

LEGAL BRIEF

Court of First Instance, Sint Maarten

Hearing of November 20th, 2018

In reference to:

Clyde van Putten c.s. vs de Staat der Nederlanden/KG EUX 201800063 KG 59/18

Most honorable Judge!,

1.0 Introduction

- 1.1 Today we are here to determine the future of the Kingdom as we have known it for the past 65 years.
- 1.2 The legal question at hand is fairly simple: can national law supersede the UN Charter?

2.0 Background

- 2.1 Since 2010, after the dissolution of the Netherlands Antilles, Sint Eustatius has been a “special municipality” of The Netherlands. Yet this legal status is in contravention of international law, which stipulates that regardless of the affiliation with the Metropole, it should always result in a “Full Measure of Self-Government” as stipulated in Article 73 of the UN Charter.
- 2.2 For example, the Government of Sint Eustatius cannot fully collect its own tax revenues, cannot set its own budget without the approval of The Hague, and cannot make decisions about its own personnel.
- 2.3 In addition, the Government has been frustrated by countless ongoing decisions that were taken by The Hague or those acting on its behalf in Sint Eustatius that violate Statia’s right to the Full Measure of Self Government under article 73 of the UN Charter.
- 2.4 Under Article 73 of the UN Charter, the Government of The Netherlands is obligated to “recognize that the principle that the interests of the inhabitants of these [non self-governing] territories are paramount.” In addition, it must assist Sint Eustatius “to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions.”

- 2.5 General Assembly Resolution 945(X) ended the reporting requirements of the Government of The Netherlands under Article 73 in relation to the Netherlands Antilles. But the status of Sint Eustatius materially changed when its people's wishes by popular referendum to remain a part of the Netherlands Antilles were denied, and the island was forced to become a special municipality of The Netherlands, without taking into account that its Full Measure of Self-Government is inviolate because it is a right under the UN Charter.
- 2.6 Since then, Sint Eustatius has not been provided "a full measure of self-government" as required by General Assembly Resolution 742.
- 2.7 In Resolution 111/17ER, adopted on May 8, 2017, the Island Council of Sint Eustatius reaffirmed its profound objections to how the Government is being treated, in violation of the obligations of the Government of the Netherlands under international law, and invoked its right to the Full Measure of Self-Government.
- 2.8 In addition, it refused to recognize any decisions taken by the Dutch Government in violation of its Full Measure of Self-Government, and strongly encouraged that a dialogue process be initiated in accordance with a prior agreement of March 2017.
- 2.9 The State's surprise decision of February 7th, 2018, without consultation with the elected Island Council of Sint Eustatius and the people of the Island, is as shocking as it is in flagrant violation of The Netherlands' obligations under Article 73 of the UN Charter.
- 2.10 Under that provision, the Dutch Government is obligated to "recognize the principle that the interests of the inhabitants of these [non self-governing] territories are paramount."
- 2.11 In addition, it must assist Sint Eustatius "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions."
- 2.12 There can be no interpretation of "self-government" or "free political institutions" that would allow the Dutch Government to unilaterally decapitate wholesale the elected and appointed Government of Sint Eustatius in a swift measure that was rubber-stamped by the Dutch' House of Representatives and Senate within merely a day.
- 2.13 Similarly, such a decision is wholly incompatible with the requirements of General Assembly Resolution 742, which says such territories must be provided "a full measure of self-government in fulfillment of the objectives of Chapter XI of the UN Charter".

- 2.14 Given the unilateral, arbitrary, and capricious way in which this decision was imposed, it is equally clear that the Dutch government is punishing the citizens of Sint Eustatius for having elected a Government that has repeatedly demanded its rights be respected.
- 2.15 This is in clear violation of their rights to freedom of opinion and expression under Article 19 of the International Covenant on Civil and Political Rights.
- 2.16 The decision is also in direct contravention of the right of the citizens of Sint Eustatius to have “the right and opportunity” to political participation under Article 25 of the ICCPR “to take part in the conduct of public affairs, directly or through freely chosen representatives.”
- 2.17 We wish to point out to Your Honor that the Dutch Constitution says unequivocally that international treaty obligations, such as those found in the UN Charter and ICCPR, supersede the Dutch law on which the Dutch Government relied to justify its takeover of the elected Government.
- 2.18 In addition, you should equally be aware that the Dutch Government has proclaimed publicly on its own web site: “Human rights are rights that apply worldwide, to all people, in all places, at all times.”
- 2.19 They are the foundations of a democracy on which every person counts. The Netherlands strives to protect and promote human rights all over the world.” Yet in this one action, it denied the elected Government of Sint Eustatius and its people any rights of due process, any independent review of case by neutral third party, and any opportunity to challenge the decision of the Dutch State.

