law or regulation']
b. a general principle of justice.
2) If section 1, subsection b, has been applied, the [Court's] decision shall indicate what general principle of justice was deemed to have been violated.

So the fundamental right to good administration is enshrined in the domestic law. And seeing that the BES-islands are an integral part of Holland, the general principles of good administration which are observed in Holland should be observed in the BES-islands also

General outline of the present case

9. We argue that the non-observance of general principles of good administration constitutes a violation of art. 7 ICCPR, i.e. such non-observance by government vis-à-vis citizens and the refusal of the Courts to correct the government in this, amounts to inhuman or degrading treatment. If not in general, at least in the present case.

   The right to good administration is also implicit in art. 2, section 3, sub letter a) jo. art. 14 ICCPR, for if it were not implicit in the right to an effective remedy (art. 2, section 3, sub letter a) ICCPR) and the right to due process in a suit of law (art. 14 ICCPR), then how could a citizen get an effective remedy against a government, if that government does not observe general principles of good administration whereas the citizens do not have the right to invoke such principles in a suit of law against that government?

So we argue that the Kingdom of the Netherlands (in this case particularly the government of *Holland* or the Dutch Secretary of State for Justice and Security) has violated art. 2, section 3, sub letter a) jo. art. 14 ICCPR in the sense that no effective remedy was granted to Mr. VELASCO, because the Kingdom did not observe general principles of good administration in deciding on Mr. VELASCO's petition. And the Court in First Instance of Bonaire (abbrv. '**CFIB**') and thereafter the Appeals Court (the Common Court of Justice, abbrv. '**CCJ**') failed to check the non-observance of these principles against aforementioned ICCPR-articles, despite their legal right (in the sense of having been enshrined in articles 93 and 94 CECN) and judicial obligation to do so.

10. We further argue that the Kingdom of the Netherlands (in this case the government of 'Holland') has violated (or rather is continually violating) art. 8, section 2 ICCPR by having enacted and upholding a specific rule (the so-called 'residence-gap rule', see below) which, when applied in practice, has the effect of forcing immigrants into a relationship of servitude vis-à-vis their employers. In *theory* this argument might be refuted, but in *practice* it is incontestably so, as we hope to make clear.

11. So we argue that this 'residence-gap rule' itself constitutes a violation of art. 8, section 2 ICCPR and hence also a violation of the right to liberty (art. 9 ICCPR).

12. Another consequence of the practical implementation of this rule is that the immigrant, as long as he remains in this relationship of servitude vis-à-vis his/her employer, does not have the right to make a living by doing work of his/her own choosing (art. 6 Int. Covenant on Economic, Social and Cultural Rights, abbrv. '**ICESC**'), which is a fundamental freedom implicit in the right to liberty (art. 9 ICCPR). So in this respect also the residence-gap rule itself constitutes a violation of art. 9 ICCPR.

13. Finally (and obviously) the 'residence-gap rule' itself (as well as its consequent application in practice) constitutes a violation of art. 26 ICCPR. For the rule applies to immigrants only. Although governments do have the right to enact special laws to regulate the influx and working conditions for immigrants, such laws and regulations may not be negatively discriminatory against them and may not violate nor restrict their fundamental freedoms and human rights, especially not in developed countries (art. 2 section 3 ICESC), which the BES-islands after their integration into Holland as of 10/10/2010 must be considered to be. So, we argue that it is discriminatory against immigrants (as it is discriminatory against Mr. VELASCO) to - by law - deny them the right to make a living by doing work of their own choosing (art. 6 ICESC).

The 'residence-gap' rule

14. Before continuing to argue the present case, it is necessary to first focus attention on the so-called 'residence-gap rule'. The basis of it is laid down in art. 5.45 of the Regulation on Admission and Expulsion for the BES-islands (abbrv. In Dutch: '**BTU BES**').

