



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2124/2011^{*, **}

<i>Submitted by:</i>	Mohamed Rabbae, A.B.S and N.A. (represented by counsels, Ettina Prakken and Michiel Pestman)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	15 November 2011 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 20 December 2011 (not issued in document form)
<i>Date of adoption of decision:</i>	14 July 2016
<i>Subject matter:</i>	Incitement to racial or religious hatred by a politician.
<i>Substantive issues:</i>	Right to an effective remedy; right to a fair hearing; incitement to racial or religious hatred; the right to equality before the law and equal protection of the law without discrimination; protection of minorities.
<i>Procedural issue:</i>	Victim standing; preclusion <i>ratione materiae</i> ; exhaustion of domestic remedies.

* Adopted by the Committee at its 117th session (20 June-15 July 2016).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier De Frouville, Yuji Iwasawa, Ivana Jelic, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.
Seven individual opinions signed by eleven Committee members are appended to the present Views.

Articles of the Covenant: 2(3); 14(1); 17 20(2); 26 and 27.

Article of the Optional Protocol: 1; 3 and 5(2)(b).

1. The authors of the communication, dated 15 November 2011, are Mohamed Rabbae, A.B.S. and N.A., all dual Dutch-Moroccan nationals. They claim to be victims of violations by the Netherlands of their rights under articles 2(3); 14(1); 17; 20; 26; and 27 of the International Covenant on Civil and Political Rights. The Optional Protocol to the Covenant entered into force for the Netherlands on 11 March 1979.

The facts as presented by the authors

2.1 Between 2006 and 2009, hundreds of individuals and organisations reported to the police insults and incitement of discrimination, violence and hatred by Geert Wilders, member of parliament and founder of the extreme right wing political party Freedom Party. However, 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 public debate. The prosecutor issued a letter to all those who reported Wilders' statements to the police explaining that no prosecution would take place because the reported facts were not liable to punishment under the criminal code.

2.2 Under Dutch law, citizens who consider themselves victims of a crime have no right to have the alleged perpetrator prosecuted. They depend on the decision of the public prosecutor. However, a citizen who has a direct interest in a prosecution can lodge a complaint with the court of appeal against a decision not to prosecute.¹ This is what a number of victims and interested people did in the present case. As a result, the Amsterdam Court of Appeal, on 21 November 2009, ordered the prosecutor to prosecute Wilders before the Amsterdam District Court (the court). Pursuant to this order the prosecutor issued a summons in which Wilders was invited to defend himself on charges of 'insult of a group for reasons of race or religion' under section 137c of the Criminal Code (CC)² and for 'incitement to hatred and discrimination on grounds of religion or race' under section 137d CC.³

2.3 Under section 51(a) and (f) of the Code of Criminal Procedure (CCP), anyone who has suffered direct damage as a result of a criminal offence may join the criminal proceedings as an aggrieved party and claim compensation. The injured party has a right to be informed about the proceedings and to access the file. Under article 334 CCP, the

¹ Section 12 : "1. If a criminal offence is not prosecuted ... the directly interested party may file a complaint against said decision with the Court of Appeal ...".

² Section 137c: "1. Any person who in public, either orally or in writing or through images, intentionally makes an insulting statement about a group of persons because of their race, religion or beliefs, their hetero or homosexual orientation or their physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category.
2. If the offence is committed by a person who makes a profession or habit of it or by two or more persons in concert, a term of imprisonment not exceeding two years or a fine of the fourth category shall be imposed."

³ Section 137d: "Any person who publicly, either orally or in writing or through images, incites hatred of or discrimination against persons or violence against an individual or property because of their race, religion or beliefs, their gender, their heterosexual or homosexual orientation or their physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or a pecuniary fine of the third category."

injured party may submit evidence in support of his/her civil claim but may not present witnesses or give his/her opinion on the merits of the criminal case.⁴

2.4 The authors and a few other individuals and organisations of Muslims and migrants joined the criminal proceedings as injured parties claiming from Wilders a symbolic compensation of 1 EUR each, with the aim of trying to influence the judicial decision by arguing that Wilders' statements fell within the definition of criminal incitement. It was their purpose to clarify the limits of what can be said in political debate and to establish the practical meaning of their right to be protected from incitement to hatred, discrimination and violence. The claim for symbolic compensation was intended to convince the judge that Wilders had crossed the boundaries between what is acceptable in a democratic society and what is liable to punishment because of the harm it causes to society as a whole, to ethnic and religious minorities and to the authors personally. Such a pronouncement from the court would not have been possible in civil proceedings.

2.5 During the courtroom debate the prosecutor asked for the dismissal of the authors' claim, on the grounds that they had not suffered direct damage as a result of a violation of articles 137c and 137d. Wilders asked for some experts to be heard. Some of them were refused by the court and others were interrogated by an investigating judge. The authors' lawyers were not allowed to attend the interrogation. Initially, the court wanted to restrict the oral intervention of the authors' lawyers to a strict explanation of their damages, but in the end it allowed them to speak about whether the facts of the charge were subject to punishment, since that was the basis of their civil claim for compensation under tort law, which supposes an unlawful act. The lawyers pleaded that Wilders' statements violated articles 137c and 137d, but were not allowed to address the unwillingness of the prosecutor to prosecute, or to argue that the charge should lead to a conviction. Later, after the composition of the court changed, the authors were not allowed to plead on whether Wilders' statements were against the law.

2.6 In its verdict of 23 June 2011, the court, after examining each of the statements set forth in the indictment, decided that the elements of the indictment could not be proven and acquitted Wilders of all charges. Consequently, the authors' claims as injured parties were declared inadmissible. Neither the prosecutor nor Wilders appealed the judgment. The authors did not have a right to appeal and, therefore, they have no further domestic remedies to exhaust.