3.0 **Dutch jurisprudence regarding the supremacy of the UN Charter**

- 3.1 The legal question has been answered by the Hoge Raad der Nederlanden in 2012. The case involved action brought by plaintiffs against the Dutch State and the United Nations for international wrongful acts relating to the death of their relatives during the siege at Srebrenica during the Yugoslavian tribal war.
- 3.2 The UN invoked its immunity under article 105 of the UN Charter. The Dutch state rushed to the UN’s defense, and from 2007 until the Hoge Raad settled the matter on Friday, April the 13th 2012, the Dutch State acted as principal defense attorney for the UN, arguing strenuously that UN Charter article 105 in conjunction with article 103 made it impossible for Dutch judges to hear the case against the UN because of the UN’s so-called “jurisdictional immunity” pursuant to article 105.
- 3.3 The court in first instance declared itself incompetent to hear the case against the UN, the court of appeal upheld that decision, and the Hoge Raad upheld the court of

appeals' decision ruling that, regardless of the seriousness of the allegations against the UN, article 105 granted the UN absolute immunity.

3.4 Not even the EVRM can derogate article 105 of the UN Charter, because the Hoge Raad ruled that article 103 gives Charter obligations unquestioned superiority.

3.5 The legitimate Government of Sint Eustatius this morning is requesting Your Honor to consider its UN-mandated right to the Full Measure of Self-Government in light of the same criteria used by the Hoge Raad with the UN's invocation of its right to immunity.

3.6 They are both rights under the UN Charter. We will return to this matter at a later point.

4.0 **The probation against the unilateral use of force, aggression and colonial domination and the "Wet Tijdelijke Taakverwaarlozing" (WTT)**

4.1 Statia contends that as a territory with a "full measure of self-government" it has certain attributes of sovereignty such as a separate territory and political independence which can become subject to acts of aggression. But there is something more fundamental at stake here. If Statia is not able to invoke the prohibition on the use of unilateral force (because it is not a "state") this will in effect give the Netherlands Government unfettered license to commit unilateral acts of aggression against the territory, because Statia is not a "state" and may not invoke the prohibition on the use of unilateral force. I am sure the Court can appreciate the absurdity of such a proposition. With respect to sovereignty, we refer to UN Resolution 742¹, which we again remind the Court the Netherlands voted in favor of, and is thus bound to.

4.2 During the 391st Meeting of the United Nations Security Council, held at the Palais de Chaillot, Paris, on Thursday, 23 December 1948 at 3 pm, the Soviet Union's representative stated the following about the Dutch actions in what is now Indonesia:..."*It becomes clear that the Dutch Colonizers in Indonesia have learned nothing and forgotten nothing where their colonial policy is concerned. They neither understand nor wish to understand that colonial slavery can no longer be imposed by force or arms upon a people which has tasted the blessings of freedom and independence...*"

4.3 During that same meeting, Colonel Hodgson, Representative of Australia, and member of the Committee of Good Offices on the Indonesian crisis stated the following: ..."*Please note this. The reply of the Netherlands delegation was made on December 17,*

¹ Voluntary limitation of sovereignty. Degree of evidence that the attributes of sovereignty which are not individually exercised will be collectively exercised...

and the Republic was given eighteen hours –seventeen hours and a half to be precise- that was even worse than what Hitler did to the Netherlands in 1940...”

