The Kingdom in violation of the European Convention on Human Rights in the case of the 'Isla' oil refinery on Curaçao

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List of abbreviations

BOO	Build Own Operate
CAE	Foundation Clean Air Everywhere
CRU	Curaçao Refinery Utilities N.V.
CUC	Curaçao Utilities Company N.V.
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GGD	Gemeentelijke Gezondheidsdienst
ISLA	Refineria Isla Curaçao B.V.
PdVSA	Petróleos de Venezuela S.A.
RdK	Refineria di Korsou N.V.
SHZC	Stichting Humanitaire Zorg Curaçao
SMOC	Stichting Schoon Milieu op Curaçao
StAB	De Stichting Advisering Bestuursrechtspraak voor Milieu en Ruimtelijke Ordening
WHO	World Health Organization

1. Introduction

Introduction to research question

This year marks the 100-year anniversary of the 'Isla' oil Refinery on Curaçao[1]. The refinery was brought to the island by Royal Dutch Shell during colonial times, to process crude oil from Venezuela. Both Curaçao and the Netherlands have greatly profited from the refinery and its anniversary is extensively celebrated on the island.[2] Meanwhile, the fact that the refinery is still running in its current state is the cause for much political debate and human rights concern. Even though the refinery's installations are heavily outdated, and it is the cause of a severe air pollution and public health complaints, the Isla refinery, now directly owned by the government of Curaçao, is continued being leased to Venezuelan State Oil Company Petróles de Venezuela S.A. (PdVSA).

The refinery is situated on the Schottegat industrial terrain, surrounded by residential areas, together with two other polluters; the 'BOO'[3] power plant that is built to provide power to the refinery, and (to a much lesser extend) Acqualectra, a government owned Utilities Company that provides water and electricity to households and companies.[4] That the refinery is the main cause of pollution on the island is no secret. During PdVSA's celebration of twenty years of exploitation of the refinery, vice-president Pedro Jiménez explained to the audience how the refinery is in the digestive system of the population, by what they eat and by what they inhale through their chimneys.[5] In addition, a study has suggested that at least 18 people prematurely die each year as a result of exposure to the refinery's emissions. [6] Even though local non-governmental organisations (ngo's) are protesting the constant exceedance of local and international environmental norms, not much has been done to ensure the health and well-being of those living in the downwind area of the Schottegat industrial terrain. Not even enforcing the Nuisance Permit, under which the refinery operates and which environmental standards have not been updated since 1997.

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[1] Curaçao is an island situated in the Southern Caribbean Sea, 65km north of the Venezuelan coast, with a land area of 444 square kilometers, and a population of around 160.000 people.
[2] Exposition 'Isla den nos bida' opened on Curaçao on December 2016, and displays the ways in which the refinery has influenced local culture for the past hundred years. *Antiliaans Dagblad* 6 December 2016.
[3] 'BOO' is short for 'Build Own and Operate'.
[4] All three establishments contribute to the emission levels (albeit to a substantially different extend) and are bound by the same Ambient Air Quality Standards to which they have to comply to together.
[5] 'Smakeloze grap PdVSA directeur 2005', *Knipselkrant Curaçao* 8 September 2012.
[6] 'Economic Value of Strategic Options for Refineria Di Korsou', *Ecorys-NEI* 2005, p.89.

Numerous lawsuits have been filed in an effort to halt the pollution brought forth by the refinery, but have so far not led to any concrete action against the refinery's polluting activities.[7] Having exhausted all local remedies, local ngo's and inhabitants are looking at the Netherlands and the European Court of Human Rights (ECtHR or the Court) for help. The most recent lawsuit is initiated against the government of Curaçao, by Foundation Clean Air Everywhere (CAE) together with 30 inhabitants of the affected area, and asks to declare that by acting negligent, the government of Curaçao is violating their rights under the European Convention on Human Rights (ECHR or the Convention). They specifically claim their rights under Articles 2, 8 and 10 of the Convention, and have announced their intention to bring the case before the European Court in Strasbourg if the outcome in national court remains unsatisfactory.[8]

When the Netherlands Antilles was dissolved on 10 October 2010, Curaçao became an autonomous country within the Kingdom of the Netherlands.[9] Curaçao is signatory to Convention with the Kingdom of the Netherlands as Contracting Party.[10] The constitutional context of Curaçao makes the Isla case interesting. Since Curaçao is not a sovereign State, it has no international legal personality and as such cannot sign international treaties. Therefore, a violation of the Convention on Curaçao will lead to a violation for the entire Kingdom of the Netherlands, even though treaty implementation and compliance is an autonomous responsibility of the individual countries. Article 43 of the Charter for the Kingdom of the Netherlands[11] (the Charter) provides that the promotion and realisation of human rights and freedoms is a matter within the competence of the constituent countries.[12] Nevertheless, the second paragraph of Article 43 provides that "[t]he safeguarding of such rights and freedoms,

[7] Lawsuits have been filed by Stichting Schoon Milieu op Curaçao (SMOC), Stichting Humanitaire Zorg Curaçao (SHZC), Foundation Clean Air Everywhere (CAE) and others since 2005. The fact that there are no mechanisms installed to measure which establishment has contributed what to the emission levels, makes it difficult to establish that they are acting unlawfully.

[8] 'Persbericht: Stichting Clean Air Everywhere gaat ultieme bodemprocedure tegen het land Curacao voeren over de aanhoudende milieu(lucht)vervuiling' *Clean Air Everywhere* 11 November 2016.

[9] Prior to 10-10-10, Curaçao was administered as the Island Territory of Curaçao, one of the five island territories of the former Netherlands Antilles. Together with Curaçao, St Maarten also became an autonomous country within the Kingdom. Aruba already became an autonomous country within the Kingdom of the Netherlands on1 January 1986. The Kingdom of the Netherlands now consists of four autonomous countries: the Netherlands, Aruba, Curaçao and St Maarten. The country of the Netherlands consists of a territory in Europe and the islands of Bonaire, Saba and St Eustatius in the Caribbean. The latter three are public bodies (within the meaning of the Dutch Constitution) and are largely governed from The Hague.

[10] 'Reservations And Declarations For Treaty No.005 - Convention For The Protection Of Human Rights And Fundamental Freedoms', *Council of Europe Treaty Office* 30 April 2018.

[11] The division of competences between the constituent countries and the Kingdom is set out in the 1954 Charter for the Kingdom of the Netherlands (the Charter). All matters are within the competence of the constituent countries, unless stated otherwise.

[12] Article 43.1 Charter for the Kingdom of the Netherlands.

legal certainty and good governance shall be a Kingdom affair", commonly referred to as the 'safeguarding function' of the Netherlands.[13] The above constitutes a problem for the Netherlands. While the average concentration of yearly emissions of sulphur dioxide and particulate matter keep rising, so does the tension between those in Dutch government who plead for an active interpretation of the safeguarding function of the Netherlands, and those who plead for a passive interpretation of the safeguarding function of the Netherlands regarding the Isla case.[14]

This thesis will assess whether the Isla case is in violation of the European Convention on Human Rights and what the legal consequences of this are for the Netherlands as Kingdom government[15] under the Charter for the Kingdom of the Netherlands. It will do so by firstly comparing the case law of the ECtHR on Articles 2 and 8 concerning the environment with the facts of the Isla case, and secondly by discussing the responsibility of the Kingdom government in light of its safeguarding function. Assessing whether or not the case in its current form is in violation of the Convention is important as the Kingdom government, by not intervening, is risking another button on its belt of human rights violations under the Convention. This is due to the fact that it ultimately bears responsibility for human rights within the Kingdom on an international level. A thorough analyses of relevant ECtHR case law with regards to the Isla case has never been produced before, making the work of this thesis unique.

Methodology

[13] Article 43.2 Charter for the Kingdom of the Netherlands. If the Kingdom finds that the country is not fulfilling its obligations under article 43.1, it can intervene on the basis of the safeguarding function.

[14] Various members of the House of Representatives have argued that the fact that acts or omissions from the government of the constituent countries can be attributed to the entire Kingdom, shows that the Netherlands should be more proactive in safeguarding human rights within the Kingdom. This would have consequences on how it deals with the Isla case, where members of the Dutch House of representatives have pleaded various times for an intervention by the Kingdom government on the basis of Article 43.2 of the Charter.

[15] The Kingdom government is a term derived from the Charter and is made up of the King and the Dutch ministers.

In order to assess whether or not those affected by the refinery's emissions could make a successful claim under the European Convention on Human Rights, chapter 2 will provide facts and background to the Isla case. This includes information on the ownership structure, the Nuisance Permit under which the refinery operates, statistics and reports on the environmental- and heath damages as a result of the refinery's emissions, and an overview of judicial procedures on Curaçao so far. Furthermore, this chapter will provide some historical-and geopolitical context of the Isla Refinery to give readers a better understanding of the core of issue and the difficulties plaintiffs have in accessing their rights through local remedies.

Facts and background to the Isla case has been derived from a variety of different sources. On the ownership structure and the Nuisance Permit, legal documents belonging to the Refinery and the power plant, can be retrieved online. Reports and audits on the refinery, its pollution or the health effects thereof have been published on the websites of local ngo's SMOC[16] or CAE[17]. In addition, specific data on the levels of sulphur dioxide and particulate matter in the area downwind of the Schottegat industrial area, that show the exceedance of environmental norms are retrieved from the measurements by Gemeentelijke Gezondheidsdienst (GGD) Amsterdam.[18] To keep track of recent developments, additional sources from local news outlets such as the *Knipselkrant Curaçao*[19], *Amigoe*[20], *Antillaans Dagblad*[21] and *Caribisch Netwerk*[22] have been used.

In order to assess whether the Kingdom of the Netherlands is guilty of violating the human rights of the people living downwind of the refinery, the facts of the Isla case will be compared with case law of the ECtHR on environmental matters in chapter 3. Since the plaintiffs on Curaçao are specifically claiming their rights under Articles 2, 8 and 10 ECHR, the research of this thesis will be confined to the case law and literature on these articles. In addition to case law, scholarly sources will be consulted. Amongst these are the Fifth Edition of 'Theory and Practice of the European Convention on Human Right*s'*[23], and 'Het EVRM en het Materiële Omgevingsrecht'[24].

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[16] Stichtingsmoc.nl.
[17] Cleanaireverywhere.com.
[18] GGD Amsterdam performs measurements at three measurement stations located in the downwind area from the Schottegat industrial terrain. The results of these are made public on luchtmetingencuracao.org.
[19] Knipselkrant-curacao.com.
[20] Amigoe.com.
[21] Antiliaansdagblad.com.
[22] Caribischnetwerk.ntr.nl.
[23] P. van Dijk ea., 2018.
[24] D.G.J. Sanderink, 2015.

Having concluded that the Isla case is in violation of the ECHR, the final chapter of this thesis will go in to the responsibility of the Kingdom government under Article 43 of the Charter for the Kingdom of the Netherland. In light of previous Kingdom interventions and recent developments, it will argue that the Kingdom government should have a more proactive stance in safeguarding the rights of those affected by the Isla refinery. To support this argument, motions and debates in the Dutch House of Representatives, as well as literature from various legal scholars will be consulted.

2. The Isla Case

The current chapter will provide facts and background to the Isla case, in order to gain a better understanding of the magnitude of the problem and the difficulties the plaintiffs have in accessing their rights on Curaçao. In order to do so, it will go into the historical context of the

refinery, its ownership structure, the gravity of the damage to public health and the environment, and the judicial proceedings that have taken place so far. In understanding the core of the issue, and the difficulties plaintiffs have in accessing their rights, it is important to have some knowledge of the (geo)political interests at play and the historical importance of the refinery for Curaçao.

Historical context

During colonial times, when slavery was abolished[25] and the economy was at a low, the Royal Dutch Shell (Shell) brought prosperity back when it started exploiting Venezuelan oilfields and decided to build its refinery on Curaçao.[26] The 'Isla' oil refinery was established in 1915 and is located along the Schottegat harbour, near the capital city of Willemstad, and surrounded by residential areas. When the refinery started processing in 1918, it soon became the economic mainstay of the island. In the early fifties, the Isla employed more than 12,000 people out of the island population of 110,000. In addition, in the beginning of the eighties, 33% of the island's Gross National Product was provided for by Shell-companies.[27]At that time Shell was so powerful on Curaçao that one of its former directors was quoted talking to a newspaper, saying "The Antillean government? We were that government".[28]

The Netherlands also greatly profited from the refinery. An important example of this was during World War II, when the Isla refinery, together with Aruba's Lago Oil and Transport Company, produced no less than 85% of the kerosene for the allied forces.[29] It was also during this period, that Shell created the infamous Asphalt Lake, by dumping an estimated 1.5 million tons of asphalt into an enclosed part of the Schottegat bay, which has never been cleaned up.[30] Since Shell was so important for Curaçao, the government treated Shell very kindly when it ran the refinery with little regard for human health or the environment.

When Venezuela nationalized its oil production in 1975, and the United States of America started striving towards a more independent energy policy, the Isla refinery started

[25] The Dutch West India Company turned Curaçao into the centre for Atlantic salve trade. Slavery was abolished on Curaçao in 1863.
[26] The natural deep-water harbor and the stable political climate of Curaçao as part of the Kingdom of the Netherladns made Curaçao the obvious choice.
[27] A. ten Kate, 'Royal Dutch Shell and its sustainability troubles: Background report to the Erratum of Shell's Annual Report 2010', 2011.
[28] Ibid, p.51.
[29] Ibid.
[30] Ibid.

operating with losses.[31] For economic reasons, the government of Curaçao did not want to see the closure of the refinery. For geopolitical reasons, the Venezuelan government wanted to stay in business with the island situated roughly 65km off its coast. As a result, when Shell and Curaçao were unable to reach consensus on its future, Venezuela involved their State-owned Oil Company PdVSA to lease the refinery.[32] The negotiations ended in 1985, with Shell selling the refinery for the symbolic figure of 4 Antillean Guilders (ANG) to the island of Curaçao, leaving behind the infamous Asphalt Lake and waiving all liability for environmental damages caused during their 70 years of exploitation.[33] The buyers were the legal entities Netherlands Antilles and island territory Curaçao. In the rental agreement[34], the Netherlands Antilles, the island territory of Curaçao and PdVSA agreed that the need for utilities (power, electricity, water and compressed air) would be provided for by an independent utility company, known as the Curaçao Utilities Company N.V. (CUC), through an onsite power plant, later known as the 'BOO' power plant.[35] In running the BOO, energy from the refinery is used for production.[36]

Since 1985 the refinery is the property of the country Curaçao (as successor of the island territory of Curaçao before 10-10-10). The government of Curaçao is the sole shareholder to Refineria di Korsou N.V. (RdK), which directly owns the refinery.[37] The country of Curaçao, through RdK, also owns all shares in the Curaçao Refinery Utilities N.V. (CRU), which is the operator of the BOO power plant, and has shares in CUC. The CUC exploits the BOO power plant, on the grounds of the terrain of the refinery and is responsible for its management and maintenance.[38] Since 1994, the country Curaçao leases he refinery via RdK to PdVSA[39] and will continue to do so until at least 2019.