2.7 The authors' claims in the domestic proceedings and before the Committee relate to Wilders' statements that, in their view, go beyond being insulting and amount to incitement to hatred, discrimination and violence; as well as statements that are not directed against Islam as a religion but against Muslims as human beings or against non-western migrants (although the distinction between attacking Islam and attacking Muslims is hard to draw). The statements in question are as follows:

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

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

⁴ Section 334: "1. At the court session the injured party may submit documents as evidence of the damage or loss incurred as a result of the criminal offence, but may not present witnesses or expert witnesses. 2. The injured party or the person who is assisting him may pose questions to the witnesses and expert witnesses, but only in regard of his claim for compensation. 3. The injured party may explain and clarify or instruct a third party to explain and clarify his claim after the public prosecutor has addressed the court (...). He may again address the court each time the public prosecutor has addressed the court, or has been given the opportunity to address the court."

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 programme will prove to be worthless'.

Questioned about the relations between Islam and criminality, he answered:

(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 he was 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. Those who will not do so, won't be here anymore in twenty years. They 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 6 February 2007 at www.geenstijl.nl or at www.pvv.nl (the website of Wilders' party):

(9) 'In last Saturday's Nederlands Dagblad, Professor Raphael Israeli has been quoted, predicting a 'Third Islamic Invasion of Europe' by means of 'penetration, propaganda, conversion and demographic change'. According to him, Europeans are committing demographic suicide with the marching of 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 attempted 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 has much more chances to succeed. The man is perfectly right'.

(c) De Pers of 13 February 2007:

(11) 'We had enough. The borders are closed, no more Islamic people coming to the Netherlands, a lot of Muslims exiting the Netherlands, denaturalisation of Islamic criminals [...]'

And:

(13) 'Former chief of the Mossad, Efraim Halevy, says that the Third World War has begun. I am not using those 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) De Volkskrant of 8 August 2007:

(20) ‘How ashamed do I feel for all those within and outside of 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’, produced by Wilders, on Islam and Muslims:

(28) The film is described in the indictment. It combines images of the attack on the Twin Towers in New York and the Atocha railway station in Madrid with images of ordinary Muslims walking on the streets, and shows apartment buildings with satellite dishes. The suggestion appears to be that the more Muslims and satellite dishes there are, the more terrorist attacks the Netherlands will have to suffer. The images are accompanied by aggressive music.

2.8 Mohamed Rabbae arrived in the Netherlands in 1966 as a refugee and was a member of parliament for the green party from 1994 to 2002. He chairs the national consultation body of Moroccans in the Netherlands. He complained about Wilders’ statements to the police. Before the court, he spoke about research data on intolerance and racism and the position of Moroccans in Dutch society.

2.9 Ms. A.B.S. is the daughter of Moroccan immigrants. She gave evidence before the court and reported that in 2010, during the election campaign, while she was walking in the street she was driven into by a young man riding his bike who was screaming: ‘Wilders is right, piss off from here!’

2.10 Ms. N.A. was born in the Netherlands of a Dutch mother and a Moroccan father. She spoke before the first composition of the court on the impact of Wilders’ language on those whom it concerns. As a result she received a large amount of aggressive and threatening e-mails, tweets and other hate messages and decided not to testify before the second composition of the court. She limited herself to writing a letter to the court, in which she noted that the expressions used by Wilders, such as “kopvoddentax” (tax for wearing a headscarf) and the comparison between the Koran and “Mein Kampf” were replicated by those who sent her hate messages.

2.11 As Moroccans and Muslims, the authors feel personally and directly affected by Wilders' hate speech and suffer the effects of it in their daily lives. They have been either personally attacked or threatened and humiliated via the internet. They are also affected by the State party's failure to convict Wilders for hate speech and the signal given to the public that his conduct is not criminal. That signal makes the authors anxious about their future in the Netherlands.

The complaint

3.1 The authors claim that the acquittal of Wilders is contrary to article 20(2) of the Covenant and that the reasoning in the judgment contains, inter alia, the following mistakes: (a) It treated the different utterances separately, instead of looking at their cumulative effect. The offence of criminal incitement can only be judged by taking into account the successive statements in their sequence and connection. The essence of the crime of incitement needs an element of agitation; (b) It accentuated the artificial distinction between criticism of Islam and humiliating Muslims. The connection between criticism of Islam and labelling Muslims as undesirable people, as for example in statement 23, is common in Wilder's sayings and makes it impossible to separate the two; (c) It rejected the counts of incitement on grounds of race because 'Moroccans and non-Western migrants' are not races; and (d) It created a kind of general and absolute exception ("the public debate"), to the crime of incitement to discrimination or hatred. As to the film 'Fitna', the court considered 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 Islam as religion is stressed". The court made this finding despite the future Netherlands it depicted, with people hanged because of their homosexuality and women killed for not obeying the laws of Allah.

3.2 The acquittal deprived article 137(d) CC of its meaning and effectiveness, though it was intended to implement article 4 of the Convention on the Elimination of All Forms of Racial Discrimination and article 20 of the Covenant. The acquittal also is not consistent with other judgments of Dutch courts in relation to hate speech. Because of Wilders' position as a politician and role in the public debate, the Court gave priority to freedom of expression and failed to protect the authors from increasing racism and hatred against Muslims. While article 20 is couched in terms of obligations of the State rather than rights of individuals, this does not imply that these matters are left to the internal jurisdiction of States and are, as such, immune from review under the Optional Protocol. If this were the case, the protection regime established by the Covenant would be significantly weakened.

3.3 Given the link between article 20 and articles 26 and 27 of the Covenant, the authors, as members of a minority in the Netherlands, are also victims of a violation of those provisions, as they have been deprived of their undisturbed life as members of the Muslim community due to increased intolerance, racism, xenophobia and anti-Muslim violence. The judgment did not balance their interests against the interest of Wilders' freedom of expression.

3.4 Victims of a crime have a poor legal position under Dutch law. They do not have the right to have witnesses heard and to discuss the facts and merits of the criminal case as such. They are only allowed to explain their claim for damages. Because the issue at stake in the present case was whether Wilders' statements constituted hate speech within the meaning of the law, and the authors were excluded from litigation of this issue in the courtroom, they have not been provided with an effective remedy pursuant to article 2(3), nor have they had a fair hearing regarding their claim for compensation within the criminal case, in accordance with article 14(1) of the Covenant. The violation of their right to a fair hearing was amplified by the fact that the prosecutor requested Wilders' acquittal and, therefore, did not argue the case against him.

