Communication under the International Covenant on Civil and Political Rights

Date: 15 November 2011

I. Information of the complainant:

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And:
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Submitting the communication:
on the author's own behalf: no
on behalf of three other persons.

Please provide the following personal details of these other persons:

Name: R First name(s): M.
Nationality: Date and place of birth:
Address or current whereabouts: elect domicile at the office of his lawyers, Keizersgracht 560-562, 1017 EM Amsterdam

Name: B S First name(s): A.
Nationality: Date and place of birth:
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Name: A First name(s): N.
Nationality: Date and place of birth:
Address or current whereabouts: elect domicile at the office of her lawyers, Keizersgracht 560-562, 1017 EM Amsterdam

If you are acting with the knowledge and consent of that person, please provide that person's authorization for you to bring this complaint : attached (3)

II. State concerned/Article violated

Name of the State that is either party to the Optional Protocol (in the case of a complaint to the Human Rights Committee) or has made the relevant declaration (in the case of complaints to the Committee against Torture or the Committee on the Elimination of Racial Discrimination): the Netherlands

Articles of the Covenant alleged to have been violated:
a. article 20 jo 26 and 27 CCPR;
b. article 2, par. 3 jo 14, par. 1 CCPR.

III. Exhaustion of domestic remedies/Application to other international procedures

Steps taken by or on behalf of the alleged victims to obtain redress within the State concerned for the alleged violation – detail which procedures have been pursued, including recourse to the courts and other public authorities, which claims you have made, at which times, and with which outcomes:

a. Systematic incitement to hatred and discrimination against Muslims and other migrants has been committed over years – in different forms – by the Member of Parliament Geert Wilders. The complainants – who are Muslims and belong to the Dutch-Moroccan community in the Netherlands – feel discriminated against, humiliated and threatened by Mr Wilders and the members and adherents of his party, resulting in discrimination and an increasingly negative attitude by considerable parts of the population. They are of the opinion that Mr Wilders by his continued hate speech has poisoned the social climate in the Netherlands, that has become more and more anti-migrant and anti-Muslim. The complainants as Muslims are targeted by Wilders and thus victims of his hate speech, the effects of which they are suffering in their day-to-day life in the Netherlands.

   Many migrants, Muslims and citizens in general have reported the criminal expressions of Mr Wilders to the police. Finally, in January 2010, the public prosecutor started criminal proceedings against Mr Wilders (for the circumstances and background of the prosecution as well as for the hate speech in question see the description of the facts), but the same public prosecutor requested his acquittal. The complainants joined the criminal proceedings as victims of the acts for which Mr Wilders was prosecuted, with the aim to influence the criminal procedure by arguing that Mr Wilders was guilty of hate speech. The complainants therefore submitted a symbolic claim for damages of € 1 each. The District Court of Amsterdam acquitted Mr Wilders by its judgement of 23 June 2011 and consequently dismissed the claims of the complainants. No appeal is open to them. As a consequence of the acquittal, the complainants are not only victims of the hate speech of Wilders but also victims of a violation of article 20 CCPR by the State of the Netherlands. In this respect it is submitted that while article 20 CCPR is couched in terms of obligations of the state rather than in rights of individuals, this does not imply that these are matters to be left to the internal jurisdiction of state parties and as such immune from review under the individual communication procedure. If such were the case, the protection regime established by the Covenant would be weakened significantly.[1]

[1] See CERD Committee No. 30/2003, The Jewish community of Oslo v. Norway, par. 10.6.

Given the narrow link between article 20 and the articles 26 and 27 the complainants are, as members of a minority in the Netherlands, also victims of a violation of the latter provisions. No local remedies are left to them.

b. According to articles 51 a – 51 h and 332 - 335 of the Code of Criminal Procedure the victims of crime have a very poor legal position in the Netherlands. They do not have the right to have witnesses heard and to discuss the facts and merits of the criminal case. They are only allowed to explain their claim for damages without having the opportunity to set forth their views on the merits of the case as such. As the debate in this case was all about whether or not the statements of Mr Wilders constituted hate speech in the meaning of the law, and the complainants were excluded from that debate in courtroom, they have not been provided with an effective remedy as meant in article 2, par. 3, nor have they had a fair hearing in the determination of their rights as victims in accordance with article 14, par.1. This is the more severe since the public prosecutor requested an acquittal and therefore did not argue the case against Mr Wilders. The judge was only provided with one-side of the legal argument due to the almost perfect harmony between the prosecution and the defence, in combination with the lack of procedural rights of the victims. At stake for the complainants was to get marked the limits of what can be said in the political debate, not to get financial compensation. The claim for symbolic compensation was just a means to convince the judge that Mr Wilders had crossed the boundaries between what is acceptable under democratic conditions and what is liable to punishment because of the harm it causes to society, and more precisely to ethnic and religious minorities and to them personally. To receive a pronouncement of the court in the on-going high profile criminal case against Mr Wilders that his words were beyond those limits was the reason for the complainants to join in the criminal procedure. A civil procedure would not have enabled them to receive the said pronouncement.
The complainants have therefore exhausted the existing local remedies, being there no right to appeal for the victims.

Have you submitted the same matter for examination under another procedure of international investigation or settlement (e.g. the Inter-American Commission on Human Rights, the European Court of Human Rights, or the African Commission on Human and People's Rights)?
No.

IV. Facts of the complaint

1. Introduction

For years the people of the Netherlands have been affected by systematic hate speech by Geert Wilders, a member of parliament, directed against non-western migrants in general and more specifically against Muslims. Mr Wilders initially was a member of parliament for the Liberal Party (VVD), in which he represented the right wing. In 2006 he left the VVD and begun his own political party, the extreme right populist Freedom Party (PVV). From that time on his language inside and outside parliament has been increasingly offensive. During the period of the utterances for which he was finally charged, his PVV party had nine seats in Parliament, since the elections of 2010 he has 24. The systematic attacks of Mr Wilders on migrants and Muslims are not only insulting but also incite hatred, discrimination and even

violence. The complainants, and many with them, feel threatened because Mr Wilders is inciting hatred against Muslims and non-western migrants in general. Their day-to-day experience is that the social climate in the Netherlands - always relatively tolerant - has been considerably changed by the anti-Muslim smear campaigns conducted and inspired by Mr Wilders. The political debate in general has been strongly influenced by these campaigns with the result that the consensus against intolerance and racism no longer exists. All conversations on these themes have at least to start with the finding that the multicultural society has failed. This is not the fault of Mr Wilders alone, but he leads in the debate and is generally seen as the main instigator.

The complainants are Dutch-Moroccan citizens, Muslims who are personally and concretely affected by Wilders' hate speech.

M.R. came to the Netherlands in 1966 as a political refugee and was a Member of Parliament for the left-wing green party (Groen-Links) from 1994 till 2002. He is the chair of a national consultation body of Moroccans in the Netherlands. He spoke in court about the multitude of research data on intolerance and racism and the position of Moroccans in Dutch society.

N.A. was born in the Netherlands of a Moroccan father and a Dutch mother. At the time of the Wilders trial she was a law student, she has now finished her studies. She spoke before the first court (see for explanation point 5 below) in order to clarify the impact of Mr Wilders language on those whom it concerns. The speech is submitted. That speech alone resulted in an inordinate amount of aggressive and threatening e-mails, tweets and other hate messages to her. As a result, she did not give evidence before the second court. She limited herself to writing a letter to the court, from which the following passage is quoted:

> ´After having recovered from the first shock, it has struck me that the use of words was sometimes much like that of Wilders. The expressions, introduced by Geert Wilders into the public debate, like ¨kopvoddentax¨[2], ¨taqquya¨[3], the comparison between Koran and Mein Kampf and the idea that Islam is an ideology, just to mention a few examples, are all terms and ideas that come back in the hate messages mentioned above. Apparently there is nothing unclear amongst Wilders´ supporters about the meaning of those expressions, that seem to be directed against me and other Moroccans. Those expressions carry the fingerprints of Wilders.´

A.BS is the daughter of Moroccan migrant workers. She is an employee of a travel agency. A small example of how the complainants experience the influence of Mr Wilders' hate campaigns is an incident that happened to her in the year 2010 during the election campaigns of that year. Walking on her way home from work, a young man drove right into her with his bike, crying: 'Wilders is right, piss off from here!' This is only one of the many examples of the influence Wilders' language has on ordinary people, worth noting because the perpetrator in this case mentioned Wilders' name explicitly as his source of inspiration. B.S. gave evidence before the second court.

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[2] Wilders has once proposed in Parliament to introduce a tax on wearing headscarves and he has named this tax in a very denigrating way ´kopvoddentax´.

[3] Taqqya is a newly by Wilders introduced concept introduced by Wilders that is erroneously supposed to be an Islamic concept meaning that Muslims should behave as if they are integrated into Western society in order to be tolerated and so reach a position to impose their will on western society. The impact is clear: whether Muslims behave as if they are integrated or not integrated, they are never to be trusted and always trying to convert people and society.

2. The statements for which Mr Wilders is charged

Between 2006 and 2009, hundreds of individuals and organisations reported insult and incitement of discrimination, violence and hatred by Wilders to the police, based on different statements he made. The public prosecutor decided not to prosecute him, arguing that the statements were not criminal but within the space granted by freedom of expression in the public debate. (It has to be remarked that statements made within Parliament may not be prosecuted in the Netherlands.) In 2009, ordered by the Amsterdam Court of Appeal (see point 3 below for further explanation), the Public prosecutor finally issued a summons for insult to a group of citizens (Muslims) and incitement to discrimination and hatred on grounds of religion and race. As the complainants based their claim against Wilders only on the parts of the indictment concerning incitement, because they feel threatened more than insulted, only these parts of the charge are quoted here (the quotations are preceded by the number the court has given in its judgement to each of the expressions of the charge):

a. De Volkskrant of October 7, 2006: (Wilders is interviewed and on the question what would change if he were be in power, he answers:

(1) 'The borders close that same day for all non-Western residents.'

And:

(2) 'The demographic composition of the population is the largest problem in the Netherlands. I am talking about what comes to the Netherlands and what multiplies here. If you look at the figures and its development ... . Muslims will move from the big cities to the countryside. We have to stop the tsunami of islamisation. That stabs us in the heart, in our identity, in our culture. If we do not defend ourselves, then all other items from my program will prove to be worthless.'

Questioned about the relations between Islam and criminality he answers:

(4) 'Absolutely. The figures are proving so. One out of five Moroccan youngsters has a police record. Their behaviour arises from their religion and culture. You can't look at that detachedly. The Pope was completely right when saying that Islam is a violent religion. Islam means submission and conversion of non-Muslims. That interpretation applies in the living rooms of those delinquents and in the mosques. It is in the communities themselves.'

And:

(5) 'Everyone adopts our dominant culture. The one who will not do so, is not here anymore in twenty years. He will be expelled.'

And:

(7) 'Those Moroccan guys are truly violent. They beat up people based on their sexual origin.'

b. An internet column of February 6, 2007 at www.geenstijl.nl or at www.pvv.nl (the website of Wilders' party PVV):

(9) 'In last Saturday's Nederlands Dagblad also professor Raphael Israeli has been quoted, who is predicting a 'Third Islamic Invasion of Europe' by means of 'penetration, propaganda, conversion and demographic change.' According to him the Europeans are committing demographic suicide with the marching Islam. The first Islamic invasion has been stopped in the year 732 at Poitiers after the conquest of Spain, Portugal and Southern France and the second attempt invasion by the Ottoman Turks has been turned back from the city gates of Vienna when they fortunately have been wiped out over there in 1683. According to Prof. Israeli

the third attempt that is now going on in Europe makes much more chance. The man is perfectly right.'

c. De Pers of February 13, 2007:

(11) 'We want enough. De borders closed, no more Islamic people coming to the Netherlands, a lot of Muslims exiting the Netherlands, denaturalization of Islamic criminals...'

And:

(13) 'Former chief of the Mossad Efraim Halevy says that the Third World War has begun. I am not using that words, but it is correct.'

And:

(14) 'I have good intentions. We allow something to happen as a result of which this turns into a completely different society. I do know that there is no Islamic majority in a couple of decades. However, the number is growing. With aggressive elements, imperialism. Walk in the street and see where this ends. You feel that you are no longer living in your own country. A conflict is going on and we have to defend ourselves. In due time, there will be more mosques than churches!'

d. The Volkskrant of August 8, 2007:

(20) 'How ashamed do I feel for all those within and without Government or Parliament who are refusing to stop the Islamic invasion in the Netherlands. How ashamed do I feel for Dutch politicians who are accepting day after day the overrepresentation of aliens in delinquency and crime and don't have an answer to that.'

And:

(21) 'The Hague is full of cowards. Frightened people who have been born cowardly and who will die cowardly. They are of the opinion and they will encourage that the Dutch culture will be based upon a Jewish- Christian- Muslim tradition. They pardon liars and criminals.'

And:

(22) 'They damn the interests of the Dutch citizen and they help transforming the Netherlands into Netherabia as a province of the Islamic super state Eurabia.'

And:

(23) 'I get sick of Islam in the Netherlands: no more Muslim migrant anymore.'

e. The film Fitna:

Mr Wilders produced a film on Islam and Muslims named Fitna.

(28) The film is part of the indictment and is described in it, but to understand the film it has to be seen. The film was shown in the courtroom and is available on the internet: www.liveleaks.com . Also a cd-rom is submitted.

One of the many malicious suggestions in the film is the combination of the images of the attack on the Twin Towers in New York and the Attochia railway station in Madrid with the images of ordinary Muslims walking in the streets and apartment buildings with satellite dishes; the suggestion is that the more Muslims and satellite dishes there are, the more terrorist attacks we will have to suffer. The whole thing is accompanied by aggressive music.

The quoted extracts a. – e were the basis of the complainants' claims in the national proceedings, and constitute the factual basis of their complaint before the Committee as well. Although the indictment contains more of Wilders' statements, the complainants have deliberately restricted their claims against him to those statements that are not only insulting

but which incite hatred, discrimination and violence; and to those statements that are not directed against Islam as a religion but to Muslims as human beings or to non-western migrants (although the distinction between attacking Islam and attacking Muslims is hard to make). The complainants apply the same restriction in the current complaint against the state of the Netherlands.

3. *The constitutional position of the public prosecutor and the legal position of the victim concerning the prosecution of a crime in the Netherlands*

The public prosecutor in the Netherlands is not obliged to prosecute all criminal offences that are reported and provable. The service of the public prosecutor is in principle free to conduct and develop its own policy, under the supervision of the Minister of Justice and thus of Parliament. The main priorities to be followed by the public prosecutor are set by the *College van Procureurs-Generaal,* which is the highest prosecutorial organ, based in the Hague. In exceptional circumstances the Minister of Justice might order a prosecution in an individual case.

In cases of discrimination the public prosecutor is bound by imperative guidelines set by the *College van Procureurs-Generaal,* in force from December 1, 2007. In the preamble of the guidelines is stated:

> 'The combating of discrimination is of great importance. Every citizen has to know and to feel that he is a full citizen and he should be protected from utterances and acts that label him as a member of a supposed inferior group.'

The main rule in the guidelines is that in cases of discrimination prosecution will always take place if the case is provable and the facts alleged constitute a crime. The public prosecutor in the Wilders case was therefore not free to decide not to prosecute for reasons of policy. Only juridical reasons, namely either that the alleged facts did not constitute a crime, or that they were not provable, could lead to a decision not to prosecute. In that sense the guidelines, formulated in order to implement a strict prosecution policy in discrimination cases, probably had a counter-productive effect in this case. Under pressure from public opinion and possibly also from politicians not to prosecute Wilders, the only way to avoid prosecution was to argue that the statements were not criminal in the circumstances. Indeed the public prosecutor issued a letter to all those who reported Wilders' statements to the police in order to get him prosecuted, explaining that no prosecution would take place because the reported facts were not liable to punishment under the Criminal Code (CC).

Citizens who find themselves victims of a crime have no right to have the supposed perpetrator prosecuted; they depend on the decision of the public prosecutor. However, a citizen who has a directly interest in a prosecution can lodge a complaint against a decision not to prosecute with the court of appeal. This is what a number of victims and interested people did in this case. Their complaint gave rise to a decision by the Amsterdam court of appeal of November 21, 2009, in which the court of appeal appeared to disagree seriously with the argumentation of the public prosecutor and ordered him to prosecute Wilders before the Amsterdam District Court. Pursuant to this order by the court of appeal, the public prosecutor finally issued a summons in which Mr Wilders was invited to defend himself on charges of 'insult of a group for reasons of race or religion' (article 137c Criminal Code) and for 'incitement to hatred and discrimination on grounds of religion or race' (article 137d CC). Among the statements that form the factual basis of this charge are the statements quoted under 1 and the film Fitna.

The Amsterdam District Court had in the meantime granted requests by broadcasting companies to broadcast the trial live on TV. As a result the trial became very high profile and provoked intense debates in the media and in the political arena over whether or not Mr Wilders' statements were acceptable under democratic conditions, and whether or not the whole issue was to be discussed in court. It was the aim of the complainants to play their role in that debate in court. The means was to file a claim for symbolic compensation.