    The text of art. 5.45, section 1 BTU BES reads:
    "De verblijfsvergunning voor onbepaalde tijd wordt verleend indien de vreemdeling direct voorafgaand aan de aanvraag of op het moment van de beslissing op de aanvraag gedurende een ononderbroken periode van tenminste vijf jaren houder is van een

verblijfsvergunning voor bepaalde tijd voor een niet-tijdelijk doel, indien de vreemdeling: (volgen 6 andere vereisten)*".*

Translation into English:

"A residence-permit for an indefinite period of time shall be granted, if directly prior to the petition or at the moment the decision on the petition is made, the alien has had a residence permit for a definite period of time for a non-temporary purpose during an *uninterrupted* period of at least five years, provided the alien:
(follow 6 other requirements)".

Note: For ease of explaining this so-called 'residence-gap rule', we shall hereinafter refer to a 'residence-permit for an indefinite period of time' as 'permanent residency'.

15. A 'residence-gap' is an interruption of legal residency during the period prior to the petition for permanent residency. This period is at least 5 years (cf. art. 5.45 BTU BES).

Example: A new immigrant starts working for an employer in the BES-islands. Initially temporary residence permits are issued to immigrants on a yearly basis. After 4 years of employment the employer fails to hand in documents on time for the fifth yearly residence permit. The result of this omission is that the fifth permit will be issued *after* the expiry of the fourth. During the period between the expiry date of the fourth and the inception of the fifth permit, there is no legal residency. This period of 'illegal' residency (i.e. residency not covered by a residence permit) is called a 'residence-gap'. The result of such a residence-gap is, that the period of 5 years legal residency as a pre-requisite for petitioning permanent residency, starts to run all over again as of the inception date of the permit following the 'residence-gap'. This means that the immigrant has to wait another 5 years before he can again petition for permanent residency, unless, of course, during this second waiting period a new residence-gap occurs, after which he has to wait another 5 years and so on, potentially for ever.

Residence-gaps occur often. This means that *immigrants have no legal certainty* that they will ever be able to obtain permanent residency. In other words, the residence-gap rule creates legal uncertainty for all immigrants. This is quite the opposite of what proper legislation is supposed to do! It is thus effectively non-legislation. Instead of providing legal certainty, this rule creates legal uncertainty. The residence-gap rule itself, therefore, constitutes a violation of the essence of the rule of law!

There are many reasons why a residence-gap may occur. Sometimes the employer is to blame, sometimes the immigrant is to blame. And sometimes the government is to blame. However, barring few exceptions, the immigrant nearly always suffers the negative consequences of the residence-gap in all these three scenarios, including if he himself is not to blame at all. This means that the immigrant is often made to suffer negative consequences for the errors or omissions of others (i.e. the employer or the government). This is a blatant violation of the general principle of justice known as '*nulla poena, sine culpa*'.

Furthermore, for the immigrant the negative consequences of a residence-gap are absurdly *disproportional* to the infraction. In the most extreme scenario a residence-gap

of just one day results in a new waiting period of 5 years! Usually residence-gaps span a period of a couple of weeks or months. But the negative consequence for the immigrant is in all cases the same, i.e. another *legally uncertain* waiting period of 5 years.

16. In the case of Mr. VELASCO the alleged residence-gap (the existence of which remains disputed) occurred between his 4th and 5th temporary residence-permits. This means that due to the residence-gap rule, he is not entitled to apply for permanent residency for another 5 years. In total his *legally uncertain* waiting period has thus been stretched to 9 years, unless during the second 5 years' period another residence-gap should occur.

    The alleged duration of the residence-gap in his case was 2 months and 2 days. The result is a legally uncertain extra waiting period of 5 years. This is clearly a grossly *disproportional penalty* or consequence for a minor infraction, which in his case was not even solely due to Mr. VELASCO's own doing! For explanation of this, see point 17 ff.

17. Irrespective of whose version of events is correct (Mr. VELASCO's or the government's), the parties do agree that Mr. VELASCO asked for an appointment to apply for an annual residence-permit on 29 April 2014. Expiry date of his 4th permit was 20 May 2014. So an appointment was requested 3 weeks prior to the expiry of his 4th annual permit.

    In 2014 Mr. Velasco petitioned for a different kind of permit, no longer to work for an employer, but to work as a director of his own company, named Rehobot Architectural Consulting B.V. The business license for this company was issued by the Bonaire government on 22 July 2014. His 5th residence-permit was issued as of this same date.