State party's observations on admissibility

4.1 The State party submitted observations on admissibility on 24 February 2012 and 28 May 2015. It disputes the admissibility of the communication for failure to exhaust domestic remedies, lack of victim status and *ratione materiae*.

4.2 On 31 March 2008, author Rabbae lodged a criminal complaint against Wilders, but the prosecutor decided not to institute proceedings. On 21 September 2009, following a complaint by other parties (none of whom are authors of the present communication), the Amsterdam Court of Appeal ordered the prosecutor to start proceedings against Wilders for discrimination and incitement to hatred. On 21 February 2010, the authors joined the proceedings as aggrieved parties. On 23 June 2011, Wilders was acquitted. The authors' claims were therefore declared inadmissible.

4.3 Article 20 is cast not in the form of a human right, but as an obligation on States to put in place legislation prohibiting the conduct described. Other articles use terms such as "all persons", "everyone", etc. Reading article 20 in terms of a justiciable human right would, in essence, result in a human right to specific legislation, and no such right is recognised. Paragraph 2 has been duly implemented in the Netherlands through legislation which prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The Committee's caselaw also suggests that article 20(2) cannot be invoked under the Optional Protocol⁵.

4.4 Joining the criminal proceedings against Wilders as aggrieved parties amounted to bringing a civil action in the context of a criminal case. Since Wilders was not convicted, the civil claim could not be examined. However, the authors could have brought a separate civil action against Wilders before a civil court pursuant to article 6:162 of the Civil Code.⁶ A person is liable under this article if an unlawful act was committed, the perpetrator is at fault, there is pecuniary or non-pecuniary damage and there is a causal link between the act and the damage done. An unlawful act or omission is committed if a right is violated, the act or omission is contrary to a statutory duty or the act or omission is contrary to a rule of unwritten law pertaining to proper social conduct. Statutory duties include treaty provisions with direct effect, including most provisions of the Covenant. A civil suit on the grounds of an unlawful act can be effective even after an acquittal in a criminal proceeding, and some cases to determine whether statements are lawful have been successful. Even if the authors do not seek compensation, a successful civil action could give them the opportunity to ask for a ban of future statements by Wilders or to request a declaratory judgment that Wilders' statements were unlawful. A decision of a civil court is open to appeal. The authors still have the possibility to bring a civil action against Wilders.

4.5 Mohammed Rabbae has not shown that he is a victim of a violation of the Covenant. He simply states that he chairs a national consultative body of Moroccans and that he spoke at Wilders' trial. The second and third authors claim that "they have been deprived of their undisturbed life as members of the Muslim community without any protection by the State party". Nevertheless, they have failed to establish that the statements in question had

⁵ Communication No.1570/2007, *Vassilari et al. v. Greece*, Views adopted on 19 March 2009, para. 6.5.

⁶ Article 6:162 : (1) A person who commits an unlawful act against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof. (2) As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour. (3) A tortious act can be attributed to the person committing the tortious act if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion).

specific consequences for them, or that such consequences were imminent, would personally affect them and that they needed the State's protection. Had they needed such protection, they could have lodged a criminal complaint. The understanding of a victim by CERD is not comparable to the definition of a victim by the Human Rights Committee, particularly since the authors in the CERD communication *Jewish Community of Oslo et al. v. Norway* were not permitted to join the criminal proceedings and had no remedy in that State party. The fact that the authors joined the criminal proceedings as aggrieved parties also cannot be equated with recognition of victim status by the domestic court. In that proceeding, their victim status would be assessed only after the defendant was convicted. The trial court thus did not have the opportunity to assess their victim status under domestic law.

4.6 The communication is in essence an '*actio popularis*',⁷ as the authors failed to establish that the statements would personally affect them. The authors sought only one Euro each and sought a general declaratory statement rather than compensation for a specific violation. According to its jurisprudence, the Committee does not assess hypothetical or potential violations of the Covenant.

4.7 The communication falls outside the scope of the Covenant since, according to the Committee's jurisprudence, an individual cannot compel, the State to commence criminal proceedings against a third person or to impose punishment.

4.8 Lastly, the State party advised that in December 2014, the Public Prosecution Service initiated criminal proceedings against Wilders for insulting a group of persons and inciting discrimination and hatred against persons on account of their race, for statements by Wilders concerning persons of Moroccan descent made in The Hague on 12 and 19 March 2014.

Authors' comments on the State party's observations on admissibility

5.1 The authors submitted comments on the State party's observations on admissibility on 20 March 2012 and 30 November 2015. Regarding exhaustion of domestic remedies, they argue that a civil proceeding must be considered ineffective. The Netherlands implemented article 20(2) of the Covenant through the criminal code, article 137d CC. The authors also do not seek compensation; they sought a judgment against Wilders by a criminal court for the important and distinct public force of a verdict establishing guilt or innocence.

5.2 Mr. Rabbæ argues that he is a direct victim of Wilders' hate speech because he is affected as a Muslim, a Moroccan and incidentally, the chairman of a national consultative body. With regard to the impact of Wilders' hate speech on their personal lives, the authors reiterate that Ms. N.A. and Ms. A.B.S. related their experiences during the domestic proceedings and Mr. Rabbæ reported the hate speech directed against him to the police. The communication is not an "*actio popularis*".

5.3 The communication is not inadmissible *ratione materiae*. The authors invoked articles 20(2), 26 and 27 of the Covenant. Their communication thus clearly falls within the scope of the Covenant.