4. *The complainants wished to participate in the criminal proceedings by filing a symbolic claim for compensation; limited legal position of the victims asking for compensation*

Citizens who are directly damaged by a criminal offence may to join the criminal proceedings by filing a claim for compensation against the defendant. However, their legal position is very limited. According to articles 51 a – 51 h Code of Criminal Procedure (CCP) (submitted and translated) as modified since January 1, 2011[4], the victim has a right to be informed about the criminal proceedings and a right to access to the file with certain restrictions (restrictions that have not been applied in this case). According to articles 332 – 335 CCP (submitted and translated) the victim may clarify his civil claim for compensation but he may not give his opinion on the merits of the criminal case.[5] He may interrogate the witnesses of the defence and of the prosecution, but only on the claim for compensation, not on the facts or the merits of the case. The lawyers of the complainants were not permitted to interrogate some experts of the defence, who had been interrogated by an investigating judge, nor to interrogate the witnesses called by the defence and by the court and interrogated by them during two court hearings

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Notwithstanding their very limited procedural rights, the complainants and a few other individuals and organisations of Muslims and migrants decided to join the criminal trial by claiming from Mr Wilders a symbolic compensation of € 1 each, with the aim of trying to influence the judicial decision by arguing that the statements of Wilders fall within the definition of criminal incitement. They were not interested in the money: it was their purpose to get the limits set of what they have to accept in terms of malicious statements against the parts of the population to whom they belong; and to have established the practical meaning of their right to be protected from incitement to hatred, discrimination and violence in accordance with article 20 jo 26 and 27 CCPR. They wished to influence the decision on that borderline.

5. *The course of the proceedings*

After a few sessions on preliminary questions, the courtroom debate on the substantive issues in the case started in October 2010. The victims lodged their claim for compensation of € 1 each.

It could have been anticipated that the public prosecutor might ask for an acquittal rather than demand a conviction, as he only initiated the proceedings when ordered to do so by the court of appeal. That is indeed what happened. The prosecution and defence arguments were in perfect harmony. As a result, the judge was not presented with any arguments in favour of conviction. The lawyers of the victims (Mr Michiel Pestman and Ms Ties Prakken for R., A. and B.S.) tried to argue the case as fully as possible but the judge systematically interrupted

[4] The first part of the trial took place under the old law but there were no differences relevant to this complaint.

[5] By the last change of this part of the Code per January 1 2011, which is in fact the implementation of the EU Framework Decision on the position of victims in the criminal process, the victim is allowed to bring documents on the merits of the case into the file, but he is still not allowed to comment on those documents!

them, as did the public prosecutor and the defence attorney. (The relevant passages of the records are submitted and translated.) The victims were of the opinion that the grounds of their claim for compensation could legitimately be argued within the space allotted them by the CCP and that, therefore, arguments about the criminality of Mr Wilders' statements were relevant. The court initially made a kind of compromise ruling on this point, giving the victims the opportunity to argue the limits of criminal liability without arguing the desirability of the prosecution. The result was that the victims' lawyer did manage to deliver most but not all of her prepared speech during the court session of October 18, 2010.

Subsequently, for reasons that are not relevant to this complaint, the defence successfully challenged the impartiality of the court, with the result that the proceedings had to start again before other judges. The case of the victims was presented again at the court session of May 27, 2011. However, the new judges took a much narrower view than their predecessors of the space the victims should be allowed in order to plead their case. A translation of the part of the record of the court session is submitted, from which it is clear that the lawyers of the victims were not allowed to speak about the criminal nature of the statements of Mr Wilders.[6]

The prosecution and the defence having, broadly speaking, taken the same position that Mr Wilders ought to be acquitted of all charges, the District Court issued its judgement on June 23, 2011. Mr Wilders was acquitted of all charges, and the victims' claims were declared inadmissible as a consequence. Naturally, neither the public prosecutor nor Mr Wilders appealed against this judgement, and there is no right to appeal for the victims. The verdict has thus become final and there is no further legal remedy available within Dutch law.

6. *The judgement of the Amsterdam District Court is not in conformity with article 20 jo 26 and 27 ICCPR; general criticism on the verdict*

The Dutch legislator has fulfilled its obligation to prohibit by law hate speech on grounds of race and ethnicity as prescribed by article 4 CERD, by modifying the articles 137c (insulting a group for reasons of race, ethnicity, religion etc.), 137d and 137e (possession of materials meant in article 137c and d with the aim of disseminating) of the Criminal Code (CC). Article 137d is the relevant article in relation to this complaint and reads as follows:

> 'He who publicly, orally, in writing or graphically, incites hatred against or discrimination of people or violence against an individual or belongings of people because of their race, their religion or their belief, their gender, their heterosexual or homosexual orientation or their physical, psychological or mental disability, shall be liable to punishment with a maximum of one year or a pecuniary fine of the third category.'

When the CCPR later obliged the countries that are parties to the Covenant to prohibit hate speech by law in article 20, the position of the Dutch government was that this obligation was already met by article 137d CC. This article has thus to be seen as the implementation of both article 4 CERD and article 20 CCPR.

In accordance with its obligations under the CERD the Dutch government reports periodically to the Committee on the Elimination of Racial Discrimination. Its reports from 2003[7] and 2008[8] include a survey of Dutch jurisprudence on article 137c- 137e CC from 1999/2007.

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[6] It is only by using the statement of the public prosecutor that the victims were not admissible while not being damaged in a legal interest the allegedly infringed ruling of article 137 d Criminal Code (CC) is aiming to protect, that a way-out has been found by the victims. (See for further explanation point 13.) As follow from the record of the court session she only partly succeeded in this attempt.

[7] CERD/C/452/Add3 of 13 October 2003, p. 17-22.

[8] CERD/C/NLD/18 of 3 March 2008, p. 23-28.

These surveys show that, in principle, utterances such as those made by Wilders are punished under one of the articles 137c, 137d or 137e CC, even when made in the context of the public debate. The verdict of the Amsterdam District Court in this case has, therefore, to be considered as an exception to the tendency in recent case-law. That being an indication already that the verdict is not in accordance with article 20 CCPR, the complainants wish to accentuate a few of the mistakes in the reasoning of the District Court:

a. *Treating the different utterances separately instead of looking at their cumulative effect*

In the decision of the Amsterdam court of appeal, ordering the prosecution of Mr Wilders, the following extract can be read:

> 'The court is of the opinion that the utterances of Wilders, as listed in paragraph 4 of this decision, seen in connection, are meant to spread hatred and to incite discrimination, not only because of their content, but also as a result of their way of presentation. This presentation is characterized by one-sided, very generalising phrasings with a radical tendency, continuing repetitions and an increasing fervour as to the wording of the points of view. That presentation, in combination with the content, substantially affects the dignity of Muslims. This kind of agitation is gratuitous and unnecessary, in the opinion of the court, as Mr Wilders could have expressed the same opinions without using these methods.'[9]

The complainants wish to emphasize with the court of appeal that incitement never can be a question of one single utterance, but needs repetition for its effect, and that for that reason the offence of criminal incitement can only be judged by taking into account the successive sayings in their sequence and connection. Such an approach would be in line with the case-law on incitement of some international tribunals. The Neuremberg Tribunal in its verdict against Julius Streicher, convicted and sentenced to death for his endless stream of anti-Semitic publications in Der Sturmer, came to the conclusion that those systematic publications were

> 'the poison injected into the minds of thousands of Germans which caused them to follow the National Socialists' policy of Jewish persecution and extermination.'

The ICTR had to judge those responsible for radio RTLM and Milles Collines, who in their broadcasting systematically characterized their Hutu identity by opposing it to the Tutsi's, and finally incited violence against the Tutsis. They were been convicted of incitement to genocide.[10]

It is this notion of poisoning the social climate that reproduces most strikingly what hate speech means and which is denied in the judgement of the District Court in this case. The element of agitation is essential to the notion of criminal incitement. The social climate cannot be poisoned by one single saying. To consider the different utterances in isolation, as the District Court did, ignores the cumulative effect of Wilders' words and misses the essence of the crime of hate speech.

b. *Accentuating the artificial distinction between criticism on Islam and humiliating Muslims*

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[9] Decision of the Amsterdam court of appeal of January 21, 2009, Par. 12.1.2.

[10] ICTR-99-52-T d.d. 05-12-2003; the case against Ferdinand Nahimana, Jean-Bosco Barayagwiza en Hassan Ngeze, p. 325-338. In this case is also referred to the Julius Streicher case.

The Supreme Court (Hoge Raad) has made a distinction between criticism of a religion and insulting groups of religious people, in the context of the offence of article 137c CC, the offence of insulting a group for reasons of (amongst others) ethnicity or religion. According to the Supreme Court, such a distinction is necessary because freedom of speech implies freedom to criticise institutions like Islam or other religions. However, by extending this reasoning – as the Supreme Court does not – to the crime of incitement, the District Court undermines the very concept of incitement to hatred, discrimination and violence, and denies the status of article 20 ICCPR as not only a permitted but even an obligatory exception to the right of free speech.

Moreover the District Court overlooks the significance of Wilders' systematic combination of criticism of Islam and the implications for individual Muslims. For instance utterance 23: 'I get sick of Islam in the Netherlands: no more Muslim migrants anymore.' The connection of criticism of Islam with the labelling of Muslims as undesirable people is common to almost all of Mr Wilders' sayings, and makes it impossible to separate the two without changing the meaning of Wilders' words.

c. *Eliminating the counts of incitement on grounds of race because 'Moroccans and non-Western migrants' are not races*

The District Court dismisses counts 4 and 5 of the indictment, incitement to hatred and discrimination on grounds of race, in one single sentence (Par. 4.4. of the verdict). Their decision is based on an understanding of racism which is contrary to the definition laid down in article 1 of the CERD, which reads:

> 'In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

The European Commission against Racism and Intolerance (ECRI) in its General policy recommendation No 7 (December 2002) has also defined racism in a more sophisticated way:

> '"Racism" shall mean the belief that a ground such as race, colour, language, religion, nationality or ethnic or national origin justifies contempt for a person or a group of persons or a notion of superiority of a person or a group of persons.'

The footnote to the definition of 'race' is important:

> 'Since all human beings belong to the same species, ECRI rejects theories based on the existence of different "races". However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to "another race" are not excluded from the protection provided for by the legislation.'

It is exactly by misunderstanding this fundamental notion of 'race' in the context of combating racism, that the District Court was able to dismiss the counts of incitement to discrimination or hatred on grounds of race in the charge against Wilders.

d. *Creating a kind of general and absolute exception – "the public debate" - to the crime of incitement to discrimination or hatred*

In its consideration of sayings 1 ('The borders close that same day for all non- Western residents.') and 5 ('Everyone adopts our dominant culture. The one who does not do so, is not here anymore in twenty years. He will be expelled.'), the District Court finds that they do not

incite hatred because they lack 'amplifying elements'; and that although they do in principle incite discrimination, they:

> ´must be considered as political proposals which he aims to realize once he has come to power in a democratic way. The defendant views that these utterances are necessary in a democratic society.´ (Par. 4.3.2., p. 11 of the verdict.)

In the eyes of the complainants it is unacceptable that the context of the political debate be used as an ultimate excuse for incitement to discrimination or hatred. Such an exception to the obligation imposed by article 20, interpreted by the District Court in a way that practically eliminates criminal responsibility for utterances made in the context of the public debate, has no legitimate ground (and the views of the defendant are in any event irrelevant). The District Court applies the same reasoning to utterance 11 ('We want enough. The borders closed, no more Islamic people coming to the Netherlands, a lot of Muslims exiting the Netherlands, denaturalization of Islamic criminals…'). According to the District Court (consideration 4.3.2., p. 13) this does incite discrimination, but it is at the same time a political proposal and thus not an offence under article 137d CC, as the statements are part of the political debate in the country. Again, the complainants oppose the finding of the District Court that everything is allowed in the political debate, an opinion that strips the offence of article 137d CC of much of its impact, and is thus contrary to article 20 CCPR.

There is no reason at all to accept the public debate as an excuse for hate speech. In the reasoning of the District Court, the rougher the tone of the political debate the larger the space for free speech. The consequence of this reasoning would be that the person with the biggest mouth decides what the tone of the debate should be and set the norm for that tone. This is exactly what is happening in the Netherlands under the influence of Wilders, now legitimized by the District Court.

The District Court apparently did not bear in mind what is said in the Declaration and Programme of Action resulting from the United Nations World Conference against Racism in Durban in 2001. In that Action Plan special attention is paid to the role of politicians:

> ***'Role of politicians and political parties***
> 115. *Underlines* the key role that politicians and political parties can play in combating racism, racial discrimination, xenophobia and related intolerance and encourages political parties to take concrete steps to promote equality, solidarity and non-discrimination in society, inter alia by developing voluntary codes of conduct which include internal disciplinary measures for violations thereof, so their members refrain from public statements and actions that encourage or incite racism, racial discrimination, xenophobia and related intolerance;´

7. *Some of the most unacceptable considerations of the District Court in the light of article 20 jo. 26 and 27 CCPR*

In the following section, some of the reasoning of the District Court that is most strikingly contrary to article 20 CCPR will be mentioned and discussed. The complainants refrain from discussing the verdict point by point, but similar comments would be possible on other parts of the judgement. The numbering of the different utterances as applied by the District Court will be followed.

As to utterance 2 (in De Volkskrant of October 7, 2006) the District Court states that especially the words ´what comes to the Netherlands and what multiplies here´ are ´blunt and

humiliating', but do not incite hatred because they do not provoke. The complainants fail to understand how a statement in which Muslims are portrayed as rabbits that cause a "tsunami" can be found not to incite hatred. It is precisely by depicting the 'others' as not human, as a natural disaster, against whom 'we' have to defend ourselves, that hatred is seeded.

As to utterance 9 (at the website at www.geenstijl.nl or at www.pvv.nl) the District Court states that it is directed against Islam and not against Muslims, an incomprehensible position since speaking about 'demographic suicide', 'invasions' and the 'wiping out of the Turks', suggests that people and not only a religion are threatening 'us' with their 'invasion'.

The District Court applies the same reasoning to utterance 13 (in De Pers of February 13, 2007), although in this case Wilders refers to a future 'world war'.

The reasoning of the District Court is stretched even further when it finds that Wilders 'balances on the border of what is accepted pursuant to criminal law' in utterance 14 in the same publication: 'Walk in the street and see where this ends. You feel that you are no longer living in your own country. A conflict is going on and we have to defend ourselves'. But the court gives Wilders the benefit of the doubt because he says in the same interview that he is not against Muslims but only against Islam. What remains in the minds of ordinary newspaper readers, however, is that 'we' feel unsafe in 'our' streets because there are too many of 'them', and that 'we' have to defend ourselves against 'them'.

As to the film Fitna, which shows an amalgam of terrorist attacks, ordinary Muslims in de streets, aggressive music and western citizens as victims, the District Court finds that it does not provoke as a whole in the sense that it incites to hatred. This despite the image of the future of the Netherlands that is depicted in the film, with people hanged because of their homosexuality and women killed for not obeying the laws of Allah.

These examples make clear that the District Court's decision was based on the preconceived idea that an acquittal was the most desirable outcome.

8. Relevant practice of the CCPR Committee and of the CERD Committee

No case has been lodged before the CCPR Committee based on article 20 so far, but the article has played its role in complaints on violation of article 19. The practice on the corresponding article 4 CERD however is encouraging to the complainants.

The case of K.L. against the Netherlands ended in a finding by the CERD Committee of violation of article 4 CERD because the state party, although having implemented article 4 in its legislation, had not taken all the necessary measures to protect the victim from incitement to hatred. The mere implementation of article 4 CERD in article 137d CC is not enough to fulfil the obligation under article 4.[11] The same will be true for article 20 CCPR.

Also important is the case of the Jewish Community of Oslo et al. vs. Norway, in which case the CERD Committee concluded that article 4 CERD was violated. The issue here was whether the Norwegian Supreme Court legitimately had given priority to freedom of speech in its balancing between the right to be protected against hate speech and the right to free speech. The CERD Committee concluded that freedom of speech was given a lower priority than the elimination of racist and hate speech in the CERD, which is compatible with the way freedom of speech is protected in several human rights conventions. The CERD Committee

[11] K.L. vs The Netherlands, CERD Committee No. 41/1991.

therefor agreed with the complainants, members of the Jewish Community that article 4 CERD had been violated.[12]

The case law of the CCPR Committee on article 19, freedom of speech, shows the same picture.

In the case of J.R.T. and the W.G. Party vs. Canada, the complainant, claiming a violation of article 19 because he was prevented from disseminating anti-Semitic messages through the post- and telephone system, had his application declared inadmissible because the it was incompatible with the provisions of the Covenant, since the State party had an obligation to prohibit such advocacy of racial and religious hatred.[13]

In the case of Faurisson vs. France the Committee concluded that the penalization of holocaust negation raises questions as to the freedom of speech, but that under the circumstances of the case the conviction of Faurisson respected the right of the Jewish community to live free from fear of an atmosphere of anti-Semitism. The conviction of Faurisson was therefore no violation of article 19.[14]

The case of Ross vs. Canada was about a teacher dismissed because of his negationist views expressed in the classroom. This was found not to be a violation of article 19 according to the Committee.[15]

Finally there is the CCPR´s General Comment on article 19, of july 2011. The last paragraphs of this comment are about the relation between article 19 and article 20 and read as follows:

> ´50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.
> 51. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as lex specialis with regard to article 19.
> 52. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every other case, in which the State restricts freedom of expression, it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.´

Dutch law prohibits hate speech in article 137d CC in a way that complies with article 19 par 3 and 20 CCPR. The problem is not the law, but the way it was interpreted away by the District Court so that the prohibition on hate speech was empty of any significance in this case. The verdict of the District Court in the Wilders case is however not in conformity with other judgements by the Dutch judiciary on hate speech. People are regularly convicted for infringement of article 137d, but Mr Wilders appears to have been treated differently because of his position as a politician and his corresponding role in the public debate.