    The Secretary of State argues that his residence-permit could not have been issued earlier, as his company had no business license until 22 July 2014. The petition for the business license was handed in on 15 April 2014. So it took the Bonaire government more than 3 months to issue this license. Even in this scenario, where Mr. VELASCO had no legal means to make the Bonaire government issue this license before 20 May 2014 (expiry date of his 4th permit) and thus to avoid the occurrence of a residence-gap, there was no leniency for him. His 5th permit was issued as of 22 July 2014, thereby establishing the residence-gap between 20 May 2014 and 22 July 2014. At least *partially* Mr. Velasco was not to 'blame' for this gap. He had petitioned for the license approx. 5 weeks before the expiry of his 4th residence-permit. If the Bonaire government would have issued the license within a reasonable period of time (let's say 4 weeks), there would have been no problem.

    The applicable law prescribes that the Bonaire government must issue the license within 8 weeks. However, it took the government 13 weeks.

    So in this case we have an example of a situation in which both the immigrant and the (Bonaire) government were partially to blame, but the full negative consequence was squarely placed on the immigrant, i.e. Mr. VELASCO. So at least partially, Mr. VELASCO had to bear a penalty for the government's partial failing. This is unreasonable, thus a *violation of the general principle of good administration of 'fairness'*.

This is especially unfair, because the residence-gap rule serves no reasonable purpose. During this case we have repeatedly asked the Kingdom's attorney what purpose or positive objective the residence-gap rule serves? The only answer that was given was that permanent residency is a strong right. Well, yes, it is a strong right. But we don't even know what this answer means, in the context of the question what the *purpose*, the rationale, of this rule is? The fact that it is a strong right is not a purpose. Laws and regulations must serve a reasonable and legal purpose. No such purpose was mentioned

18. It is fair to conclude, then, that the true (but unstated) purpose of the residence-gap rule is to create obstacles for migrants on their way to permanent residency, because the Kingdom apparently does not want immigrants to obtain a strong residency right. Unless the government of Holland can come up with another more reasonable purpose, it is fair to conclude that the residence-gap rule itself is *degrading* (art. 7 ICCPR), because it makes it difficult for immigrants to obtain permanent residency *for no good reason*.

19. On top of all this, the Kingdom adds salt to the wound by postponing the penalty to the last moment. Whenever a residence-gap occurs, usually a new temporary work and residence permit is issued following the gap, provided the employer and the immigrant want to continue working together despite the residence-gap. In other words, the residence-gap is tolerated or FORGIVEN, if you will, as it was in Mr. VELASCO's case. All is fine, *until* the immigrant tries to obtain permanent residency after his 5th yearly residence permit. Then all of a sudden the forgiven residence-gap is revived and he is denied permanent residency, because one, two, three or even four years earlier there was a residence-gap. In other words, first the government is forgiving and allows the immigrant to stay and keep on working, until the immigrant applies for a 'free permit'. This is *degrading* (art. 7 ICCPR). It is cynical and very unfair.

20. And to add insult to injury, in the particular case of Mr. VELASCO, the Kingdom managed to thwart fairness a good bit more. Before applying for permanent residency, Mr. VELASCO had requested the Immigration Service to check if there were any residence-gaps in his case. He received a written letter of date 4 June 2015 saying that there were no residence-gaps. He was told he could petition for a 'free permit' (see ex 7 with translation into English). But when he did so, the government discovered that they had made a mistake and that in 2014 (following his 4th permit) there was a gap after all.

    Now, if one should assume that there was some magnanimity on the side of the government, considering that it was they who had made a mistake, one's assumption is wrong. First of all, they pointed to a disclaimer, literally in small print at the bottom of the page, reading: '*You cannot derive any rights from this letter*' (see ex 7). And to rub it in, they told him (even sanctioned by the Courts!) that he should have known. This is so unfair, it is sickening. It is also a violation of the principle of good administration, formally known as the 'principle of legitimate expectation', but perhaps more accurately rendered as the 'good faith principle'. The government as well as citizens should always act in good faith. We cannot see any good faith here on the part of the government. Mr. VELASCO had a legitimate expectation to be granted a permanent residence permit on the basis of

aforementioned letter. This expectation was caused by the government itself and it should have been complied with. But it was not.

