



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 3236/2018*, **

<i>Communication submitted by:</i>	S.E.H. (represented by counsel, Michiel Bijkerk)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kingdom of the Netherlands
<i>Date of communication:</i>	11 February 2018 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 8 October 2018 (not issued in document form)
<i>Date of adoption of decision:</i>	31 October 2023
<i>Subject matter:</i>	Freedom of movement and residence in one's country in the context of expulsion
<i>Procedural issue:</i>	Admissibility: lack of sufficient substantiation; exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of movement; degrading treatment; non-discrimination
<i>Articles of the Covenant:</i>	2 (1), 7, 12 (1) and (4) and 26
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1. The author of the communication is S.E.H., a national of the Kingdom of the Netherlands born on 18 July 1984. He claims that the State party has violated his rights under article 2 (1), read alone and in conjunction with article 26, and articles 7 and 12 (1) and (4) of the Covenant. The Optional Protocol entered into force for the State party on 11 March 1978. The author is represented by counsel.

Facts as submitted by the author

2.1 The author was born in the European part of the Kingdom of the Netherlands. He arrived in Bonaire in 2010 and remained there without officially registering his stay until 2016. During that time, he committed several criminal offences and was declared persona

* Adopted by the Committee at its 139th session (9 October–3 November 2023).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu. Pursuant to rule 108 of the Committee's rules of procedure, Yvonne Donders did not participate in the examination of the communication.



non grata in an administrative decree of 20 November 2015, by which the court ordered his removal from the island.

2.2 On 26 November 2015, the author filed a formal written objection with the State Secretary of Justice and Security of the Kingdom of the Netherlands, requesting that the deportation decree be revoked. On 27 November 2015, he filed summary administrative proceedings, requesting the Bonaire Court of First Instance to suspend the deportation decree. On 3 February 2016, the Bonaire Court suspended the decree, as requested. By a decree of 18 February 2016, the State Secretary rejected the author's formal written objection.

2.3 On 23 February 2016, the author again filed summary administrative proceedings, requesting the Bonaire Court of First Instance to suspend the above-mentioned decree of 18 February 2016. The Bonaire Court decided to treat both petitions simultaneously and passed a judgment, on 11 March 2016, rejecting both petitions.

2.4 Despite the author's request to be deported to the European part of the Kingdom of the Netherlands, where he was born and had ties, he was instead deported to Curaçao,¹ where he had lived for a significant number of years and where he held residence by right of descent.

2.5 In April 2016, the author lodged an appeal to the Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba. In its judgment of 1 September 2017, the Joint Court upheld the decision of the Bonaire Court of First Instance of 11 March 2016.

2.6 The author submits that, in administrative cases, there is no recourse to the Supreme Court in The Hague, to any other (administrative) court in the Kingdom of the Netherlands for an appeal in cassation or to any other court on any of the Caribbean islands within the Kingdom of the Netherlands. He claims to have exhausted all available domestic remedies.

2.7 The matter has not been submitted under another procedure of international investigation or settlement.

Complaint

3.1 The author claims that the decision to exclude him from Bonaire, by declaring him persona non grata, and his subsequent deportation to Curaçao constitute a violation of his rights under article 12 of the Covenant, read alone and in conjunction with articles 2 (1) and 26 of the Covenant. Alternatively, he claims to be a victim of a violation of articles 2 (1) and 26 of the Covenant only.

3.2 The author also questions the validity of the reservation made by the Kingdom of the Netherlands in respect to article 12 of the Covenant. He asserts that his rights under article 12 of the Covenant were arbitrarily taken from him, in violation of article 2 (1) and article 26 of the Covenant, in all six Caribbean islands within the Kingdom of the Netherlands.² In other words, the author requests the Committee to subsidiarily find that the reservation and declaration in relation to article 12 made by the Kingdom of the Netherlands are incompatible with the object and purpose of the Covenant insofar as they deny the rights under article 12 of the Covenant conferred upon nationals of the Kingdom of the Netherlands in all six Caribbean islands within the State party.

3.3 In addition, the author claims that treating him as a foreign national and expelling him twice to Curaçao constitutes degrading treatment, as referred to in article 7 of the Covenant.

3.4 Lastly, the author requests compensation for expenses he incurred owing to his return from Curaçao to the European part of the Kingdom of the Netherlands, a trip which he could have avoided had he not been "arbitrarily" deported to Curaçao.

¹ After his initial deportation, the author returned to Bonaire but was deported again. However, he does not provide the dates or other details of his second deportation.

² The reservation and declaration in respect of article 12 of the Covenant were entered by the Kingdom of the Netherlands in 1978 and 2010, respectively.

State party's observations on admissibility and the merits

4.1 On 5 April 2019, the State party submitted its observations on admissibility and the merits. It recalls the facts of the case, the constitutional structure of the Kingdom of the Netherlands, including the regulations concerning admission to and expulsion from its territories, other applicable domestic law and policy, the reservation it made with regard to article 12 of the Covenant and applicable international law.

4.2 With regard to the facts, the author is a national of the Kingdom of the Netherlands by birth. He was born in the European part of the Kingdom of the Netherlands on 18 June 1984 of parents born in Curaçao. The author has lived on Bonaire since 2010. While living there, he did not obtain the required permit for long-term residence. Since 2003, Curaçao has been the author's place of habitual residence. When the exclusion order declaring him "undesirable" was issued, he was registered with the Civil Registry Office of Curaçao.