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[12] The Jewish Community of Oslo et al. vs. Norway, CERD Committee No. 30/2003.
[13] J.R.T. and the W.G. Party vs. Canada, ICCPR Committee No. 104/1981.
[14] Faurisson vs. France, ICCPR Committee No. 550/1993.
[15] Ross vs. Canada, ICCPR Committee No. 736/1997.

In conclusion, the priority given by the Amsterdam District Court to freedom of speech is not in accordance with the case-law and opinions of the CCPR Committee and of the CERD Committee on the same subject. The State of the Netherlands has therefore violated article 20 jo art. 26 and 27 CCPR.

9. Case law of the European Court on Human Rights on hate speech and the limits of free speech

The ECtHR has decided on the limits of freedom of expression in regard to utterances of the same kind as Wilders' and made in the context of the public debate in four cases. Three of these concerned elected politicians an one (Norwood) a prominent member of a political party. The first one is an older case against the Netherlands concerning possession of leaflets calling upon the white people of the Netherlands to remove all Surinamese and Turkish workers from the country as soon as possible. The leaflet came from Glimmerveen, the chair of the far right wing Nederlandse Volksunie (NVU). He and a fellow member of the party were sentenced to two weeks in prison for the possession with a view to distribution of leaflets that incited racial discrimination, article 137e (old) CC. Glimmerveen had presented himself as a candidate for the municipal elections in The Hague, but the voting board had invalidated the voting list on the same grounds. Glimmerveen lodged an application to the EComHR claiming a violation of article 10 ECHR, freedom of expression. In its defence, the State referred to its obligations under the CERD and to the reference in article 10, par 2 ECHR, to the responsibilities of those exercising their freedom of expression. The EComHR did not consider the argument based on article 10 as it declared the applicant's complaint inadmissible on the basis of article 17 of the Convention (the equivalent of article 5 CCPR), which prevented the applicant from relying on article 10.[16]

The second case was against the UK. Norwood was a prominent member of the British National Party, an extreme right wing party in the UK. He had a picture behind his window of the attacks on the twin towers, with the text: 'Islam out of Britain – Protect the British People' and a crescent and star in a prohibition sign. He was fined £ 300 for 'having displayed with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it'. His defence was that the poster was against Islamic extremism and was not abusive or insulting. He filed a complaint to the ECtHR for an alleged violation of article 10, freedom of expression. Before the ECtHR he argued, referring to the Handyside case,[17] that:

> 'free speech includes not only the inoffensive but also the irritating, contentious, eccentric, heretical, unwelcome and provocative, provided that it does not tend to provoke violence. Criticism of a religion is not to be equated with an attack upon its followers.'

The ECtHR declared his complaint inadmissible,[18] again referring to article 17 ECHR, with the following consideration:

> '...The poster in question in the present case contained a photograph of the Twin Towers in flame, the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign. The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack

[16] EComHR 11 oktober 1979 (appl. 8348/78 and 8406/78), Glimmerveen and Hagenbeek, decision on the admissibility.
[17] ECtHR December 7, 1976, Handyside vs UK, hudoc.
[18] ECtHR 16 November 2004, appl. 23131/03, Norwood vs UK, decision on the admissibility.

> on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14 ...'

These considerations are directly applicable to several utterances of Wilders and to the film Fitna, and the reasoning of the District Court is not likely to convince the ECtHR, nor the CCPR Committee.

The third one is a more recent case against Belgium: Féret.[19] Féret was a member of parliament for his Front National. In the program of this party was the expulsion of all immigrants, and the party was opposed to 'the islamisation of Belgium'. During the election campaign a poster was used titled 'this is the couscous clan' showing a woman with headscarf and a man with a turban holding a sign with the text 'The Koran says: kill the nonbelievers and make a bloodbath of it' and at the foot of the page: 'The FN says NO'. After his parliamentary immunity had been lifted, Féret was prosecuted and convicted. He was sentenced to 250 hours community service to be spent in a centre for integration of persons of foreign nationality, and disqualified from standing for election for a period of ten years. Féret lodged an application to the ECtHR. In contradiction to the two former cases this application was declared admissible and the ECtHR applied the necessity check of article 10, par. 2. In that context it considered the importance of free speech in the public debate, particularly for an elected politician (legal grounds 63 and 65 respectively). But it also stressed in legal motive 64:

> '64. Tolerance and respect for the equality of all people are the basis of a democratic and pluralistic society. Consequently it can be judged necessary in a democratic state to penalize or even prevent utterances that encourage hatred, included religious hatred, or encourage, incite, promote or justify such hatred, as long as is taken care that the imposed 'formalities', 'conditions', 'restrictions' or 'sanctions' are proportionate in relation to the legitimate aim they are serving.'

The conclusion of the ECtHR (with a majority) was that the Belgium State had not violated Féret's freedom of speech.

In its verdict in the Wilders case the District Court (in par. 4.3.1., p. 9) referred to this judgement, but in a very one-sided way. For instance, it referred to the above mentioned legal motives 63 and 65 of the ECtHR's judgement in which the interest of freedom of speech is stressed for an elected representative in the public debate, but omitted to mention legal motive 64, in which tolerance and respect as an essential basis for a democratic society is emphasized, and which consideration finally carried the ECtHR's judgement. (The lawyer of the victims quoted the missing legal motive 64 in her pleadings on May 27, 2011.)

The last of the four comparable cases before the ECtHR is Le Pen vs. France.[20] Le Pen was the chair of the Front National in France and elected member of parliament. In an interview with Le Monde he stated:

> 'At the day we will have not 5 but 25 millions of Muslims in France, it will be them who command. And the French will sneak along the walls, will walk on

[19] ECtHR July 16, 2009, Féret vs Belgium, hudoc (only in French).
[20] ECtHR 20 April 2010, (appl. 18788/09), Le Pen vs France (only in French).

> the pavements with downcast eyes. If not, they will be said: why do you watch me that way? Are you looking for troubles? And you should slink-off if you don't like a beating.'

He was fined € 10.000 for incitement to discrimination, to hatred or to violence on grounds of race, ethnicity or religion. After fruitless appeal and cassation he filed an application to the ECtHR. The court found that, since the French court of appeal had considered that by depicting a view of the Muslim population in general as threatening for the French, and by creating a generalizing picture of 'the Muslims' and thus creating an opposition between 'them' and 'us' that was able to create or strengthen hostility within the population, the French state had sufficiently demonstrated that the infringement to Le Pen's freedom of speech was necessary in a democratic society. Article 10 has not been violated (with unanimity). The similarity between Le Pen's statements and some of Wilders' is striking.

In conclusion, in the four European countries where people have been judged and convicted for hate speech, including the Netherlands over thirty years ago, the ECtHR has agreed with this infringement on freedom of speech, notwithstanding that this freedom is a cornerstone of democracy, even when the public debate is at stake and the convicted persons are elected politicians (all but Norwood). The reason why these infringements are accepted is that the protection of minorities against intolerance and racism is another, and in these cases still more, important cornerstone of democracy and a peaceful society.

10. International organisations on hate speech

Some international organs have given general comments or reports on different countries on the freedom of speech in relation to hate speech. Most relevant for this case are the following:

EU Framework decision on combating racism and xenophobia[21]

The EU Framework Decision focuses on combating racism and xenophobia by means of criminal law. The aim is to ensure effective punishment of hate speech, also of legal persons in all the countries of the EU. States of the EU are ordered to impose serious penalties, including for aiding and abetting and instigating hate speech.

The CCPR Committee's General Comment on article 19

This comment has been mentioned already in point 8.

Other international bodies have made reports on the situation in different countries.

ECRI Third Report on the Netherlands[22]

The ECRI, the European Commission against racism and intolerance under the Council of Europe, in its report from 2008, paid special attention to two new phenomena in the Netherlands: the tone of the political and public debate on issues around integration and islamophobia.

A few quotes from the report as to the tone of the debate:

> '123. Responsible communication and a balanced approach have been consistently categorised and dismissed as sterile "political correctness" and "old politics", and ultimately as self-censorship in an environment where freedom

[21] Framework Decision 2008/913/JHA of November 2008.

[22] European Commission against Racism and Intolerance Third Report on the Netherlands, CRI (2008) 3, adopted 29 June 2007.

of expression has often been interpreted or portrayed as a freedom which should be unrestricted and all encompassing.'

'124. ECRI is deeply concerned about these developments, not only because they have allowed for racist and xenophobic expression to become, sometimes quite explicitly, a more usual occurrence within public debate itself, but especially because of the impact that the new political and public debate has had on public opinion and on the actions of ordinary citizens...'

'130. ECRI notes (...) that more recently, the Freedom Party, has been particularly vocal in proposing controversial policies and in resorting to racist or xenophobic discourse, targeting above all Muslim communities. Furthermore, ECRI notes that exponents of mainstream political parties rarely take a stand against this type of discourse.'

And a few quotes on the recommendations of ECRI on this subject:

'134. ECRI strongly recommends that the Dutch authorities take steps to counter the use of racist and xenophobic discourse in politics. To this end it recalls, in this particular context, its recommendations formulated above concerning the need to ensure an effective implementation of the existing legislation against incitement to racial hatred, discrimination and violence. In addition, ECRI calls on the Dutch authorities to enforce vigorously the existing legal provision targeting specifically the use of racist and xenophobic discourse by exponents of political parties.'

On the theme of islamophobia the following quotes are significant:

'135. (...) ECRI stresses that Muslims are the minority group that appears to have been affected the most by these events. (...) As since ECRI's second report the Muslims of the Netherlands have been the subject of stereotyping, stigmatising and sometimes outright racist political discourse and of biased media portrayal and have been disproportionately targeted by security and other policies, they have also been the victims of racist violence and other racist crimes and have experienced discrimination.'

'138. The role of political discourse in determining this situation appears to ECRI to have been crucial. ECRI notes that in recent years, Dutch politicians have not hesitated to resort to stereotyping, stigmatising and sometimes outright racist remarks concerning Muslims and to derogatory remarks about Islam, in both cultural and religious terms. Typically, this type of discourse has portrayed Muslims as invading the country in waves, thereby posing a major threat to the country's security and identity. Policies have accordingly been advocated to close the borders to them. Islam has been repeatedly qualified as "subculture" and Muslims have been presented as the carriers of backward values, generally incompatible with democracy and the values of Western societies. Islam has also been portrayed as a violent religion in itself, many of whose aspects Muslims need to abandon to adapt to life in the Netherlands. Although in the opinion of many observers the borders of the criminal law provisions against racist expression, and notably those against incitement to racial hatred, discrimination and violence have in some instances been crossed, ECRI is not aware of cases where these provisions have been applied with respect to politicians. More generally, however, ECRI notes with regret that stigmatising, stereotyping and even outright racist discourse targeting Muslims (which, as mentioned above, has more recently been voiced notably by the

Freedom Party (PVV) has remained as a rule unchallenged by mainstream political parties.'

It is not difficult to recognise in these quotes some of the passages of the indictment against Wilders. The criminal proceedings finally initiated against him due to the decision of the Amsterdam court of appeal and against the will of the political authorities, as well as the outcome of that proceedings, are a striking illustration of the observations of ECRI.

The complainants wish to close this list of comments from international bodies with the reaction of UN Secretary-general Ban-Ki Moon to the film Fitna. On March 28 2008 he gave in front of journalists the following comment on the issuing of the film:

'I condemn, in the strongest terms, the airing of Geert Wilders' offensively anti-Islamic film. There is no justification for hate speech or incitement to violence. The right of free expression is not at stake here. I acknowledge the efforts of the Government of the Netherlands to stop the broadcast of this film, and appeal for calm to those understandably offended by it. Freedom must always be accompanied by social responsibility.

The United Nations is the centre of the world's efforts to advance mutual respect, understanding and dialogue. We must also recognize that the real fault line is not between Muslim and Western societies, as some would have us believe, but between small minorities of extremists on different sides with a vested interest in stirring hostility and conflict.'

11. Oslo

On July 22, 2011 the far right Norwegian Anders Breivik killed eight persons during a shooting at a government building in Oslo and 69 at the island Atoya where young social democrats were together for their summer camp. The shooting appeared to be well prepared, also in an ideological way. During the months before the shootings Breivik, under the pseudonym Andrew Berwick, distributed a manifesto outlining his political thinking via the internet.[23] This was mainly against migrants, against Muslims, against multi-cultural society, against an integrated Europe and against internationalism. In his roughly 1500 page manifesto, Breivik refers thirty times to Wilders, who he admires greatly. He repeats the proposal of a certain Fjordman to award Wilders the "Nobel Prize for Appeasement of Jihad".[24] A speech of Wilders' is quoted with warm approval:

'Also in mid-September 2008, politician Geert Wilders said during a speech in Parliament that Moroccans are colonising the Netherlands. According to Wilders, Moroccans didn't come there to integrate, but "to subjugate the Dutch" and rule over them. "We lose our nation to Moroccan scum who go through life while abusing, spitting and molesting innocent people," Wilders stated. "They happily accept our dole, houses and doctors, but not our rules and values", he said. According to him there are "two nations." The cabinet's nation is that of "climate hysterics and uncontrollable Islamisation." The other nation, "my nation," Geert Wilders said, "is that of the people who have to foot the bill and are being robbed and threatened by Islamic street terrorists."'[25]

[23] To be found on the internet, for instance at: http://download.omroep.nl/nos/docs/edit manifest.pdf .
[24] At page 656.
[25] At page 608.

In the same manifesto, Breivik lists nationalist and anti-Islam parties all over Europe,[26] including the PVV in the Netherlands; and in a list of 'large patriotic Facebook groups' the page of Geert Wilders can be found under the heading 'Using Facebook and other social networking sites as a platform to consolidate and grow the European resistance movement'.[27]

In the Netherlands, as in some other countries, this has provoked a debate on the responsibility of Wilders for the deeds of his admirer. Although very few hold Wilders directly responsible, many think that he bears indirect responsibility. Wilders himself denies any responsibility at all, and has declared that he will not adapt his language as a result of these events. The complainants are of the opinion that Wilders is at least partly responsible for the climate he has deliberately created, and which has facilitated Breivik to commit his awful acts. Moreover are they of the opinion that the state of the Netherlands that has given Wilders free play has a special responsibility in this matter. The reaction of the Prime Minister Marc Rutte to the acquittal of Wilders before the Dutch Press Agency ANP was as follows:

> 'the verdict of the judge is clear and in conformity with the demand of the public prosecutor. That's good news for Geert Wilders, with whom we are cooperating fruitfully on the basis of the exemption agreement.[28]

The killings by Breivik took place one month after the judgement in the Wilders case. Everything that is said about the possibility that the judgement would have been different if it had taken place after the killings is speculative. All the same there is certainly now good reason to rethink the easy way in which the District Court gave freedom of speech absolute priority over the protection of minorities from hate speech.

Wilders is responsible for his own words, but the Dutch state is responsible for the protection of the social climate, and has to ensure that nobody poisons that climate in a way Wilders has done and still does. The least that can be said with reference to this incident is that Wilders' hate speech is not as innocent as many politicians in the Netherlands seem to think.

12. Summary of why article 20 (jo. 26 and 27) has been violated by the state of the Netherlands and why the complainants are victims of that violation

In general

As is apparent from the above mentioned facts, the Dutch public prosecutor and the District Court chose not to convict Geert Wilders for his hate speech. Article 137d CC, conceived to implement article 4 CERD and article 20 CCPR in Dutch legislation, has thus been deprived of its meaning and effectiveness for the complainants.

No complaint based on article 20 has been lodged so far to the CCPR Committee. Nowak, in his handbook seems to suggest that article 20 only creates a special exception to certain individual rights provided for in the CCPR, especially to the right of free speech.[29] On the other hand, the authors of the most recent handbook on the Committee's case-law invite members of minority groups to make use of article 20 in a direct way:

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[26] At page 1192.

[27] At page 1214.

[28] 'De uitspraak van de rechter is duidelijk en conform de eis van het OM. Dat is prima nieuws voor Geert Wilders, met wie wij op basis van het gedoogakkoord goed samenwerken.'

[29] Manfred Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, Kehl am Rhein: N.P. Engel Verlag 2005, p. 468.

'Ethnic and religious minorities who are especially threatened by incitement should make use of all relevant United Nations procedures and mechanisms, including invoking article 20(2) of ICCPR...' [30]

This call to make a direct use of article 20 - which corresponds with the practice of the CERD Committee on the corresponding article 4 CERD - at the same time clarifies the narrow link between article 20 and the articles 26 and 27, which protect the complainants as members of a cultural and religious minority respectively against unequal and discriminatory application of the law and against infringements to their right to the enjoyment of their cultural and religious life in their own way. For this reason they base their complaint on the articles 26 and 27 as well. By the repeated utterances of Wilders they have been deprived for a great deal of their undisturbed life as members of the Muslim community in the Netherlands, without any protection by the State of the Netherlands. In the verdict of the Amsterdam District Court their interests are not fairly balanced against the interest of Wilders' free speech.