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[31] 'Our History', *Refineriaisla.com* 2018.

[32]'Regering Venezuela Dwong PdVSA tot Huur Isla', *Antilliaans Dagblad* 3 May 2015.

[33] The agreement specifically stated that the buyers had to abstain irrevocably and unconditionally from existing and future claims for pollution or other environmental effects exerted by Shell. E. van den Berg, 'Shell liet milieuramp achter op Curaçao: raffinaderij in 1985 voor 4 gulden verkocht' 2015.

[34] This agreement is also known as the 'Government Agreement'.

[35] BOO (build, own, operate), constructed in 2003, is a public-private partnership (PPP) project model in which a private organization builds, owns and operates some facility or structure with some degree of encouragement from the government.

[36] This consists of a limited number of refinery gasses, but mostly asphalt, the quality of which is largely dependent on the type of crude oil that is being refined.

[37] 'Our History', *Refineriaisla.com*, 2018.

[38] This makes RdK and CRU de facto the exploiters of the refinery and the BOO power plant that belongs to it.

[39] The refinery is being exploited by Refineria Isla Curazao S.A. (Refineria Isla), to which PdVSA holds all shares. Refineria Isla is a company under Venezuelan law, with a branch office on Curaçao, which fully owns the daughter company Refineria Isla Curaçao B.V.. Refineria Isla Curaçao B.V. is the operating company that executes the management and operations of the installation and the factory terrain.

The government is working hard to find a new company to lease the refinery after 2019, but has failed to do so thus far. The poor state of the refinery makes it hard for the current premier of Curaçao, Eugene Ruggenaath, to find an interested party.[40] Even though PdVSA has made known that it wishes to continue leasing the refinery after 2019, 3 billion USD is needed to modernize the refinery and PdVSA is already failing to pay its debts due to the financial crisis in Venezuela.[41] Despite the heavy cost on the environment, and the difficulties in finding a company willing and able to modernise the refinery, the government seems to want to keep the refinery open at all costs.[42] When no party has been found before the current lease agreement ends, Ruggenaath plans for PdVSA to temporarily continue to lease the refinery without modernisation.[43] In the meantime Curaçao has accepted help from the Netherlands in finding an interested party.[44]

Environmental and health concerns

Both the refinery and the power plant operate under a Nuisance Permit, that was granted to them in 1997 for the entire duration of the lease agreement between RdK and PdVSA.[45] Following article 1.1 of the Permit, facilities can only be in function when in compliance with the provisions of the Permit. The Environmental services are authorized to monitor and control the compliance to this permit. The Nuisance Permit also provides the government with the right to enforce its provisions and stop illegal activities (article 34), to exercise governmental pressure (article 36) and to impose a fine (article 37).

The Nuisance Permits of the refinery and the power plant both contain the same

[40] 'Voortbestaan raffinaderij Curaçao pijndossier voor Kabinet Ruggenaath', *Caribisch Netwerk* 4 December 2017.
[41] Ecorys-NEI had earlier researched three possible scenarios for the refinery in the future. The outcome of this was to either modernise, move, or close the refinery. The authorities in 2012 had argued that modernizing would offer the best economic, social and financial perspective for the island but that a third investor is needed because neither Curaçao or PdVSA could invest the required USD 3 billion. 'Plan van Aanpak Isla Raffinaderij: Strategische opties voor de raffinaderij en Schottegatgeboed', *Government of Curaçao* 30 May 2012, p. 9.
[42] The government of Curaçao in 'Plan van Aanpak Isla Raffinaderij: Strategische opties voor de raffinaderij en Schottegatgebied' of 2012, estimated that the Isla is good for 8,5% of their GDP, offers direct employment to 1000 people, indirect employment to 500 others, and contributes about 400 million Antilian Guilders to public treasury annualy, p.8
[43] 'Isla-raffinaderij: wie gaat er nog investeren in schone lucht?', *Caribisch Netwerk* 20 December 2017.
[44] 'Curaçao aanvaardt hulp Nederland bij zoektocht naar nieuwe huurder raffinaderij', *Caribisch Netwerk* 6 December 2017.
[45] The basis of the permit stems from the 'Hinderverordening Curaçao 1994', (A.B. 1994 no. 40) and was drafted by the Environmental Service Curacao, RdK and Refineria Isla.

‘Attachment F’, which contains limit values for the concentration in the air at the ground level for various substances.[46] These norms are extended to Isla and BOO, to which they have to comply together.[47] Curaçao knows three main sources on the Schottegat industrial terrain that contribute to the concentration of sulphur dioxide at the ground level: the Isla refinery, the BOO power plant, and to a much lesser extent, electricity and water supplier Aqualectra. Since the government has not made a distribution of the maximum contribution to the level of sulphur dioxide to each of these sources, it is technically difficult to establish the violation of this norm by one of the polluters. Moreover, there are no mechanisms in place to establish which installation contributed what to the emission level.

That there is a violation of the norms in the Nuisance Permit is evident, since automatic measurements to the concentration of sulphur dioxide and particulate matter in the air at the ground level have been conducted in the area downwind of the refinery since 2010.[48] Measurements to the air quality at the ground level in these areas show that the yearly average emission norm of sulphur dioxide (laid down at 80 µg/m3) has been exceeded every year since 2013, with a peak of 225 µg/m3 annual average in 2015, almost three times the allowed yearly average limit value (and over ten times the allowed limit value of the WHO). [49] Furthermore, the Nuisance Permit stipulates that the allowed daily average emission of sulphur dioxide (laid down at 365 µg/m3 a day) cannot be exceeded more than once a year, while measurements show that this was exceeded 39 times in 2015, reaching peaks of with peaks of 600 µg/m3. [50]

Additionally, since abovementioned norms and provisions have not been updated since 1997, they are in stark contrast with modern environmental norms such as those by the World Health Organization (WHO) or the European Union (EU). In comparison to the daily average emission of sulphur dioxide as stipulated in the Nuisance Permit, the daily average limit value of the EU is set about three times lower (125 µg/m3). Furthermore, in comparison to the yearly average of Attachment F, the guideline value of the WHO is set four times lower (20µg/m3).

[46] Article 6.3 of Attachment F to the Nuisance Permit Isla.
[47] CRU exploits the BOO power plant under a lease agreement and because it has its own legal personality, it has its own Nuisance Permit. Both permits apply the same environmental standards. The norm from 1997 counts for all sources, and was not updated when the BOO power plant was installed in 2003. This leads to a complicated discussion on who exactly contributes what to the air quality.
[48] In request of the government of Curaçao, the ‘Gemeentelijke Gezondheidsdienst Amsterdam’ has installed measuring stations in three affected areas (Beth Chaim, Julianadorp and Kas Chicitu). Results are publicized daily on www.luchtmetingencuracao.org.
[49]D. de Jonge, ‘Meetresultaten Luchtkwaliteit Curaçao 2015’, 2016.
[50] The daily average norm for sulphur dioxide of 365 µg/m3, which cannot be exceeded more than once a year, was exceeded 39 times in 2015, with peaks of 600 µg/m3, and 3 times in 2016, with a peak of 706 µg/m3. See table 1 of Appendix A.

Even though the Nuisance Permit calls upon the evaluation of its norms and provisions every five years, this has never been done.[51] Even more remarkable is that while the environmental norms in the Nuisance Permit are relatively weak and often exceeded, the Nuisance Permit has never been enforced.

The violation of abovementioned norms makes that inhabitants of the affected areas suffer from complaints such as odour nuisance, headaches, red and tearing eyes, cough, raspy voice, sore throat, shortness of breath, and asthma. To make matters worse, the constant current of the wind blows the emission gasses into the poorer neighbourhoods, and it is not uncommon that schools in the area have to be evacuated due to sudden headaches amongst students.[52] The link between high concentrations of sulphur dioxide and public health is well established in literature. Even Attachment F of the Nuisance Permit warns that the current concentrations of sulphur dioxide at the ground level could result in increased mortality rates (for example from bronchitis and lung cancer), hospital admissions, respiratory illnesses and other health complaints.[53] In addition, one of the earlier researches by lung specialist C.J.J. Westerman in 1997 concluded that high concentration of sulphur dioxide, particulate matter and sulphate can explain many cases of illnesses in the affected area.[54] Furthermore, a study conducted by Ecorys-NEI in 2005 concluded that as a result of the refinery's emissions, eighteen people prematurely die per year.[55] Inhabitants also complain about a green substance on their house and outside furniture, the composition of which has been found to exist out of carcinogenic substances which spread through tiny drops and can be inhaled by people living in the affected areas.[56] Additional research to the exact health effects of the green substance is needed, but has

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[51] Article 1.2 of the Nuisance Permit.

[52] The Juan Pablo Duarte school in Buena Vista has to close down regularly when heavy smoke exits the refinery or when students suffer headaches or other complaints.

[53] Appendix D of Regulation 1, Attachment F, states that "For concentrations of about 500 μg/m3 of SO_2 (24-hour average) increased mortality may occur. For concentrations of about 300 μg/m3 to 500 μg/m3 of sulfur dioxide (24-hour average) increased hospital emissions of older persons for respiratory disease may occur (…). For concentrations ranging from 105 μg/m3 to 265 μg/m3 of sulfur dioxide (annual average) increased symptoms of respiratory and lung disease may occur. For concentrations ranging from 115 μg/m3 to 120 μg/m3 of sulfur dioxide (annual average) increased frequency and severity of respiratory diseases in school children may occur as well as increased mortality from bronchitis and lung cancer'. On Long Term (Annual) Standard the Appendix notes that '[f]or concentrations ranging from 105 μg/m3 to 265 μg/m3 of sulfur dioxide (annual average) increased symptoms of respiratory and lung disease may occur. For concentrations ranging from 115 μg/m3 to 120 μg/m3 of sulfur dioxide (annual average) increased frequency and severity of respiratory diseases in school children may occur as well as an increase in mortality from bronchitis and lung cancer".

[54] C.J.J. Westerman, 'Chronic Non-Specific Lung Disease', 1997.

[55] 'Economic Value of Strategic Options for Refineria Di Korsou' *Ecorys-NEI* 2005, p.89.

[56] The green substance seems to be coming from industrial sources (such as the burning of oil). 'Bepaling van de elementsamenstelling van een groene aanslag aanwezig op vijftal locaties op Curaçao met behulp van elektronenmicroscopie en Rontgen microanalyse', *TNO* 17 August 2015.

so far not been carried out.

In response to the abovementioned concerns, many inspections to the functioning of the refinery have taken place and numerous reports have listed recommendations.[57] While reports and recommendations keep stacking up, the chances are small any of them end up being used, seeing as most others have not.[58] This was reason for Stichting Schoon Milieu op Curaçao (SMOC), Stichting Humanitaire Zorg Curaçao (SHZC) and Foundation Clean Air Everywhere (CAE), to file numerous lawsuits in an effort to halt the pollution brought forth by the refinery.

Legal proceedings on Curaçao

For over a decade, civil society organisations have tried to hold the Isla accountable for their pollution through the legal system at hand. While this has significantly increased awareness, they have not yet managed to actually halt or lower the level of pollution. SMOC initiated legal proceedings in 2005 by demanding the authorities to enforce the Nuisance Permit and apply coercive measures against the Isla and the BOO power plant.[59] In this procedure, Curaçao[60] argued that stopping illegal activities would mean shutting down the refinery, which would significantly hurt Curaçao's already weak economy. The judge was not convinced and found that the authorities had not gone into proper investigation toward the gravity of the environmental violations.[61] The court of first instance also confirmed the likelihood that the annual average sulphur dioxide limit at the ground level had been systematically exceeded by Isla and other sources in the years prior to the court case, and found that Isla's share in the total concentration of sulphur dioxide at ground level by itself exceeded the combined annual average value of the Nuisance Permit. In 2010, the Joint Court of Justice of the Netherlands Antilles and Aruba confirmed the unlawfulness of the sulphur dioxide emissions from the Isla refinery and concluded that the measures required to reduce Isla's emissions to an acceptable

[57] Examples are a technical and environmental audit by FLOUR that suggested switching to lighter crude oil, TNO recommendations to conduct follow-up research to the effect of the cardiogenic materials in the green substance, or a recent audit carried out by E&D Technologies Texas following a fire in the Isla refinery in 2017, which concluded that the refinery has been very lucky in avoiding major incidents as many technical requirements are not being met.
[58] An example of early recommendations is a report from 'Dienst Centraal Milieubeheer Rijnmond' in 1983 that recommended that the refinery should be forbidden to flare gasses for longer periods of time. Thirty-five areas later, flaring is still commonly used to get rid of byproducts.
[59] Court of First Instance of Curaçao, judgment of 19 July 2006, LAR 2005/146.
[60] During that time, Curaçao was part of the Netherlands Antilles, and the Executive Council (Bestuurscollege) formed the daily administration of the island territory of Curaçao. The proceedings were held against the Executive Council.
[61] Court of First Instance of Curaçao, judgment of 19 July 2006, LAR 2005/146.

level did not require a particularly large investment from Isla and would not compromise the survival of the refinery. [62] The interests of the inhabitants suffering from the emissions thus outweighed the economic interests, and the Joint Court prohibited the Isla to contribute than 80 µg/m3 to the yearly average emission, with a penalty of 75 million ANG in case the Isla violated the norm again. While this marked the first victory for SMOC, it did not have much effect since there are no mechanisms in place to measure which facility on the industrial terrain contributes what to the annual amount of sulphur dioxide at the ground level. In addition, in May 2012, the highest administrative judge ruled that the government did not (yet) had to actively enforce the Nuisance Permit concerning the emission of sulphur dioxide and particulate matter. The highest administrative judge found that the interpretation of the enforcement request was taken too wide.[63]

In a more recent procedure initiated by SMOC, CAE and others in 2015, the local court refused to give the government a time limit to reduce the pollution and concluded that the authorities were 'on the right track' to combat its pollution problems.[64] The plaintiffs in this case tried to rely on Articles 2, 8 and 10 ECHR, but the local judge did not go into their rights under the Convention. [65]

CAE and others v. Curaçao

After twelve years of disappointing judicial proceedings for all organisations, CAE, together with thirty residents of the area downwind of the Schottegat terrain, have started new proceedings on the merits against the government of Curaçao.[66] In addition, the plaintiffs clearly state their wish to bring the case before the European Court of Human Rights if the