- 4.4 Decades later, on February 7, 2018 a comparable unlawful act of unilateral aggression was unleashed against the unsuspecting people of Statia. Their elected officials were summarily ejected from their offices, under the threat of force.
- 4.5 It was an act against a peaceful, unarmed, alien people, exercising their right to the “Full Measure of Self-Government” accorded to them under article 73 of the UN Charter.
- 4.6 This underscores the brazen unlawfulness of the action of the Dutch State, because it violated the *ius cogens* norm on the prohibition on the unilateral use of force.
- 4.7 And this from a country that hosts two of the world’s most important tribunals in the area of International Public Law, among which is the International Court of Justice.
- 4.8 Your honor, we the democratically elected government of Statia, were removed without even so much as a courtesy call to inform us of the impending events.
- 4.9 This speaks to the contempt in which we are held, and the callous disregard for our “Full Measure of Self-Government”. It also speaks to the unlawfulness of the act undertaken by the Dutch state, because it is a direct and flagrant violation of article 73 of the UN Charter.
- 4.10 The Hoge Raad qualifies these acts as follows: *...”In de tweede plaats heeft het hof dit optreden getoetst aan de rechtsbeginselen die besloten liggen in art. 2 en 3 EVRM, en art. 6 en 7 IVBPR (respectievelijk het recht op leven en het verbod op onmenselijke behandeling), omdat deze beginselen moeten worden beschouwd als regels van internationaal gewoonterecht die universele gelding hebben, en waaraan de Staat is gebonden.* (r.o. 3.15.2 ECLI:NL:HR:2013:BZ9225 - Nuhanovic).
- 4.11 The role of “customary international law “was also expounded on by the European Court of Human Rights (EHRM in the case of Behrami vs France: (EHRM 71412 and 78166/01).
- 4.12 *“The responsibility of the UNSC in this respect is unique, and has evolved as a counterpart to the prohibition, now customary international law, **on the unilateral use of force.**”*
- 4.13 *“**The prohibition on the unilateral use of force by States**, together with its counterpart principle of collective security, mark the dividing line between the classic concept of international law,”*

- 4.14 *"The second type of action, "negative peace", was founded on the Preamble, Article 2 § 4 and most of the Chapter VII measures and amounted to **the prohibition of the unilateral use of force** (Article 2 § 4)."*
- 4.15 From this reading of the pronouncements by the European Court for Human Right, we hope that it has become clear to Your Honor that the prohibition of the use of force as employed by the Dutch State against Statia is a violation of a ius cogens norm, and the law on which it is based is null and void according to article 53 of the Vienna convention which states:..."*A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.*"
- 4.16 Now, Your Honor, if a treaty is null and void if it conflicts with a peremptory norm of international law, a national law such as the "Tijdelijke Wet Taakverwaarlozing", on which the unilateral use of force against Sint Eustatius was based, is also null and void.
- 4.17 About these ius cogens norms, Professor Kooijmans writes:..."*Ten aanzien van bijvoorbeeld het verbod van agressie, rassendiscriminatie, en van koloniale overheersing is echter inmiddels een duidelijke communis opinio ontstaan, bevestiging hiervan is te vinden in de al genoemde rechtspraak van het Internationaal Gerechtshof, maar ook van onder andere het Europese Hof voor de Rechten van de Mens, het Joegoslavië-Tribunaal, en in de nationale rechtspraak...*" (Internationaal Publiekrecht in Vogelvlucht, prof. mr. P.H. Kooijmans, p. 21).
- 4.18 Colonial domination is defined as follows: "...*Involves the establishment of a centralized foreign authority within a territory, which is run by colonial officials...*"
- 4.19 According to Michael W. Doyle of Harvard University, "...*in a system of direct rule, the native population is excluded from all but the lowest level of colonial government...*"
- 4.20 Ugandan academic Mahmood Mamdani classifies direct rule as "...*centralized despotism: a system where natives are not considered citizens...*"
- 4.21 The "Tijdelijke Wet Taakverwaarlozing" is an act of colonial domination, and as such it violates the prohibition on colonial domination. It represents a system of "*centralized despotism*".
- 4.22 The fact that the State is here in court to defend its colonial domination speaks volumes. For what else has it come to argue, but that their national laws grant them license to rule over a foreign people? How more in conflict with the prohibition against colonial domination can they be?

- 4.23 And as we have seen, colonial domination is one of those ius cogens norms to which the Dutch state is bound according to the Hoge Raad, and which it has flagrantly violated with the “Tijdelijke Wet Taakverwaarlozing”.
- 4.24 We can conclude this section by summarizing the following: the ius cogens nature of the prohibition against aggression, the unilateral use of force, and colonial domination are such that the Tijdelijke Wet Taakverwaarlozing, is rendered null and void.