4.3 Between 12 October 2011 and 8 July 2015, the author was convicted of multiple criminal offences in Bonaire, including violation of the Opium Act (1960) (Bonaire, Sint Eustatius and Saba), multiple assaults, criminal damage and violation of the Bonaire Road Traffic Ordinance. On 2 November 2015, the author was informed that the Minister for Migration intended to impose an exclusion order against him, based on the fact that the author was not eligible for automatic admission to Bonaire and did not have a residence permit allowing him to live there. The author was given an opportunity to inform the Immigration and Naturalization Service of his response to the letter, giving notice of the Minister's intention, within two weeks of the date of the letter. In their response of 10 November 2015, the author and his authorized representative stated their objection to the intention to issue an exclusion order.

4.4 On 20 November 2015, an exclusion order was imposed against the author, pursuant to the Admission and Expulsion Act.³ The decision was based on the fact that the author was convicted of multiple offences in Bonaire between 12 October 2011 and 8 July 2015 and had been living in Bonaire for a considerable amount of time without ever having had the right to reside there. There were no exceptional facts or circumstances that would give the Government reason to refrain from imposing an exclusion order.

4.5 On 26 November 2015, the author lodged an objection to the exclusion order of 20 November 2015. On 27 November 2015, the author also applied for interim relief to the Court of First Instance of Bonaire, Sint Eustatius and Saba with regard to the exclusion order, which was considered on 12 January 2016. The author and his representative were present at the hearing. By its judgment of 3 February 2016, the Court of First Instance granted the application for interim relief and suspended the exclusion order. In response to the author's objection of 26 November 2015, the Minister for Migration, in his decision of 18 February 2016, declared the author's objection unfounded and further substantiated the grounds justifying the exclusion order, following assessments of the interests involved. On 23 February 2016, the author submitted to the Court of First Instance an application for review of the decision of the Minister for Migration of 18 February 2016. The Court upheld the exclusion order of 20 November 2015. The author also applied for interim relief to the Court of First Instance and participated, along with his representative, in a video hearing, which was held on 4 March 2016. By its judgment of 11 March 2016, the Court of First Instance declared the application for review unfounded and the application for interim relief was denied. Subsequently, the author lodged an appeal with the Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba. The Joint Court of

³ The Admission and Expulsion Act sets out that an exclusion order may be imposed on aliens by the Minister: (a) if they are not eligible for automatic admission or have not been granted a residence permit, and have repeatedly committed an act that constitutes an offence under this Act; (b) if they have been convicted by final and unappealable judgment of a court of a serious offence that carries a term of imprisonment of three or more years or have been given a non-punitive order within the meaning of article 39, paragraph 3, of the Criminal Code of Bonaire, Sint Eustatius and Saba for such an offence; (c) if they are not eligible for automatic admission or have not been granted a residence permit, and pose a risk to public order or national security; (d) pursuant to a treaty; or (e) in the interests of international relations.

Justice heard the case on 30 March 2017. The author and his representative attended the hearing. On 1 September 2017, the Joint Court of Justice upheld the contested decision.

4.6 The State party submitted information on the structure and legal order of the Kingdom of the Netherlands. The State party asserts, *inter alia*, that the Charter of the Kingdom of the Netherlands was accepted in 1954 by the Antillean and Surinamese federal sub-States of their own free will. The Admission and Expulsion Act, which came into force with the restructuring of the Kingdom of the Netherlands on 10 October 2010, lays down rules for the admission and expulsion of aliens and of nationals of the Kingdom of the Netherlands who were not born or naturalized on Bonaire, Sint Eustatius or Saba. Nationals from the European part of the Kingdom of the Netherlands, Aruba, Curaçao and Sint Maarten are, in principle, allowed to enter Bonaire, Sint Eustatius and Saba freely and are permitted to stay there as tourists for six months, without further conditions. Nationals who wish to stay longer or in a capacity other than as tourists may do so if they are eligible for automatic admission (if they have a certificate of good conduct, a place to live and sufficient means of support) or have been granted a residence permit. Nationals who are not eligible for automatic admission require a residence permit. The conditions for automatic admission have been broad and most nationals are not required to apply for a residence permit. This means that while nationals have largely free access to the islands, it is subject to criteria aimed at preventing an unregulated mass influx of nationals from the European part of the Kingdom of the Netherlands.

4.7 The reservation of the Kingdom of the Netherlands to article 12 of the Covenant was originally entered upon its ratification of the Covenant in 1978.⁴ With regard to article 12 (1), (2) and (4), the State party explained that the Kingdom of the Netherlands, which is a party to the Covenant, consists constitutionally of the separate territories (countries) of the Kingdom of the Netherlands and the former Netherlands Antilles. Admission and residence are regulated differently in the two territories. The Kingdom of the Netherlands wishes to establish, beyond doubt, that article 12 does not imply that legal residence in one of its constituent territories confers a right of entry to the other.

4.8 On 10 October 2010, the Netherlands Antilles ceased to exist as an autonomous country. Subsequently, on 11 October 2010, the following declaration was made:

The Kingdom of the Netherlands, consisting, as per 10 October 2010, of the European part of the Netherlands, the Caribbean part of the Netherlands (the islands of Bonaire, Sint Eustatius and Saba), Aruba, Curaçao and Sint Maarten, regards these parts as separate territories for the purpose of article 12 (1), and as separate countries for the purpose of article 12 (2) and (4) of the Covenant.