[62] The Court in First Instance had earlier ordered an expert report to weigh the interests of the residents living downwind of the Isla refinery against the (socio)economic interests of the island. See Joint Court of Justice of the Netherlands Antilles and Aruba, judgment of 12 January 2010, ECLI:NL:OGHNAA:2010:BK9395.
[63] GHvJ 28 mei 2012, *LJN* BX0658, *CJB* 2012/3, p. 156.
[64] The judgment was extensively criticized by legal scholars. See for example K. Frielink & L. Rogier, 'Annotatie bij het vonnis in kort geding van het Gerecht in eerste aanleg van Curaçao d.d. 16 november 2015, zaaknr. KG74136/2015'.
[65] ECLI:NL:OGEAC:2015:24 Court of First Instance of Curaçao, judgment of 16 November 2015; It is remarkable that the judges on Curacao did not go into the plaintiffs' claims of their rights under the Convention. From the principle of subsidiarity, it follows that it is first and foremost for national authorities to ensure that the rights enshrined in the Convention are not violated and to offer redress if ever they are.
[66] The case of CAE, together with around thirty residents of the area downwind of the Schottegat terrain, is assisted by lawyer Sandra in 't Veld and a team of lawyers from Stibbe Advocaten Amsterdam.

outcome remains unsatisfactory.[67] All plaintiffs in the current case are inhabitants of the area downwind of the Schottegat-industrial terrain, and all claim to suffer damage to their belongings as a result of green substance or soot, and a reduced quality of life through health complaints, odour nuisance and stress.[68] The plaintiffs complain that despite various promises and consultations with the authorities, relevant research and measurements are not being carried out, actions formulated by experts are not being followed through and promised education to inhabitants on their health risks is not taking place.[69] The plaintiffs demand that the government holds those who are guilty of causing the environmental damage accountable and steps up to protect the public health of its citizens. More important for this thesis, the plaintiffs ask the local court to declare that by acting negligent, the government is violating their human rights, as laid down in the European Convention of Human Rights.[70] They specifically seek protection under articles 2 (Right to Life), 8 (Respect for Private and Family Life) and 10 (Access to Information) of the Convention. The plaintiffs claim that it is evident that the environmental and health problems derive from the Isla refinery, the related BOO power plant, and to a much lesser extend Aqualectra, but that the government should promote the human rights of its citizens regardless of where the damage comes from.[71]

In their application, they rely on article 24 and 25 of Curaçao's country regulations, which dictate that the habitability of the country and the protection of the environment is the responsibility of the government, and that the government is to take measures for the promotion of public health. [72] Having lost hope that the government of Curaçao is willing or able to address the current problem, and having exhausted local remedies available to them, the plaintiffs are looking at Strasbourg (and The Hague) for help.

Conclusion

In conclusion, serious pollution and constant exceedance of the allowed limit values of the Nuisance Permit has been going on for decades, is measured and publicised online by the government, and is hence well-known by the government. Despite its heavily outdated norms and the constant exceedance thereof, the Nuisance Permit has never been enforced, and has never been updated. In addition, numerous reports have linked the refinery's emissions to

[67] The announcement made the front page of local newspaper 'Amigoe'. 'Bodemprocedure CAE en 30 mede-eisers tegen het Land Curaçao', *Amigoe* 11 November 2016.
[68] Application CAE and others v. Curaçao, paragraph 23.
[69] Application CAE and others v. Curaçao, paragraph 101.
[70] Application CAE and others v. Curaçao, paragraph 5.
[71] Application CAE and others v. Curaçao, paragraphs 4-6.
[72] State Regulations of Curaçao, 'Staatsregeling van Curaçao'.

health complaints, diseases or even premature deaths amongst inhabitants of the affected area. Even though the results of these researches have been known for years, the government of Curaçao has shown either unwilling or unable to resolve the situation, and has taken no concrete measures to protect its citizens against the detrimental impact of the emissions on those affected.

The plaintiffs have also failed to make any significant changes through the local legal system. We can see that the outdated system of permits and the failure to obtain data on the exact emissions from the Isla refinery, instead of that of all industrial activity on the Schottegat terrain, makes that little can be achieved through the legal instruments at hand on the island. Additional measurement systems need to be installed before a judge can rule with certainty that the refinery is acting unlawfully. However, when the local judge had established that the refinery is emitting more than it is allowed, this remarkably enough has not led to actual punishment. Even when a judge would enforce the environmental norms of the Nuisance Permit, significant air pollution will proceed to exist when compared to modern environmental norms. Having exhausted all local remedies, the plaintiffs intend to take the case to Strasbourg is legitimate and understandable. A judgment by the ECtHR is binding and the Kingdom of the Netherlands would be obligated to comply with it.[73]

3. The Isla case and the European Convention on Human Rights

The following chapter will analyse whether the interferences brought up by the plaintiffs in the case of CAE and Others v. the government of Curaçao are in violation with the European Convention on Human Rights. In order to do so, this chapter will first go into the applicability of the ECHR on Curaçao, and give a brief introduction to environmental protection under the Convention. It will subsequently compare the facts of the Isla case with literature and jurisprudence on the right to life (Article 2) and the right to respect for private and family life

[73] Article 46 paragraph 1 of the ECHR provides that "[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties".

(Article 8) in environmental cases. There will be no subchapter on the plaintiffs' claims under the right to access to information (Article 10), because the freedom to receive information cannot by itself be understood as imposing on public authorities a general obligation to collect and disseminate information relating to the environment.[74] Articles 2 and 8 of the Convention can impose a positive obligation on public authorities to ensure a right of access to information, which will be dealt with when discussing Articles 2 and 8.

Applicability of the ECHR

The Kingdom of the Netherlands is a contracting party to the European Convention on Human Rights[75], and all constituent countries of the Kingdom are bound by it. Since only the Kingdom of the Netherlands is a subject of international law, only the Kingdom can conclude, ratify and accede to international legal agreements, such as treaties and conventions. However, the geographical applicability of these agreements may be confined to Aruba, Curaçao, St Maarten, the European part of the Netherlands and/or the Caribbean part of the Netherlands (Bonaire, St Eustatius and Saba). Upon signing the Convention, a specific declaration was included by the Kingdom which laid down that it would also apply to the Caribbean parts of the Kingdom.[76] The extension of the ECHR and certain Protocols to Dutch Overseas Territories follows from article 56 of the Convention. Article 56 concerns the territorial application of the Convention and provides that "Any State may … declare … that the … Convention shall … extend to all or any of the territories for whose international relations it is responsible". Curaçao, as autonomous country within the Kingdom of the Netherlands is thus bound by its provisions and shall secure to everyone within its jurisdiction the rights and freedoms defined in Section I of the Convention as laid down in Article 1 of the Convention.[77] The fact that Curaçao is primarily responsible flows from Article 43 of the Charter for the Kingdom of the Netherlands, which states that "[e]ach of the Countries shall promote the realization of fundamental human rights and freedoms, legal certainty and good governance".[78]

[74] 'Manual on Human Rights and the Environment', 2011.
[75] The European Convention on Human Rights was opened for signature in Rome on 4 November 1950 and entered into force on 3 September 1953. All 47 Council of Europe Member States are party to the Convention.
[76] 'Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms', 2016.
[77] Section I of the Convention contains the Rights and Freedoms protected by the ECHR.
[78] The Charter for the Kingdom of the Netherlands is the constitution for the Kingdom as a whole and lays down the division of competences between the Kingdom of the Netherlands and its four autonomous countries. All

Any person, non-governmental organization or group of persons in a country signatory to the Convention has a right to raise a complaint with the Court under Article 34 of the Convention, subject to the conditions set out in Article 35.[79] Following from Article 35 of the Convention, in order for an individual or a group of individuals to make a claim under the Convention, they must have directly and personally been the victim of the violation(s) they are alleging. The violation must be attributable to the State concerned and the applicants must have exhausted all national remedies available to them.[80] All plaintiffs in the current case are inhabitants of the area downwind of the industrial terrain where the Isla and its power plant are situated.[81] All claim to suffer from a reduced quality of life through odour nuisance, stress, health complaints, green substances and soot on their belongings, and worry about the irreversible consequences of the air pollution.[82] In addition, as we have established in the previous chapter, the plaintiffs have exhausted all national remedies available to them.

Environmental protection under the ECHR

Since the Convention was drafted well before awareness of environmental issues arose, its provisions do not specifically enshrine the right to a healthy environment. However, as it is now commonly accepted that environmental degradation can lead to human rights violations, the European Court of Human Rights has progressively developed an environmental dimension within the Convention, mostly through the extensive interpretation of Article 2 (right to life) and Article 8 (right to respect for private and family life).[83] In the context of the environment, Article 2 can be applied when activities endangering the environment are so dangerous that they endanger human life, and Article 8 can be applied when these activities significantly

areas are considered to be internal competences of each of the autonomous countries unless the Charter explicitly states otherwise.

[79] From Article 34 of the Convention, it follows that "[t]he Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right".

[80] Article 35 ECHR.

[81] Application CAE and others v. Curaçao, paragraph 21.

[82] Application CAE and others v. Curaçao, paragraph 23.

[83] 'Manual on Human Rights and the Environment', 2011, p.11.

interfere with the right to respect for private and family life. Under Article 1 of the Convention, the Contracting State is required to 'secure' the Convention rights to everyone within its jurisdiction. This entails that public authorities are not only to refrain from arbitrary interference with the right to life or the right to private and family life (negative obligation), but also have a 'positive obligation' to ensure the enjoyment of these rights.[84]

While Articles 2 and 8 often overlap, meaning that a violation of Article 2 often also entails a violation of Article 8, the protection of both articles substantially differ in scope. When comparing the 'right to life' to the 'right to respect for private and family life', the latter requires a less intense breach to be violated. Whereas Article 8 can apply in cases of substantial hindrance, Article 2 only comes to play in life threatening situations. As a result, the Court leaves no room for States to refrain from taking measures when the right to life is at stake, while in the case of an interference with the right to respect for private and family life, the State is mostly required to strike a fair balance between the interests of the community and that of the individual. Because of the above, issues under Article 2 in cases concerning the environment are exceptional. On the other hand, interferences with the right to respect for private and family life in theory could be caused by any type of pollution and are much more common in the ECtHR case law concerning the environment. The following subchapters will assess whether the interferences in the Isla case are in violation with Articles 2 and 8 of the Convention.

Article 2 'The Right to life'

Introduction

The plaintiffs in CAE and others v. the government of Curaçao complain that their right to life under Article 2 of the Convention is violated, as the authorities have failed to comply with their (substantive) positive obligation. The right to life is protected under Article 2 of which the first paragraph reads as follows:

[84] P. van Dijk ea., 'Theory and Practice of the European Convention on Human Rights', 2018. p. 11.

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

While the primary duty of Article 2 is to prevent the State from deliberately taking life[85], the Court has developed its jurisprudence in a way that Article 2 also contains a 'positive obligation' of States to take appropriate steps to safeguard the lives of those within its jurisdiction. In the context of the environment, Article 2 can thus be applied when activities endangering the environment are so dangerous that they also endanger human life.[86]

Since modern industrialized society knows many highly polluting activities that can be dangerous for people living in its proximity, the Court has set certain boundaries for a State to be required to take concrete measures to prevent a risk from materialising. The State is only obliged to take measures when they are reasonable, within their power, and when there is a 'real and immediate' threat to life, that the authorities knew or should have known of. In addition, for a case to fall under Article 2, a causal link between the risk to life and the acts or negligence of the State must be established. What could be reasonably expected of a State to avoid a real and immediate risk to life of which they have or ought to have known should be answered in light of all circumstances of the particular case.[87] Furthermore, the Court has found that in technically complicated cases such as those concerning the environment, States enjoy a rather wide margin of appreciation.

While this is called the 'substantive' aspect of Article 2, the State also has a 'procedural' obligation; in the case of violations of Article 2, the State must also "conduct an effective inquiry into the facts that led to the violations and punish the persons responsible for the misconduct".[88] As mentioned, issues under Article 2 in cases concerning the environment are exceptional. So far the Court has found the right to life to be violated in four cases concerning

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[85] Except for the circumstances it sets out in the second paragraph. Paragraph 2 of Article 2: "[d]eprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection".
[86] *L.C.B. v. UK*, paragraph 36; *Öneryildiz v. Turkey*, paragraph 71; *Budayeva and Others v. Russi*a, paragraph 128.
[87] *Osman v. United Kingdom*, paragraph 116.
[88] 'Theory and Practice of the European Convention on Human Rights', p.11.

the environment: *Budayeva and Others v. Russia*[89], *Özel and Others v. Turkey*[90], and *Kolyadenko and Others v. Russia*[91], all concerning natural disasters, and *Öneryildiz v. Turkey*[92], concerning deaths resulting from dangerous industrial activities.

Positive obligation

The positive obligation of States to ensure the right to life was first recognized in the case of *L.C.B. v. the United Kingdom*[93], and includes that public authorities have a duty to guarantee the right to life, even when this is threatened by other (private) persons or activities that are not directly connected with the State.[94] This means that no actual loss of life has to have occurred for a State to be in violation of its positive obligations under Article 2 of the Convention.[95]

In *Kolyadenko and Others v. Russia*, applicants complained that the authorities had put their lives at risk by the dumping of a large amount of water, causing a sudden flood in the area where the applicants lived.[96] Even though no actual lives were lost, the Court established that "the authorities had positive obligations under Article 2 of the Convention to assess all the potential risks inherent in the operation of the reservoir, and to take practical measures to ensure the effective protection of those whose lives might be endangered by those risks"[97]. The Court ruled that the absolute right to life of the applicants was violated, because the authorities did not give a warning before dumping the water and did not properly maintain the canal, causing the lives of the applicants to be endangered.[98] It noted that:

[89] *Budayeva and others v. Russia*, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/0, judgment of 20 March 2008.The case primarily concerned the applicants' allegations that the Russian authorities had failed to warn the local population about the likelihood of a large-scale mudslide (that had cost Vladimir Budayeva's life and harmed others), to implement evacuation and emergency relief policies or, after the disaster, to carry out a judicial enquiry.

[90] *Özel and Others v. Turkey,* Application nos. 14350/05, 15245/05 and 16051/05, judgment of 17 November 2015. The Court held unanimously that there had been a violation of Article 2 under its procedural head. The case concerned the deaths of the applicant' family members, who were buried alive when buildings collapsed due to one of the deadliest earthquakes ever recorded in Turkey. The Court found that the national authorities had not acted promptly in determining the responsibilities and circumstances of the collapse of these buildings.

[91] *Kolyadenko and others v Russia*, Applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, judgment of 28 February 2012.

[92] *Öneryildiz v. Turkey*, Application no. 48939/99, judgment of 30 November 2004.

[93] *L.C.B v. the United Kingdom,* Application no. 23413/94, judgment of 9 June 1998, paragraph 36.

[94] *Öneryildiz v. Turkey,* paragraph 71.