The complainants are victims of the violations of articles 20 jo. 26 and 27 CCPR

The introduction of the complainants under point 1, above, describes how A. BSwas personally attacked by a man who stated that he had been incited by Wilders, and how N.A. was threatened and humiliated via the internet by persons using the same terminology as Wilders, after she gave evidence in court about the impact of Wilders' words on Muslims in general and on herself in particular.

Under point 10, above, the ECRI report on the Netherlands is quoted, that directly links the current atmosphere of intolerance, racism and xenophobia to the language of Wilders and his PVV (of which he is the only member!) in combination with the lack of adequate reaction by the government.

Anti-Muslim violence has become more frequent since the murder of publicist Theo van Gogh by a Muslim extremist in 2006 and it is not always explicitly linked to Wilders, but sometimes it is. In June 2009 the Turkish community building and mosque in Veendam was plastered with texts such as 'piss of from the Netherlands', 'white power', 'Geert Wilders' and swastikas.

Research shows that anti-Islamic violence and discrimination are increasing in the Netherlands. The Monitor Rassendiscriminatie 2009 shows that together with a decrease of the total amount of racist violent incidents (anti-Semitism, anti- refugees, anti coloured people) those against Muslims have increased since 2005.[31]

Research at the University of Tilburg has revealed that the careers of government personnel of migrant origin are damaged by the language of Geert Wilders and Rita Verdonk (another anti-migrant politician with her own political party).[32]

According to Meldpunt Discriminatie Internet (Complaints Desk for the internet), Moroccans and Muslims, categories that are in practice interchangeable for those who want to humiliate

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[30] Jakob Th. Möller and Alfred de Zayas, *United Nations Human Rights Committee Case Law, A.Handbook,* Kehl am Rhein: N.P. Engel Verlag, 2009, p. 377.

[31] Landelijk expertisecentrum van Art. 1, Anne Frank Stichting and Universiteit Leiden, *Monitor Rassendiscriminatie 2009,* p. 145.

[32] Research done by Hans Siebers, Tilburg University, www.inoverheid.nl/artikel/nieuws/1957218.

either one, are the most frequent targets of threats and gross insults on the internet, and it points to Wilders as the main cause.[33]

Research Bureau Motivaction interviewed a sample of Moroccans and Turks in 2009 and found that 74 % of them think that autochthone Dutchmen are more negative about Muslims since the increasing popularity of Wilders, and 57 % feel less at home than before in the Netherlands.[34]

Thus, the complainants are victims not only of Wilders, but also of the state of the Netherlands that has failed to protect them against increasing racism and hatred of Muslims. Here again they rely upon the above-mentioned decision of the CERD Committee in the very similar case of the Jewish community of Oslo against Norway.[35] In that case, the Committee declared the complainants admissible as victims because they belonged to a category of potential victims, at risk of being exposed to the effects of the dissemination of ideas of racial superiority and incitement to racial hatred without adequate protection, due to the acquittal of the perpetrators of these ideas. That is exactly the case of the current complainants.

Finally, the complainants refer to the case of Toonen v. Australia,[36] the core decision of the CCPR Committee on the notion of 'victim' as a person who has been personally affected by State action or omission. That is what the complainants are: affected by the omission of the Dutch state to convict Wilders for hate speech and so giving the signal to the public that this sort of language is not criminal. That signal makes them anxious about their future in the Netherlands.

13. Violation of article 2, Par 3 and 14, Par 1

In general

As victims the complainants should have had adequate procedural rights in order to substantiate their claims and to get the alleged violation of their rights ex articles 20, 26 and 27 CCPR judged by an independent tribunal. In fact they had not. As mentioned already briefly under point 4, above, the position of the victim in criminal proceedings is very weak under Dutch law. The public prosecutor is supposed to look after the interests of the victims but in this case he/she has only argued for the victims' claim to be declared inadmissible and for Wilders to be acquitted. The complainants and their lawyers had to fight to make their arguments, and for a large part they did not get the chance to do so. The complainants were able to say something about the implications of Wilders' words for the position of Muslims and migrants, but their lawyers were severely restricted in substantiating their claim with juridical arguments.

The law

As indicated already under point 4 the articles 51a – 51h and 332 – 335 CCP (submitted in translation) define the procedural position of the victim in the criminal process. In short the victim has, on his request, the right to be informed about the case, but he has no right to get a suspect prosecuted himself (article 51a par. 3). He may ask for access to the file (article 51b, par 1), but he has no right to it; he may ask that certain documents that he finds relevant be added to the file (article 51b, par. 2), but he has no right to insist upon that. Only the victims of serious (violent) crime have the right to speak about what the crime has done to them

[33] www.meldpunt.nl/uploads/uploaddocuments/Jaarverslag 2008.pdf. p. 19.
[34] Motivaction 25 June 2009, Muslims on the country of Wilders; Factsheet. www.motivaction.nl.
[35] CERD Committee 17 June 2003, no. 30/2003.
[36] CCPR Committee No 488/1992, Nicholas Toonen v. Australia.

(article 51e), victims of lesser crimes (like hate speech) may only clarify their damages, after having joined the procedure for that purpose (article 51f).

A victim's claim for compensation can be declared inadmissible without the victim having had the opportunity to clarify his damages (article 333). The victim can produce documents in evidence but may not comment on those documents and he may not bring witnesses himself (article 334, par. 1). The victim may interrogate witnesses of the prosecutor and the defence but only on the issue of damages and not on the crime itself (article 334, par. 2).

The law as described came into force at January 1, 2011. During the first part of the procedure the old law, which granted still less rights to the victims, was still in force. However, as there were no practical consequences of the previous law in this case, the details of that law are not discussed here.

The change in the law was necessary for the implementation of the EU Framework Decision on the standing of victims in criminal proceedings.[37] Article 3 of this Framework Decision reads:

> 'Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.'

Dutch politics has always been opposed to an active role of the victim in criminal proceedings; there is a strong culture of the public prosecutor having a monopoly position in the criminal process. Probably for that reason the legislator has found the strange compromise of granting the victim a right to submit evidence in the form of documents as prescribed by the Framework Decision, without giving him a right to comment on those documents and to call witnesses himself.

The practice in this case

At the start of the proceedings, Wilders and his lawyer asked for some experts to be heard. Some of them were refused by the court, a few of them were interrogated by an investigating judge. The lawyers of the complainants wanted to attend the interrogation but were not allowed.

During the first part of the proceedings, before the first judges, there was discussion about the permitted scope of the pleadings of the lawyers of the complainants. Initially the court wanted to restrict the lawyers to a strict explanation of their damages, but the arguments of the lawyers convinced the court to let them speak about whether the facts of the charge were liable to punishment or not, as that was the basis of their civil claim for compensation within the framework of tort law, which supposes an illegal act. So the lawyers did have the opportunity to plead that the words of Wilders violated article 137d CC. They were however not allowed to speak on the unwillingness of the prosecutor to prosecute or to argue that the charge should lead to a conviction. The relevant part of the record of that court session is submitted.

Before the second court and the new judges – the decisive court sessions – everything had to start again, and this time the situation of the victims was much worse. Witnesses were interrogated by the defence and the court during the hearings, but the complainants were not allowed to ask them questions. They were also not allowed to plead on the question of whether Wilders' statements were against the law or not. The lawyers of the complainants did have the relative luck that the prosecutor not only asked for the dismissal of their claim, but

[37] Framework Decision on the standing of victims in criminal proceedings, 15 March 2001, 2001/220/JHA.

also for its inadmissibility on the grounds that their damage was not the result of a violation of the norm that was supposed to be protected by article 137d CC (the so-called 'Schutznorm' theory that limits civil liability). That gave the victims the opportunity – after discussion with the court – to plead on the question of what norm the article 137d CC does protect. They were this able to put part, but far from all of their vision of the legal aspects of the case before the judges. The relevant part of the record of the court session of May 27, 2011 is submitted in translation.

The lawyer for the defence called this manoeuvre of the victims a U-turn, which it was in fact, but it was the only way for the victims to be able to say something relevant to the main issue of the case: whether the utterances of Wilders were within or outside the limits of the criminal law.

Violation of article 2, par.3 jo. 14, par. 1 CCPR
The victims have not had the opportunity to plead their case freely and adequately. That they found some 'tricks' to say at least something relevant during the sessions of the District Court, does not change their poor legal position in its essence. The victims sought remedy for the violation of their right to be free from hate speech in the criminal procedure against Wilders, but as a result of the many restrictions on their legal position they have not been granted an effective remedy for the violation of their rights.

In the determination of their claim for compensation within the criminal case they were not provided with a fair hearing. They are thus victims of a violation by the Dutch state of the articles 2, par 3 and 14, par 1 CCPR.

Author's signature: .....

V. List of supporting documents :

- Authorizations of the three complainants;
- a copy of the verdict of the Amsterdam District Court of June 23, 2011 in English (promulgated by the Court for the foreign media);
- a translation of the articles 137d CC, 51a-h CCP and 332-335 CCP;
- speech by N.A. held in court hearing of 18 October 2010;
- passages of the minutes of the court hearing of 18 October 2011;
- passages of the minutes of the court hearing of 27 May 2011;
- a CD-ROM of the film Fitna.

Böhler

AMSTERDAM DISTRICT COURT

VERDICT

Public prosecution's number: 13/425046-09

Date of the verdict: 23 June 2011

Verdict of the full criminal chamber of the Amsterdam district court in the criminal case against

Geert Wilders,

Born in Venlo on 6 September 1963,
Registered in the central municipal administration of personal data on the following address: Binnenhof 1 A (2513 AA) in The Hague.

1. The investigation at trial

This verdict was reached on objection following the investigation at trial of 7 and 14 February, 14, 16 and 30 March, 13 and 15 April, 2, 23, 25, 27 and 30 May, 1 and 9 June 2011.

The district court has examined the request from the public prosecutors mrs B.C.C. van Roessel and P.C. Velleman and the information as brought forward by the defendant and his legal counsel, mr. A.M. Moszkowicz

2. Indictment

The district court has numbered the utterances in the indictment and will follow this numbering when reviewing the individual utterances.

At the court hearing of 4 and 12 October 2010, the district court, in a different composition, admitted the requests from the public prosecutors as regards an alteration to the indictment. Pursuant to article 322, section 4 of the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering, Sv)*, these decisions were upheld after this district court started the investigation at trial again on 7 February 2011.

After the alterations of the indictment as referred to above, the defendant is charged with the following:

[Note of the translator: as requested, the charges of the indictment (count 1, page 1 of the original Dutch text, up till and including count 5, page 23 have not been translated into English].

3. Preliminary questions

In his plea, the legal counsel to the defendant (hereafter: the legal counsel) has placed critical notes about the decisions of the district court as regards the preliminary objections brought forward by the legal counsel. However, the district does not see a ground for another review of these decisions following the plea of the legal counsel.

3.1 Validity of the indictment

The following passages have been included under 1 of the indictment:

- 'in any case (repeatedly) texts of a similar nature and/ or meaning', and
- 'in any case (repeatedly) texts and/ or pictures and/ or images and/ or audio fragments of a similar nature and/ or meaning'.

De district court does not share the view of the legal counsel that the public prosecutors would intend to include other utterances in the indictment which have not been included in this indictment, by including the text passages as referred to above in the indictment. The district court understands that these text passages relate to the utterances as referred to in the indictment and the movie fragment from Fitna, as referred to in the indictment, and that these are not meant to include any new utterances. This is a common and accepted way of recording the charges, especially as regards indictable offences of expression. This alternative text does not violate the essence of the allegation. The fact that the text passages as referred to above are included in the indictment, does not create any uncertainties as regards the question against which he should defend himself.

Contrary to the legal counsel, the district court deems that the passage of the indictment under 2 and 3 which relates to the movie Fitna, is valid as well. The defendant has been charged with the fact that he has placed/ ordered to place Fitna on the website as stated, and as a result of which it is alleged that he has committed those indictable offences. This allegation is neither incomprehensible nor unclear, i.e. that the defendant could not defend himself against it. The observation of the legal counsel that the movie contains utterances which were not expressed by the defendant but by others, is a matter of proof and does not jeopardize the validity of the indictment.

The indictment is valid.

3.2 Competence to examine the indictment

This district court is competent to examine the charges of the indictment.

3.3 Admissibility of the public prosecutors

3.3.1. Partial inadmissibility, as reached on 20 March 2011

In its decision of 30 March 2011 and after an objection to that extent, the district court declared the public prosecutors inadmissible as regards the utterance under 1 of the indictment: *"I am tired of the Koran in the Netherlands: prohibit that fascist book'*. At that time, the district court considered that it would quote this partial inadmissibility of the pubic prosecutors – which was a final decision – in a verdict at a later stage again, in order to allow for the possibility to appeal against this decision. Therefore, the district court will quote (the

considerations which resulted in) the decision, which were quoted as well in the minutes of the trail on 30 March 2011.

The district court has considered the operative part of the decision from the Court of Appeal in the procedure of article 12 Dutch Code of Criminal Procedure, which only refers to Nazism, in connection with the considerations of the Court of Appeal in this respect, and draws the conclusion that the Court of Appeal allegedly intended to restrain the request as regards group defamation to utterances which contain comparisons with Nazism.
Indeed, the Court of Appeal considers comparisons with Nazism and fascism both disturbing and insulting, but after a judicial review with the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR) and the judgments from the European Court on Human Rights (hereafter: ECoHR), the Court of Appeal only considers references to Nazism "insulting to such an extent (and inadmissible) that these should be brought within the boundaries of criminal law".

Based on the foregoing, the public prosecution is inadmissible in the prosecution of the defendant as regards the group defamation as charged under 1, as far as it relates to utterances which concern comparisons with fascism. This means that the public prosecution shall be declared inadmissible as regards the charge under 1 for the following utterance: *"I am tired of the Koran in the Netherlands: prohibit that fascist book"*. The decision of inadmissibility does not relate to the following passage: *"the foundation of the problem is the fascist Islam, the sick ideology of Allah and Mohammed as laid down in the Islamic Mein Kampf"*. This passage, which has to be reviewed in full extent, also contains, apart from the comparison between the Islam and fascism, a comparison between the Islam and the book Mein Kampf, and thereto, with Nazism.

3.3.2. Partial inadmissibility as regards utterance 27 of counts 2 and 3

The district court considers that the public prosecutors shall be declared inadmissible as regards the passage in the charges under 2 and 3 from the Dutch newspaper *De Volkskrant* of 11 February 2008, with the following title: 'there is no need anymore, but The Movie will come': *"This way, he wants to show that the Koran is 'not dead but the face of the Islam: a life threatening danger'.* (utterance 27). That is to say, this concerns a quotation from an utterance by the defendants which has been included as utterance 26 under 2 and 3 in the indictment (interview in the regional newspaper *De Limburger* of 9 February 2008 *'Islam is my Fitna'.*). Thus, the defendant has expressed one utterance which has been quoted as utterance from *De Volkskrant* (the quotation) and as utterance from the newspaper *De Limburger*. Because of this duplicate in the indictment, the public prosecutors are inadmissible as regards the quotation.

The public prosecution is admissible as regards the other parts of the indictment

3.4. Suspension of the prosecution

There are no reasons to suspend the prosecution.

4. Evaluation of the evidence

4.1. The utterances as included in the indictment

First of all, the district court will determine whether the utterances as included in the indictment (for which the public prosecution is admissible) can be attributed to the defendant.

The utterances derive from various interviews, an opinion article, an internet column and a movie. The titles are only included in the indictment in order to refer to the publications in which those utterances were quoted. Contrary to the statement of the legal counsel, the titles are not included in the indictment as utterances from the defendant and, therefore, the district court will not examine these titles as such.

4.1.1. Utterances which are attributed to the defendant

The following is of importance in order to answer the question whether the utterances in the indictment shall be attributed to the defendant. The defendant did not dissociate himself from the utterances which were charged against him. Quite the contrary, in his final words he stated that he expressed those utterances which are charged against him as a politician within the framework of the public debate[1]. In addition, these fit within a repeating core theme of his three statements at trial that he regards the Islam as a danger.

As regards the internet column *'Mohammed (part II): the Islamic invasion*[2] and the opinion article from the Dutch newspaper *De Volkskrant* of 8 August 2007 by the name of *'Enough is enough: prohibit the Koran*[3], the legal counsel to the defense has stated that these are written by his client. Therefore as well, the utterances from these publications are attributed to the defendant.

Some publications which have been included in the indictment, have also been published on the websites *www.geertwilders.nl* and/ or *www.pvv.nl*. This applies to the article from *De Volkskrant* of 7 October 2006 by the name of *'The pope is completely right'*[4], which was placed on the site as referred to above on 6 October 2006 by the name of *"Stop the tsunami"* and for the article from the Dutch free newspaper *De Pers* of 13 February 2007 by the name of *"I have good intentions"*[5], which was placed on the sites as referred to above by the name of *"What motivates Geert Wilders?"* It can be assumed that the posting on the websites were carried out by the defendant himself or with his approval. Consequently, the defendant did not dissociate himself from this. Taking this into consideration, the utterances in the publications as referred to above are attributed to the defendant.