5.4 Article 20(2) not only imposes an obligation on States to legislate against hate speech, but must also give individuals the right to be protected from it. Article 4 ICERD is also couched in terms of states' obligations rather than rights of individuals, but this has not

⁷ Communication No. 1868/2009, *Andersen v. Denmark*, Inadmissibility decision of 26 July 2010, para. 6.4.

prevented CERD from declaring admissible claims invoking violations of this provision. If the Committee nevertheless finds that such individual protection is not given under article 20, it should be interpreted to be provided by article 17. They argue that they have emphasized their collective right to identity by invoking article 20 in connection with articles 26 and 27. However, as an infringement on one's individual identity (for instance by racial defamation) also influences one's capacity and freedom to enjoy one's collective identity, and vice versa. Accordingly, the State party's actions also violate article 17, interpreted in light of article 20(2).

5.5 Regarding the proceedings initiated against Wilders in December 2014, the Prosecutor only decided to prosecute Wilders again after public outcry over his behaviour.

State party's observations on merits

6.1 In its observations of 28 May 2015 the State party rejects the authors' contention under article 2(3) that Wilders' acquittal did not constitute effective enforcement of legislation. The authors had the opportunity to lodge a complaint against the prosecutor's decision not to investigate and the various legal arguments relevant to the criminality of Wilders' statements were addressed at length during the proceedings. The authors claim that their aim was to clarify the boundaries of the law, and the judgment of the court means that they succeeded. The fact that the ultimate outcome of the court's assessment was not in the authors' favour does not constitute ineffective enforcement of legislation. Article 2(3) does not guarantee the authors a favourable outcome of the available remedy, let alone a right to a conviction. Any guarantee of a conviction would be incompatible with the fundamental principle the right to a fair trial. Thus there has been no violation of article 2(3).

6.2 With respect to article 14(1), Dutch criminal law allows anyone who has suffered direct damage as a result of a criminal offence to join the criminal proceedings as an aggrieved party to claim compensation. Article 14 does not require greater protection for the rights of an aggrieved party in criminal proceedings than are recognized under domestic law. Those rights under Dutch law include the rights to submit evidence of damage suffered, to question witnesses and experts in relation to compensation and to explain the claim. The authors' aim was to influence the criminal proceedings and convince the court that Wilders had exceeded the limits of what is permissible in public debate. However, the norm which the legislator aimed to protect through this proceeding was the right to compensation for damage suffered. Under Dutch law the authors are not permitted to play any other role, such as influencing the criminal proceedings.

6.3 The authors are incorrect that no arguments in favour of conviction were presented to the court and ignore the central role of the court in criminal proceedings. A criminal court seeks to independently establish the truth and is responsible for ensuring a full examination at the trial. The submissions of the prosecution and the defense are not decisive. The judge presides over the hearing, questions the defendant, examines witnesses, enters into discussions with parties and responds to all these factors in the judgment.

6.4 In 2008, three legal academics issued separate reports on the legal merits of prosecution in order to assist the Public Prosecution Service in deciding whether or not to prosecute. The reports were added to the case file. A full examination subsequently took place at the trial and witnesses were questioned. Everything that the authors wished to put forward came before the court. Thus there has been no violation of article 14.

6.5 Regarding the claim under article 20, it is not disputed that this provision has been implemented correctly via section 137d CC. The aim of both article 20 and section 137d CC is to outlaw incitement to hatred, but it is for the national courts to decide whether incitement to hatred has actually occurred. Article 20 has been highly controversial

amongst states, resulting in very different ways of implementation. Domestic courts are best positioned to assess whether certain utterances are punishable, as they possess the entire case file and can fully assess the criminality of the acts. If review by the Committee is possible, such review must be restricted. It is not for the Committee to re-evaluate the findings of the court on whether Wilders' acts and statements are punishable under criminal law. This is particularly pertinent since article 20 does not create individual rights.

6.6 Article 20(2) does not prohibit all negative statements concerning national groups, races or religions. But a statement that 'constitutes incitement to discrimination, hostility or violence' must be banned. The provision is controversial due to the underlying fear that a broad ban will be abused by governments or will discourage citizens from engaging in legitimate democratic debate. The distinction between articles 19 and 20 is that it is only the specific forms of expression indicated in article 20 that States must prohibit by law. Under the jurisprudence of the European Court of Human Rights regarding freedom of expression, even statements that offend, shock or disturb are permissible. In principle great value should be attached to statements by politicians, parliamentarians, trade union leaders or other public figures, but it is also vital that elected representatives avoid public utterances that could foster intolerance. Inciting the exclusion of foreigners fundamentally undermines human rights and thus everyone, including parliamentarians, should be extremely cautious in their utterances. At the same time, those who choose to manifest their religion cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.

6.7 The UN, OSCE and OAS have indicated that no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility, or violence. The Parliamentary Assembly of the Council of Europe considers that acts that intentionally and severely disturb public order and call for public violence by reference to religious matters should be prohibited, as far as necessary in a democratic society, in accordance with article 10 of the European Convention on Human Rights. To be restricted, it is not sufficient that expressions merely disturb public order; they must also call for public violence.

6.8 Defining which acts fall within article 20 remains difficult. No clear line can be drawn between criticism—even if deemed offensive—and incitement to violence, hostility or discrimination. Nor is there a universally accepted definition of hate speech. Each set of facts is particular and can only be assessed and adjudicated according to its own circumstances and context. This was the difficult task performed by the court. The authors are incorrect in assuming that Wilders' statements are covered by article 20 almost by definition. That must be decided by a court for each specific statement. Any other approach would infringe a defendant's right to a fair trial.

6.9 The legislative history of section 137d CC shows that the intention was to criminalise incitement to hatred or discrimination against persons, thus not religions. Criticism of the most deeply-held convictions of the adherent of a religion, of the faith itself and of the institutions and organisations based thereon is acceptable. Freedom of expression played a role in the decision to keep such criticism beyond the reach of section 137d, since criticism of religion or belief must be allowed as much scope as possible, even where that criticism touches the most deeply-held convictions of the believers and the institutions or organizations based on the religion or belief. Criticism is a criminal offence, however, if it is unequivocally directed at persons themselves and not simply at their opinions, convictions and behaviours. An insulting attack on a belief does not automatically constitute an attack on those who adhere to that belief; under the law an insulting description of a belief is only insulting to persons if it involves drawing conclusions about those persons. This distinction only applies with respect to the grounds religion or belief,

not race or ethnic origin. The legislative history also establishes that in interpreting ‘incitement to,’ the legislator sought a connection with the offence defined in section 131 CC, namely inflammatory behaviour that incites the commission of criminal offences or acts of violence.