[95] See for example *L.C.B v. the United Kingdom* or *Öneryildiz v. Turkey.*

[96] *Kolyadenko and Others v. Russia*, paragraph 130.

[97] *Kolyadenko and Others v. Russia,* paragraph 166.

[98] Application CAE and Others v. Curaçao paragraph 113.

> Under the circumstances, the authorities could reasonably have been expected to acknowledge the increased risk of grave consequences in the event of flooding following the urgent evacuation of water from the Pionerskoye reservoir, and to show all possible diligence in alerting the residents of the area downstream of the reservoir. In any event, informing the public of the inherent risks was one of the essential practical measures needed to ensure effective protection of the citizens concerned.[99]

In addition, the Court has found that the positive obligation on States may also apply in the context of (dangerous) industrial activities. Under Article 2 of the Convention, the Court has qualified toxic emissions from a fertilizer factory, waste collection sites or nuclear tests as 'dangerous activities', whether carried out by public authorities or private companies, but the concept could encompass a wider range of industrial activities. In the case of *Öneryildiz v. Turkey*, a methane explosion occurred on a rubbish tip and the refuse erupting from it engulfed more than ten houses, including the one belonging to the applicant, who lost nine close relatives in the accident. The applicant complained that no preventive operational measures had been taken even though an expert report had drawn the attention of the municipal authorities to the danger of a methane explosion at the tip, two years before the accident. The Court in *Öneryildiz v. Turkey* reiterated that the positive obligation of States applies in the context of a range of dangerous activities, whether they are public or private, in which the right to life may be at stake, "*a fortiori* in the case of industrial activities, which by their very nature are dangerous".[100] The Court further stated that this obligation includes the State's duty to enact regulations addressing the specific characteristics of the dangerous activity.[101] The regulations must govern the "licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks".[102] Amongst these preventive measures, special emphasis should be placed on the public's right to information.[103] In addition, the Court noted that it is important to assess whether the legal measures put in place "call for criticism" and whether they are actually being implemented.[104]

[99] *Öneryildiz v. Turkey,* paragraph 71.
[100] *Öneryildiz v. Turkey,* paragraph 71.
[101] *Öneryildiz v. Turkey,* paragraph 90.
[102] *Öneryildiz v. Turkey,* paragraphs 89-90.
[103] *Öneryildiz v. Turkey,* paragraphs 90.
[104] *Öneryildiz v. Turkey,* paragraph 97.

However, not every alleged risk to life can oblige the authorities to take operational measures to prevent that risk from materialising under the Convention.[105] While judging the extend of the positive obligation of the authorities in *Öneryildiz v. Turkey*, the Court assessed (1) whether there was a real and immediate risk to life and (2) whether the authorities knew or ought to have known about this risk.[106] The Court found that since the authorities knew – or ought to have known – that there was a real and immediate risk to the lives of people living near the rubbish tip, they had an obligation under Article 2 to take preventive operational measures to the protection of those people.[107]

Harmfulness and foreseeability

As seen in the judgment of the Court in *Öneryildiz v. Turkey*, the extent of the positive obligation of public authorities generally depends on factors such as the harmfulness of the dangerous activities and the foreseeability of the risk to life. [108] The ECtHR finds that a State has not complied with its positive obligation under Article 2 when it has established, for example:

> … that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[109]

In Kolyadenko and others v. Russia, the poor state of the canal and its maintenance problems were known to the authorities at least two years before the flood, and the recommended measures had not been properly implemented.[110] The Court held that "[u]nder

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[105] *Osman v. the United Kingdom*, paragraph 116.

[106] In the case of *Budayeva and others v. Russia*, 20 March 2008, (15339/02) the Court assesses whether there a risk to life existed and whether the authorities should have been aware of this, but other than in *Öneryildiz* v. Turkey it did not speak of a 'real and immediate risk', paragraphs 147-149.

[107] *Öneryildiz v. Turkey*, paragraphs 98-101. For this argument, it was of crucial importance to the Court that in Turkey safety measures for waste tips existed due to the risk of methane gas explosions and that an expert report had noted the authorities that the waste tip was not upholding safety requirements two years before the explosion took place. The Court thus found that the authorities allowed the existence of a 'real' risk to the lives of those living around the waste tip, but did not properly explain why it found the risk to be 'immediate'. The safety measures were not up to date since the 1970s and nothing happened in the 23 years before the explosion.

[108] *Öneryildiz v. Turkey* paragraph 73; *L.C.B v. the United Kingdom,* paragraphs 37-41.

[109] *Osman v. United Kingdom*, Application no. 87/1997/871/1083, judgement of 28 October 1998, paragraph 116.

[110] *Kolyadenko and Others v. Russia*, paragraphs 168-170. The Court found that "it appears that the authorities disregarded technical and safety requirements and, therefore, potential risks, including risk to human lives, by

the circumstances, the authorities could reasonably have been expected to acknowledge the increased risk of grave consequences in the event of flooding … and to show all possible diligence in alerting the residents of the area downstream of the reservoir”.[111] Furthermore, in the case of *Öneryildiz v. Turkey,* the Court found that “it was impossible for the administrative and municipal authorities responsible for supervising and managing the tip not to have known of the risks inherent in methanogenesis or of the necessary preventive measures, particularly as there were specific regulations on the matter”.[112] Since actual loss of life had occurred as a result of the inactions of the State, the Court did not have to go into the harmfulness of the interference, and found that the authorities knew or ought to have known that there was a real and immediate risk to life without giving an explanation as to why it found the risk to be ‘real and immediate’.

In the case of *Kolyadenko and others v. Russia*, where a mere risk to life was discussed, the Court did not use the terms ‘real and immediate’, but did asses which of the applicant’s lives were endangered as a result of the events complained of. The fact that they survived and sustained no injuries had no bearing on the conclusion of the Court, but a link needed to be established.[113] What is interesting to note is that while the Court found that Article 2 was applicable because the flood had posed a real risk to life, it dismissed the applicants who were not at home at the time of the flood and did not have to flee their house.[114] This is remarkable, because it makes the applicability of Article 2 dependent on the coincidental fact if the applicants were home at the time of the events or not. If they had coincidentally also been home, the Court would have found that the State had failed them in safeguarding their rights under the Convention.

Causal link

While a causal link between the risk to life and the acts or negligence of the State must also be established, the Court often does not go into much detail on why it has recognized this causal link. Its assessment under *Kolyadenko and Others v. Russia*, the Court merely stated that it had

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failing to reflect them in legal acts and regulations and allowing urban development in the area downstream from the Pionerskoye reservoir”, “in de absence of any measures aimed at protecting the area from floods”.

[111] *Kolyadenko and Others v. Russia,* paragraph 181.

[112] *Öneryildiz v. Turkey*, paragraph 101.

[113] *Kolyadenko and Others v. Russia,* paragraph 155.

[114] *Kolyadenko and Others v. Russia*, paragraphs 152 – 155.

no doubt "that there is a direct link between that violation and the pecuniary losses alleged by the applicants"[115]. Furthermore, in the case of *Öneryildiz v. Turkey,* the Court established that:

> [i]n the present case there is no doubt that the causal link established between the gross negligence attributable to the State and the loss of human lives also applies to the engulfment of the applicant's house. In the Court's view, the resulting infringement amounts not to 'interference' but to the breach of positive obligation, since the State officials and authorities did not do everything within their power to protect the applicant's proprietary interests.[116]

In *L.C.B. v. the United Kingdom*, the Court found that the applicant failed to prove a causal link between the actions of the State and her risk to life. L.C.B. concerned an applicant who argued that her childhood leukaemia was caused by her father being exposed to high levels of radiation when he served as a catering assistant on Christmas Island at the time nuclear test were conducted there by the United Kingdom. She argued that the State had failed to warn her parents of the possible risks to her health. The Court found that the authorities could have reasonably believed at the time that the applicant's father had not been exposed to dangerous levels of radiation, and did not find a conclusive causal link between the nuclear blasts and the applicant's leukaemia. Considering this, it could not have been expected of them to take action in respect of the applicant. The case does further demonstrate that 'dangerous activity' which threatens human life can potentially violate Article 2, even if no actual lives were lost. Had the Court found that the authorities should have been aware of the risks to their health, and a causal link was established, the outcome might have been different.

Margin of appreciation

In contrast to claims made by the plaintiffs in CAE and others v. Curaçao, the State under Article 2 enjoys a rather wide margin of appreciation in difficult social and technical spheres

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[115] *Kolyadenko and Others v. Russia*, paragraph 245.

[116] *Öneryildiz v. Turkey*, paragraph 135.

such as issues concerning the environment.[117] As to the specific practical measures the State must take in the context of dangerous activity, the Court has held that as there are different ways to ensure Convention rights, and that failing to take one specific measure, does not mean the State cannot fulfil its positive duty in other ways.[118] In *Kolyadenko and Others v. Russia* the Court had additionally stated that "[i]n this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources"[119] When evaluating whether the State has fulfilled its positive obligation, the Court will take into consideration the particular circumstances of the case, having regard to i.a. the domestic legality of the authorities acts or omissions, the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue.[120] In the case of *Kolyadenko and Others v. Russia* the Court found a violation of Article 2, arguing that:

> no impossible or disproportionate burden would have been imposed on the authorities in the circumstances of the present case if they had complied with their own decisions and, in particular, taken the action indicated therein to clean up the Pionerskaya river to increase its throughput capacity and to restore the emergency warning system at the Pionerskoye reservoir. [121]

The Court additionally noted that no other solutions were envisaged by the authorities to ensure the safety of inhabitants.[122]

In the case of *Öneryildiz v. Turkey* the Court found the Turkish government in violation with Article 2 as it concluded that a timely installation of a gas-extraction system before the fatal event could have been a non-costly, effective measure within the powers of the authorities.[123] The Court argued that "The preventive measures required by the positive obligation in question fall precisely within the powers conferred on the authorities and may reasonably be regarded as a suitable means of averting the risk brought to their attention".[124]

Industrial emission

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[117] In their application, the plaintiffs of CAE and Others v. Curaçao argue that the government does not enjoy a margin of appreciation under cases concerning Article 2, paragraph 111.
[118] *Budayeva and Others v. Russia*, paragraph 134; *Kolyadenko and Others v. Russia*, paragraph 160.
[119] *Kolyadenko and Others v. Russia*, paragraph 160.
[120] *Kolyadenko and Others v. Russia*, paragraph 161.
[121] *Koyladenko and Others v. Russia,* paragraph 183.
[122] *Kolyadenko and Others v. Russia*, paragraph 184.
[123] *Öneryildiz v. Turkey*, paragraph 107.
[124] *Öneryildiz v. Turkey*, paragraph 107.

As can be established from the above, environmental cases on the right to life have so far been limited to cases concerning exposure to nuclear radiation, natural disasters, and industrial activities that led to accidents in which lives were lost.[125] In light of the previous case law on Article 2 it will be difficult to establish whether the Isla case, containing of a risk to life due to industrial emission, is in violation with the convention. Not only is the risk to life in the Isla case arguably a lot less 'real and immediate', but the causal link between the risk to life and industrial emissions is difficult to establish.

One previous case on industrial emissions and the right to life has been brought before the Court, which is the case of *Smaltini v. Italy* (2015)[126], but was declared inadmissible. *Smaltini v. Italy* concerned the Ilva industrial site in Taranto which shows many similarities with the Isla case on Curaçao. Ilva is a steel production and processing company, which for many years has been mired in controversy over the environmental and health impact of the emissions from the Taranto steel plant, the largest of its factories. Ms Smaltini suffered from leukaemia and claimed that her illness had been caused by the emissions from the plant. She brought proceedings against a manager of Ilva, which the national judge discontinued on the basis that no causal link had been established between the emissions and the applicant's condition.[127] Even though Ms Smaltini had submitted various documents supporting the claim that there was a causal link between her leukaemia and the polluting activities of the Ilva Steel plant, a haematological report, requested by the preliminary investigative judge, assessed the incidence of leukaemia in Ms Smaltini's age group to be no higher in the relevant region, than in other regions of Italy.[128]

When she turned to the ECtHR she complained under the procedural aspect of Article 2 because the domestic authorities had not established the existence of a causal link between the polluting emissions from the Ilva plant and her leukaemia. Under the procedural aspect, the Court only had to determine whether the courts in reaching their conclusion had submitted the case to the careful scrutiny as required by Article 2 and did not have to go into the substantive dimension of Article 2. The ECtHR observed that, according to the reports examined by the domestic courts, the incidence of leukaemia was no higher in the Taranto region than in other regions of Italy. The Court therefore found that Ms Smaltini had failed to demonstrate that in

[125] 'Environment and The European Convention on Human Rights – Factsheet', 2016.
[126] *Smaltini v. Italy,* Application no. 43961/09, admissibility decision 24 March 2015.
[127] *Smaltini v. Italy*, paragraph 21.
[128] *Smaltini v. Italy*, paragraphs 14-18. Ms Smaltini had submitted her medical certificate, an undated report downloaded from the internet concerning the purported emission of carcinogenic agents by the plant, and DVDs in which the head of the Department of Haematology affirms the existence of a causal link between the rise in the incidence of leukaemia and the polluting emissions from Ilva during TV programmes.

the light of the scientific data available at the time of the events, and without prejudice to the findings of future scientific studies, that the authorities had failed in their obligation to protect her life under the procedural aspect of Article 2. The application was rejected as being manifestly ill-founded. This decision leaves an open door for future applications against Ilva, in the case of more persuasive evidence being able to prove the link between the pollution and the damage, and suggests that States could have a positive obligation to protect their citizens from risk to life in the case of industrial emissions.

There are currently two other cases pending before the Court concerning industrial emissions and the right to life: *Locascia and Others v. Italy*[129], *Cordella and Others v. Italy*[130]. *Cordella and Others v. Italy* also concerns the Taranto Ilva steel plant.[131] As it is unclear which approach the Court will take in examining the merits, it is impossible to tell with certainty whether the Court would find the Kingdom of the Netherlands in violation with Article 2 of the convention in the Isla case.

Article 2 and the Isla case

The plaintiffs in CAE and others v. the government of Curaçao complain that their right to life under Article 2 of the Convention is violated, as the authorities have failed to comply with their (substantive) positive obligation. The government as public entity and as private owner has direct influence, but fails to use its power to enforce the Nuisance Permit, uphold modern safety standards or take any other preventive measures to protect the lives of those affected. In addition, the authorities of Curaçao have also been warned multiple times for the physical state of the refinery, the likeliness of dangerous incidents happening, and the accompanying health risks to the population.[132] Furthermore, the causal link between the health complaints of the inhabitants and the refinery's emissions are suggested by numerous expert reports, amongst

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[129] *Locascia and Others v. Italy*, Application no. 35648/10 [pending]. The 19 applicants live in the municipalities of Caserta and San Nicola La Strada (Campania). They complain in particular about the danger to their health and the interference with their private life and home caused by the operation of a private waste disposal plant and by the failure of the authorities to secure, clean-up and reclaim the area after the closure of the plan

[130] Joined cases *Cordella and Others v. Italy*, Application no. 54414/13 & *Ambrogi Melle and Others v. Italy* Application no. 54264/15. These applications concern the polluting emissions from the Taranto Ilva steel plant. The applicants, who live(d) in or near Taranto, allege that the Italian authorities failed to take the necessary measures to safeguard the environment and the health of persons. The Court gave notice of the applications to the Italian Government and put questions to the parties under Article 2 (right to life), Article 8 (right to respect for private life) and Article 13 (right to an effective remedy) of the Convention.