As regards the movie Fitna, the district court considers that the closing credits contain the following: 'scenario Geert Wilders & Scarlet Pimpernel' and 'a movie by Geert Wilders'. It can be deduced from this and from the interview in the Dutch regional newspaper *De Limburger* of 9 February 2008 by the name of *"Islam is my Fitna*[6] that the defendant was

[1] See minutes of the trial on 1 June 2011.
[2] Guide card 8.
[3] Guide card 11.
[4] Guide card 7.
[5] Guide card 9.
[6] Guide card 12.

closely engaged in the realization of the movie. Therefore, the movie Fitna is attributed to the defendant as well.

In an opinion article sent in by the defendant to *De Volkskrant* of 8 August 2007 by the name of *'Enough is enough: prohibit the Koran'*, he has included a quotation of the author Oriana Fallaci. The defendant writes in this respect: "I have been telling this for years: a moderate Islam does not exist. And those who do not want to believe me: read the speech by the Italian author Oriana Fallaci on 28 November 2005, who unfortunately passed away last year'. Subsequently, the defendant quotes Fallaci. By finding support for his own statement with the words of Fallaci, and by including those words in an opinion article written by him self, the defendant has incorporated Fallaci's words. Therefore, this utterance is attributed to the defendant.

In his internet column *'Mohammed (part II): the Islamic invasion'*, the defendant has quoted Professor Israeli and added to this that Israeli was completely right. Thereto, the defendant incorporated the words of Israeli. Therefore, this utterance will be attributed to the defendant as well.

4.1.2. Utterances which cannot be attributed to the defendant

The indictment under 2 and 3 contains the following passage: *"Such a new version would be desirable, deems the PVV-leader; a Koran without all resentful verses. "That one would have the size of a Donald Duck" according to Wilders'*. (Utterance 24). Following the indictment, this utterance would derive from the website of *Radio Nederland Wereldomroep* (Radio Netherlands World broadcast) and/ or *De Wereldomroep* (World broadcast). Neither from the interview on Radio Netherlands World broadcast[7] nor in any other way can be concluded without any doubt that the defendant expressed this utterance in the interview. Therefore, the district court considers that this utterance cannot be attributed to the defendant and will acquit the defendant of this part.

The phrase in utterance 27 (under 2 and 3 in the indictment) *'in the GPD-interview he explains that he will illustrate texts and verses from the Koran with documentary images'*. This concerns a summary from a journalist and, therefore, does not refer to an utterance of the defendant. In addition, the district court shall not attribute this utterance to the defendant either and shall acquit the defendant of this part.

4.2. Group defamation, count 1

The legal framework; law and jurisprudence

Article 137c, paragraph 1, Dutch Criminal Code

> He who publicly, verbally or in writing or image, deliberately expresses himself about a group of people based on their race, their religion or belief, their hetero- or homosexual nature or their physical, mental or intellectual disabilities, shall be liable to a prison sentence of a maximum of one year or pecuniary fine of the third category.

It can be deduced from the parliamentary documents with regard to the realization of the statutory provision, that only the violation of self-esteem or discrediting the group because

[7] Guide card 14.

this belongs to a particular race, professes a particular religion or has a particular belief, is liable to punishment. Criticism as regards beliefs and behavior – in any way whatsoever – falls outside the scope of the penal provision as drawn up.[8]

In addition, it can be deduced from the parliamentary debate on the statutory provision that the scope of the article is limited. 'Thus, defamation of a group will (...) only be liable to punishment when one injures that group, community in the particular characteristics of that group, this race, that religion or that belief. Each and every form of criticism, even a severe form of criticism on expressions from that group or the behavior of those who belong to the group, falls outside the scope of the penal provision.'[9]

The Dutch Supreme Court of Justice (*Hoge Raad)* indicates in the verdict by the name of *Gezwel*[10] that, based on the limited scope of article 137c Dutch Criminal Code which was intended by the legislation, the utterance shall relate, without any doubt, to a certain group of people which can be qualified by their religion. The sole circumstance that disturbing utterances about a religion hurt the followers of that religion as well, does not suffice, according to the Dutch Supreme Court, to align those utterances with utterances about those followers, that is about a group of people based on their religion.

Consideration of the utterances under 1 of the indictment

The first utterance in the indictment derives from the article in *De Volkskrant*: "*Enough is enough: prohibit the Koran*".

This utterance partly relates to the Islam and for that part does not relate to a group of people. The second part *"you will see that all evil that the sons of Allah commit against us and themselves, derives from that book"*, relates to the behavior of Muslims. According to the legislator, criticism as regards the behavior of the followers of a particular religion falls outside the scope of article 137c Dutch Criminal Code. In connection with the remainder of the article, the utterance does not bear another meaning either.

Utterances 2 and 3 derive from the article in *De Volkskrant* as well. As phrased, these utterances do not refer to a group of people based on their religion, but to the Islam and the Koran. In connection with the entire article, these utterances do not bear another meaning either.

The fourth utterance derives from the movie Fitna. As phrased, this utterance unmistakably relates to the Islam. Muslims are not mentioned. Even in connection with the entire movie, it cannot be deduced that the defendant draws negative conclusions about Muslims with this utterance as such.

Conclusion as regards the utterances in count 1

Therefore, as regards all utterances in the indictment under 1, it is considered that the element of article 137c Dutch Criminal Code 'about a group of people based on their religion' has not been fulfilled. Therefore, the district court considers, together with the public prosecutors and the counsel for the defense, that the charges under 1 are not proven.

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[8] Parliamentary Documents II 1969-1970, 9724, Memorandum in Reply nr. 6, p. 4.
[9] Proceedings I 1970- 1971, p. 555.
[10] HR 10 March 2009, LJN BF0655.

4.3. Incitement to hatred against and discrimination of Muslims based on their religion, counts 2 and 3

4.3.1. The legal framework; Convention, law and jurisprudence

Article 10 ECHR

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 137d, paragraph 1, Dutch Criminal Code

> He who publicly, orally, in writing or graphically, incites hatred against or discrimination of people or violent against an individual or belongings of people because of their race, their religion or their belief, their gender, their heterosexual or homosexual orientation or their physical, psychological or mental disability, shall be liable to punishment with a maximum of one year or a pecuniary fine of the third category.

People

During the realization of article 137d Dutch Criminal Code, the legislator observed that there is no need for a general criminal protection for institutes or organizations founded on religion or belief for their oral or practical activities in the Dutch society.

> '*As regards criticism for that action, an open space to the maximum extent shall be created. The penal provisions as proposed (*addition of the district court: article 137c and 137d Dutch Criminal Code) *do not hamper this at all, even if the criticism should concern the most fundamental perceptions on which those institutes or organizations are founded. The criminality starts where criticism results in the defamation of the honor and reputation or the incitement to hatred against or discrimination of the group for the sole reason that its members are followers of the religion or life philosophy against which the criticism is directed.*'[11]

The district court deduces from this that the legislator expressly intended to penalize incitement to hatred against or discrimination of people. In principle, the legislator has intended to leave utterances about the religion outside the scope of article 137d Dutch Criminal Code. Based on the considerations as referred to above about criticism against the religion or the activities as a result of this, the freedom of expression has played a role in this respect as well.

Incitement to

[11] Parliamentary documents II 1969-1970, 9724, Memorandum in Reply, nr. 22a, p. 3-4.

It can be deduced from legal history that the legislator has made the connection with the indictable offence provocation as laid down in article 131 Dutch Criminal Code. The conception of 'provocation' in that article is explained as follows: incitement to something that cannot be tolerated.[12]

Incitement to hatred
During the closing speech, the public prosecutors analyzed incitement to hatred. In short, it can be concluded that it is a matter of incitement to hatred in case of utterances which indicate an inherently opposing dichotomy. In order to incite to hatred, i.e. to an extreme emotion of deep antipathy and animosity, the utterance should almost and at all times contain an amplifying element.
The district court shares this analysis, but deems it possible that it is a matter of incitement to hatred as well in particular circumstances, whilst a dichotomy is not stated in the utterance with so many words. That is to say, the legal text does not request the determination of an inherently opposing dichotomy in order to determine incitement to hatred. In addition, the jurisprudence contains examples of judicial finding of fact of utterances which incite to hatred, whilst an inherently opposing dichotomy is not expressly mentioned.[13] One can imagine that it is a matter of incitement to hatred against people whilst the others are not expressly mentioned as such. That is to say, an utterance can be scathing and (therefore) provocative without being clear in the first place which people are provoked.
It can be deduced from the equalization between 'provoke' and 'incite to', and from the fact that hatred shall be characterized as en extreme emotion, of a deep resentment and animosity, that it is a matter, in principle, of an amplifying element as referred to above.

Incitement to discrimination
Article 137d Dutch Criminal Code was established as a result of the International Convention of New York on the Elimination of All Forms of Racial Discrimination. In order to implement this convention, the Dutch Criminal Code has incorporated article 90 quater, in which the concept of discrimination is explained. Therefore, the component discrimination of article 137d Dutch Criminal Code is explained based on article 90 quater Dutch Criminal Code in the following way:

> "any form of distinction, exclusion, limitation or preference, which aims at or can result in the denial or limitation of the recognition, the use or the execution, based on the equality of human rights and the fundamental rights in political, economic, social or cultural matter or any other matters of public life."

Discrimination entails a conduct described in a concrete way. Contrary to the extreme emotion of hatred, an amplifying element is not necessary with incitement to discrimination.

Connection and context
In order to answer the questions if it is a matter of incitement to hatred or discrimination, the circumstances of the utterance can be of importance as well. First of all, the district court refers to the verdict of the Dutch Supreme Court of Justice of 16 April 1996[14], in which the following is considered: "The question whether the definition of the indictable offence of the articles 137c (old) and further of the Dutch Criminal Code is fulfilled by using the words

[12] Parliamentary documents II, 1967/1968, 9724, nr. 3, p. 5 (Explanatory Memorandum).
[13] See for example: HR 16 April 1996, LJN: AD 2525 (Janmaat) en HR 23 November 2010, LJN: BM9135 (Combat 18).
[14] See footnote 13.

'aliens, minorities and asylum seekers', depends, among other things, on the characteristics of the utterances, the possible mutual connection and the context in which the utterances were expressed."
The district court finds support for this consideration in the recent verdict Combat 18[15] as well, since the Dutch Supreme Court of Justice considers in general words that the utterances do not exclusively have to be considered one by one in order to answer the question whether it is a matter of incitement to hatred or discrimination, but also the particular circumstances of the case and considering the associations which can be created.

Therefore, the district court will determine the various utterances whilst considering the utterances as such, the connection with the rest of the interview or the article in which the utterance was expressed, the other utterances of the defendant which relate to this matter and which have been added in the file, and the context in which the utterances were expressed.

It can be deduced from the legal history that article 137d of the Dutch Criminal Code encompasses a limitation to the freedom of expression, but that the legislator has intended to guarantee this fundamental right as much as possible. The Dutch Supreme Court of Justice has determined in its jurisprudence on several occasions as regards article 137c Dutch Criminal Code that the context can take away the insulting character of the utterance. For example, the context can be the public debate in which the freedom of expression is of fundamental importance.[16]
Based on the similar nature of the penal provisions (137c and 137d Dutch Criminal Code) and the wording, the district court does not see a ground for excluding the jurisprudence as referred to above with regard to incitement to hatred and/ or discrimination. If the utterance, given the wording, considered in connection with the particular piece, incites to hatred, it is difficult to imagine that the context in which the utterance was expressed (for example in the public debate) puts the character of the incitement to hatred into perspective or takes it away. This is more likely in the situation of incitement to discrimination.

It can be deduced from the jurisprudence of the European Court on Human Rights, as was pleaded by the legal counsel, that article 10 paragraph 2 of the European Convention on Human Rights leaves little room for the limitation of the freedom of expression in case of political expressions or matters of public interest. If it is a matter of a limitation as laid down by law which serves a legitimate purpose, then it will have to be determined whether the limitation is necessary in a democratic society. The European Court on Human Rights stresses that it is of utmost importance in a democratic society to leave room for the political debate. The European Court deems the freedom of expression of utmost importance and deems that political expressions can only be limited for very urgent reasons. Freedom of expression is of high importance to everyone, but especially for a representative who represents his electorate (Féret[17], consideration 63, 65). Within the framework of the freedom of expression, even utterances which 'offend, shock or disturb' are allowed.[18] It shall be a matter of a 'pressing social need' if a limitation to the right of freedom of expression shall be imposed and the limitation shall be proportional. At the same time, in the case Erbakan[19]. The Court considered that it is of fundamental importance that politicians avoid to use words in their

[15] See footnote 13.
[16] HR 9 January 2001, LJN: AA9367.
[17] European Court on Human Rights 16 July 2009, Féret v. Belgium, LJN: BJ9038.
[18] For example: European Court on Human Rights 7 December 1976, Handyside v. United Kingdom, NJ 1978, 236.
[19] EHRM 6 juli 2006, Erbakan t. Turkije, Appl. 59405/00.

public speeches which could incite to intolerance (Erbakan, consideration 64). The European Court on Human Rights deems that the incitement to exclusion of aliens constitutes a fundamental violation of human rights and, therefore, demands special precaution from everyone, including politicians (Féret, consideration 75).

4.3.2. Examination of the utterances in the indictment

Utterances aimed against religion

At trial, the defendant has stated that he does not address people, but the Islam. The defendant states so too in the interviews which are in the file and where the utterances are derived from and which are charged against him. For example, he says in the interview with the free newspaper *De Pers* of 13 February 2007: "In the Sinai desert: they had very little, but they shared everything with me. And: "Iran, what a friendly people live there". And: "I only have something against the religion, not against the people". And: "I only want to point out to people that the Islam is the largest danger for us that is threatening us."And: "If Muslims do want to assimilate, then they are full citizens, not one millimeter of lesser value than you or I". In the interview with the Dutch newspaper *De Volkskrant* of 7 October 2006, he states "if we close those twenty radical mosques tomorrow, then all other mosques benefit from it".

The file contains many utterances of the defendant, among which the utterances and the movie Fitna which have been included in the indictment. Fitna will be discussed separately hereafter.

The district court states, based on the utterances as included in the file, that the defendant particularly expresses himself about the evil aspects, in his view, of the Islam and the Koran. When the utterances which are charged against him are examined one by one, then it turns out for the majority of these utterances that these refer to the Islam and the Koran. Since the defendant addresses the religion and not the people (Muslims) with these utterances, it cannot be proven beyond any reasonable doubt that he incites to hatred against and/ or discrimination of *Muslims* with these utterances, as was charged against him. This concerns the utterances as numbered above with 3, 4, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25 and 26.
As regards the utterances 20, 21 and 22, the district court considers again that these utterances constitute criticism towards people, especially politicians who, according to the defendant, do not recognize the evil aspects of the Islam in his view. Therefore, these (components of the) utterances cannot be regarded as incitement to hatred against or discrimination of people based on their religion.

The defendant shall be acquitted of utterances under 2 and 3 of the indictment.

Hereafter, the district court will discuss the other utterances.

Utterances aimed against the worshippers

The district court examines the wording of the utterances, considered in connection with the relevant piece and placed in a broader context.

The article *'The pope is completely right'*

This concerns an interview with the defendant which was published in *De Volkskrant* of 7 October 2006. The article starts with the question: "what is the first thing that you change if you were to be the leader of the Netherlands tomorrow?"
The district court analyses the first part of the interview as follows. The defendant was asked questions about his political ambitions and the reasons thereto. The defendant paints a picture of the Netherlands where a lot of Muslims live who do not abide by the Dutch rules. He is of the opinion that the "tsunami of Islamization" has to be stopped and that the solutions which have been proposed so far do not yield results and he proposes other (immigration) measures.

The district court examines the utterances in the interview referred to above as follows.

Counts 2 and 3, utterance 1, 5 and 6

1. 'The borders close that same day for all non-Western residents'.

5. 'Everyone adopts our dominant culture. The one who does not do so, is not here anymore in twenty years. He will be expelled'.

6. 'We have a huge problem with Muslims, It is past bearing in all cases, and we propose solutions that will not even result in de mouse being locked in the cage.'

These utterances refer to people. Considering the connection with the remainder of the article, it becomes apparent, even when it does not immediately appear from the utterance itself that Muslims are meant by 'non-Western residents' and 'everybody'. Therefore, the component 'against or of people respectively' is considered to be proven by the district court.

Incitement to hatred against Muslims?
These utterances do not incite to hatred. The wording of these utterances does not contain amplifying elements. It does not appear from the remainder of the article either that these utterances of the defendant incite to hatred against Muslims.

Incitement to discrimination of Muslims?
Considered separately, these utterances have a discriminatory character. The defendant intends to make a distinction between Muslims and non-Muslims as regards immigration and residence rights. The defendant does a number of different political proposals in the article, as stated above. Utterance 5 is a proposal to expel Muslims who do not assimilate. Furthermore, the defendant proposes that every non-Western resident has to sign an assimilation contract. These utterances are political proposals as part of the public debate, or criticism as regards the governmental policy or as regards plans of others in the political administrative arena.
As stated above under 4.3.1, under 'connection and context', a politician has a lot of room for expressing his view in principle. The utterances of the defendant must be considered as proposals which he aims to realize once he has come to power in a democratic way. The defendant views that these utterances are necessary in a democratic society. In his view, he addresses public problems this way.