6.10 Section 137d was drafted in compliance with the ICERD. The discrimination element in section 137d CC is based on the definition of the term in section 90: ‘any distinction, exclusion, restriction or preference 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 field of politics or economics, in social or cultural matters or any other area of social life’. Discrimination is a specifically defined behaviour. In contrast to incitement to hatred (an extreme emotion), incitement to discrimination does not require an intensifying element.

6.11 The judgment cannot be described as a departure from existing domestic case law. Cases establish that prosecutions on the basis of discrimination require a case-by-case assessment of the particular statements as well as their context. Cases often result in convictions but also often result in acquittals. In its judgment, the court held that it would “assess the various statements in terms of their wording as such, their connections with the rest of the interview or article of which they are a part, the other statements made by the defendant on this subject and included in the case file, and the context in which the statements were made’. The indictment also did not charge individual statements; counts 2 and 3 listed 28 statements together. Thus, the authors are incorrect that the court did not consider the statements in context and their cumulative effect.

6.12 The court did not draw an artificial distinction between criticism of Islam and criticism of Muslims. For incitement to either hatred or discrimination, Section 137d requires that a statement refer unequivocally to a specific group of persons who are characterized by their religion and distinguish themselves from others by their religion. The judgment also shows that the distinction between criticism of Islam and criticism of Muslims should not be taken literally in every case.

6.13 The authors criticise the acquittal of Wilders of incitement to hatred and discrimination on account of race because, according to the court, the ‘race’ ground could not apply to Moroccans and non-Western immigrants. The court did hold that the ‘race’ component of the charge could not be proven. However, this does not mean the court believed that this ground can never apply to Moroccans and non-Western immigrants. Nor would such a conclusion correspond to existing Dutch jurisprudence, which holds that the definition of ‘race’ also covers ‘descent or national or ethnic origin’.

6.14 For some of the statements, the importance of public debate informed the court’s decision to find ‘incitement to discrimination’ not proven. This assessment is in line with ECHR jurisprudence under article 10(2) of the European Convention, which considers that it is essential to allow scope for political debate and that restrictions on political utterances may be imposed only for extremely compelling reasons.

6.15 The court found that in the period the statements were made, the multicultural society and immigration were major topics of public debate. The fiercer the debate, the more scope for freedom of expression is needed, and in such circumstances statements may even offend, shock or disturb. The court held that Wilders’ statements were not of a nature that they should be deemed criminal as excessive and hence excluded from the public debate. Thus, the court did not make public debate ‘an absolute exception’, but indicated in general terms the boundaries of when incitement to hatred and discrimination may arise. The authors also do not accurately describe the film *Fitna*.

6.16 For the above reasons, the State party believes that the communication does not violate article 20. Given the close connection between the authors’ references to articles 26

and 27 and article 20, and given that they have not offered any separate grounds regarding articles 26 and 27, the State party confines its observations to article 20.

Authors' comments on the State party's observations on the merits

7.1 The authors submitted comments on 30 November 2015. They argue that ECRI's 20 June 2013 report on the Netherlands welcomed the Wilders' court's discussion of ECHR case law on freedom of political expression, but noted that in *Féret v. Belgium* the ECHR indicated that in principle, limiting hateful expression that justifies intolerance can be considered necessary in democratic societies if the restrictions are proportionate to the legitimate aim pursued. An appeal in Wilders' case to accurately reflect ECHR caselaw therefore would have been warranted.

7.2 With respect to articles 2(3) and 14(1), the authors deny that they claim a right to have Wilders convicted. They claim against the lack of an effective prosecution. The prosecutor did little to make the prosecution effective, as shown by the decision to entrust the prosecution to the same individuals who initially decided a prosecution was not warranted. This, plus their half-hearted attempts to secure a conviction and the weak legal position of victims in Dutch criminal proceedings, resulted in a *de facto* alignment of the prosecutor with the defence. In Dutch criminal proceedings the victim is fully dependant on the judge and the prosecutor. An example is the prosecutor's hiring of three legal academics for advice on whether to prosecute Wilders. The authors did not agree with most of their opinions, but were not allowed to comment on them or call their own experts.

7.3 The authors agree that the State party has implemented article 20(2) sufficiently in its legislation. The problem lies in the application of the law in the present case. The judgment deviates from domestic jurisprudence showing a less tolerant approach to hate speech.

7.4 As to the relationship between articles 19 and 20, the authors maintain that freedom of speech cannot be used to legitimize hate speech. In very similar cases, the ECHR has drawn clear boundaries when free speech is used for hate speech.

7.5 The court failed to take into account the cumulative effect of Wilders' statements, despite acknowledging the rulings of the Supreme Court which emphasise the importance of context in judging the criminal character of certain sayings.

7.6 In principle, religious criticism should not be criminally sanctioned, because it does not amount to defamation of a group. The court failed to acknowledge the distinction between defamation and hate speech, while Wilders repeatedly confuses the two. For instance, with respect to utterance 14, the court admitted that it was used against Muslims and that the use of the words 'to defend ourselves' was provocative. It even found that Wilders was on the edge of criminal activity, but then noted that: 'the defendant says in the interview that he is not against Muslims but against the Islam'. The court therefore decided there was no incitement to racial hatred. Wilders' emphasis on Islam, as opposed to Muslims, shows that he took legal advice, but does not alter the essence and the effect of his utterances.

7.7 Wilders repeatedly used the words 'Moroccans' and 'non-western immigrants'. The court's decision that the element of 'race' could not be established suggests that it applied a definition of race contrary to that of the Supreme Court and the definition used by the CERD and the ECRI.