21. *In summary*, it has been shown that the residence-gap rule
    a) creates *legal uncertainty*, which is the opposite of what proper legislation should do; it is thus against the rule of law;
    b) imposes a grossly *disproportional* penalty for the minor infraction of a short period of illegal residence;
    c) often makes *immigrants bear the penalty* (either fully or partially) for other people's wrongful or negligent actions;
    d) serves *no reasonable purpose* and is therefore *unfair*, even *degrading*.

    In the particular case of Mr. VELASCO, we also see that the government acted *unfairly*, *in bad faith* and *against the principle of legitimate expectation*.

    In short, all or nearly all general principles of good administration were ignored.

The present case

22. In its defense, the Kingdom posits that their hands are tied, because the 'residence-gap rule' is laid down in the domestic law. The fact that the rule itself is against the rule of law (creates legal uncertainty) and violates various general principles of good administration (such as the principles of proportionality and fairness) and various general principles of justice (such as all legislation having to serve a reasonable purpose), or can only be applied by violating these principles (as, for example, in the case of Mr. VELASCO), was no reason for the Kingdom to desist from applying the rule.

    Simply put: To hell with general principles of good administration! To hell with general principles of justice! To hell with human rights! The law is the law! If this simplistic reasoning should be valid, then any government could enact whatever law running counter to the rule of law, counter to the ICCPR and citizens' fundamental rights. But this would constitute a violation of art. 5 ICCPR. Therefore this reasoning cannot stand.

    The Courts have refused to check the residence-gap rule against general principles of justice and of good administration on the ground that this rule is part of the domestic law and it can only be checked against the ICCPR or other human rights treaties in very exceptional circumstances. The Courts have seen no such exceptional circumstances in this case, nor in any of the long series of other cases relating to this same issue.

    This is incomprehensible.

    Mr VELASCO is of the opinion that the residence-gap rule and the treatment he received on the basis of this rule from both the government of Holland and the Courts violate the rule of law, the ICCPR, general principles of justice and his fundamental right to good administration. Thereby art. 2, section 3, sub letter a) jo. art. 14 ICCPR have been violated. And this violation in itself constitutes a violation of art. 7 ICCPR.

    For it is indeed inhuman or *degrading* to treat citizens or immigrants in a way which violates general principles of good administration and/or general principles of justice.

23. The rule furthermore causes that many immigrants are treated as modern-day serfs. For as long as their migratory status is uncertain, immigrants are vulnerable. They can be and are exploited by employers. They leave their own countries in hopes of finding a freer, more prosperous and more stable future. Most of them consider having to return to their countries of origin as a severe punishment. It is obvious that the fear for such punishment makes them vulnerable. Some employers exploit this vulnerability and underpay their migrant workers (paying them less than the legal minimum wage), or require them to do unpaid overtime, or in extreme cases even exact sexual services from female workers. If the immigrants refuse to comply with such exploitative practices, the employer will dismiss them, which more often than not results in them having to return to their own country, the punishment they wish to avoid at nearly any price.

    In all fairness, it must be said that the government does offer some protection against these practices, but basically the burden of proof is always on the migrant worker. And mostly they cannot prove the exploitative practice. Therefore, during the long period of legal uncertainty, this protection is very questionable. If, for example, an employer should pay the exact minimum wage, whereas the market wage level in a certain sector is much higher (as, for instance, is the case in the construction sector), the migrant worker cannot voluntarily quit his job and look for better paid work somewhere else, because the government's protection does not cover such a situation. Quitting for such a reason, is considered the migrant worker's own 'fault' (and thus no protection), wherefore he has to leave the island, because no new permit will be issued to him. And this is exactly the punishment he wishes to avoid at all cost.

    In this connection it should be understood that in the BES-islands an employer cannot hire any migrant worker without a work-permit issued to him. The migrant worker needs a residence permit, which will *not* be granted to him, unless a work-permit has been granted to his employer. This means that a migrant worker is bonded to his employer and he cannot just quit his job. And if he does quit anyway, the government will not grant a work-permit to another employer, unless the migrant worker can prove that it was not his 'fault' that he lost his job. Thus he is bound in servitude to his employer until the day he has obtained permanent residency (which immigrants quite tellingly call the '*free permit*'). To obtain such a free permit may take anywhere between 5 to 20 years or longer as a consequence of the legal uncertainty caused by the residence-gap rule.