[131] The applicants in *Cordella and Others v. Italy*, who live in or near Taranto allege that the Italian authorities failed to take the necessary measures to safeguard the environment and the health of the people. The applicants also claim their right under Article 8 of the Convention.

[132] Application CAE and Others v. Curaçao, paragraph 112.

which one report that establishes the premature death of at least eighteen people per year due to the refinery's emissions.[133]

When comparing the facts of the Isla case to the facts in cases such as *Kolyadenko and Others v. Russia* and *Öneryildiz v. Turkey*, many similarities can be detected. Summarizing the judgment of the Court in these cases, the State has a positive obligation in the case of dangerous industrial activities to take preventive operational measures when there is a real and immediate risk to the lives of those affected by it, about which the authorities knew or should have known about. Nevertheless, one could question if the Court will find that the applicants in the current case suffer from a real and immediate risk to life. [134] The mere possibility that the plaintiffs could become one of the eighteen people to prematurely die due to toxic emissions will most likely not be enough to invoke Article 2 of the Convention. In addition, in comparison to the 18 premature deaths per year, Curaçao counted 19 deaths in traffic over 2017.[135] Also, according to the Dutch National Institute for Public Health and the Environment, estimates on the premature deaths due to air pollution in the Netherlands vary from 6,700 to 19,000 per year.[136] Furthermore, the possibility that due to the poor state of the refinery an accident will happen in the future which poses a real and immediate threat to life is also not sufficient to invoke Article 2. While it is of course possible that the Court develops its case law in *Locascia and Others v. Italy* or *Cordella and Others v. Italy and Ambrogi Melle and Others v. Italy* as such that Article 2 offers protection for health concerns as a result of industrial emission, it is more likely that the Court will dismiss the current case under Article 2 and will find the case more appropriately dealt with in the context of Article 8. A similar outcome was found in the admissibility decision in the case of *Fadeyeva v. Russia*[137], which we will discuss in the following subchapter.

Article 8 'The Right to Respect for Private and Family Life'

Introduction

The plaintiffs in CAE and Others v. Curaçao also claim their rights to respect for private and family life as well as for the home and correspondence under Article 8 of the Convention, which reads as follows:

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[133] Economic Value of Strategic Options for Refineria Di Korsou' *Ecorys-NEI* 2005, p.89.

[134] From the case law of the Court in *Öneryildiz v. Turkey*, *Budayeva and Others v. Russia* and *Kolyadenko and Others v. Russia* it follows that the assessment of whether the risk is 'real and immediate' is primarily the assessment of whether the chances of it happening are not unlikely.

[135] '2017 telde 19 verkeersdoden', *Curacaoniews* 5 January 2018.

[136] 'Hoe komt het dat de luchtkwaliteit in Nederland zorgwekkend is', *Volkskrant* 22 August 2017.

[137] *Fadeyeva v. Russia*, Application no. 55723/00, judgment of 9 June 2005.

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

The Court has recognized that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such way as to affect their private and family life adversely".[138] The case law of Article 8 consists of a variety of situations where the environment is harmed in ways that interfere with the rights protected by Article 8. For Article 8 to apply, it does not matter if the pollution is directly caused by the State or whether State responsibility arises from their failure to regulate private-sector activities properly.[139]

As mentioned, in comparison to the right to life, the right to respect for private and family life has a wider scope and requires a less intense breach to be violated. An interference affecting the integrity of private and family life in theory could be caused by any type of pollution and does not have to seriously affect the applicant's health.[140] For an issue to arise under Article 8, the environmental factors must directly and seriously affect private life, family life, the home, or correspondence. There are thus two main things the Court must consider – whether there exists a causal link between the activity and the negative impact on the individual, and whether this has attained a certain threshold of harm or a 'minimum level of severity'.[141] When the above is established, the Court will examine whether the State's positive obligation to protect the right has been engaged. Conditions upon which a State may interfere with the enjoyment of a protected right are set out in the second paragraph of Article 8, and include the economic well-being of the country. Interferences under paragraph 2 of Article 8 are only allowed when these are 'in accordance with the law' or 'prescribed by law' and 'necessary in a democratic society'. Within this necessity test, the Court will examine whether the authorities have succeeded in striking a fair balance between the interest of the community

[138] *López Ostra v. Spain*, Application no. 16798/90, paragraph 51, judgment of 9 December 1994.
[139] *Giacomelli v. Italy*, Application no. 59909/00, paragraph 78, judgment of 2 November 2006.
[140] *López Ostra v. Spain*, paragraph 51.
[141] 'Manual on Human Rights and the Environment', p. 19 – 20.

and the applicant's effective enjoyment of their right to respect for the home and private and family life. When doing so, special emphasis is placed (especially in the case of health risks) on the access to information of those affected.[142]

The Court has applied Article 8 in several cases of pollution or potentially dangerous (industrial) activities. The Court for example found Article 8 to be violated due to shortcomings of the authorities in cases concerning toxic emissions (*Fadeyeva v. Russia*[143], *Dubetska and Others v. Ukraine*[144], *Băcilă v. Romania*[145], and *Giacomeli v. Italy*[146]), and the use of dangerous industrial procedures (*Tătar v. Romania*[147], *Taşkin and Others v. Turkey*[148]).

Minimum level of severity

To make sure that not every hindrance in modern industrialized society falls within the scope of Article 8, the Court tests whether the interferences complained of reaches a minimum level of severity. An interesting case in this respect, is that of *Fadeyeva v. Russia* in 2005, as it shows many similarities with the Isla case. Ms. Fadeyeva was living in the proximity of a steel factory which toxic emissions significantly polluted the air of the area she lived in, and far exceeded the norms of Russian environmental legislation for inhabited areas. [149] Even though the Russian authorities had appointed a buffer zone around the premises of the plant, aimed at separating it from the residential areas, in reality thousands of people lived there, including Ms. Fadeyeva and her family. In 1990, Ms Fadeyeva had demanded in local court to be appointed housing in a safe area, which got her on a waiting list that was so long that it did not provide an effective solution to her problem. She initially complained to the ECtHR under both Article 2 and Article 8. The Court ruled that the air pollution formed no 'real and immediate' risk to her physical integrity or her life, but did not explain why.[150] The Court found the case better dealt with in the context of Article 8, concerning which it noted that:

> 68. Article 8 has been relied on in various cases involving environmental concern, yet it is not

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[142] *Guerra and Others v. Italy.*
[143] *Fadeyeva v. Russia*, Application no. 55723/00, judgment of 9 June 2005.
[144] *Dubetska and Others v. Ukraine*, Application no. 30499/03, judgment of 10 February 2011.
[145] *Băcilă v. Romania*, Application no. 19234/, judgment of 30 March 201004.
[146] *Giacomelli v. Italy*, Application no. 59909/00, judgment of 2 November 2006.
[147] *Tătar v. Romania*, Application no. 67021/01, judgment of 27 January 2009.
[148] *Taşkin and Others v. Turkey*, Application no. 46117/99, judgment of 10 November 2004.
[149] A Decree adopted by the Russian government in 1996 even stated that the concentration of polluting substances in the residential areas was twenty to fifty times higher than the maximum limits and that the situation had resulted in a continuing deterioration of public health. *Fadeyeva v. Russia*, paragraph 15.
[150] *Fadeyeva v. Russia* (admissibility decision), Application no. 55723/00, judgment of 16 October 2003.

> violated every time that environmental deterioration occurs: no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention (...). Thus, in order to raise an issue under Article 8 the interference must directly affect the applicant's home, family or private life.
>
> 69. The Court further points out that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 (...). The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.
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> 70. Thus, in order to fall within the scope of Article 8, complaints relating to environmental nuisances have to show, firstly, that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained. [151]

The Court accordingly found that the minimum level of severity was reached, since the exceedances of safe concentrations of toxic elements were serious (potentially harmful to the health and well-being of those exposed to it) and took place over a significant period of time.[152] From the assessment of the court in *Fadeyeva v. Russia* we can see that the intensity and duration of the nuisance, its physical or mental effects and the contexts in which it takes place, are important factors in establishing whether interference reaches the minimum level of severity. Nevertheless, the Court is often brief in its explanation on whether the minimum level of severity has been reached. Furthermore, as it varies from case to case, it is difficult to detect a clear pattern in its assessment thereof.

Wat is clear, is that hindrances inherent to modern industrialized society do not fall within the scope of Article 8. In addition, it seems as though the minimum level of severity is often found to be reached when research shows that an activity is in violation of national or international norms and regulations, such as those of the World Health Organization.[153] Moreover, the same counts for activities that have led to the deterioration of health or diseases.[154] On the other hand, the mere violation of national laws does not necessarily mean

[151] *Fadeyeva v. Russia,* paragraph 68-70.
[152] *Fadeyeva v. Russia,* paragraph 87.
[153] D.G.J. Sanderink, '*Het EVRM en het materiele omgevingsrecht*', 2015, p. 51.
[154] Ibid, p. 52.

that Article 8 applies.[155] The Court has further found Article 8 to apply to cases concerning noise hindrance due to air traffic[156], the emissions of a waste processing installation[157], the extraction of gold in a goldmine through 'sodium cyanide leaching'[158], and the environmental pollution of toxic substances due to the exploitation of a goldmine[159].

Causal link

Similar to Article 2, we can only speak of a violation of the ECHR and liability of the government, when the authorities can in any way be held responsible for the interference with a Convention right. In the case of *Fadeyeva v. Russia,* the applicant provided a medical document by a clinic in St Petersburg in support of the claim that her health had deteriorated due to the fact that she lived near a steel plant. The Court found that this report "did not establish any causal link between environmental pollution and the applicant's illnesses". [160] Furthermore, the applicant did not present any other medical evidence connecting the state of her health to high pollution levels in the area where she lived. She did provide numerous official documents confirming that the environmental pollution in the area had constantly exceeded safe levels and that any person being exposed to such pollution levels would inevitably suffer serious damage to his or her health and well-being.[161] Despite the lack of medical evidence, the Court found that:

> 87. In summary, the Court observes that over a significant period of time the concentration of various toxic elements in the air near the applicant's home seriously exceeded the MPLs. The Russian legislation defines MPLs as safe concentrations of toxic elements [...] Consequently, where the MPLs are exceeded, the pollution becomes potentially harmful to the health and well-being of those exposed to it. This is a presumption, which may not be true in a particular case. The same may be noted about the reports produced by the applicant: it is conceivable that, despite the excessive pollution and its proved negative effects on the population as a whole, the applicant did not suffer any special and extraordinary damage.

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[155] Ibid, p. 51.
[156] *Hatton and Others v. the United Kingdom*, Application no. 26022/97, judgement of 8 July 2003; *Powell and Rayner v. the United Kingdom*, Application no. 9310/81, judgment of 21 February 1990; *Flamenbaum and Others v. France*, Application no. 375/04, judgment of 13 December 2012.
[157] *López Ostra v. Spain.*
[158] *Taşkin and Others v. Turkey.*
[159] *Tătar v. Romania.*
[160] *Fadeyeva v. Russia,* paragraph 80.
[161] *Fadeyeva v. Russia,* paragraph 81.

> 88. In the instant case, however, the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel plant. Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home. Therefore, the Court accepts that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention.[162]

In comparison, in the case of *Tătar v. Romania,* where the applicants argued, among other things, that the State had violated their rights under Article 8, as they acted negligent while a company involved in gold mining activities (in hands of the government and operating with a government permit) made use of 'sodium cyanide leaching'. This resulted in an increased concentration of toxic substances, which led to the deterioration of the asthmatic disorder of one of the applicants. The Court accepted that there was an increased concentration of the toxic material in the environment and also that the applicant had an asthmatic disorder, but ruled that there was not enough scientific evidence on the existence of a causal link between the concentration of the toxic material and the deterioration of asthma.[163]

Finally, regarding the attribution of the alleged interference to the State, the Court in *Fadeyeva v. Russia* noted that the steel plant was not "owned, controlled, or operated by the State", and the Russian authorities could thus not be said to have directly interfered with the applicant's right to respect for private life or home. However, as the State's responsibility in environmental cases can arise from the failure to regulate private industry it concluded that:

> the authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The combination of these factors shows a sufficient nexus between the pollutant emissions and the State to raise an issue of the State's positive obligation under Article 8 of the Convention.[164]

Having established the causal link between the damage and the actions or inactions of the State, it remains to be determined whether the interference with the right is legitimate under

[162] *Fadeyeva v. Russia,* paragraph 88.
[163] *Tătar v. Romania,* paragraphs 98-106.
[164] *Fadeyeva v. Russia,* paragraph 92.

paragraph 2 of Article 8, and whether the State has struck a fair balance between the competing interests of the applicant and the community as a whole.

Fair Balance

Paragraph 2 of Article 8 provides that an interference with the right to private and family life by public authority can be legitimate when in accordance with the law and necessary in a democratic society in the interest of, for example, the economic well-being of the country. However, the interference must be proportionate to the legitimate aim pursued. For this purpose, a fair balance must be struck between the interest of the individual and the interest of the community as a whole. Within this tests, States enjoy a rather wide margin of appreciation since the Court finds that environmental matters are so complex that local authorities are in a better position to assess what the best policy is.[165] The Court will assess whether the public authorities have approached the matter with due diligence and have taken all competing interests into consideration in their decision-making process leading to measures of interference. In comparison to the right to life, the Court under Article 8 only in exceptional cases goes so far as to indicate appropriate positive measures.

An early example of a case concerning industrial pollution under Article 8 was *López Ostra v. Spain*[166] in 1994. The applicant in this case lived in a town with a high concentration of leather industries. She complained to the Court that the authorities had not acted concerning the nuisance that consisted of smells, noise and polluting fumes, coming from a waste-treatment plant (build with government funding) only twelve meters away from her home. The Court found that not only had the State failed to take measures to ensure her right to respect for the home, private and family life, it had also resisted against the ruling of a local judge who ordered the temporary shutdown of the establishment by lodging an appeal. The Court held a violation of Article 8, concluding that the authorities had not succeeded in striking a fair balance between the interest of the town's economic well-being and the applicants enjoyment of her right to her home and her private and family life. The Court did not further go into why it found that the State failed in striking a fair balance.