7.8 The authors object to the use of public debate as an excuse for hate speech, and to the court's emphasis on the importance of the public debate without referencing the responsibilities of politicians to the integrity of that debate. The way a statement is perceived by the average citizens is crucial to assessing whether it constitutes hate speech, as hate speech is a crime that always involves both a sender and a receiver.

Additional observations by the State party

8.1 On 2 February 2016 the State party formulated additional observations. It notes that the first hearing in the second criminal case against Wilders, commenced in 2014, will take place in March 2016.

8.2 Regarding the present case, the prosecutor complied with the order of the Amsterdam Court of Appeal fully and without reservation, presented detailed legal and factual arguments, based its opinion on purely legal grounds and did not follow the line taken by Wilders' defence. The Court of Appeal's decision also formed part of the case file. The fact that the case was being prosecuted by the Public Prosecution Service partly through a public prosecutor who had been involved in the decision not to prosecute did not mean that the Court of Appeal's order for prosecution was complied with half-heartedly. The prosecutor represents the positions of the Public Prosecution Service. The interim relief judge held that the prosecutor complied with the Court of Appeal's order in full. The acquittal was not appealed because the Procurator General concluded that the case was not suitable for such an application.

8.3 In Dutch criminal proceedings, the victim does not have a status equivalent to the defendant and is not a party to the proceedings. There is no obligation under the Covenant to make victims equivalent parties to criminal proceedings. Giving victims a separate right to prosecute would undermine the prosecutor's monopoly on prosecutions and to pursue prosecutions in the public interest. Accordingly a victim cannot produce witnesses at trial, question them or have them questioned. However, victims can make their views known to the public prosecutor before the trial and can request that a particular witness be summoned.

8.4 There is no clear dividing line between social criticism and incitement to violence, hostility and discrimination. Under ECHR jurisprudence in *Perinçek v. Switzerland*, establishing whether certain statements constitute incitement to hatred or violence requires a case by case approach based on the nature and the potential effects of the statements and the context in which they are made. Statements made in the context of public debate are entitled to a large measure of protection.

8.5 The assessment of a statement must be objective and cannot depend on the perception or degree of injury, since these differ from one person or group to another. The assessment is made on the basis of the meaning of the words on their own and the meaning of the statement in conjunction with the rest of the utterance. Possible recipients of the message are also taken into account, because to interpret statements it may be necessary to view them within the circumstances of the case and in light of the associations they evoke.

8.6 The distinction between statements relating to persons and statements relating to a religion is essential, inter alia, for freedom of expression to allow criticism of religions or the behaviour of individuals. Moreover, although the district court gave no further reasons for its decision that the 'race' component of the charge could not be proven, this does not mean that the court disregarded the definition employed by the Supreme Court, CERD and ECRI, which the prosecutor relied upon. The court likely concluded that the component 'on account of their race' was not proven.

8.7 The authors do not substantiate their claim under article 17. Their view that article 17 protects the right to collective identity is not supported. The authors also have not demonstrated that Wilders' utterances hindered them in the enjoyment of their religion or cultural customs and traditions in community with others.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 As required under article 5(2)(a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 With regard to the exhaustion of domestic remedies under article 5(2)(b) of the Optional Protocol, the Committee notes the State party's contention that because Mr. Wilders was not convicted, the authors' civil claim within the criminal proceedings could not be examined. Moreover, it is uncontested that the authors can still bring a separate civil action against Mr. Wilders before a civil court on the grounds of an unlawful act, pursuant to article 6:162 of the Civil Code, even if they do not seek compensation. A successful civil action would enable the authors to ask for a ban of future statements by Mr. Wilders or to request a declaratory decision that Mr. Wilders' statements were unlawful. The Committee also notes the authors' arguments that such a civil action in this case is not an effective remedy because their aim was not to seek compensation, but to have a determination as to whether an offence under article 137d of the Criminal Code had been committed.

9.4 The Committee recalls its jurisprudence that under article 5(2)(b) of the Optional Protocol, the author must make use of all judicial or administrative avenues that offer him a reasonable prospect of redress.⁸ It observes that a civil action under article 6:162 of the Civil Code would have allowed the authors to seek pecuniary or non-pecuniary damages for a tort for unlawful acts committed by Mr. Wilders, as well as declaratory relief. However, the Committee also observes that the authors did not seek to obtain civil compensation for any tort committed by Mr. Wilders. What they sought, through their participation in the national judicial proceedings, was a judgement against him by a criminal court for the important and distinct public force of a verdict establishing guilt or innocence under section 137d CC, a provision intended to implement the State party's obligation under article 20(2) of the Covenant. Accordingly, the authors chose the remedy afforded by the State party that was most specifically tailored to their aim.⁹ The Committee considers that this determination could only be obtained in criminal proceedings. The Committee therefore considers that it is not prevented, under article 5(2)(b), from examining the communication.

9.5 The Committee notes the State party's objection to admissibility on the grounds that the authors lack victim status and that the communication is in essence an '*actio popularis*', as the authors failed to establish that the statements by Mr. Wilders would personally affect them. In this respect the Committee recalls its jurisprudence that "a person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely this requirement should be taken. However, no individual can, in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant".¹⁰ Accordingly, any person claiming to be a victim of a violation of a right protected by the Covenant must demonstrate either that a State

⁸ Communication No. 437/1990, *Pereira v. Panama*, Inadmissibility decision adopted on 21 October 1994, para. 5.2.

⁹ *Andersen v. Denmark*, *supra*, para. 6.3.

¹⁰ Communication No. 35/1978, *Aumeeruddy-Cziffra et al. v. Mauritius*, Views adopted 9 April 1981, para. 9.2.

party has by an act or omission already impaired the exercise of his right or that such impairment is imminent, basing his arguments for example on legislation in force or on a judicial or administrative decision or practice.¹¹ In applying this principle, the Committee has recognized that “where an individual is in a category of persons whose activities are, by virtue of the relevant legislation, regarded as contrary to law, they may have a claim as ‘victims’”.¹² Moreover, in *Toonen v. Australia*, although the legislative provisions challenged by the author had not been enforced by the authorities for a number of years, the author pointed, inter alia, to derogatory and insulting remarks and a “campaign of official and unofficial hatred” directed at homosexual persons, and claimed that the mere existence of the legislation fueled discrimination, harassment of, and violence against, the homosexual community. The Committee concluded that the author “had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally”¹³ sufficient to establish his status as a victim.