    In this way the residence-gap rule itself lays the groundwork for the inevitable submission of migrant workers to a modern kind of servitude, which violates art. 8, section 2 ICCPR. And this is also a violation of the right to liberty (art. 9 ICCPR). For the right to make a living by doing work of one's own choosing (art. 6 ICESC) is a fundamental freedom which is implicit in the right to liberty (art. 9 ICCPR).

    In this context, it should also be observed that the BES-islands, having become an integral part of Holland as of 10 October 2010, cannot be considered to be a '*developing country*' as referred to in art. 2, section 3 ICESC, so that no restrictions to ICESC social rights are permitted in the BES-islands for immigrant workers. So if the outlined

situation of the immigrant cannot be deemed to amount to 'bonded labor' or 'servitude', it is at least a violation of everyone's innate right to freedom (art. 9 ICCPR).

Such treatment also amounts to discrimination (art. 26 ICCPR) on the ground of national origin. For, obviously, nationals do not risk any punishment or reprisal as having to return to their country of origin when they refuse to comply with the aforementioned exploitative practices. Nor are they subjected to a long period of legal uncertainty. Nor to the other direct negative consequences of the residence-gap rule mentioned above.

Formulation of the petition to the UN Committee

24. A. In view of all of the above considerations, Mr. VELASCO petitions the UN Human Rights Committee to find that the residence-gap rule and/or the treatment he personally received on the basis of this rule constitute a violation of art. 2, section 3, sub letter a jo. art. 14 (due process and right to good administration), art. 7 (degrading treatment), art. 8 section 2 (prohibition of servitude), art. 9, section 1 (right to liberty), and art. 26 ICCPR (non-discrimination), these articles considered both severally and/or in conjunction.

    B. Mr. VELASCO therefore petitions the UN Human Rights Committee specifically: ***primarily*** to find that the Kingdom (i.e. the government of Holland) should grant him the permanent residence-permit he petitioned for with inception date as of 20 May 2015 or as of any other date as the UN Committee might deem fit to determine, or ***subsidiarily*** to find that the Kingdom should grant him the permanent residence-permit he petitioned for after the lapse of a *proportional* penalty period equal to the duration of the residence-gap, which occurred from 20 May 2014 through 22 July 2014. In other words, to grant him the permit as of 22 July 2015 or as of any other date as the UN Committee might deem fit to determine.

    C. Further, Mr. VELASCO petitions the UN Human Rights Committee to award him costs and fair compensation. His petition was unjustly rejected and he returned to Colombia. He still wishes to return to Bonaire to work as a director of his own aforementioned company, for which he needs the permit he petitioned for.

    Bonaire, 9 August 2018
    On behalf of Mr. Vladimir VELASCO PARRA
    Michiel Bijkerk, attorney-at-law

    Author's signature:

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

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

- Copies with translation into English of the most important articles of the relevant national legislation, as well as decisions of domestic courts and authorities on your claim:

Exhibit 2: Second administrative decree of date 10 May 2016, declaring Mr. VELASCO's objection unfounded, with translation into English

Exhibit 3: Decision of the Court in First Instance of Bonaire of date of date 7 April 2017 with translation into English;

Exhibit 4: Decision of the 'Common Court of Justice of Aruba, Curaçao, St. Maarten and of Bonaire, St. Eustatius and Saba' (abbr. the 'Common Court of Justice' or 'CCJ') of date 5 December 2017 with translation into English;

Exhibits 5 & 6: Opinions of Neth. Antillean Mr. Gorsira and Mr. Jonckheer on the federal nature of the Kingdom Charter expressed in 1955 at the United Nations (translation into English embedded in the text of the communication above, pt. 2;

Exhibit 7: Letter of date 4 June 2015 directed to Mr. VELASCO, with translation into English.

- The UN language chosen for this communication is English.