An interesting case in this respect is the case of *Băcilă v. Romania*[167]. Băcilă lived close to a factory that emitted a significant amount of sulphur dioxide and heavy metals, polluting

[165] *Hatton and Others v. UK*, Application no. 36022/97, judgment of 8 July 2003, paragraphs 97- 100.
[166] *López Ostra v. Spain*, Application no. 16798/90, judgment of 9 December 1994.
[167] *Băcilă v. Romania*, Application no. 19234/04, judgment of 20 March 2010.

the environment. The Court ruled that it was not up to the ECtHR to decide whether the factory had to have been shut down to comply with environmental norms, but did note that even though the emissions had gone up, the authorities had not taken any action.[168] The authorities had not acted because the factory was the biggest employer of the city and they were afraid that taking measures would lead to the closing of other businesses and would threaten many jobs in the area. Even though the economic well-being of the country is listed under paragraph 2 of Article 8 as a possible legitimate reason to interfere with the exercise of the right to Article 8, the Court ruled that the issue of employment should not have prevailed over the right of the applicant to a healthy environment. The Court found that the grave consequences of the pollution for the applicant and other inhabitants of the village meant that the government had a positive obligation to take reasonable and adequate measures to safeguard their Convention rights. Since they did not take adequate measures, the Court concluded that they had not struck a ‘fair balance’ between the (economic) interest of employment and the right of the applicant to respect for the house, and private and family life.[169]

In the case of *Fadeyeva v. Russia*, the Court also found that there had been a violation of Article 8 of the Convention because Russia had failed to strike a fair balance between the interests of the community and the applicant’s effective enjoyment of her rights under the Convention. In its assessment, the Court noted in particular that the Russian authorities had authorised the operation of a polluting plant in the middle of a densely populated town, and that the toxic emissions exceeded the safe limits of domestic legislation. In addition, while the polluting plant at issue operated in breach of domestic environmental standards, there was no proof that the State had undertaken or enforced effective measures that took into account the interest of the local population, even though the authorities were capable of reducing the industrial pollution to acceptable levels. Furthermore, the Court noted that the plan to create a buffer zone free from housing had not been properly implemented and that the applicant was not offered any effective solution to move from the dangerous area.

Even though the positive obligation on States are of various kinds and vary in every situation, generally, when the activity violated domestic rules, the State must take necessary steps to end it.[170] Furthermore, the failure to provide information about environmental risks is often found to be a relatively easy way to protect the health of those affected. A good example

[168] *Băcilă v. Romania*, paragraph 69.
[169] *Băcilă v. Romania*, paragraph 70-73.
[170] J. Akandji-Kombe, ‘Positive obligations under the European Convention on Human Rights’, 2007.

of this is *Guerra and Others v. Italy*, where the Court found the authorities in violation with Article 8, as they had not provided the local population information that would have enabled them to assess the risks they and their families might run if they continued to live near a chemical factory. In comparison, the Court found no violation when the authorities had fulfilled their obligation to inform and thus protect and inform residents (*Hardy and Maile v. the United Kingdom*[171]). Finally, it is important that the State has approached the problem with due diligence and gives consideration to all competing interests when weighing the interest of the community against the interest of the individual. In the case of *Giacomelli v. Italy,* the Court stated that:

> in a case … which involves government decisions affecting environmental issues, there are two aspects to the examination which it may carry out. Firstly, it may assess the substantive merits of the government's decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual.[172]

In this case, the Court accordingly found the absence of a prior environmental-impact assessment and the failure of the authorities to suspend the activities of a plant generating toxic emissions close to a residential area a violation of Article 8.

Article 8 and the Isla case

The plaintiffs in CAE and others v. the government of Curaçao argue that their rights under Article 8 of the Convention, are violated. They specifically make mention of their right to physical and mental integrity, the right to respect of the home, and the positive obligations of the government to protect its citizens against environmental and health degradation.[173]

As we have learned above, in cases concerning an existing violation due to environmental nuisance under Article 8, the applicants must show that there was an actual interference with the applicant's home or private life and that a level of minimum level severity has been reached.[174] A causal link must also be established between the actions or negligence of the authorities and it must be clear whether the government knew or should have known

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[171] *Hardy and Maile v. the United Kingdom,* Application No. 31965/07. judgment of 14 February 2012.
[172] *Giacomelli v. Italy,* paragraph 79.
[173] Application CAE and Others v. Curaçao, paragraph 117.
[174] *Fadeyeva v. Russia*, paragraph 70.

about the existing violation. In the Isla case, all plaintiffs are inhabitants of the affected area under the smoke of the refinery, and all claim to suffer damage to their belongings as a result of green substance or soot, and a reduced quality of life through odour nuisance, health complaints and worries about the irreversible health effects of the substances they are breathing in.[175] The health complaints as a result of the environmental pollution suffered by the plaintiffs include headaches, red and tearing eyes, cough, raspy voice, sore throat, shortness of breath, and asthma.[176]

The causality of the refinery's emissions and effects on health is suggested by various reports. The GGD concluded in 2015 that inhaling the concentrations as they have been measured in the area downwind from the refinery can lead to the narrowing of the respiratory tract which can lead to difficulties breathing, a lower lung function and an increase in asthmatic complaints.[177] Furthermore, the causality of serious detrimental effects on health and high concentrations of sulphur dioxide and particulate matter is established in the Nuisance Permit. In addition, research by TNO has shown that the green substance consists of i.e. nickel, sulphur and vanadium, the danger of which are well established in literature and that, when inhaled, can be the cause of cancer. The government of Curaçao, as private owner of the polluting establishments, and as pubic entity not enforcing environmental legislation, has direct influence on the pollution and can thus be held responsible.

In the current case, it is fairly easy to establish that the authorities are well aware of the effects on health and the risks to life as all reports and statistics mentioned under Chapter 2 are well known to the authorities. In addition, in a 'Request for Proposals' dating from June 2016, the government communicated that:

> the refinery currently produces a heavy residual fuel oil which is used as fuel within the refinery and also by power plants in the refinery and externally. The combustion of this residual fuel oil is producing visible and significant particulate and acid gas pollution on the island. This is not compatible with the Government of Curaçao's (CoC's) promotion of Curaçao as a premier tourist destination, nor is it beneficial to the health of the population on the island.[178]

[175] Application CAE and Others v. Curaçao, paragraph 23.
[176] Application CAE and Others v. Curaçao, paragraph 28.
[177] Application CAE and Others v. Curaçao, paragraph 85.
[178] Application CAE and Others v. Curaçao, paragraph 65.

Premier Ruggenaath has also publicly stated that the poor state of the refinery is causing difficulties in finding a new company interested in exploiting the refinery.[179]

Whether or not the Court in the current case will find the level of severity 'high' enough is fairly unpredictable as it is dependent on many circumstances and there is no clear pattern in the Court's assessment of it.[180] We have seen that previous cases in which the Court found that the interference crossed the threshold of harm include the emissions of a waste-treatment plant (*López Ostra v. Spain*), the toxic emissions for the production fertilizer (*Guera and others v. Italy*), and air pollution from a steel factory (*Fadeyeva v. Russia*). As we have learned from *Fadeyeva v. Russia*, "the intensity and duration of the nuisance, and its physical or mental effects" will most likely be taken into consideration by the Court.[181] The intensity of the pollution far exceeds national and international limit values, which has been going on for decades. How the court will weigh the gravity of the physical and mental effects is unclear. Nevertheless, the Court finds that the minimum level of severity is often reached when research suggests that national or international measures (such as those of the WHO) are being exceeded.[182] In addition, activities that lead to damage to health or diseases are generally more likely to cross the threshold of severity.[183]

When establishing whether the authorities in the current case have failed to comply with their positive obligation under Article 8, the Court will assess whether the current interference can be justified under paragraph 2 of Article 8, and whether the authorities have managed to strike a fair balance between the interests of Curaçao and the interests of the individuals affected. In doing so, multiple factors will be weighed, such as its lawfulness and the impact that concrete measures of the State will have on the economic well-being of the country. It is clear from chapter 2 of this thesis that the emissions significantly exceed local environmental regulation. In addition, regarding the economic argument, a local judge on Curaçao has ruled not to be convinced by the argument that stopping illegal activities would mean shutting down the refinery, which would significantly hurt the already weak economy of Curaçao.[184] The local judge found that the Executive Council had not gone into proper investigation toward the gravity of the environmental violations and had not been able to prove that enforcing the Nuisance Permit means shutting down the refinery.[185] It would therefore be

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[179] 'Staat raffinaderij Curaçao bemoeilijkt zoektocht naar nieuwe huurder', *Caribisch Netwerk* 2018.
[180] 'Het EVRM en het materiele omgevingsrecht', p. 48.
[181] *Fadeyeva v. Russia* paragraph 69.
[182] *Fadeyeva v. Russia* paragraph 87-88; *Tătar v. Romania*, paragraph 95.
[183] 'Het EVRM en het materiele omgevingsrecht', p. 48.
[184] LAR 2005/146 19juli 2006.
[185] LAR 2005/146 19juli 2006.

difficult to argue that the current decision to not take administrative action against the Isla refinery (or other polluting establishments) and to not further investigate the gravity of the health risks as a result of the emissions reflects a fair balance between the public interest at stake and the human rights in question or the principle of due diligence. Furthermore, we have learned from the case of *Băcilă v. Romania* that economic well-being or the protection of employment rates cannot justify the lack of action from the State when the interference is caused by something that is in violation with national law.[186]

The government of Curaçao could have protected its citizens in various ways. It could for example have enforced the Nuisance Permit or followed the recommendations of many expert reports advising on ways to bring the emission down. In this respect, not only the lack of enforcement by the authorities of Curaçao must be noted, but also the poor quality of the environmental legislation, as several polluting establishments have to comply with the same norm together, even though it is not possible to assess which installation has contributed what to the air pollution level. In addition, in 2014 the government promised to take measures against the green substance, but has never done so. Furthermore, one could argue that if the authorities find it no option to bring down the level of pollution from the refinery, they could have given the inhabitants of the affected areas the possibility to move. A research by the GGD in 2007 has shown that 65% of respondents living in the affected area positively respond when they are asked if they would like to move.[187] Due to the known risks to health caused by the refinery's emissions, the Dutch Ministry of Defence gave all their personnel residing in one of the affected areas the option to move with a financial contribution made by the Netherlands.[188] The government of Curaçao gave no such option to its citizens. Lastly, the authorities could have educated the residents of the possibly detrimental effects of the pollution on their health.

In conclusion, it is likely that the Court will find the Kingdom of the Netherlands in violation of Article 8 in the Isla case, as it has authorised the operation of a polluting plant in the middle of a densely populated area, which toxic emissions constantly exceed the safe limits of domestic legislation, while various reports and the Nuisance Permit establish the causality of emissions and public health issues, without any proof that the responsible authorities have taken concrete measures to protect the rights of the local population. Not even enforcing its Nuisance Permit.

[186] 'Het EVRM en het materiele omgevingsrecht', p. 183.
[187] Application CAE and Others v. Curaçao, paragraph 33.
[188] Application CAE and Others v. Curaçao, paragraph 33.

Conclusion of analysis

We have seen that severe air pollution can be detrimental to health and can negatively impact one's physical integrity as protected under the term 'private life' of Article 8. Very severe cases of air pollution could even be in violation with the right to life, as protected by Article 2 of the Convention. It is well established in the case law of the European Court that the State under Articles 2 and 8 is not only bound to withhold from violating the rights protected by these Articles, but also has a positive obligation to actively safeguard those interests that are protected. The government can be obligated to enact legislation towards the protection of those rights, or to take concrete measures. These concrete measures can be aimed at preventing future interferences or to end current interference.

In this chapter, we have discussed that the Court has found that the positive obligation of the State under Article 2 encompasses the domain of public health in relation to harmful activities and that no actual loss of life needs to have occurred. Summarizing its case law, the Court has established that the State has a positive obligation in cases concerning dangerous industrial activities to take preventive operational measures when there is a real and immediate risk to the lives of those affected by it, about which the authorities knew or should have known about. However, the mere possibility that the applicant could become one of the eighteen people to prematurely die due to toxic emissions will most likely not be enough to invoke Article 2 of the Convention. As explained above and as in line with the judgment in *Fadeyeva v. Russia*, the Court will probably find the current risk to life or physical integrity not to pass the threshold of 'real and immediate risk' under Article 2 and will find the issue more appropriately dealt with under Article 8.

In comparison to the right to life, the right to respect for private and family life has a wider scope and requires a less intense breach to be violated. In theory, an interference affecting the integrity of private and family life could be caused by any type of pollution. For an issue to arise under Article 8, the environmental factors must directly and seriously affect private and family life or the home. There are thus two main things the Court must consider – whether there exists a causal link between the activity and the negative impact on the individual that is attributable to the State and whether this has attained a certain threshold of harm or 'minimum level of severity'. Paragraph 2 of Article 8 provides that an interference with the right to private and family life by public authority must be in accordance with the law and follow a legitimate

aim, such as the economic well-being of the country. The interference must also be proportionate to the legitimate aim pursued. For this purpose, a fair balance must be struck between the interest of the individual and the interest of the community as a whole.

From the analysis of the case law of Article 8 in comparison the facts of the Isla case, it seems likely that the Court will find the current case in violation with Article 8 of the Convention. No preventive or repressive measures have been taken by the government of Curaçao, other than continuously issuing more audits towards the functioning of the refinery. The causality between the emissions and public health has been suggested by numerous reports, and judging from similar environmental cases under Article 8, it is likely that the Court will find that the minimum level of severity in the Isla case has been reached. Furthermore, due to all audits and investigations, the authorities are well aware of the current situation and its effect on public health. It also seems unlikely that Curaçao could successfully argue that educating the inhabitants, or enforcing its own regulations would impose a disproportionate burden. Because of the before mentioned it is likely that the Court will establish that Curaçao has not succeeded in striking a fair balance between the economic well-being of the island, and the right of the plaintiffs to respect for their home and their private and family life.

Therefore, comparing the current situation to the case law of the European Court on Human Rights, there seems to be enough evidence that the human rights of the people living downwind of the Isla refinery are being violated within the definitions of the Convention. Where harmful industrial activities affect the health and well-being of local residents, the Court's case law imposes positive obligations on States to protect the health of people living near the centre of the activity, to inform them of the harmful effects of the activity including any risk of accident, or to help them relocate if necessary and possible. In the absence of any concrete measures by Curaçao, and the fear for future disappointing local judicial procedures for the plaintiffs, the following chapter will briefly go into the responsibility of the Kingdom government under the ECHR and the Charter for the Kingdom of the Netherlands.