9.6 In the present case the Committee notes that the authors do not bring abstract claims as members of the general population of the State party. The authors are Muslims and Moroccan nationals, and allege that Mr. Wilders’ statements specifically target Muslims, Moroccans, non-Western immigrants, and Islam. The authors accordingly are members of the category of persons who were the specific focus of Mr. Wilders’ statements. They further allege that they feel personally and directly affected by Mr. Wilders’ hate speech and suffer the effects of it in their daily lives, including through attacks on the internet, and that they have been adversely affected by the signal given to the public, through the acquittal, that Mr. Wilders’ conduct is not criminal. The authors joined the criminal proceedings as alleged injured parties pursuant to section 51(a) CCP. The Committee further notes that Mr. Rabbat chairs the national consultation body of Moroccans in the Netherlands, complained about Mr. Wilders’ statements to the police and spoke in court about research data on intolerance and racism and the position of Moroccans in the State party. Ms. A.B.S. testified before the court that in 2010, she had been driven into by a bicyclist who screamed at her making explicit reference to Wilders’ statements. The third author, Ms. N.A., after testifying before the court on the impact of Wilders’ statements, received numerous threatening messages, as a result of which she decided not to testify again. In view of the foregoing, the Committee considers that the authors are members of the particular group targeted by Mr. Wilders’ statements and thus persons whom article 20(2) is intended to protect, and that Mr. Wilders’ statements had specific consequences for them, including in creating discriminatory social attitudes against the group and against them as members of the group. The Committee accordingly considers that the authors have sufficiently substantiated, for purposes of admissibility, that their claims are not merely hypothetical.

9.7 The Committee notes the State party’s argument that article 20 of the Covenant is not cast in terms of a justiciable right. However, the Committee considers that in stating that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”, article 20(2) provides protection for people as individuals and as members of groups against this type of

¹¹ *Andersen v Denmark*, supra, para. 6.4; Communication No. 1879/2009, *A.W.P. v. Denmark*, Views adopted 1 November 2013, para.6.4.

¹² Communication No. 359/1989, *Ballantyne et al. v. Canada*, Views adopted 31 March 1993, para. 10.4.

¹³ Communication No. 488/1992, *Toonen v Australia*, Views adopted 31 March 2004, paras. 2.5-2.6, 5.1.

discrimination. The article is designed to give specific recognition to the prohibition on discrimination set forth in article 26 of the Covenant, by identifying a limitation that States parties must impose on other enforceable Covenant rights, including the principle of freedom of expression under article 19 of the Covenant.¹⁴ The Committee considers that article 20(2) accordingly does not merely impose a formal obligation on States parties to adopt legislation prohibiting such conduct. Such a law would be ineffective without procedures for complaints and appropriate sanctions. The invocation of article 20(2) by individuals who have been wronged accordingly follows the logic of protection that underlies the entire Covenant.¹⁵

9.8 The State party argues that the communication falls outside the scope of the Covenant since, according to the Committee's jurisprudence, an individual cannot compel the State to commence criminal proceedings against a third person or to impose punishment. The Committee notes the authors' comments in this respect that their claim is about the lack of an effective prosecution. The Committee also notes the authors' allegations about the limited role given to them, as injured parties, in the criminal proceedings, as they could not, for instance, call on witnesses; participate or provide arguments during the examination of the facts and merits of the case on whether Mr. Wilders' statements amounted to incitement to hatred, discrimination or violence; or appeal the Court's judgement. In this respect the Committee considers that, for the purpose of admissibility, the authors have sufficiently substantiated their claims under article 14(1) and article 2(3) in conjunction with articles 20(2) and 26.

9.9 Regarding the authors' allegations under articles 17 and 27 of the Covenant, the Committee considers that the authors have not adduced specific arguments in support of their claims under these provisions, distinct from their claims under articles 20(2) and 26. Accordingly, the Committee considers this part of the communication as insufficiently substantiated and declares it inadmissible under article 2 of the Optional Protocol.

9.10 In view of the foregoing the Committee decides that the communication is admissible insofar as it raises issues with respect to article 14(1), and article 2(3) in conjunction with articles 20(2) and 26 of the Covenant, and proceeds to examine these claims on the merits.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in light of all the information made available by the parties, as required under article 5(1) of the Optional Protocol.

10.2 The Committee notes the authors' claim that in the criminal proceedings pursued against Mr. Wilders under article 137d CC, a provision intended to implement the State party's obligations under article 20(2) of the Covenant, their rights were not respected, due to the limited role they had as injured parties and the lack of an effective prosecution.

10.3 The Committee recalls its jurisprudence that article 14 does not provide individuals with a right to have other individuals prosecuted or punished.¹⁶ However, individuals can, under article 14(1), claim their right to a fair hearing in the determination of their rights and

¹⁴ General Comment No. 34, Article 19, freedoms of opinion and expression, CCPR/C/GC/34, paras. 51-52.

¹⁵ Communication No. 1570/2007, *Vassilari et al. v. Greece*, Views adopted 19 March 2009 (individual opinion of Committee members Abdelfattah Amor, et al.)