5.0 The right to self-determination

- 5.1 According to UN resolution 747 (VIII) of November 27, 1953, regardless of how this right is exercised, the outcome must be a “*Full Measure of Self-Government*” in fulfillment of the objectives of Chapter XI of the UN Charter.”
- 5.2 This puts to rest the false argument that “they chose the present status”. No relationship according to UN resolution 747 can result in anything other than the Full Measure of Self-Government.
- 5.3 UN Resolution 742 (VIII) of that same date states: “6. *Considers that the manner in which Territories referred to in Chapter XI of the Charter can become fully self-governing is primarily through the attainment of independence, although it is recognized that self-government can also be achieved by association with another State or group of States if this is done freely and on the basis of ABSOLUTE EQUALITY...*”
- 5.4 Nowhere in this section does one get the impression that the United Nations intended, envisioned or allowed a relationship, which the Dutch State currently wishes to impose, one of colonial domination, coercion and the imposition of its will by the unilateral use of force.
- 5.5 To the contrary, this resolution projects a relationship based on mutual respect, trust and **absolute equality**, which leaves no room for the rule of the one over the other.
- 5.6 May we remind Your Honor once more that the Netherlands Under Article 73 of the UN Charter, the Government of the Netherlands voted in favor of this resolution and is thus bound by its provisions, and thus so too, is this court.

6.0 Statia’s right to the Full Measure of Self Government

- 6.1 In our petition we submitted abundant evidence that Statia has the right to the FMSG.
- 6.2 Included were many official statements to that effect, such as the following from Mr. Kernkamp before the UN: “...*With regard to the overseas territories in the Caribbean*

*area, the Netherlands Antilles and Surinam, lengthy conferences had been held with representatives of the inhabitants of those Territories, and it had been decided that, in conformity with the wishes of the inhabitants, they would be incorporated in the Netherlands Kingdom on an equal footing with that part of the Kingdom which was situated in Europe...by that decision those territories had obtained **a full measure of self-government**" (UN Special Committee on information transmitted under article 73e of the Charter, Second Session, Summary Record of the Forty-Fifth meeting, held at Palais de Nations, Geneva on Wednesday, 24 October 1951 at 2:30 p.m, p. 15)*

- 6.3 Here is what professor Kooijmans has to say with respect to that statement concerning the attainment of the Full Measure of Self-Government by Minister Kernkamp: *"...Een staat kan zich ook binden door eenzijdige handelingen of verklaringen, en andere staten doen bepaalde dingen in de overtuiging dat de verklaring niet zal worden teruggedraaid...handelingen of verklaringen is in 1974 door het Internationaal Gerechtshof uitdrukkelijk erkend in de zaak van de Franse kernproeven in het gebied van de Stille Oceaan..." (Kooijmans, p. 19-20)*
- 6.4 Additionally, on April 4th, 1955, the Permanent Representative of the Government of the Netherlands wrote to the United Nations: *"...As the Secretary-General is aware, the Permanent Representative of the Netherlands informed him in a letter of 31 August 1951 that the Netherlands Government had decided no longer to submit an annual report on Surinam and the Netherlands Antilles in conformity with article 73 (e) of the UN Charter.*
- 6.5 *1/ That decision was taken on the strength of the Interim Orders which came into effect for Surinam on 20 January 1950 and for the Netherlands Antilles on 7 February 1951 and **by virtue of which these countries obtained complete autonomous powers as regards the management of their domestic affairs, including the promotion of their economic, social and educational interests.***
- 6.6 The people of Sint Eustatius contend that it is a wrongful deed to enact the Tijdelijke Wet Taakverwaarlozing, because we could depend on Mr. Kernkamp's and the Permanent Representative's declarations before the United Nations, that a full measure of self-government had been attained. Coming back from those statement is a wrongful deed (onrechtmatige daad).
- 6.7 The report by Mssrs. Franssen and Refunjol, which was used as the main justification for the Dutch State's intervention, should therefore be considered in the same light in which the Hoge Raad considered the allegations against the UN. Regardless of the seriousness of the charges against the UN, its right to immunity was to be respected. Regardless of the allegations in any report therefore, Statia's right to the FMSG must also be respected!
- 7.0 **The wall of protection around the FMSG, pursuant to article 73 of the UN Charter**