In accordance with article 19 of the Vienna Convention on the Law of Treaties, which codifies customary international law, the primary source of reference regarding the question of reservations to a treaty is the treaty itself. Article 19 of the Vienna Convention states that a State may formulate a reservation to a treaty unless it is incompatible with the object and purpose of the treaty. Although the Vienna Convention does not define the notion of “object and purpose”, that notion points to something that is the core obligation, the essential provision or the *raison d’être* of a particular treaty. This view is also reflected in the guidelines of the International Law Commission constituting the Guide to Practice on Reservations to Treaties, adopted in 2011.⁵

4.9 As regards admissibility, the State party recalls the author’s claims to be a victim of a violation of article 12 of the Covenant since he was deported from one territory of the Kingdom of the Netherlands to another territory during a time when it was one country. The State party holds that this claim is inadmissible for several reasons. The Government has explained the constitutional structure of the Kingdom of the Netherlands above, including the different regulations that exist concerning admission and residence. In view thereof, a reservation to article 12 was made, clarifying that for the application of article 12, the different territories that make up the Kingdom are to be regarded as separate territories,

⁴ See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec.

⁵ [A/66/10/Add.1](#), guideline 3.1.5.

establishing beyond doubt that article 12 does not imply that legal residence in one of the territories confers a right of entry to the other.⁶ Since 10 October 2010, there have been four separate territories within the Kingdom of the Netherlands: the European part of the Kingdom of the Netherlands, including the Caribbean part of the Kingdom of the Netherlands (Bonaire, Sint Eustatius and Saba), Aruba, Curaçao and Sint Maarten.

4.10 The author also questions the validity of the reservation and declaration made by the Kingdom of the Netherlands in respect of article 12 of the Covenant. The State party is convinced that its reservation to article 12 of the Covenant is compatible with the object and purpose of the treaty since it does not impair the core obligation or the *raison d'être* of the Covenant. The core obligation of article 12, which is to guarantee the right to liberty of movement and freedom to choose one's residence within the State, the right to leave any country, including one's own, and the right not to be arbitrarily deprived of entry to one's own country, is fully respected for anyone lawfully residing in any autonomous country of the Kingdom of the Netherlands. The reservation applies without distinction to any Netherlands national present in any autonomous territory of the country. Moreover, the reservation made by the Kingdom of the Netherlands with respect to the specific provisions of article 12 has not been objected to by any other State party to the Covenant, nor has the Committee itself, in the past, questioned or raised any concerns in respect of the reservation. This implies that the reservation is generally accepted. In view of the above, the author cannot claim to be a victim of a violation of article 12. This part of his communication should therefore be declared inadmissible.

4.11 As regards the author's claim under article 2 (1) of the Covenant, which prohibits discrimination, made in relation to article 12 of the Covenant, the State party reiterates that the reservation made by the Kingdom of the Netherlands applies without distinction to any Netherlands national present in any autonomous territory of the country. Since the reservation has been generally accepted under international law, there is also no issue under article 2 (1). The author's complaint under article 2 (1) should be declared inadmissible.

4.12 As to claims under article 7 of the Covenant, the author argues in his communication that depriving a person of his full nationality rights constitutes degrading treatment prohibited under article 7. He is of the opinion that treating him as a foreign national and deporting him twice to Curaçao, which is not his island of birth, constitutes degrading treatment. The State party submits that from the national proceedings it does not appear that the author exhausted all available remedies with respect to his claim under article 7 of the Covenant. Furthermore, the author has not substantiated his claim of degrading treatment. The State party adds that the author has not sufficiently substantiated that he was actually individually affected by the contested decision and that therefore he has not established victim status.⁷ Nor has the author provided any credible evidence that the actions of the Minister for Migration caused him harm of the kind against which article 7 of the Covenant offers protection. In any case, the author has not provided any information demonstrating that his situation reaches the threshold of "degrading treatment" prohibited by article 7. Therefore, this part of the author's claim should be considered inadmissible.

4.13 Since, in the context of admissibility, the State party demonstrated that there has been no violation of article 12 of the Covenant, either read alone or in conjunction with article (2) (1) or of article 7 of the Covenant, its observations on the merits are limited to the author's claim under article 26 of the Covenant. Since the author had no right to reside in Bonaire and had been convicted of committing multiple offences in Bonaire, the action taken was not contrary to the principle of non-discrimination. Article 26 of the Covenant prohibits discrimination on any ground and that right is self-standing, without relation to other rights under the Covenant. The Committee has held that not every differentiation between persons amounts to discrimination as long as the criteria on which it is based are reasonable and

⁶ This situation remained materially unchanged after the constitutional restructuring of the Kingdom of the Netherlands, as at 10 October 2010. The reservation was amended by the subsequent declaration.