The district court determines that the multicultural society and immigration played an important role in the public debate at the time when the utterances were made. There is more

room for the freedom of expression in situations when it is a more vehement debate. As stated, in those cases utterances may even offend, shock or disturb.
These utterances of the defendant cannot be regarded in such a way that they shall be deemed punishable because of exceeding the legal boundaries, as a result of which they should be excluded from the public debate. In addition, the defendant states in this article as well that he does not address every Muslim with the measures as proposed. Based on the foregoing, the context takes away the discriminatory character of the utterance. Therefore, the component 'incitement to discrimination' pursuant to article 137d Dutch Criminal Code cannot be deemed proven.

As regards the utterances under 2 and 3 of the indictment, the defendant will be acquitted.

Count 2 and 3, utterance 2

'The demographic composition of the population is the largest problem in the Netherlands. I am talking about what comes to the Netherlands and what multiplies here. If you look at the figures and its development ... . Muslims will move from the big cities to the countryside. We have to stop the tsunami of islamicism. That stabs us in the heart, in our identity, in our culture. If we do not defend ourselves, then all other items from my program will prove to be worthless.'

In this fragment, the defendant addresses that the Islam is growing and that action shall be taken against this. Furthermore, the utterance unmistakably addresses Muslims.
Therefore, the district court deems proven the component 'against or of people respectively'.

Incitement to hatred against Muslims?
Because of the wording, Muslims (and others) can feel insulted by this utterance. Especially the words *'I am talking about what comes to the Netherlands and what multiplies here'*, can be regarded as blunt and humiliating without any doubt.
However, the district court deems that this utterance does not have a provocative character and, therefore, does not incite to hatred either.

Incitement to discrimination of Muslims?
The utterance does not incite to direct or indirect discrimination.

The defendant will be acquitted as regards this utterance under 2 and 3 of the indictment.

Count 2 and 3, utterance 7

'Those Moroccan boys are truly violent. They beat up people based on their sexual origin. I have never used any violence'.

Incitement to hatred against and/ or discrimination of Muslims?

This utterance refers to Moroccan youngsters, both as regards the wording and in connection with the remainder of the article. Thus, in this case the defendant does not talk about a group of people because of their religion.

The defendant will be acquitted as regards this utterance of count 2 and 3 in the indictment.

The article *'I have good intentions'*

This concerns an extensive interview in the free newspaper *De Pers* of 13 February 2007 with the defendant in which he addresses his political program, the Islam and the personal experiences and reasons why he has established his view on the Islam.

Count 2 and 3, utterance 11

'We want enough. De borders closed, no more Islamic people coming to the Netherlands, a lot of Muslims exiting the Netherlands, denaturalization of Islamic criminals...'

This remark was made following a question of the reporter about his political program and the future. It can be deduced from the remainder of the interview, in which this utterance was reported, that the defendant primarily addresses the Islam. However, the defendant also addresses – in both a positive and negative way – Muslims. Therefore, the utterance refers to people, both in wording and in connection with the entire article.
Thus, the district court deems proven the component 'against or of people respectively'.

Incitement to hatred against Muslims?
The utterance does not contain an amplifying element and cannot be considered as incitement to hatred against Muslims – not in connection with the remainder of the article either.

Incitement to hatred of Muslims?
This utterance can be regarded as an utterance with a discriminatory character. It is the intention of the defendant to make a distinction between Muslims and non-Muslims as regards immigration and residence rights. However, this utterance, together with the utterances as addressed above from the interview in *De Volkskrant*, is a political proposal within the framework of the public debate. For the same reasons as considered above, the utterance, no matter how radical, cannot be regarded as incitement to discrimination pursuant to article 137d Dutch Criminal Code.

The defendant will be acquitted as regards this utterance under 2 and 3 of the indictment.

Counts 2 and 3, utterance 14

'I have good intentions. We allow something to happen as a result of which this turns into a completely different society. I do know that there is no Islamic majority in a couple of decades. However, the number is growing. With aggressive elements, imperialism. Walk in the street and see where this ends. You feel that you are no longer living in your own country. A conflict is going on and we have to defend ourselves. In due time, there will be more mosques than churches!"

The defendant expresses this utterance at the end of the interview after the reporter has asked him if he incites unpleasant feelings among the population. In the fragment before this utterance, the defendant says that he wants to point out to people that the Islam is the largest danger which is threatening us. In this fragment he explains what happened in his view if the Islam grows and no further action is taken. He does not refer to Muslims with so many words, but the utterance does contain indications that he is talking about people, for he talks about an Islamic majority with aggressive elements. Also the fragment "*walk in the street and see where this ends*", does at least give the impression that this is about Muslims. Therefore, the district court deems proven the component 'against or of people respectively'.

Incitement to hatred against Muslims?
The defendant gives the impression, especially with the words *'walk in the street and see where this ends. You feel that you are no longer living in your own country'* that the increase of the number of Muslims bears negative consequences for the society. In addition, he says: *'a conflict is going on and we have to defend ourselves'*. This incitement to people to defend themselves has a subversive character, also by the vehement wording. The connection with the remainder of the interview does not take away the provocative character of these vehement words.

The defendant balances on the border of what is accepted pursuant to criminal law by expressing himself this way. However, the defendant says in the interview that he is not against Muslims but against the Islam indeed. The district court deems that the utterance, considered in connection with the remainder of the interview, does not incite to extreme feelings of a deep sense of resentment and animosity: hatred.

Therefore, the utterance does not incite to hatred pursuant to article 137d Dutch Criminal Code.

Incitement to discrimination of Muslims?
The utterance does not incite to direct or indirect discrimination.

The defendant will be acquitted as regards this utterance under 2 and 3 of the indictment.

Count 2 and 3, utterance 28 (Fitna)

The movie Fitna has been completely included in the indictment. The movie was shown at trial and the entire movie is described in the indictment.

Among other things, the movie contains images of violent behavior of Muslims and Muslims who incite to violence or consider this justified. In addition, non-Muslims are shown, who are victims of attacks from Muslims. Therefore, the movie unmistakably addresses people as a result of which the component "against or of people respectively" is fulfilled.

Incitement to hatred against Muslims?
The movie shows texts from the Koran in the first part of the movie, both in wording, images and sound, together with fragments of attacks committed by Muslim extremists in New York, London and Madrid.
Even though sentiments of resentment and reluctance can be intensified by the confronting and limited method of presentation, it cannot be stated that the presentation of these images

and occurrences (derived from reality) has a provoking character, as a result of which it is not a matter of incitement to hatred.

In (especially the first part of) the second half of the movie, starting with the fragment *"The Netherlands controlled by the Islam"*, an picture is painted of the Netherlands, in which more and more Muslims come and live in the Netherlands. Charts are shown of the increase of the number of Muslims in the Netherlands and Europe over the years; among other things, pictures are shown of women wearing a headscarf, satellite receivers, Dutch police officers in uniform who have to take off their shoes before entering a mosque, an individual who defends murder in the name of family honor and preaches carried out in Dutch mosques. Consequently, the following text is shown: *"The Netherlands in the future?"* and images are shown, among other things, of men who are hanged with the word 'homosexuals' shown, and women who are killed.

These images are not surrounded by some nuancing. They are surrounding by music which sounds threatening. These images have a provocative character, in connection with the music. With these images it is suggested that the increase of Muslims in the Netherlands will result in an increase of violence and criminality and this will (also) be caused by the Muslims who already live in the Netherlands. As a result of this, there is a risk that these images incite to feelings of hatred against Muslims.

Under 4.3.1. above, under 'Connection and context', it has been considered that it is hardly imaginable that, at the moment in which the utterance in its wording incites to hatred, the context in which the utterance was made (for example the public debate) can nuance or take away the character of the incitement to hatred. However, the district court deems that this is the case indeed here. These images must be considered in connection with the remainder of the movie and the context of the public debate. As has repeatedly been stressed by the defendant, the message of the movie as a whole is the evil influence of the Islam. At the end of the movie the text is shown which states that it is not up to him to tear out resentful pages from the Koran, but that it is up to the Muslims themselves. The district court understands that the defendant speaks here and concludes that his message primarily addresses the Islam and its negative aspects.

As regards the context, the district court considers the following. It is reiterated that at the time when the utterances were made, the multicultural society and immigration played a prominent role in the public debate. Pursuant to the interpretation of the European Court on Human Rights, it must be possible to express utterances in the public debate which offend, shock or disturb. As a politician, the defendant has expressed his utterances during the period of indictment in the public debate, as a fanatic fighter of the – evil in his view – Islam. Thereto, he has expressed himself in an offending and shocking manner, and he uses images and texts in the movie Fitna as well which are shocking and provocative. In this debate, he has repeatedly proposed measures which have to limit the influence of the Islam in the Netherlands. In this respect, he has stressed on more occasions that he does not have anything against Muslims, and, for example, he has stated that Muslims who assimilate are just as good as any other person. The main message of the defendant about the Islam is a message which he simply should be able to express in the Netherlands.

The district court considers that the movie viewed as a whole does not incite to hatred, in the context of the public debate, in which the necessary warning, in the view of the defendant, against the Islam as religion is stressed.

Incitement to discrimination of Muslims?
Based on the contents of the movie it cannot be concluded that it is a matter of incitement to hatred. The movie does not contain utterances or fragments which are intended to raise the idea with others to discriminate. It cannot be determined either that the movie as a whole is intended to raise this idea with others.

The defendant will be acquitted as regards this utterance under 2 and 3 of the indictment.

4.4. Incitement to hatred against and discrimination of non-Western residents and Moroccans based on their race, counts 4 and 5

Together with the public prosecutors and the counsel for the defense, the district court deems that the defendant shall be acquitted of counts 4 and 5 in the indictment. Apart from the answer to the question whether the defendant addresses people in his utterances, the component 'based on their race' cannot be proven in any case.

5. Other objections

Considering the judgment of the district court as referred to above, the other objections of the legal counsel do not have to be addressed.

6. As regards the injured parties

Since neither a sentence nor a measure was imposed on the defendant – without invoking article 9a of the Dutch Criminal Code, the district court will determine that the injured parties

- Stichting Nederland Bekent Kleur *(Foundation Holland Speaks Out)*
- Stichting Landelijk Beraad Marokkanen (*Foundation National Convocations of Moroccans)*
- Stichting Movimentu Antiano i Arubano por Promové Participashon (*Foundation of Antillean and Aruban Movement for the Promotion of Participation)*
- Vereniging van Arbeiders uit Turkije in Nederland *(Association of Workers from Turkey in the Netherlands)*
- M. Rabbae
- A. Bensalah
- N. Abaida
- L. Aarras
- Y.B. Wolthuis
- Beweging tot Herstel van het Respect (*Movement for the Restoration of Respect)*
- Vereniging Raad van Marokkaanse Moskeeën Nederland (*Association of the Council of Moroccan Mosques in the Netherlands)*
- J. de Kreek
- P. de Wolf

shall be inadmissible in their requests.

7. Decision

Based on the foregoing, the district court renders the following decision.

Declares that the public prosecutors are inadmissible in the prosecution of the defendant for the utterance under one of the indictment *'I am tired of the Koran in the Netherlands: prohibit that fascist book.'* and the fragment of the utterance under 2 and 3 of the indictment: "*This way, he wants to show that the Koran is 'not dead but the face of the Islam: a life threatening danger'*

Declares that the other components of the indictment cannot be proven and, therefore, acquits the defendant.

Declares that the injured parties are inadmissible in their requests.

Böhler

This verdict was rendered by:
mr. A.A.M. van Oosten, chairman,
mrs. G.P.C. Janssen and J.C. Boeree, judges,
in the presence of mrs. R.R. Eijsten and A. Bernsen, clerks,
and pronounced during the public court hearing of this district court on 23 June 2011.

Article 137d, paragraph 1, Dutch Criminal Code

He who publicly, orally, in writing or graphically, incites hatred against or discrimination of people or violence against an individual or belongings of people because of their race, their religion or their belief, their gender, their heterosexual or homosexual orientation or their physical, psychological or mental disability, shall be liable to punishment with a maximum of one year or a pecuniary fine of the third category.

BOOK I | Title IIIA. The Victim
First Division. Rights of the Victim

Article 51a

1. A victim is identified as a person who has suffered financial- or other damages as a direct consequence of a criminal offense. A legal person that has suffered financial- or other damages as a direct consequence of a criminal offense is equated with a victim.

2. The public prosecutor will ensure the proper treatment of the victim.

3. At the request of the victim, the police and the public prosecutor will notify him of the instigation and progress of the case against the accused. In particular, at a minimum the police will provide written notification of a decision to refrain from investigation, or the submission of a written report against an accused. The public prosecutor will provide a written notification of the instigation and continuation of the prosecution, of the date and time of the court hearing, and of the final verdict in the criminal proceedings against the accused. In designated cases, and in any case if there is a crime in the sense of article 51e, paragraph four, the public prosecutor will, upon request, also notify the victim of the release of the accused or convicted person.

4. At the request of the victim, a notification will be provided of the possibilities for him to obtain compensation for damages.

Article 51b

1. At the request of the victim, the public prosecutor will authorize the taking of cognizance of the documents that are relevant to the victim. During the investigation at the court hearing, this authorization is granted by the court in factual instance before which the case is being prosecuted by the public prosecutor.

2. The victim can request that the public prosecutor add documents to the case file that he considers relevant for the assessment of the case against the accused.

3. In the interest of the investigation, or in the interest of the protection of privacy, the investigation or prosecution of criminal offenses, or due to substantial grounds related to the public interest, the public prosecutor can refuse the taking of cognizance of certain documents on the case file.

4. When applying the third paragraph, the public prosecutor will provide the victim with a written notification of his decision. Within fourteen days after such notification, the victim may lodge an objection with the court to which the prosecutor belongs. The court will render its decision as soon as possible.

5. The manner in which the cognizance of the case file documents takes place can be regulated by a general administrative decision.

6. The victim that has been granted access to the documents, can obtain a copy thereof from the Registry in accordance with that which is determined in article 17 of the Tariff law in criminal cases.

Article 51c

1. The victim may receive legal counsel.

2. During the court hearing, the victim may be represented by an attorney provided the latter declares himself explicitly authorized to do so, or by a duly authorized person with a special power of attorney to that end.

3. If the victim does not speak Dutch, or is insufficiently fluent in this language, he can be assisted by an interpreter.

Article 51d

Articles 51a through 51c are equally applicable to surviving relatives, as provided in article 51e, paragraph two, and to those persons specified in article 51f, paragraph two.

Article 51e

1. The victim, or a surviving relative, can make a statement during the court hearing about the effects that the criminal offenses indicated in the fourth paragraph have had on him. The victim will provide the public prosecutor with a written notice of his intention to do so, so that he may be duly summoned.

2. The surviving relatives that are eligible to a summons pursuant to the first paragraph are:
   a. the spouse, registered partner or lifetime companion, in absence thereof, or in the event of their inability or unwillingness to attend;
   b. the direct blood-relatives in the first degree, in absence thereof or in the event of their inability or unwillingness to attend, the indirect blood relatives in the second degree.

3. The victims or surviving relatives that are eligible to exercise the right to speak, include the minor that has reached the age of twelve. The same applies to the minor that has not yet reached that age and who is deemed capable of making a reasonable assessment of his interests in the case.

4. The right to speak can be exercised when the charges concern a criminal offense which, according to the statutory description, carries a prison term of eight or more years, or if they concern one of the crimes listed in articles 240b, 247, 248a, 248b, 249, 250, 273f, paragraph one, 285, 285b, 300, paragraphs two and three, 301, paragraphs two and three, 306 through 308 and 318 of the Dutch Penal Code, and article 6 of the 1994 Road- and traffic law.

Second Division. Compensation for Damages

Article 51f

1. He who has suffered direct damages as a consequence of a criminal offense, can join the criminal proceedings as injured party within the context of his claim for damages.

2. In the event that the person specified in paragraph one has passed away as a result of the criminal offense, his heirs can join the criminal case as parties within the context of the claim they inherited under general title, and those persons specified in article 108, paragraphs one and two, Book 6 of the Dutch Civil Code within the context of the claims specified therein.

3. The persons specified in paragraphs one and two can also join the criminal proceedings as parties within the context of a part of their claim.

4. Those who, in order to appear in a civil case, require assistance or representation, also require assistance or representation in order to join the criminal case as parties pursuant to paragraph one. An authorization from the district court, as specified in article 349 paragraph one, Book 1 of the Dutch Civil Code, is not required for the representative. The provisions concerning assistance or representation necessary in civil cases are inapplicable with regard to the accused.

5. In the event that the public prosecutor instigates or continues prosecution, he will provide the injured party with a written notification as soon as possible. In the event that the case is dealt with during a court session, the public prosecutor will notify the injured party of the time of said session as soon as possible.