4. A Kingdom problem

From the analysis in Chapter 3, it seems reasonable to conclude that the human rights of the people living downwind of the Isla refinery are being violated within the definitions of the Convention. The pollution and its effect on public health have been known for years and the authorities of Curaçao have shown either unwilling or unable to effectively address the

situation. In addition, an outdated system of environmental legislation and measurements make that little can be acquired through the local legal system. The question then arises, what the legal consequences of this are for the Kingdom of the Netherlands under the ECHR and the Charter for the Kingdom of the Netherlands[189]. Under Article 1 ECHR, the Kingdom of the Netherlands, as contracting party, is bound to secure to everyone within its jurisdiction the rights and freedoms set forth in section I of the Convention. This includes the people of Curaçao. Conform Article 46 ECHR, the provisions of the Convention are binding, and the Kingdom is thus obliged to take measures. As a result, local ngo's are not just blaming their own government for the current situation, but to a large extend also the Netherlands.[190]

If the Isla case was to stand before the European Court of Human Rights, it would not be the first time the Court rules over acts committed in Caribbean parts of the Kingdom. In the recent case of *Murray v. the Netherlands*[191], the Court found acts committed on Aruba and Curaçao to be incompatible with Article 3 of the Convention and accordingly found the entire Kingdom of the Netherlands in violation with the ECHR.[192] The Court in its judgment did not discuss the issue of State attribution and did not concern itself with the Charter or the division of competences between the Netherlands and the constituent countries.[193] The case led to a significant number of Members of the Dutch House of Representatives pleading for a more proactive role of the Netherlands in safeguarding human rights, as it ultimately bears responsibility on the international level. This discussion was extended to the Isla case where numerous politicians have pleaded for an intervention by the Kingdom government.[194]

The Kingdom government has the power to intervene on the basis of the safeguarding function depending on the interpretation of it. As mentioned earlier, following from Article 43 paragraph 1 of the Charter for the Kingdom of the Netherlands, the promotion and realisation of human rights and freedoms is a matter within the competence of the constituent countries. However, paragraph 2 provides that "[t]he safeguarding of such rights and freedoms, legal

[189] The Charter was signed in 1954 and describes the political relationship (the division of competences) between Curaçao and the Netherlands. It is the leading legal document of the Kingdom and the Constitution of the Netherlands and the Basic Laws of Curaçao are subordinate to it.

[190] 'SMOC stapt naar Europese Hof want Nederland laat Curaçao stikken', *Caribisch Netwerk* 19 March 2013.

[191] *Murray v. Netherlands*, Application no. 10511/10, judgement of 26 April 2016.

[192] The case dealt with a complaint of a man who was sentenced with murder in 1980 and spend the rest of his life in imprisonment, until he was pardoned due to the deterioration of his health. Mister Murray complained about his life sentence as it has no perspective of release and about the conditions of his imprisonment. The ECtHR, more specifically the Grand Chamber, unanimously ruled that his imprisonment was in breach with the prohibition on torture and inhuman or degrading treatment or punishment as it had no perspective on release and no psychological help.

[193] The fine accompanying the judgement was paid in June 2016, and was shared by Aruba and Curaçao.

[194] Stichting SMOC gives good overviews of motions concerning the Isla case on its website. See for example 'Waslijst aan Isla-moties Tweede Kamer: erkenning schending mensenrechten en ondeugdelijk bestuur'.

certainty and good governance shall be a Kingdom affair" commonly referred to as the 'safeguarding function'.[195] If the Kingdom government finds that a country is not fulfilling its obligations to promote "the realisation of fundamental human rights and freedoms, legal certainty and good governance",[196] it can intervene on the basis of the safeguarding function.

Whether a situation calls for an intervention by the Kingdom government is rather vague and leaves much room for discussion. The legal text of the Charter under Article 43 is very open for interpretation and past Kingdom interventions have taken place on such arbitrary grounds that consulting jurisprudence will not be of much help.[197] For more guidance on how and when to use the safeguarding function, the Official Explanation on Article 43 also offers little assistance. It dictates that the Kingdom must be able to take measures in case these fundamental rights and freedom, rule of law and good governance do not exist, but that the resources available to the country must be taken into account.[198] Taking such a measure can only be considered when there is no redress possible in the country itself to solve the unacceptable situation. It further provides that it is not possible to give a summation of measures that could qualify, as the manner in which should be responded is dependent on the specific circumstances of the issue at hand. A Vision Document drafted by the Dutch government in response to discussions following the Murray case further establishes that according to the Dutch government, the safeguarding function should only apply when there is no means of redress and should be seen as the 'ultimate remedy', applied with the utmost restraint.[199] Whether this is the case, is primarily to be assessed by the Council of Ministers[200] and will most likely happen in consultation with the governor of the constituent country at issue.

The Charter lays down various ways in which the Kingdom government can intervene. According to Article 50, it can suspend and undo legislative and administrative decisions that are in conflict with the Charter, international rules, a Kingdom act (rijkswet) or a general measure of the Kingdom government (algemene maatregel van rijksbestuur). Moreover,

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[195] Article 43.2 of the Charter for the Kingdom of the Netherlands.
[196] Article 43.1 of the Charter for the Kingdom of the Netherlands.
[197] W. van der Woude and W.S. Zorg in 'Dan belt u even en dan regelen we dat. Over beleidskaders, rechtspolitieke keuzes, verharde relaties en selectieve flinkheid in de Koninkrijksrelaties onder Rutte II' have tried to deduct some sort of expectation pattern in light of past Kingdom interventions, but have found it hard to do so.
[198] Official explanation to Article 43 of the Charter fort he Kingdom of the Netherlands.
[199] 'Waarborgfunctie Koninkrijk: het waarborgen van rechten en vrijheden, rechtszekerheid en deugdelijk bestuur in het Koninkrijk der Nederlanden' (visiestuk).
[200] The Council of Ministers is made up of the Dutch ministers and the ministers plenipotentiaries of Aruba, Curaçao and Sint Maarten.

Article 51 stipulates that the Kingdom government can take a general measure when an organ in one of the autonomous countries is not or not sufficiently providing something that according to the Charter, an international rule, a Kingdom act or a general measure, should be provided for. As these are rather intrusive measures, they have never been applied. More often, the Kingdom government will give instructions to the governor of the constituent countries. The task of the governors on Aruba, Curaçao and Sint Maarten are twofold: they function as head of the governments of the constituent countries and they defend the interests of the Kingdom as representative of the King. On the basis of Article 21 of the Regulations of the Governor, the governor can prevent the establishment of formal decisions when these are in violation with the Charter.[201] In the Isla case, the Kingdom government could thus take a general measure to prohibit the Isla from emitting more than it is allowed, and to ensure the installation of additional measuring systems, or it could instruct the governor to prevent the continuation of the lease agreement with PdVSA after 2019 without serious modernisation of the refinery.

In the Isla case, the Kingdom government has enough grounds to intervene on the basis of Article 43 of the Charter. Already in 2016, the Dutch House of Representatives adopted a motion calling the failure of the authorities of Curaçao to enforce environmental legislation in the Isla case 'poor governance' and agreed that it violates the fundamental human rights of the citizens of Curaçao.[202] Deciding whether there exists a means of redress when a constituent country is structurally refusing to prevent human rights violation is a vague concept. In addition, in previous occasions, the constituent countries (of Aruba and Sint Maarten) had all possibilities to tackle the issue at stake, but interventions by the Kingdom government took place on the assumption that these possibilities would not be taken.[203] Furthermore, several interventions have taken place on financial grounds, even though this is not taken up in the Charter as a legitimate reason for an intervention.[204] Here it needs to be put forward that the

[201] On Curaçao for example, due to escalating political instability in 2017, the governor was instructed not to sign the act of dissolution of the cabinet on the basis of article 21 of the Regulations of the Governor of Curaçao (so in her capacity as an organ of the Kingdom).

[202] On 10 February 2016, a motion singed by Van Laar, Van Raak, Sjoerdsma, Voordewind, Van Tongeren, Bisschop and Thieme on 10 February 2016, called the lack of enforcement of the authorities on Curaçao 'poor governance', established that this violates the fundamental human rights of the citizens of Curaçao and called upon the Kingdom government to enter into negotiations with the authorities of Curaçao and request with urgency to take measures in order to reduce the harmful emissions by the Isla Refinery within three months. The result was Dutch assistance for the inspection carried out by FLUOR.

[203] W. van der Woude & W.S. Zorg, 'Dan belt u even en dan regelen we dat. Over beleidskaders, rechtspolitieke keuzes, verharde relaties en selectieve flinkheid in de Koninkrijksrelaties onder Rutte II', 2017

[204] Especially the governor of Aruba has been given numerous instructions to intervene in Aruba's budgetary issues. In one of these instances, the Aruban prime minister got so angry that he announced to go on a hunger strike until the Governor would sign the budget law.

explanation of the safeguarding function in principle is not judicial but political. That means that when parliament thinks that there is a case of poor governance, there is a case of poor governance. W. van der Woude and S. Zorg who have researched Kingdom interventions since 10-10-10 further conclude that while the Kingdom has intervened on the basis of financial arguments or to safeguard good governance and to a certain extend rule of law (in the elections of Curaçao), it has remained "anxiously quiet with respect to fundamental human rights and freedoms".[205]

The role of the Netherlands in the Isla case has so far been that of offering assistance when asked for it, but has shown reluctant to intervene or even take a stance. [206] Dutch ministers for Kingdom Affairs (R. Plasterk and R. Knops) maintain that regarding the Isla case, dealing with the consequences to the environment and public health is the autonomous responsibility of Curaçao.[207] They argue that as long as the Isla case is on the agenda of Curaçao, and people are working on it, the Council of Ministers does not need to act on the matter.[208] The fact that the Isla case has been 'on the agenda' of Curaçao for over a decade without any effective measures being taken is left unmentioned in this argumentation.

The passive stance of Dutch politicians in the current case can largely be explained by the sensitivity for the role that the Netherlands has played during colonial times. The autonomous status of the countries is rather new and a measure by the Kingdom government will most likely be interpreted as the Kingdom making use of its legislative and executive power, which will lead to heightened tensions between the Netherlands and Curaçao.[209] However, another important reason for the Kingdom government to not take an active stance on the matter seems to be political opportunism. [210] For Dutch politicians, there is no popularity to gain on the Caribbean dossier, as Dutch voters generally have little interest in the matter. In contrast, when it comes to financial issues, the Netherlands has a clear economic incentive to intervene, since Article 36 of the Charter makes that The Hague is likely to financially contribute in case one of the Caribbean countries has financial troubles.

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[205] W. van der Woude & W. Zorg, 2017, p. 221.
[206] An example of this is technical assistance when carrying out audits.
[207] R.W. Knops, 'Schriftelijke antwoorden op vragen gesteld tijdens de eerste termijn van de begrotingsbehandeling van Koninkrijksrelaties op 7 november 2017', 7 November 2017.
[208] 'Plasterk: Curaçao is aan zet met de Isla', *Caribisch Netwerk* 4 November 2015; Stenogram 8 november 2017, 2018D17247.
[209] When the governor of Curaçao was instructed to intervene in the political instability in 2017, a political party on the island labeled the actions of the Netherlands as 'neo-colonial'. W. van der Woude & W.S. Zorg, 2017.
[210] O. Nauta, 'Waarborging Van Goed Bestuur In De West: Voorstel voor een werkbare invulling van de waarborgfunctie in de Caribische rijksdelen', 2014.

However, regardless of the vision of the Dutch government and the unpopularity of the Caribbean dossier amongst politicians, international accountability remains a valid reason to actively safeguard human rights within the Kingdom. It this context, it is important to note that a possible violation under the ECHR attributed to the entire Kingdom is not the only thing the Kingdom government should fear for. In addition to the Convention, the Kingdom has also ratified the Paris Climate Agreement[211], where countries have committed themselves towards fossil free forms of energy. The Kingdom as a whole is also signatory to the Montreal Protocol[212] and the Convention on Biological Diversity[213]. Hoping that the problem will solve itself if Curaçao fails to find an interested party (or even offering help to find a new party to lease a heavily outdated oil refinery), does not seem like the way to ensure compliance to abovementioned treaties. Especially noting the fact that the concentration of particulate matter and sulphur dioxide on Curaçao are estimated to be among the highest in the world, far exceeding both local and international environmental- and health norms.[214] Not intervening, based on the argument that treaty compliance is the autonomous responsibilities of the countries, will make the Kingdom in structural violation of its international obligations. The fact that Curaçao's failure to comply with international legislation will make the entire Kingdom in violation with international law should be a significant incentive for the Kingdom government to intervene in the Isla case.[215]

5. Conclusion

The purpose of this thesis has been to assess whether the Isla case is in violation of the European Convention on Human Rights, and to discuss the legal consequences of such a violation for the Netherlands (Kingdom government) under the Charter for the Kingdom of the Netherlands. For that reason, this thesis has discussed the facts and background to the Isla case, compared these findings to the case law of ECtHR on Articles 2 and 8 concerning the

[211] The Paris Climate Agreement is an agreement within the United Nations Framework Convention on Climate Change and has the aim to stop the increase of global average temperature.
[212] The Montreal Protocol on Substances that Deplete the Ozone Layer is an international treaty designed to phase out the production of numerous substances that are responsible for ozone depletion.
[213] The Convention on Biological Diversity, signed in 1992, has the goal to develop national strategies for the conservation and sustainable use of biological diversity.
[214] E. L. Pulster, 'Assessment of Public Health Risks Associated with Petrochemical Emissions Surrounding an Oil Refinery', 2015.
[215] Apart from international law arguments, in this case a convincing economic argument for closing the refinery can also be made. As it is estimated that the world will run out of oil within the next century, and an increasing amount of countries are choosing to invest in renewable energy sources as opposed to fossil fuel, one could argue that it is not smart to invest billions in the modernization of an oil refinery.

environment, and subsequently discussed the responsibility of the Kingdom government as 'safeguarder' of human rights within the Kingdom.

In the factual analyses of the Isla case, we have established that local air quality statistics show a constant exceedance of environmental norms, which has been going on for decades and is linked to various health complaints, diseases or premature deaths amongst inhabitants of the affected area. Even though the government is well aware of the situation, it has never enforced existing environmental legislation aimed at protecting the health of its citizens, and has never updated its heavily outdated norms. In addition, the plaintiffs are unable to make any changes through the local legal system, as the failure to obtain data on the exact emissions from the Isla refinery, instead of that of all industrial activity on the Schottegat terrain, makes that little can be achieved through the legal instruments at hand. Furthermore, it seems that due to economic and (geo)political reasons, the authorities of Curaçao wish to keep the refinery running at all costs. Having exhausted all local remedies, the plaintiffs intend to take the case to Strasbourg is thus legitimate and understandable.