⁷ *Aumeeruddy-Cziffra et al. v. Mauritius*, communication No. 35/1978, para. 9.2 (available at https://www.ohchr.org/sites/default/files/Documents/Publications/SelDec_1_en.pdf).

objective and the aim is to achieve a purpose which is legitimate under the Covenant.⁸ The decision to impose an exclusion order and expel the author to Curaçao does not constitute a prohibited distinction between nationals born in the European part of the Kingdom of the Netherlands, such as the author, and nationals born on Bonaire, Sint Eustatius and Saba. As the author was born in the European part of the Netherlands, he is subject to the rules that apply to nationals born outside Bonaire, Sint Eustatius and Saba, as laid down in the Admission and Expulsion Act. The Act has no discriminatory intent.⁹

4.14 The distinction between the aforementioned groups has been laid down in law given that the European part of the Kingdom of the Netherlands and the overseas territories of the Kingdom of the Netherlands differ fundamentally in terms of economic and social circumstances. Consequently, rules and specific measures were introduced for Bonaire, Sint Eustatius and Saba that take into account the factors that fundamentally distinguish these small islands from the European part of the country. These factors include their economic and social conditions, their significant distance from the European part of the Kingdom of the Netherlands, their insular character, small size and population, their geographic location and their climate. These fundamental differences justify the establishment of special rules for the islands of Bonaire, Sint Eustatius and Saba.¹⁰ Moreover, the distinction drawn in the Admission and Expulsion Act is based on the objective criterion of place of birth.

4.15 The distinction serves a legitimate purpose, namely the protection of the interests of the small islands of Bonaire, Sint Eustatius and Saba and their residents. Given the small size of the islands and their small populations, and consequently their limited absorption capacity, particularly in an economic sense, an excessive and uncontrolled influx of people could have a serious impact on these islands. The rules that apply to nationals born in the European part of the Netherlands are, in principle, more flexible than those that apply to non-nationals (aliens). The Admission and Expulsion Act is structured in such a way that many nationals are eligible for automatic admission to, and residence on, Bonaire, Sint Eustatius and Saba. Nationals have largely free access to the islands. The criteria that apply were set for the sole and legitimate purpose of protecting the interests of Bonaire, Sint Eustatius and Saba and their residents.

4.16 The exclusion order against the author, who was born in the European part of the Kingdom of the Netherlands, was made pursuant to the Admission and Expulsion Act as he had no right to reside on Bonaire and posed a risk to public order. The author committed and was convicted of a considerable number of serious offences on Bonaire within a short period of time. The author finished serving his most recent sentence on 7 March 2016. When the decision was made to impose an exclusion order, there were strong indications that he posed a threat to his former partner. Criminal acts not only infringe on the lives and safety of those directly affected but can also engender feelings of insecurity among the public. On a small island like Bonaire, which is 40 kilometres long and 12 kilometres wide, with a population of less than 22,000, all offences, especially violent offences such as those of which the author was convicted, constitute a serious threat to public order. It may also prove virtually impossible for a victim to avoid encountering a perpetrator in daily life.

4.17 The personal interests of the author were taken into account in the decision-making process at the national level. However, these interests were ultimately not found to be compelling enough to warrant refraining from issuing an exclusion order against him. The fact that the author has Netherlands nationality did not present an obstacle to an exclusion order. The State party has stressed that the distinction made between citizens of the various constituent parts of the Kingdom of the Netherlands is expressly permitted as a result of the reservation with regard to article 12 of the Covenant. The Government is therefore certain that the system provided for by the Admission and Expulsion Act cannot be considered to

⁸ *Goncalves et al. v. Portugal* (CCPR/C/98/D/1565/2007), para. 7.4, and *Jongenburger-Veerman v. Netherlands* (CCPR/C/85/D/1238/2004), para. 7.2.

⁹ *Simunek et al. v. Czech Republic* (CCPR/C/54/D/516/1992), para. 11.7, and *Wackenheim v. France* (CCPR/C/75/D/854/1999), para. 7.4.

¹⁰ *Van Oord v. Netherlands* (CCPR/C/60/D/658/1995), para. 8.5, and *Smidek v. Czech Republic* (CCPR/C/87/D/1062/2002).

discriminate on the basis of origin against citizens of one of the territories of the Kingdom of the Netherlands.

4.18 The State party believes that the differential treatment has a legitimate aim and is based on reasonable and objective criteria. It follows that no prohibited distinction has been made between the author, who was born in the European part of the Kingdom of the Netherlands, and nationals born in Bonaire, Sint Eustatius and Saba in relation to admission to and residence in the constituent parts of the country. Lastly, the State party addresses the author's assertion, including to the Immigration and Naturalization Service, that he would have preferred to have been deported to the European part of the Kingdom of the Netherlands because he had closer ties there than in Curaçao. It recalls that all the interests concerned were given careful consideration at the national level. Before unlawfully taking up residence on Bonaire, the author lived in Curaçao. Curaçao was the author's place of habitual residence, a fact confirmed by his registration in the personal records database in Curaçao. In accordance with applicable legislation, the author was expelled to his most recent place of residence.

4.19 The State party concludes, pursuant to articles 1 and 2 of the Optional Protocol, that the communication is inadmissible. Alternatively, the State party considers that there has been no violation of article 12, read alone or in conjunction with articles 2 (1), 7 or 26 of the Covenant, and that the communication as a whole is unfounded.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 19 July 2019, the author submitted comments on the State party's observations on admissibility and the merits. He considers the observations of the State party to be based on various mistaken premises with respect to the law and to contain several mistranslations.