Article 51g

1. The public prosecutor will send a form with which a victim can join the case as party together with the notification, pursuant to article 51a, paragraph three, that the prosecution of the accused will be instigated. Prior to the commencement of the court session, the joinder will take place by providing the public prosecutor charged with the prosecution of the criminal offense a specification of the content of the claim and of the grounds upon which the claim is based. This specification takes place using a form that is drawn up by the Office of the Public Prosecutor, and which contains the surname, given name(s), date of birth and address-/residence of the injured party.

2. The public prosecutor will provide the accused with a written notification of the joinder as soon as possible and, in the circumstances designated in paragraph four, the parents or legal guardians of the accused.

3. During the court session, the joinder takes place by providing the judge with specification pursuant to paragraph one, first sentence, at the latest before the public prosecutor is given the opportunity to take the floor in accordance with article 311. This specification can also be done verbally.

4. If the claim of the injured party concerns conduct that is to be considered active conduct by an accused who has not yet reached the age of fourteen and to whom this conduct could be attributed as an unlawful act should his age not stand in the way thereof, the claim is deemed to have been directed at the parents or legal guardian of the accused.

Article 51h

Further rules with regard to mediation between the accused and the victim can be proscribed in a general administrative decision.

BOOK II | Title VI. Investigation during the court session
Second Division. Investigation of the injured party's claim during the court session

Article 332

The court can order that the injured party, who appeared neither in person nor via a representative, be summoned to appear at the court hearing at a later date, to be determined by the court.

Article 333

If, in the opinion of the court, the injured party evidently has no standing, it can pronounce the absence of standing of the injured party without further investigation of the case.

Article 334

1. During the court session, the injured party can submit documents to prove the damages he suffered as a consequence of the criminal offense, but he cannot propose the names of witnesses or experts.

2. The injured party, or the person that is assisting that party, can question the witnesses and experts, but only with regard to his claim for damages.

3. After the public prosecutor has taken the floor pursuant to article 311, the injured party can offer further explanation as to his claim, or have this done on his behalf. He can take the floor subsequent to the public prosecutor each time after latter has taken the floor, or has been given the opportunity to take the floor.

Article 335

Barring application of article 333, the court will render its decision regarding the claims filed by the injured party simultaneously with the final verdict in the criminal proceedings.

Böhler

I am a Muslim. I am Moroccan. I am Dutch. I am a product of the so called 'multicultural society'.

My mother is Dutch. My maternal family has bravely resisted the Nazi regime in World War II. Two of my great-uncles were killed in their efforts for freedom for the Dutch people. My great-grandparents hided Jews in the war. My grandfather is greatly honored. My youngest uncle is one of the first plastic surgeons in the Netherlands. I cherish this history.

My father is Moroccan. My paternal family looking for a better life in the seventies, moved to different places in Europe. My father was young, learned quickly and worked hard. For the Netherlands and for his family. My great-uncle was a professor at the prestigious University of Al-Karaouine in Fes. People came from distant towns and cities asking questions with regard to the application of Islamic law in specific cases. Morocco's King Mohammed V refused to submit to the Nazis during World War II, while the Nazis wanted the King to treat the Jewish citizens inhumanely. I cherish this history.

Islam is prominent in my life. The Quran and Hadith provide guidance in my life. I am not a fascist. I am not a Nazi. I am not a terrorist. I am no criminal. Nor am I violent. And yet I have to defend myself on a regular basis. I have blond hair and green-brown eyes. I do not wear a veil. I participate in the Netherlands on a social and economic level. And yet I am often hold responsible and accountable for things that Wilders associates with the Islam and Muslims. This applies not only to me, it applies to many of the first, second, and third generation Moroccan immigrants.

By the statements of Mr. Wilders, I feel discredited and damaged in my reputation. Where Judaism and Christianity are generally appreciated as civilized beliefs, Islam is posed as a fascist, Nazi and sick ideology, promulgated by a pedophile prophet.

It is new to be asked in a job interview whether I shake hands with men. It is new that when I do not take a drink on an informal party because of the Muslim fasting month, I am expected to answer why I believe in such "crap" as an "educated girl". It is new that students wearing headscarves asking for directions at their schools, are automatically referred to the cleaning corner. It is new that my cousin cannot find an internship. It is new that more and more Muslims are considering to leave the Netherlands. It is new that women leaving a local mosque get beer cans throwing at them. It is new, that only a week ago, a local mosque in Dordrecht was shot. It is all new and it is something of the past years. It is the result of the populist instrument of Islam bashing that has emerged by the continuing launch of anti-Islam statements of Mr. Wilders. His offensive, inciting, and polarizing language led to an intolerant Netherlands.

How can I be expected to adapt to the dominant Dutch culture - as envisaged by Mr. Wilders- as I, with my background, will never be accepted by this dominant Dutch culture? Must I explicitly choose to join the Anglican Church, as my Dutch grandmother did, or the Dutch Reformed Church, as my grandfather did, just to be able to feel safe here? What remains is a constitutionally guaranteed right to religious freedom in the Netherlands. A right that enriches and has enriched the Netherlands.

I do not believe that Mr. Wilders ever worried about difficulties with the Moroccan youth in neighborhoods as Oosterwijk and Slotervaart. I do not believe that Mr. Wilders ever brought up a constructive solution, nor promoted a constructive debate in the Netherlands on problems in the social field. I believe that Mr Wilders is an opportunist who, by bashing one million Dutch Muslim, wants to ascend the 'throne'. I believe that Mr. Wilders is a dangerous ideologist who has split Dutch society in an anti-Islam camp and a neutral and tolerant Netherlands. It is a divide and rule policy to distract people from what the solution of social problems really is. Everywhere in society sympathy is growing for Wilders and his statements. Don't we remember the history of Nazism? I believe this is only the beginning of a future in which the prospects of Muslims and Moroccan Dutch will get more depressing. I believe that Mr Wilders should be stopped before more Dutch are fed with his despicable ideas about Muslims.

Böhler

Mr Wilders loves Israel. I encourage him to remember what the first generation of Israelis experienced before settling in Israel. They were insulted and discriminated. They were spit on and persecuted. Because of their faith and their identity.

Muslims have often protected the Jews throughout history. Now, on my turn, I request this court to protect me as a Muslim and as a Moroccan against Mr Wilders and his incitement to hatred and discrimination. I also request this court to accept my claim for damages of 1,- euro.

The Netherlands do not belong in those list of rogue states. Nations that do not want to grant protection to those who are different from the mainstream.

Thank you for your attention.

Naoual Abaida

Böhler

AMSTERDAM DISTRICT COURT

Public Prosecutor's Office No. 13/425046-09

MINUTES OF THE COURT SESSION

Minutes of the public court session of the criminal division of the aforementioned courthouse, on 18 October 2010 (further explanation injured parties pursuant to article 334 paragraph 4 of the [Dutch] Code of Criminal Procedure).

Present:
J.W. Moors, president,
J.M.J. Lommen-van Alphen and M.M. van der Nat judges
M. Cordia clerk.

The Office of the Public Prosecutor is represented by P.C. Velleman and B.C.C. van Roessel, both public prosecutors.

The Court resumes the investigation from the point at which it was adjourned on 15 October 2010.

The President notes that the Accused Geert Wilders and his counsel A.M. Moszkowicz, are present.

(...)

The President notes that (...) counsel Mrs. T. Prakken and Mr. M. Pestman (...) are also present.

(...)

The President charges the junior Judge to lead the investigation.

The junior Judge declares, in essence:

> *Ladies and gentlemen, last week I reviewed the injured parties' claims. Today we will listen to the further clarification that the injured parties will provide. Not everyone was present when I addressed the injured parties last week. Therefore, not everyone heard the framework that I, just to be on the safe side, had sketched; the framework within which you as injured party, may take the floor. I know for certain that counsels Pestman and Prakken were present, but I will repeat it for the others.*

Last week I said that you may offer further clarification as to your claims during the hearing. You can also let someone else do this. The legislator has said that, within the context of this clarification, you may fully express your views about the background, the content and the basis of the claim.

This means that today you may speak as to why you yourself, or your clients, feel that you have suffered damages as a result of statements made by Mr. Wilders. You may state what these damages consist of and in which manner you think these damages should be compensated.

However, you may not speak as to what the Court ought to decide with regard to the case against Mr. Wilders other than within the context of your claim. You may not state that—or why—Mr. Wilders ought to be convicted in the criminal case. You may also not say that you think that Mr. Wilders ought to be sentenced, and may also not say what such a sentence should be.

The Court trusts that you will comply with these legal rules, but will let you know when you threaten to contravene them. Should this result in arguments during the hearing, you can turn to me and the Court will rule on the matter.

(...)

Counsel Pestman speaks in accordance with the written submission of his oral arguments. The submission has been attached to these minutes as Annex II, and the content thereof is considered entered into the case.

Counsel Pestman notes that (at margin-note 2 of his submission) his clients are not surprised that the public prosecutors have requested acquittal, but are surprised that, when doing so, they were able to keep a straight face.

The junior Judge declares, in essence:

Mr. Pestman, I will interrupt you already.

Counsel Pestman declares, in essence:

I haven't even begun.

The junior Judge declares, in essence:

No, that is correct. You may express your views as to the content of that which the prosecutors have said, but I do not appreciate it when you qualify the actions of the prosecutors, and therefore request that you do not do this.

Counsel Pestman declares, in essence:

I will simply continue my oral arguments if you don't mind. You yourself specified the framework of this case, and I agree with it. We are allowed to fully express our views as to the nature, content and also the background of the claim.

The junior Judge declares, in essence:

Precisely, and that entails that you may not fully express your views as to the public prosecutors. You may therefore continue, but should you qualify the prosecutors in such a manner again, I will interrupt you once more.

Counsel Pestman declares, in essence:

Does the same count with regard to the investigative judge? Am I also not allowed to speak about that?

The junior Judge declares, in essence:

About the content. Not about the persons.

Counsel Pestman declares, in essence:

I do not know who the investigative judge is, I would have liked to have met him. But, as you know, we were not invited to attend the hearings by the investigative judge. We were kept away based on—in our eyes—dubious grounds.

Counsel Moszkowicz declares, in essence:

President, I object to this narrative, already.

The junior Judge declares, in essence:

That is clear. Mr. Pestman, I clearly told you that you may express your views as to the content of the decisions that were made by officers within or without this court, but not as to the persons themselves, nor can you qualify their conduct, please.

Counsel Pestman declares, in essence:

One of those decisions was to deny us access to the hearings of the experts, in our eyes in contravention of the law. You know that the investigative judge subsequently sent us a piqued letter.

Counsel Moszkowicz declares, in essence:

I continue to object.

Counsel Pestman declares, in essence:

This letter was read out here, as such I am allowed to speak about it.

The junior Judge declares, in essence:

Mr. Moszkowicz , would you care to clarify your objection?

Counsel Moszkowicz declares, in essence:

Yes, in fact you have already said it. To start with, the investigative judge cannot defend himself here, that is point one. In full conformity with the legal proscriptions, he rightly did not allow the counsel for the injured parties to attend the hearing which was held in connection with the hearing of expert-witnesses. This is not about a further explanation as to damages, this does not concern the basis of the claim and other criteria that you noted just now at the beginning of this hearing, this is simply out of order.

Counsel Pestman declares, in essence:

I am curious as to the legal proscriptions to which my colleague is referring.

Counsel Moszkowicz declares, in essence:

I will not argue with you about this at all, because you are not here today with regard to this point.

The junior Judge declares, in essence:

No, you should not do that, argue with each other. I would like for you to convey your arguments through me. I told you at the beginning that if arguments were to arise, the Court would rule on the matter. I will first see whether the public prosecutors wish to express their views on this point, and then we will withdraw briefly in order to make a decision.

Public prosecutor Mr. Van Roessel declares, in essence:

We are of the opinion that Mr. Pestman ought to limit himself to, indeed, substantiation of the alleged damages and, as you rightly noted, that does not include the persons of the Public Prosecutor's Office nor does it concern the person of the investigative judge and his decisions. I would therefore indeed request that you emphasize to Mr. Pestman that he must limit himself to that for which he is here today, namely the substantiation of the damages.

The junior Judge declares, in essence:

Clear. Would you care to respond to that, Mr. Pestman?

Counsel Pestman declares, in essence:

No, my position is clear. I think that I am allowed to say something about the decisions that were taken by the investigative judge in this case. For that matter, I have said what I wanted to say about this. As such, we can continue again.

The junior Judge declares, in essence:

No. The Court will briefly adjourn and will render a decision on this point.

The Court adjourns the hearing briefly in order to deliberate, and resumes the investigation from the point at which it was adjourned.

The junior Judge declares, in essence:

Mr. Pestman, you said you were finished with your attacks on the Public Prosecutor's Office, against the persons of the public prosecutors, and against the investigative judge. I would suggest that you are indeed finished with this, because you are not permitted, I repeat, to express your views about the persons within or without this court. You may fully express your views as to the damages you claim, as to the basis of your claim, and you will be given all the time you need for this, but not in this manner. And if you do this again, I will interrupt you once more.

Counsel Pestman declares, in essence:

I wanted to say something about the Accused. I assume that I am allowed to say something about that on behalf of my client, or not?

The junior Judge declares, in essence:

You are allowed to say something about your claim for damages and nothing else.

Counsel Pestman declares, in essence:

Something then, about the Accused within the context of my claim, and the claim of my clients. In the written submission of my oral arguments I had noted that the Accused has kept conspicuously quiet until now, but you can strike that as it is no longer the case. However I would like to say something about the website of the PVV[1] in which an interesting package of measures is proposed that would alter the position of victims in criminal proceedings. I quote the PVV-website with regard to this package of measures: "In that package of measures the perpetrators are no longer central, but the victims, as well as the longing of well-intentioned Dutchmen for freedom and security. The judicial procedure should show understanding and compassion only towards the victims. Their interests must, more than is presently the case, be given a central place in the administration of criminal justice", or so the website of the PVV. This is, of course, a foolish conception of criminal law, but I have to hand it to the

[1] PVV: Partij Voor de Vrijheid (or *Party for Freedom*, the political party of the Accused)

Accused that: of course our clients are also well-intentioned Dutchmen with a passport, and that they too long for freedom and security. And that is why they are here today. That does not mean to say that you should only have understanding for our clients, or only show compassion to them. The position of the injured party is important, but it will please you to hear that we think that this may never go at the cost of the position of the Accused. By the way, our clients are curious as to whether these proceedings and this case will lead the Accused to amend his stance with regard to the position of the victim in criminal proceedings and the accused?

The junior Judge declares, in essence:

Mr. Pestman, this is not a political forum. You may express your views as to the claim, and nothing else. If, via this little excursion, you finally plan to arrive at the matter of your claim, I would ask you to explain beforehand how you imagine doing so.

Counsel Pestman declares, in essence:

I thought I would get there by taking small steps.

The junior Judge declares, in essence:

I suggest that you now take large steps toward the content of your claim.

Counsel Pestman continues the presentation of his oral arguments, and speaks in accordance with margin-notes 11 and following of his written plea.

(...)

Counsel Rabbae speaks according to his explanation as to the claim for damages in Annex III. The content of the Annex is considered entered into the case.

During the presentation of arguments by Counsel Rabbae, Counsel Moszkowicz temporarily leaves the courtroom.

Counsel Rabbae declares, in essence:

This feeling is all the more strong now that the Dutch government, which is tasked with the protection of minorities pursuant to international, European and national guidelines, has passively followed the reprehensible and dangerous conduct of the Accused to date. However we note that, unfortunately, the Office of the Public Prosecutor has been very passive in this respect.

The public prosecutor Mr. Van Roessel declares, in essence:

Mr. President, this is about the Office of the Public Prosecutor again, and it has been made clear today that this is not the idea.

The junior Judge declares, in essence:

You, Mr. Rabbae, have heard the previous decision by the Court regarding the remarks made by Mr. Pestman. This also applies to you.

Counsel Rabbae declares, in essence:

President, I am not talking about the persons. I am talking about the policy, that affects us. The Directive on combating racism[2] by the Office of the Public Prosecutor affects us where it concerns the actions of the Office of the Public Prosecutor with regard to racism. That is what concerns me. I am not concerned with any particular person at the Office of the Public Prosecutor.

The junior Judge declares, in essence:

As long as you discuss the content of the decisions and not the Office of the Public Prosecutor as institution, or the public prosecutors themselves. I hope that this is clear.

Counsel Rabbae declares, in essence:

President, we note that on the one hand, the government has the duty to protect minorities from racism and, by extension, the Office of the Public Prosecutor has the duty to actively take action against racist and discriminating statements. Unfortunately however, and much to our bewilderment, we find that no work is being done, neither on the side of the government, nor on the side of the Office of the Public Prosecutor. Over the past few days, I have furthermore heard the Office of the Public Prosecutor declare that we have not suffered any direct damages from Wilders. However, I am happy that a law exists that enables us to discuss our own situation, and we are actually in a better position to judge on the matter.

Counsel Rabbae continues presenting his oral arguments:

The junior Judge declares, in essence:

Thank you Mr. Rabbae. If I am correct, the idea was that Mrs. Abaida was to speak after you. How long do you plan speak madam?

Counsel Abaida declares, in essence:

Just a few minutes. My account shall be considerably shorter. This can be done before the adjournment?

The junior Judge declares, in essence:

It sure can.