From the analysis of the case law on Articles 2 and 8 of the Convention regarding environmental matters, this thesis has established that if the Isla case was ever to come before the ECtHR, it would most likely find the Kingdom in violation of the right to respect for private life, protected by Article 8 of the Convention, and applicable to the people of Curaçao. The responsible authorities of Curaçao have undertaken no concrete measures to protect their citizens from the health risks accompanying the refinery's emissions, which makes it very unlikely that they could convince the Court that they have struck a fair balance in weighing the interest of the community against those of the individuals.

Ideally of course, the issue will be effectively addressed before the case reaches Strasbourg. A possible scenario could be that the authorities fail to find an interested party to take over the lease of refinery when the contract with PdVSA ends, forcing the Isla to shut down. However, it would reflect better on the Kingdom of the Netherlands, as contracting party to the ECHR, if it effectively protects the Convention rights of its citizens, instead of as a by-product of a failed search for a new company. The responsibility therein lies firstly with the responsible authorities of Curaçao, but secondly with the Kingdom government as 'safeguarder' of human rights within the Kingdom.

From chapter 4, we have learned that the question of whether the kingdom government can intervene on the basis of the safeguarding function is more a question of politics than it is of law. The Convention is applicable in the Caribbean part of the Kingdom and a violation of

its provisions provides solid grounds for an intervention on the basis of Article 43.2 of the Charter. Such an intervention is legitimate since substantial proof of human rights violations and poor governance exists. Furthermore, in light of recent interventions in the autonomous matters of the Caribbean countries within the Kingdom, it will be difficult for the Kingdom government to successfully argue that it is able to intervene in the case of financial problems, but not when there is structural evidence of human rights violation. Even more important, regardless of its internal division of competences, a country in violation with the Convention, cannot argue it is not responsible.

Due to the growing importance of international treaties such as the ECHR and the Paris Agreement, and the possibility of future claims arising, the current structure of accountability is not sustainable. If the Kingdom government wishes to take no responsibility, and is unwilling to interpret the provisions of the Charter in light of its international obligations, it should seriously consider altering the Charter. If this is not possible it could consider changing the conditions under which it is signatory to the ECHR. However, in absence of these changes, it should choose to take safeguarding human rights and fundamental freedoms within its Kingdom more serious, since it ultimately bears responsibility on an international level. The Isla case, in which victims have unsuccessfully been trying to claim their right to a healthy living environment for over twelve years, could then be a good place to start.

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Appendix A: Air Quality Statistics

Tabel 2: Gemeten jaargemiddelde concentraties 800 Beth Chaim in µg/m³.

Stof	Eenheid	Norm	2010	2011	2012	2013	2014	2015	2016
SO_2	Gem.[jaar]	80	34	64	62	152	170	225	153
SO_2	Max.[dag][1]	-	174	306	427	402	421	600	706
SO_2	Aantal daggem.>365	1	0	0	2	1	5	39	3
TSP	Gem.[jaar]	75	42	46	46	49	56	65	57
TSP	Aantal daggem.> 150 [2]	18	0	0	0	0	0	9	2

1: Mag maximaal 1 maal per jaar voorkomen.

2: Mag maximaal 5% van de dagen overschreden worden.

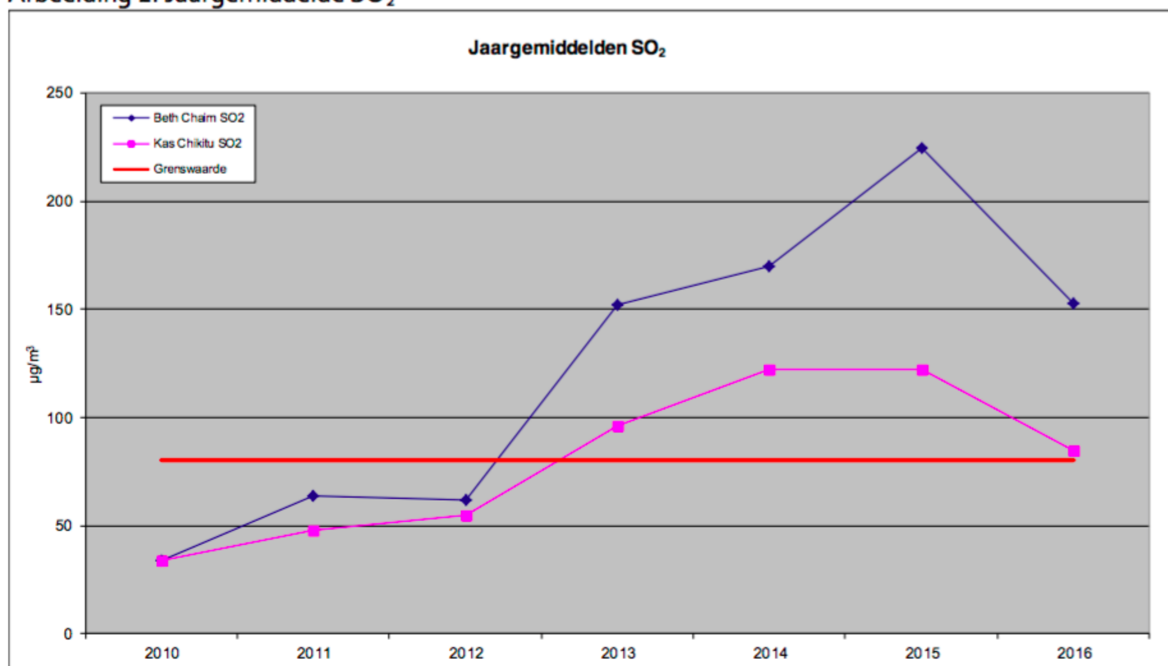
Tabel 3: Gemeten jaargemiddelde concentraties 801 Kas Chikitu in µg/m³.

Stof	Eenheid	Norm	2010	2011	2012	2013	2014	2015	2016
SO_2	Gem.[jaar]	80	34	48	55	96	122	122	85
SO_2	Max.[dag][1]	365	174	205	269	292	341	408	254
SO_2	Aantal daggem.>365	1	0	0	0	0	0	1	0
PM10	Gem.[jaar]	-	40	37	40	41	38	43	40
H_2S	Gem.[jaar]	-	3	3	5	7	5	6	6

1: Mag maximaal 1 maal per jaar voorkomen.

2: Mag maximaal 5% van de dagen overschreden worden.

Afbeelding 2: Jaargemiddelde SO_2



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Appendix B: Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

The Governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the rst steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

ARTICLE 1
Obligation to respect Human Rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I RIGHTS AND FREEDOMS

ARTICLE 2
Right to life

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as in inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 8
Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10
Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 13
Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an of financial capacity.

SECTION II EUROPEAN COURT OF HUMAN RIGHTS

ARTICLE 32
Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

ARTICLE 34
Individual applications

The Court may receive applications from any person, non- governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

ARTICLE 35
Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2. The Court shall not deal with any application submitted under Article 34 that

(a) is anonymous; or
(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

ARTICLE 46
Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.

4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to full its obligation under paragraph1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

SECTION III MISCELLANEOUS PROVISIONS

ARTICLE 56
Territorial application

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.

2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.

3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

Appendix C: The Charter for the Kingdom of the Netherlands

Statuut voor het Koninkrijk der Nederlanden.
Geldend van 17-11-2017 t/m heden.

Wet van 28 October 1954, houdende aanvaarding van een statuut voor het Koninkrijk der Nederlanden

Preambule Nederland, Aruba, Curaçao en Sint Maarten,

constaterende dat Nederland, Suriname en de Nederlandse Antillen in 1954 uit vrije wil hebben verklaard in het Koninkrijk der Nederlanden een nieuwe rechtsorde te aanvaarden, waarin zij de eigen belangen zelfstandig behartigen en op voet van gelijkwaardigheid de gemeenschappelijke belangen verzorgen en wederkerig bijstand verlenen, en hebben besloten in gemeen overleg het Statuut voor het Koninkrijk vast te stellen;

constaterende dat de statutaire band met Suriname is beëindigd met ingang van 25 november 1975 door wijziging van het Statuut bij rijkswet van 22 november 1975, *Stb.* 617, *PbNA* 233;

constaterende dat Aruba uit vrije wil heeft verklaard deze rechtsorde als land te aanvaarden met ingang van 1 januari 1986 voor een periode van tien jaar en met ingang van 1 januari 1996 voor onbepaalde tijd;

overwegende dat Curaçao en Sint Maarten elk uit vrije wil hebben verklaard deze rechtsorde als land te aanvaarden;

hebben besloten in gemeen overleg het Statuut voor het Koninkrijk als volgt nader vast te stellen.

§ 1. Algemene bepalingen

Artikel 1
Het Koninkrijk omvat de landen Nederland, Aruba, Curaçao en Sint Maarten.

Artikel 1a
De Kroon van het Koninkrijk wordt erfelijk gedragen door Hare Majesteit Juliana, Prinses van Oranje-Nassau en bij opvolging door Hare wettige opvolgers.

Artikel 2
1. De Koning voert de regering van het Koninkrijk en van elk der landen. Hij is onschendbaar, de ministers zijn verantwoordelijk.

2. De Koning wordt in Aruba, Curaçao en Sint Maarten vertegenwoordigd door de

Gouverneur. De bevoegdheden, verplichtingen en verantwoordelijkheid van de Gouverneur als vertegenwoordiger van de regering van het Koninkrijk worden geregeld bij rijkswet of in de daarvoor in aanmerking komende gevallen bij algemene maatregel van rijksbestuur.

3. De rijkswet regelt hetgeen verband houdt met de benoeming en het ontslag van de Gouverneur. De benoeming en het ontslag geschieden door de Koning als hoofd van het Koninkrijk.

Artikel 3
1. Onverminderd hetgeen elders in het Statuut is bepaald, zijn aangelegenheden van het Koninkrijk:

(a) de handhaving van de onafhankelijkheid en de verdediging van het Koninkrijk;
(b) de buitenlandse betrekkingen;
(c) het Nederlanderschap;
(d) de regeling van de ridderorden, alsmede van de vlag en het wapen van het Koninkrijk;
(e) de regeling van de nationaliteit van schepen en het stellen van eisen met betrekking tot de veiligheid en de navigatie van zeeschepen, die de vlag van het Koninkrijk voeren, met uitzondering van zeilschepen;
(f) het toezicht op de algemene regelen betreffende de toelating en uitzetting van Nederlanders;
(g) het stellen van algemene voorwaarden voor toelating en uitzetting van vreemdelingen;
(h) de uitlevering.

Andere onderwerpen kunnen in gemeen overleg tot aangelegenheden van het Koninkrijk worden verklaard. Artikel 55 is daarbij van overeenkomstige toepassing.

§ 2. De behartiging van de aangelegenheden van het Koninkrijk

Artikel 6
1. De aangelegenheden van het Koninkrijk worden in samenwerking van Nederland, Aruba, Curaçao en Sint Maarten behartigd overeenkomstig de navolgende bepalingen.

2. Bij de behartiging van deze aangelegenheden worden waar mogelijk de landsorganen ingeschakeld.

Artikel 7
De raad van ministers van het Koninkrijk is samengesteld uit de door de Koning benoemde ministers en de door de regering van Aruba, Curaçao onderscheidenlijk Sint Maarten benoemde Gevolmachtigde Minister.

Artikel 8
1. De Gevolmachtigde Ministers handelen namens de regeringen van hun land, die hen benoemen en ontslaan. Zij moeten de staat van Nederlander bezitten.

2. De regering van het betrokken land bepaalt wie de Gevolmachtigde Minister bij belet of ontstentenis vervangt.
Hetgeen in dit Statuut is bepaald voor de Gevolmachtigde Minister, is van overeenkomstige toepassing met betrekking tot zijn plaatsvervanger.

Artikel 28
Op de voet van door het Koninkrijk aangegane internationale overeenkomsten kunnen Aruba, Curaçao en Sint Maarten desgewenst als lid tot volkenrechtelijke organisaties toetreden.

§ 4. De staatsinrichting van de landen

Artikel 41
1. Nederland, Aruba, Curaçao en Sint Maarten behartigen zelfstandig hun eigen aangelegenheden.

2. De belangen van het Koninkrijk zijn mede een voorwerp van zorg voor de landen.

Artikel 42
1. In het Koninkrijk vindt de staatsinrichting van Nederland regeling in de Grondwet, die van Aruba, Curaçao en Sint Maarten in de Staatsregelingen van Aruba, van Curaçao en van Sint Maarten.

2. De Staatsregelingen van Aruba, van Curaçao en van Sint Maarten worden vastgesteld bij landsverordening. Elk voorstel tot verandering van de Staatsregeling wijst de voorgestelde verandering uitdrukkelijk aan. Het vertegenwoordigende lichaam kan het ontwerp van een zodanige landsverordening niet aannemen dan met twee derden der uitgebrachte stemmen.

Artikel 43
1. Elk der landen draagt zorg voor de verwezenlijking van de fundamentele menselijke rechten en vrijheden, de rechtszekerheid en de deugdelijkheid van het bestuur.

2. Het waarborgen van deze rechten, vrijheden, rechtszekerheid en deugdelijkheid van bestuur is aangelegenheid van het Koninkrijk.

Artikel 48
De landen nemen bij hun wetgeving en bestuur de bepalingen van het Statuut in acht.

Artikel 49

Bij rijkswet kunnen regels worden gesteld omtrent de verbindendheid van wetgevende maatregelen, die in strijd zijn met het Statuut, een internationale regeling, een rijkswet of een algemene maatregel van rijksbestuur.

Artikel 50

1. Wetgevende en bestuurlijke maatregelen in Aruba, Curaçao en Sint Maarten, die in strijd zijn met het Statuut, een internationale regeling, een rijkswet of een algemene maatregel van rijksbestuur, dan wel met belangen, welker verzorging of waarborging aangelegenheid van het Koninkrijk is, kunnen door de Koning als hoofd van het Koninkrijk bij gemotiveerd besluit worden geschorst en vernietigd. De voordracht tot vernietiging geschiedt door de raad van ministers.

2. Voor Nederland wordt in dit onderwerp voor zover nodig in de Grondwet voorzien.

Artikel 51

1. Wanneer een orgaan in Aruba, Curaçao of Sint Maarten niet of niet voldoende voorziet in hetgeen het ingevolge het Statuut, een internationale regeling, een rijkswet of een algemene maatregel van rijksbestuur moet verrichten, kan, onder aanwijzing van de rechtsgronden en de beweegredenen, waarop hij berust, een algemene maatregel van rijksbestuur bepalen op welke wijze hierin wordt voorzien.

2. Voor Nederland wordt in dit onderwerp voor zover nodig in de Grondwet voorzien.

Artikel 52

De landsverordening kan aan de Koning als hoofd van het Koninkrijk en aan de Gouverneur als orgaan van het Koninkrijk met goedkeuring van de Koning bevoegdheden met betrekking tot landsaangelegenheden toekennen.