5.2 The Admission and Expulsion Ordinance is not an act of the Kingdom of the Netherlands but a law adopted by the parliaments of each of the three Caribbean islands of Curaçao, Aruba and Sint Maarten (three individual constituent parts of the Kingdom of the Netherlands) and is applicable exclusively on the island that has adopted such a law. The three constituent parts of the Kingdom of the Netherlands mentioned should be considered as federal sub-States within the country and not *sui generis* constituent entities as they cannot be considered as "autonomous countries". They are not independent, nor do they have they separate nationality. This means that article 12 of the Covenant has to be interpreted and applied in accordance with article 50 of the Covenant. The State party is correct in its assessment that the constitutional order of the Kingdom of the Netherlands comprises a number of unitary elements, in accordance with the doctrine that a federation is a sovereign State that includes a union of partially self-governing States. The three islands of Curaçao, Aruba and Sint Maarten form a constituent part of the federation, with a generous scope of autonomy. Accordingly, the three islands are not internationally recognized as independent or sovereign States and the Committee should confirm this interpretation. In addition, the European part of the Kingdom of the Netherlands is also a federal sub-State. The Kingdom of the Netherlands comprises the European part of the country, including the islands of Bonaire, Sint Eustatius and Saba, and the islands of Curaçao, Aruba and Sint Maarten. Moreover, each island has its own constitution.

5.3 *De jure*, the Kingdom of the Netherlands is a federation comprising four federal sub-States (article 1 of the Charter of the Kingdom of the Netherlands). In that context, pursuant to the country's Charter and its "concordance-principle", all responsibilities and tasks are vested in the federal sub-States, unless explicitly assigned to the country as a unified whole. Within the country there is one single nationality, which is regulated under the Kingdom Act amending the Charter for the Kingdom of the Netherlands with regard to the dissolution of the Netherlands Antilles, which applies in all four sub-federal States of the country. This is one of the reasons why internal migration restrictions for nationals within the country cause numerous violations of articles 12 and 26 of the Covenant. All four federal sub-States have the power to regulate such restrictions, according to domestic law within each sub-State, and article 3 (sect. 1(f)) of the Charter assigns the power of supervision to the Kingdom of the Netherlands. General rules concerning admission and expulsion of nationals, laid down in Federal Ordinances of Curaçao, Aruba and Sint Maarten, require the approval of the Government of the Kingdom of the Netherlands before they can enter into force.

Internal migration restrictions for nationals have been introduced specifically for the residents of the islands of Bonaire, Sint Eustatius and Saba. The Kingdom of the Netherlands has not yet legislated any such restrictions for its own nationals. Nationals from all six islands therefore enjoy free right under article 12 of the Covenant if they wish to settle in the Kingdom of the Netherlands. Nationals from the European sub-State, however, do not enjoy the same rights under article 12 of the Covenant if they wish to settle in one of the six islands. All such restrictions violate articles 12 and 26 of the Covenant.

5.4 The author, a national whose parents were from Curaçao, was born in the European part of the Kingdom of the Netherlands on 18 July 1984 and lived there from his birth until 2003. He registered in Curaçao in 2003. Curaçao was not his habitual place of residence as of 2003, as the State party asserts. Rather, the State party is correct to have asserted that his habitual place of residence was Bonaire, at least as of 2010, but probably earlier. One exclusion order was issued against the author in 2015. He was expelled to Curaçao twice. The author holds that the State party has exaggerated the seriousness of the offences for which he was convicted between 2011 and 2015, as he spent approximately 12 to 15 months in jail for those offences. Regarding the State party's assertion that, at the moment of issuing the exclusion order, the author was not eligible for "automatic admission" to Bonaire and that he did not have a residence permit, the author asserts that the term "automatic admission" is another mistranslation as a national can obtain admission "by operation of law", after having met three legal preconditions. Furthermore, he agrees with the State party that, as of 17 November 2017, article 1, section 2, of the Charter of the Kingdom of the Netherlands and article 132a of the Constitution of the State party allow for differential regulations and measures, so-called differentiation clauses, for Bonaire, Sint Eustatius and Saba, in relation to the Kingdom of the Netherlands. Differentiation is acceptable as long as there is a clear distinction between differentiation and discrimination. The concerned clause cannot be used to discriminate, as it was in the author's case. The author complains about violations of articles 12 and 26 of the Covenant. If he is right, no rule in the domestic Constitution (such as the Charter of the Kingdom of the Netherlands and/or the Constitution of the European and Caribbean Netherlands) can justify such discrimination.