- 7.1 Your honor, what purpose would treaties serve, if a country could sign a treaty, ratify it, and then turn around and pass national laws to circumvent its treaty obligations?
- 7.2 This is precisely what the Dutch State is attempting to do with the Tijdelijke Wet Taakverwaarlozing.
- 7.3 The Netherlands have signed and ratified the UN treaty in which the right to the FMSG is enshrined.
- 7.4 Now, the Government of the Netherlands is violating that treaty by introducing a law to circumvent its obligation to respect Statia's right to the FMSG.
- 7.5 Fortunately there are four articles of International law which protect the FMSG: Articles 2 and 103 of the UN Charter, and articles 26 and 27 of the Vienna Convention on the Law of treaties.
- 7.6 Article 27 of the Vienna treaty is of particular relevance: *"...A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46..."*
- 7.7 It should also be borne in mind that the Netherlands has ratified both the UN Charter and the Vienna convention, and the Dutch courts are therefore bound to respect them. If the court is so bound, so is the State.

8.0 How the Hoge Raad applied article 103 and 105 of the UN Charter (ECLI:NL:HR:2012:BW1999)

- 8.1 *"...Die immuniteit is absoluut. Het handhaven daarvan behoort bovendien tot de verplichtingen van de leden van de VN die, zoals ook het EHRM in Behrami, Behrami en Saramanti in aanmerking heeft genomen, ingevolge art. 103 Handvest VN in geval van strijdigheid voorrang hebben boven verplichtingen krachtens andere internationale overeenkomsten. 4.3.6."*
- 8.2 *Die immuniteit komt de VN toe ongeacht de buitengewone ernst van de verwijten die de Stichting c.s. aan hun vorderingen ten grondslag leggen. 4.3.14..."*
- 8.3 Not even the EVRM article 6 could derogate the "right under the charter" to immunity.
- 8.4 If the EVRM cannot infringe or encroach on a right under the UN treaty, how can any law in the Kingdom be able to do so? Statia's right to the FMSG is just as absolute as the UN right to immunity, and that right accrues to Statia regardless to what any report

might say.

9.0 Conclusions

- 9.1 Your Honor! For some strange reason, the State believes that it can wipe out, eliminate, and set aside its obligations under the United Nations Charter, and Statia's rights under the same Charter, by concluding treaties, such as Het Statuut, protocols, regeerakkoorden, bestuursakkoorden, and arrangements such as the Cft, laws such as the Wolbes, Finbes, and Tijdelijke Wet Taakverwaarlozing.
- 9.2 This reasoning, as we have amply demonstrated to the court, is both absurd and erroneous for there simply does not exist any action of national law or treaty which can derogate from rights or obligations under the UN Charter.
- 9.3 Dutch national law can never supersede rights or obligations under the UN Charter.
- 9.4 The interest which article 73 of the UN Charter seeks to protect is perhaps higher or at least equal in importance as that which article 105 seeks to protect, namely international peace and security.
- 9.5 Article 73 seeks to protect vulnerable territories such as Statia against violations of the ius cogens norm, the peremptory norm of customary international law against colonial domination.
- 9.6 The Hoge Raad ruled that once the UN invoked article 105, the judge did not even have to conduct any further examination of the matter.
- 9.7 The Hoge Raad ruled the judge in first instance was right to back away and declare himself incompetent to hear any case brought against the UN.
- 9.8 The Government of the Netherlands defended the immunity of the UN vociferously from 2007 to 2012, taking the matter all the way to the Hoge Raad, while spending hundreds of thousands of Euros in defending the UN.
- 9.9 It wrapped itself in article 103, invoking it time and again before the courts.
- 9.10 We therefore demand equal treatment by the Dutch State and request the State to employ the same vigor and effort in defense of Statia's UN-mandated right to the full measure of self-government.
- 9.11 We therefore request this court to declare the FMSG off limits to the Dutch State, and declare itself incompetent to hear any arguments the state might proffer against the Statia's right to the FMSG.

- 9.12 We request, on the same grounds as the Hoge Raad applied in the above referenced case, that the court not admit or consider any arguments with respect to Statia's FMSG by the State.
- 9.13 Finally, Your Honor, we need to point out that the fact that today, the Dutch State requested a postponement to provide their statement of defence in the main proceedings related to this case, demonstrates the importance and urgency of the people of Sint Eustatius being protected against additional unlawful actions by the Dutch State.
- 9.14 That is why we request the Court to rule that the Dutch State withdraws immediately and totally from Sint Eustatius and turn back over the Government to us, the legitimate Government of Sint Eustatius.
- 9.15 Since we don't need any time to prepare, and have been running the affairs of the Island before the Dutch State took over, there is no need for a transitional period.