[2] 'Aanwijzing bestrijding van racisme'

Counsel Abaida declares, in essence:

I will submit copies of my account momentarily.

Counsel Abaida speaks according to her explanation as to the claim for damages in Annex IV. The content of that Annex is considered entered into the case.

The Court interrupts the investigation in order to rest and have lunch. After the adjournment, the Court resumes the investigation from the point at which it was adjourned.

The junior Judge declares, in essence:

If I understand correctly, the floor is for Ms. Prakken. Ms. Prakken, in the interest of planning, how long will you speak?

Counsel Prakken declares, in essence:

Approximately an hour and fifteen minutes.

Counsel Prakken speaks according to her explanation as to the claim for damages which has been attached to these minutes as Annex V, the content of which is considered entered into the case.

Counsel Prakken declares, at margin-note 11 of her plea, in essence:

Wilders says that he is not repeating the words of former Mossad-chef Efraim Halevy that the Third World War has begun, but says that the statement is correct. This is the same rhetoric that Mr. Moszkowicz employed when he noted that you can in fact say something by saying that you are not saying it.

Counsel Moszkowicz declares, in essence:

President, I am sorry that I must briefly intervene here. Via a somewhat gratuitous U-turn the very thing that we agreed would not be done, is now being done. Whether or not the facts for which Mr. Wilders stands accused are criminal, and are therefore possibly also unlawful in civilibus, is something that you will determine, and I do not feel like listening to a second set of closing arguments. The first one was already long. I therefore request that you limit counsel who now has the floor in that which she has to say today. And it is also very clear—because we are not crazy on this end—that the choice was made to employ this U-turn in order to do that which you have repeatedly said it is not supposed to be done.

The junior Judge declares, in essence:

And how do you see this exactly? You have heard the arguments presented by Ms. Prakken. She says: we may fully substantiate the basis of our claim. The basis is an unlawful act, she says. The unlawfulness lies in the fact that, in her vision, we are

dealing with statements of a criminal nature. Where do you find the fault in these arguments?

Counsel Moszkowicz declares, in essence:

That is why I call it a U-turn. What I am trying to say is that it is now posited that the unlawfulness must be reasoned as it were, that the opportunity must be provided to substantiate that unlawfulness, but that unlawfulness is of course closely connected to the question of whether or not my client is criminally liable, whether or not he is guilty of the facts as they have been charged, and the injured party is not allowed to express any views about this, and that is why I call this a U-turn. Even aside from the fact that the arguments as presented by the defense, are now being discussed by the injured parties.

The junior Judge declares, in essence:

Let us turn it around. In which manner would you think that Ms. Prakken ought to do this with a claim based on an unlawful act?

Counsel Moszkowicz declares, in essence:

Yes, that is her problem. I can only say that the way she is doing it now, that this is not pursuant to the law.

The junior Judge declares, in essence:

Your position is clear, thank you. As I have previously done, I will also look to the Office of the Public Prosecutor to see what its position is.

The public prosecutor Mr. Van Roessel declares, in essence:

Indeed, the U-turn construction-feeling exists here too. Factually, what needs to be demonstrated as far as we are concerned, is what the damage is, and that has to be substantiated. Only, what Ms. Prakken is indeed doing, is taking the civil path in order to say whether or not what Mr. Wilders said amounts to a criminal offense. This side also objects to that. How this must subsequently be framed is up to Ms. Prakken.

Counsel Prakken declares, in essence:

I would like to briefly respond to this. This is the U-turn pursuant to the law. How can you claim damages for an unlawful act without expressing your views about the unlawfulness itself? That is impossible. It is the construction of the law. It is a sort of efficacy-operation of the law. If the criminality is there, the unlawfulness does not require further demonstration. If the culpability in the criminal case is debatable, it will have to be debatable with regard to the arguments concerning the unlawfulness, it is as it is. I will absolutely not express views on sentencing and such matters, that is not at all at issue.

The junior Judge declares, in essence:

That is clear, thank you. Would you like to respond?

Counsel Moszkowicz declares, in essence:

The arguments by Ms. Prakken already indicate that this is a complicated matter, and that you must ask yourself whether this matter should be addressed here at all.

The public prosecutor Mr. Van Roessel indicates that the Office of the Public Prosecutor does not feel the need to respond.

The Court adjourns the investigation in order to deliberate.

The Court resumes the investigation from the point at which it was adjourned.

The junior Judge declares, in essence:

The Court has reached the decision that Ms. Prakken is allowed to express her views about the criminality of the statements, but not about the culpability of Mr. Wilders. That is a decision for the Court and I request that you, Ms. Prakken, continue with the presentation of your oral arguments.

Counsel Prakken continues the presentation of her oral arguments, and speaks in accordance with margin-notes 21 through 52 of her written plea.

Counsel Prakken declares, in essence:

With the observation that international law, in particular the ECHR in no way obstructs conviction of the Accused, and with that, the imposition of payment of damages to our clients, nothing is said about whether such a conviction must follow. An order was given to prosecute and it is thereby up to the judge. Needless to say the judge has a margin of appreciation. According to that same international law however, this margin of appreciation is not unlimited. I will successively discuss a number of international legal instruments to combat racism and xenophobia that are relevant to this case. The previously referenced ECRI-report[3], among others, makes the following recommendation: ECRI urges the Dutch government to take steps against the use of racist and xenophobic language in politics. To this end, the commission refers in particular to the recommendation formulated above ...

Counsel Moszkowicz declares, in essence:

President, you still think this falls under, I will do this rhetorically now, because I would like a court-ruling on this matter, if I may.

[3] ECRI: European Commission Against Racism and Intolerance

The junior Judge declares, in essence:

Then I would first like to hear your position.

Counsel Moszkowicz declares, in essence:

It is the same, actually.

The junior Judge declares, in essence:

The same?

Counsel Moszkowicz declares, in essence:

Yes, it is the U-turn. I do not understand that I am the only one who understands this today, or so it seems at any rate.

The junior Judge declares, in essence:

No new arguments at this time?

Counsel Moszkowicz declares, in essence:

No, I thought my first one was convincing enough, to be honest.

The junior Judge declares, in essence:

And from the side of the Office of the Public Prosecutor?

Public prosecutor Mr. Van Roessel declares, in essence:

Our feeling, that we just put into words, is also still the same. I sometimes get the idea that I am listening to closing arguments. It seems to me that the fact that madam is allowed to deliver such extensive oral arguments goes completely beyond the substantiation of a claim for damages. But alright, you have taken that decision and therefore we are to respect it.

Counsel Moszkowicz declares, in essence:

Perhaps I might make one more remark about this?

The junior Judge declares, in essence:

First Ms. Prakken, then you.

Counsel Prakken declares, in essence:

I do not believe I have said a word about the culpability of Mr. Wilders.

Counsel Moszkowicz declares, in essence:

Yeah, yeah ...

The junior Judge declares, in essence:

Wait a minute Mr. Moszkowicz. I heard you, Ms. Prakken, say things like the conviction of the Accused. I heard you say things about discretion, the margin of appreciation that the judge still has. How would you place this?

Counsel Prakken declares, in essence:

The margin of appreciation with regard to the criminality of these statements, that is what it is all about.

The junior Judge declares, in essence:

But that is not what you said.

Do you care to respond to this?

Counsel Moszkowicz declares, in essence:

Yes, very briefly. There is little to be done about it, I think, because just as was the case with Ms. Prakken's colleague, the same thing is happening again, however I would like to have said this in any case, so that I can look at myself in the mirror tomorrow. You provide the framework. It is not being adhered to. This is being done under the aegis of the explanations as to why the alleged conduct of my client is unlawful. You give a lot of leeway, and for this you should be complimented, and I mean that. But there are also limits to the leeway that you must give to the spokesperson for the injured parties. And I have been listening to this for a while, and I do not want to take matters to a head, but everybody here knows what, exactly, is going on.

The junior Judge declares, in essence:

You position is clear. The Office of the Public Prosecutor feels the need to make a final response?

Public prosecutor Mr. Van Roessel declares, in essence:

No thank you.

The Court adjourns the investigation in order to deliberate.

The Court resumes the investigation from the point at which it was adjourned.

The junior Judge declares, in essence:

> *Mr. Moszkowicz, Ms. Prakken, and this is particularly addressed to the latter, at the beginning of this day, the Court clearly sketched the framework within which you are allowed to express your views at this hearing. This is rather a strict framework, and you will have noticed that the Court has given you quite a lot of leeway in order to substantiate your claim. The Court believes that you are presently—and we have taken the liberty to leaf through the written submissions of your oral arguments—that you are presently, and I am referring to the paragraphs 51 and following, exceeding the limits of what is permissible. In those paragraphs, you express your views about the desirability of prosecution, the incentives for criminalization and such, therefore the Court will not give you the opportunity to present the last segment of your oral pleadings. If I am correct, you then reach your conclusion. As such, you have the floor again from that point onwards.*

Counsel Prakken declares, in essence:

> *From my conclusion onwards? I request a short recess in order to deliberate about this.*

The junior Judge declares, in essence:

> *Would you like everyone to leave the courtroom for this, or can you yourself leave the courtroom and will you return shortly? Approximately how long do you need?*

Counsel Prakken declares, in essence:

> *We need approximately 10 minutes.*

The Court is adjourned so that counsel Prakken has the opportunity to deliberate.

The Court resumes the investigation from the point at which it was adjourned.

The junior Judge declares, in essence:

> *Ms. Prakken, you have the floor.*

Counsel Prakken declares, in essence:

> *Mr. President, members of the bench, we needed some time for deliberation in order to decide how to respond, now that we are also dealing with our own freedom of expression. Considering the fact that I have said almost everything that I wanted to*

say. Of course I would have liked to make another comment about international law and the instruments for combating racism ...

The junior Judge declares, in essence:

Ms. Prakken, earlier today I heard somebody in this courtroom speak of a rhetorical trick. So be sure not to do that.

Counsel Prakken declares, in essence:

I will swallow this then, you have apparently already read it, and Mr. Moszkowicz will now receive a copy, and furthermore it is now available via the website of my firm. I will now proceed to our conclusions, and these are brief so I am almost finished.

The junior Judge declares, in essence:

Please proceed

Counsel Prakken speaks in accordance with pages 27 and 28 (conclusion) of her written plea.

Böhler

AMSTERDAM DISTRICT COURT

Public Prosecutor's Office No. 13/425046-09

MINUTES OF THE COURT SESSION

Minutes of the public court session of the criminal division of the aforementioned courthouse, on 27 May 2011.

Present:
A.A.M. van Oosten, president,
G.P.C. Janssen and J.C. Broere judges
R.R. Eijsten and A. Bernsen clerks.

The Office of the Public Prosecutor is represented by B.C.C. van Roessel and P.C. Velleman, both public prosecutors.

(...)

[Accused]: **GEERT WILDERS**

[d.o.b.] 6 September 1963
[p.o.b.] Venlo, the Netherlands
[reg. address] Binnenhof A1 (2513 AA), The Hague, the Netherlands

Counsel for the Accused Mr. A.M. Moszkowicz, attorney in Amsterdam, is present at the court session.

The following legal counsel for the injured parties are also present at the court session:
- Mrs. E. Prakken and Mr. M. Pestman, both attorneys in Amsterdam;
- (...)

(...)

The President declares, in essence:

> *Today, the injured parties may offer further clarification as to their claim. The framework within which this clarification must be provided follows from the law. The matter at hand is the determination of the damages suffered, and the extent thereof. The injured parties may substantiate this point and offer background information. In order to award the claim, the charges must first be proven. A conviction is a conditio sine qua non for the claim to be sustained. This stage has not yet been reached. For*

the sake of argument, the injured parties may base the discussion of their claim on the hypothesis that the alleged conduct amounts to a criminal offense, and that a conviction will follow. This limits the injured parties, as the full pre-trial phase is left out. Regardless however, insofar as the legal framework allows, the injured parties may express their views on the behavior under reproach. The margin between what is permitted or disallowed with regard to the clarification of the claims is difficult to determine. A grey area exists. The Court will make sure that these margins are not exceeded. Arguments may arise. The injured parties may offer the Court insight to their memoranda of oral pleading. This could prevent arguments. Whether or not they agree to do so, is up to the injured parties themselves.

(...)

The President declares, in essence:

Before I give the floor to counsel Prakken, I note that the Court upholds the previously sketched framework. By way of explanation, I cite Parliamentary Papers 2005-2006, 30143, nr. 8: "In addition to the (most important) systematic objection that the victim has no personal right to prosecute, it is not given that, with the attribution of a formal position as procedural party, he can therefore provide commentary as to the results of the investigation, the substance of the decision to prosecute, and the answering of the questions in articles 348 and 350 of the [Dutch] Code of Criminal Procedure.

During trial proceedings in this case, counsels Prakken and Pestman expressed their views on matters of evidence, sentencing, criminality, the political program of the Accused, the role of the Public Prosecutor's Office and the alleged mistakes by the investigating judge. These topics are not open for discussion today.

Counsel Prakken declares, in essence:

I heard the Court on Wednesday. I have somewhat adapted my arguments. The Dutch legislator did not wish for the victim to have a say with regard to criminality. The question is if this is in compliance with the Framework Decision.

Counsel Prakken submits her written 'Explanation as to the Injured Parties' Claims' to the Court. She speaks in accordance with the non-stricken passages of this plea, which has been attached to these minutes as Annex IV, and the content of which is considered entered into the case.

The President interrupts counsel Prakken as she delivers page 14 of this plea. The President notes that counsel Prakken is offering an extensive examination of the international legal framework and asks how this relates to the alleged damage.

Counsel for the Accused declares, in essence:

I am pleased with your intervention, Mr. President. During the last hearing, counsel Prakken used a creative U-turn in order to say what she was not allowed to say

anyway. You will see that I was found to be correct. Counsel Prakken will not listen. We will see this shortly.

The President notes that he does not, at present, see how the arguments provided by counsel Prakken are relevant to the damages.

Counsel Prakken declares, in essence:

I would like to clarify what the norm is that article 137d of the [Dutch] Criminal Code aims to protect. This is essential to my argument. The Schutznorm is of importance in order to demonstrate the direct damage. Article 137d of the [Dutch] Criminal Code does not only concern endangerment. The article has significance in and of itself. It concerns the right to be safeguarded from a climate that incites racism. There are two distinct bases. The first is the injustice in and of itself; the second is the violation of the internationally recognized right to be safeguarded from a climate that incites racism.

The President declares, in essence:

For the sake of argument, you may assume the hypothetical situation in which the norm has been violated. This section has been sufficiently clarified.

Counsel Prakken declares, in essence:

May I state the norm?

The President declares, in essence:

I have made myself clear. For the sake of argument, you may assume the hypothetical situation in which the norm has been violated.

Counsel Prakken declares, in essence:

So I am only permitted to present my conclusion?

The President declares, in essence:

You may express your views on the general principle insofar as it is relevant to the claim.

Counsel Prakken declares, in essence:

I want clarify that there is room to claim damages using the Schutznorm. This is denied by the Public Prosecutor's Office.

The President declares, in essence:

Now you are touching upon that which the Public Prosecutor's Office has contended. You want a different outcome.

Counsel Prakken declares, in essence:

I would like to clarify that the Schutznorm was met.

The President declares, in essence:

It is a dim area. The Court must pay close attention to what you say.

Counsel Prakken declares, in essence:

I would like to deliberate.

The court orders an adjournment so that counsel Prakken has the opportunity to deliberate.

The Court resumes the investigation from the point at which it was adjourned.

Counsel Prakken declares, in essence:

My clients have filed a claim for damages. They have the right to compensation. I have endeavored to take into account the remarks made by the Court with regard to the framework within which the claims are to be further clarified. My argument concerns the civil aspects of the Schutznorm. This falls within the narrow framework stipulated by the Court. I am forced to provide my conclusion first. I am not given the opportunity to provide my substantive arguments. This is a violation of article 6 of the European Convention on Human Rights and Fundamental Freedoms. I require a written record of this. I do not see the point of continuing my arguments. I quit.

The President declares, in essence:

The Court does not wish to deprive you of the right to provide further clarification with regard to your claim. During the adjournment, the Court looked at the written submission of your oral arguments on the topic you were presenting. Your arguments are on the border of what is permissible. It is a grey area. The Court has decided that you may continue delivering your arguments on this topic.

Counsel Prakken declares, in essence:

If this is the conclusion of the Court, I will continue my explanation. I hope that I will be permitted to finish delivering these arguments.

The President declares, in essence:

That depends on what you plan to say because the Court has not looked at the entire written submission of your oral arguments.

Counsel Prakken continues delivering her arguments.

Counsel for the Accused interrupts counsel Prakken during the presentation of her oral arguments and declares, in essence:

Someone must interrupt counsel Prakken. Counsel Prakken has announced that she will explain what incitement to hatred means within the context of international law. What does this have to do with damages?

Counsel Prakken declares, in essence:

The damages are a direct result of conduct that falls within the scope of article 137d of the [Dutch] Criminal Code.

The President declares, in essence:

It is not yet possible to ascertain the relevance of the arguments presented by counsel Prakken.

Counsel for the Accused declares, in essence:

You are walking into a trap.

The President declares, in essence:

The Court cannot determine this at present, and will assess the relevance in retrospect.

Counsel Prakken continues presenting her oral arguments.