5.5 The author agrees with the State party that the the parliament of the Kingdom of the Netherlands passed the Admission and Expulsion Act exclusively for Bonaire, Sint Eustatius and Saba, in effect as of 10 October 2010. The Act was based on the differentiation clause set out in article 1, section 2, of the Charter of the Kingdom of the Netherlands at the time. This fact does not mean that its provisions are in accord with the Covenant. The author also agrees that the Admission and Expulsion Act is similar to the Federal Ordinances on Admission and Expulsion of the federal sub-States of Curaçao, Aruba and Sint Maarten. The Act applies *mutatis mutandis* to nationals of the Kingdom of the Netherlands not born or naturalized in Bonaire, Sint Eustatius or Saba. The author further agrees with the State party that nationals born in the European part of the Kingdom of the Netherlands, Curaçao, Aruba and Sint Maarten are free to enter Bonaire, Sint Eustatius and Saba as tourists for no longer than six months. Nationals not born in Bonaire, Sint Eustatius or Saba have no free admission to those islands. They need either a residence permit under the same conditions as aliens or they may be admitted "by operation of law". The three requirements for admission have been drafted to keep nationals not born in Bonaire, Sint Eustatius or Saba out of those islands. The State party's observations about the largely free access of nationals to those islands are entirely false. Nationals without a place to live, without work or wealth or with a criminal record, are not welcome in Bonaire, Sint Eustatius and Saba. The justification for those restrictions given by the State party is to prevent an unregulated mass influx of nationals born in the European part of the Kingdom of the Netherlands to Curaçao, Aruba and Sint Maarten. In the author's case, the question is whether this justification can pass muster in the light of articles 12 and/or 26 of the Covenant. While that can be debated, a system of permits based on three restrictive requirements is not "largely free access", nor is it "automatic admission". The author reiterates that nationals from the European part of the Kingdom of the Netherlands only have free access as tourists, up to six months, which also constitutes a restriction.

5.6 As regards the State party's argument that the distinctive categories of nationals in article 1 of the Admission and Expulsion Act are justified, since article 132a of the Constitution allows for differential laws in all federal sub-States, the author reiterates that there is a distinction between differentiation and discrimination. The differentiation clause in

article 132a of the Constitution does not justify any discrimination. In addition, the distinctive categories between nationals within the Kingdom of the Netherlands involve not only the federated sub-States of the country. The residents of Curaçao, Aruba and Sint Maarten, who are nationals of the Kingdom of the Netherlands, are also involved. A similar differentiation clause as in article 132 of the Constitution is not included for Curaçao, Aruba and Sint Maarten in the Charter of the Kingdom of the Netherlands or in the Constitutions of the federal sub-States of the country.

5.7 Furthermore, the author asserts that some politicians in the European part of the Kingdom of the Netherlands have repeatedly attempted to introduce restrictions to free admission and residence similar to those contained in the Admission and Expulsion Act (as well as similar restrictions to the Federal Ordinances on Admission and Expulsion of the federal sub-States of Curaçao, Aruba and Sint Maarten) in order to restrict the access of nationals born in the six islands who wish to settle in the European part of the Kingdom of the Netherlands. To date, those attempts have failed. However, if discriminatory distinctions persist against nationals from the European part of the Kingdom of the Netherlands in order to protect the islands from immigration, those politicians will one day succeed, as introducing the same restrictions would be reciprocal. This should be prevented. If the Committee should rule that those distinctions are unjustifiably discriminatory and that the restrictions are therefore incompatible with the object and purpose of the Covenant, such a change, which would also affect other Covenant rights, would be prevented. If the Committee rules that the Kingdom of the Netherlands is indeed a federation, consisting of the four federal sub-States, article 50 of the Covenant would apply fully.

5.8 The author admits his case is unlikely to elicit empathy as his behaviour in Bonaire was clearly in violation of the law and against social norms. Nevertheless, this should not affect the principle that no one's human rights should be violated and that nobody should be discriminated against, including ex-convicts.

5.9 According to the author, another example of the effect of such discrimination is the case of a foster mother who was entrusted with the care of a child born in Curaçao of Curaçaoan parents. When the foster child was about 11 years old, the foster mother decided to move to Bonaire, where her father had been 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 as of the date of submission of the present comments, she has lived there with her foster mother without a residence permit. She could not comply with the requirements of the Admission and Expulsion Act. Immigration officials have offered to give her a residence permit as an alien. The child has basically lived on Bonaire as an undocumented alien, without access to health insurance by the Government since she cannot be registered with the Civil Registry. This example clarifies why this discriminatory practice should stop, if not within the whole Kingdom of the Netherlands, then at least within the six Caribbean islands.

State party's additional observations

6.1 On 23 September 2019, the State party submitted that the author's comments of 19 July 2019 do not provide it with any reason to alter its position as expressed in its initial observations of 5 April 2019. The State party nevertheless makes additional observations, on the understanding that it does not agree with the points in the author's comments that it does not address below.

6.2 In his comments, the author submits that the Kingdom of the Netherlands is a federation, which means that article 12 of the Covenant would have to be interpreted and applied in accordance with article 50 of the Covenant. The State party rejects that view. In its initial observations, the State party outlined the constitutional structure of the Kingdom of the Netherlands as a *sui generis* legal order that does not justify its labelling as a federation. The author's statement is also contradicted by the practice of the Kingdom of the Netherlands at the international level, in particular with regard to the territorial scope of treaties.

6.3 It is the consistent practice of the Kingdom of the Netherlands to indicate, at the time of expressing its consent to be bound by a treaty, upon which parts of the country the treaty will be binding, thereby establishing its intention regarding the territorial scope of the treaty

for the entire country. It has been generally accepted that the State party may confine the territorial scope of treaties to any of the constituent parts of the Kingdom of the Netherlands, that is, Aruba, Curaçao, Sint Maarten and the Kingdom of the Netherlands (the European and the Caribbean parts of the Kingdom of the Netherlands). This practice includes treaties which, like the Covenant, contain specific provisions on the territorial scope in respect of federal States. In this respect, the Committee welcomed, in its concluding observations on the fifth period report of the State party of July 2019, its ratification of: (a) the Convention on the Rights of Persons with Disabilities in 2016;¹¹ (b) the International Convention for the Protection of All Persons from Enforced Disappearance in 2011;¹² and (c) the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2010.^{13,14}

6.4 The Kingdom of the Netherlands also ratifies treaties, including the Covenant and its Optional Protocol, for all its constituent parts. In all such cases, the Kingdom of the Netherlands will always specify the different constituent parts of the country for which the treaty will be binding. In its instrument of ratification of the Covenant and the Optional Protocol, deposited on 11 December 1978, it explicitly stated that it had ratified both treaties for the Kingdom of the Netherlands in Europe and for the then Netherlands Antilles. The above generally accepted State practice at the international level is a manifestation of the constitutional order within the Kingdom of the Netherlands, by which each constituent part may decide autonomously whether or not it wishes to be bound by a treaty. Since only the Kingdom of the Netherlands is subject to international law, it formalizes such choices at the international level. The same is true about reservations that may be made. It is always specified for which constituent part or parts of the Kingdom of the Netherlands that reservations are made.

6.5 In the opinion of the State party, the practice described above refutes the author's assertion that the Kingdom of the Netherlands is a federation and that, therefore, article 12 should be interpreted and applied in accordance with article 50 of the Covenant. As regards article 29 of the Vienna Convention on the Law of Treaties, quoted by the author, the State practice by the Kingdom of the Netherlands is covered by the exception explicitly mentioned therein.¹⁵

6.6 With regard to the author's comments concerning the permissibility of the reservation to article 12, the State party reiterates that the core obligation of article 12, which is to guarantee the right to liberty of movement and freedom to choose one's residence, the right to leave any country, including one's own, and the right not to be arbitrarily deprived of entry to one's own country, is not affected by the reservation. Anyone lawfully residing in any part of the Kingdom of the Netherlands is provided protection under article 12. The reservation applies without distinction to any national present in any part of the Kingdom of the Netherlands. It cannot, therefore, be said that the reservation violates any peremptory norm under international law.

6.7 In conclusion, the State party reiterates its position that the present communication should be declared inadmissible pursuant to articles 1 and 2 of the Optional Protocol. In addition, the State party submits that there has been no violation of the Covenant and that the communication is unfounded.

¹¹ The ratification of the Convention on the Rights of Persons with Disabilities pertains to the European part of the State party.

¹² The ratification of the International Convention for the Protection of All Persons from Enforced Disappearance pertains to the European and Caribbean parts (Bonaire, Sint Eustatius and Saba); as of 2017, the ratification of the Convention also pertains to Aruba.

¹³ The ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pertains to the European part of the State party.

¹⁴ [CCPR/C/NLD/CO/5](#), para. 4.

¹⁵ "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".

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 it is admissible under the Optional Protocol.

7.2 The issue before the Committee is whether the expulsion order against the author, to leave Bonaire for Curaçao, both of which are within the Kingdom of the Netherlands, violated the author's rights under articles 2, 7, 12 (1) and (2) and 26 of the Covenant.

7.3 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.

7.4 The Committee notes the State party's assertion that the author has not exhausted domestic remedies in the context of article 7 of the Covenant, that the author's claim of degrading treatment resulting from his expulsion from Bonaire to Curaçao has not been raised before national authorities and that therefore the domestic remedies have not been effectively exhausted. The Committee also notes the State party's argument that the circumstances of the author's expulsion have not reached the threshold of degrading treatment and that he has not established victim status in that regard. The Committee observes that the author has not rebutted the State party's objection about the lack of exhaustion of domestic remedies, as he does not claim to have presented the allegations of degrading treatment in the context of appeals against the expulsion order before the domestic courts. The Committee therefore finds that it is precluded from considering the author's claim under article 7 by the requirements of article 5 (2) (b) of the Optional Protocol.

7.5 As regards the author's claims under article 2 (1) of the Covenant, the Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.¹⁶ The Committee also considers that the provisions of article 2 cannot be invoked as a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim. The Committee notes, however, that the author has already alleged a violation of his rights under article 12, resulting from the interpretation and application of the existing laws of the State party. The Committee does not consider the examination of whether the State party also violated its general obligations under article 2 of the Covenant, read in conjunction with article 12, to be distinct from the examination of a violation of the author's rights under article 12 of the Covenant. The Committee therefore considers that the author's claims in the context of article 2 (1) of the Covenant are incompatible with article 2 of the Covenant and inadmissible under article 3 of the Optional Protocol.

7.6 Regarding the author's claim under article 12, the Committee notes that the author objected to the expulsion order against him, as a national born in the European part of the Kingdom of the Netherlands, who was removed for his repeated criminal activity in Bonaire, where he had resided unlawfully since 2010, and his effective expulsion from Bonaire to Curaçao on two occasions, in 2015 and 2016. The author holds that he had a right to stay in Bonaire, or, alternatively, to be removed to the European part of the Kingdom of the Netherlands rather than to Curaçao. The Committee also notes the arguments of the State party that: the Admission and Expulsion Act, which applies to Bonaire, Sint Eustatius and Saba, serves to protect the islands of Bonaire, Sint Eustatius and Saba from a massive influx of nationals, mainly from the European part of the Netherlands, given the limited size and resources of the Caribbean islands; the immigration rules are within the sovereign discretion of the State party; and the majority of nationals, once they have met three legal requirements, are entitled to automatic admission to the islands of Bonaire, Sint Eustatius and Saba, as well as to request a residence permit. The State party further argued that: the expulsion order

¹⁶ *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), para. 10.12.

against the author was issued as a consequence of his criminal activity and as a means protecting his former partner, who is living in Bonaire legally; since the author was an unlawful resident of Bonaire and his last legal residence was registered in the civil register of Curaçao, he had to be removed to Curaçao as a precautionary measure, adopted by the Minister of Immigration; and the author challenges the applicable immigration rules, extrapolating his arguments. The Committee observes that: in his comments the author regretted his deplorable behaviour in Bonaire; the State party maintained that its action against the author was necessary, proportionate and lawful; the author was able to move from Curaçao to the European part of the Kingdom of the Netherlands; and immigration affairs are at the discretion of the State party. In the light of the above, the Committee considers that the author failed to adequately substantiate his claim of a violation of the freedom of movement and residence for the purpose of admissibility since he resided unlawfully in Bonaire and was expelled for repeated criminal activity, which he unsuccessfully challenged before the domestic courts. Furthermore, the Committee considers that the author has not demonstrated that the assessment of his individual circumstances by the national authorities was arbitrary or disproportionate and consequently declares his claim in this regard to be inadmissible, pursuant to article 2 of the Optional Protocol.

7.7 With regard to the author's objection to the reservation and the declaration of the Kingdom of the Netherlands under article 12 of the Covenant, the Committee notes the State party's argument that the four constitutive territories of the State are considered as separate autonomous territories and that the right of residence in one does not automatically entitle the right of residence in another. The Committee observes that: the State party's reservation has not been objected to by other States parties to the Covenant; the State party argued that the nature of its reservation is in accordance with the Guide to Practice on Reservations to Treaties of the International Law Commission; and the Committee has not previously expressed concerns over its scope. The Committee also observes that it is a general prerogative of a State party to enter a reservation, pursuant to article 19 of the Vienna Convention on the Law of Treaties, and that a treaty is binding upon each party in respect of its entire territory, in accordance with article 50 of the Covenant. In such circumstances, the Committee considers that the author has not sufficiently substantiated his allegation that the reservation is not compatible with the object and purpose of the Covenant, since the Admission and Expulsion Act contains distinct immigration rules for all Netherlands citizens wishing to settle in Bonaire, Sint Eustatius and Saba, whereas the Covenant remains binding on the Kingdom of the Netherlands as a whole.¹⁷ Accordingly, the Committee concludes that this part of the author's claim under article 12 is also inadmissible, pursuant to article 2 of the Optional Protocol.

7.8 As regards the author's claim under article 26, the Committee notes the State party's argument that: the specific circumstances invoked by the author have been properly assessed by the domestic authorities; the mere fact that the author was subject to an expulsion order does not constitute a violation of the principle of non-discrimination; and no causal link between the disputed expulsion and the alleged discriminatory consequence has been established. The Committee also notes the State party's arguments that: the Admission and Expulsion Act applies to all nationals of the Kingdom of the Netherlands; the Act has no discriminatory intent; the Act is based on the objective criterion of place of birth and that the distinction serves a legitimate purpose, namely the protection of the interests of the small islands of Bonaire, Sint Eustatius and Saba and their residents (paras. 4.13-4.15); and the distinct immigration rules for the islands of Bonaire, Sint Eustatius and Saba have been prompted by their specific socioeconomic circumstances, including limited size and resources. The State party maintains that such distinction is objective and reasonable and pursues a legitimate aim, as set out in the distinction clause of the Charter for the Kingdom of the Netherlands and the Constitution of the European and Caribbean Netherlands.

7.9 The Committee recalls that, for the purposes of article 26 of the Covenant, a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed

¹⁷ Human Rights Committee, general comment No. 24 (1994), paras. 6 and 18.

and the aim sought to be realized.¹⁸ Moreover, the State parties enjoy a margin of appreciation¹⁹ in assessing whether and to what extent differences in otherwise similar situations justify different treatment. The Committee notes that the distinct immigration rules for nationals of the Kingdom of the Netherlands who wish to reside in Bonaire, Sint Eustatius and Saba for periods longer than six months were adopted for practical and objective reasons, including a requirement of a request for residence permit for stays (residence) of over six months, and that the author's expulsion was prompted by his illegal stay and illegal activity in Bonaire. In addition, the author has not established that the authorities' assessment of his circumstances in the context of his expulsion was clearly arbitrary or amounted to a denial of justice. Therefore, the Committee finds that the author has not substantiated that the authorities' expulsion order against him was discriminatory. Accordingly, the Committee concludes that the author's claims under article 26 of the Covenant are also inadmissible due to a lack of sufficient substantiation, in accordance with article 2 of the Optional Protocol.

8. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 2, 3 and 5 (2) (b) of the Optional Protocol;
- (b) That the decision shall be transmitted to the State party and to the author.

¹⁸ Human Rights Committee, general comment No. 18 (1989), para. 13.

¹⁹ Human Rights Committee, *Hertzberg et al. v. Finland*, communication No. R.14/61, Views adopted on 2 April 1982, para. 10.3, and *Raihan v. Latvia* (CCPR/C/100/D/1621/2007 and CCPR/C/100/D/1621/2007/Corr.1), para. 8.3. See also general comment No. 34 (2011), para. 36.