¹⁶ Communication No. 213/1986, *H.C.M.A. v. The Netherlands*, Inadmissibility decision adopted 30 March 1989, para. 11.6.

obligations in a suit at law. In the present case, the authors' claims as injured parties, within the criminal proceedings, are of a civil nature and therefore their rights and obligations regarding their civil claims for compensation in case the accused person is found guilty are to be protected. In this respect, the Committee notes that, before the Amsterdam District Court, the authors chose to exercise their rights by bringing a civil claim under section 51 CCP as injured parties, a mechanism that is not required by the Covenant but that is available under domestic law. The Committee further notes that pursuant to this procedure, their lawyers were allowed to speak about whether the facts of the charge were liable to punishment and to plead that Wilders' statements violated article 137d. The Committee also notes that the authors were allowed to submit documentation and testify before the court. Accordingly, the Committee considers that the facts before it do not reveal a violation of the authors' rights under article 14(1) in conjunction with the determination of their rights and obligations in a suit at law.

10.4 Regarding the authors' claims that Mr. Wilders' acquittal breached their rights under articles 2(3), 20(2) and 26, the Committee notes that article 20(2) secures the right of people as individuals and as members of groups to be free from hatred and discrimination under article 26 by requiring States to prohibit certain conduct and expression by law.¹⁷ It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions.¹⁸ Article 20(2) is crafted narrowly in order to ensure that other equally fundamental Covenant rights, including freedom of expression under article 19, are not infringed. The Committee recalls in this regard that freedom of expression embraces even expression that may be regarded as deeply offensive.¹⁹ Moreover, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential to the promotion and protection of free expression.²⁰ The Committee further recalls its jurisprudence that prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20(2).²¹ Nor may such prohibitions be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.²² The Committee additionally recalls that articles 19 and 20 are compatible with and complement each other.²³ A prohibition that is justified on the basis of article 20 must also comply with the strict requirements of article 19(3).²⁴ Thus, in every case, measures of prohibition under article 20(2) must also be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of article 19(3), and they must conform to the strict tests of necessity and proportionality.²⁵ The Committee further notes that article 20(2) does not expressly require the imposition of criminal penalties, but instead requires that such advocacy be "prohibited by law." Such prohibitions may include civil and administrative as well as criminal penalties.

10.5 The Committee observes that the authors have not challenged the manner in which the State party has chosen to legislatively implement article 20(2), but argue that due to insufficient advocacy by the prosecution, errors in the reasoning of the court, and the lack

¹⁷ General Comment No. 34, *supra*, para. 51.

¹⁸ *Id.*, para. 52.

¹⁹ *Id.*, para. 11.

²⁰ *Id.* para. 20.

²¹ *Id.* para. 48.

²² *Ibid.*

²³ *Id.* para. 50.

²⁴ *Id.* para. 48; see also paras. 50, 52.

²⁵ *Id.* para. 22.

of any appeal, the criminal prosecution was ineffective in this case. The Committee notes that the State party has chosen to implement article 20(2) through section 137d CC, which is enforceable through criminal prosecution. According to the State party, private remedies are also available through a civil action appended to a criminal proceeding pursuant to section 51 CCP, and through section 6:162 of the Civil Code. According to the State party, the concept of “incitement” in 137d is intended to reach “inflammatory behaviour that incites the commission of criminal offenses or acts of violence.” The Committee notes the State party’s argument that 137d criminalizes incitement to hatred or discrimination only against persons, not religions, since criticism of even the most deeply-held convictions of the adherents of a religion is protected by freedom of expression. The State party further notes that, in the difficult area of hate speech, each set of facts is particular and must be assessed by a court or impartial decision maker on a case-by-case basis, according to its own circumstances and taking into account the specific context.

10.6 The Committee observes that in the present case, the State party’s domestic law afforded interested persons the opportunity to secure an order from the Amsterdam Court of Appeal directing the public prosecutor to prosecute Wilders. The public prosecutor charged Wilders with “insult of a group for reasons of race or religion” under section 137c and “incitement to hatred and discrimination on grounds of religion or race” under section 137d, for all of the statements set forth in the authors’ submission. Pursuant to section 51(a) CCP, the authors joined a civil claim to the criminal proceeding, and were allowed to introduce arguments that Wilder’s conduct violated 137d. The Committee also notes the State party’s argument that the public prosecutor impartially represented the prosecutor’s office and fully presented the factual and legal issues in the case, and that the court was independently responsible for evaluating the law and evidence and entered judgment after a careful assessment in light of the applicable law of each of Wilders’ statements in context.

10.7 The State party has chosen to establish a legislative framework through which statements contemplated by article 20(2) are prohibited under criminal law, and which allows victims to trigger, and participate in, a prosecution. Such a prosecution was pursued in this case, and the trial court issued a detailed judgment evaluating Wilder’s statements in light of the applicable law. The Committee therefore considers, in light of the arguments and the circumstances of the case, that the State party has taken the necessary and proportionate measures in order to “prohibit” statements made in violation of article 20(2) and to guarantee the right of the authors to an effective remedy in order to protect them against the consequences of such statements. The obligation under article 20(2), however, does not extend to an obligation for the State party to ensure that a person who is charged with inciting to discrimination, hostility or violence will invariably be convicted by an independent and impartial court of law.²⁶ The Committee therefore cannot conclude that the State party violated article 2(3), in conjunction with articles 26 and 20(2) of the Covenant.

11. The Human Rights Committee, acting under article 5(4), of the Optional Protocol, is of the view that the facts before it do not reveal a breach of any provision of the Covenant.

²⁶ *Vassilari v. Greece*, *supra*, para. 7.2.

Annex I

Individual opinion of Committee member Mr. Dheerujlall Seetulsingh

1. All actions or words which tend to advocate or stir racial hatred or which may offend the dignity of fellow human beings are objectionable, reprehensible and morally condemnable. But before being legally condemned, the advocates of such actions or words, if prosecuted, must benefit from due process in Courts. And for them to be found in breach of the ICCPR, all the provisions of the Covenant and its Optional Protocol must be complied with. In the present case the authors allege that the State Party has violated articles 2(3), 14(1), 17, 20, 26 and 27 of the Covenant because the Amsterdam District Court failed to find the alleged perpetrator (Mr. Wilders) guilty on charges of ‘insult of a group for reasons of race or religion’ under Section 137c of the Criminal Code and for ‘incitement to hatred and discrimination on grounds of religion or race’ under Section 137d of the Criminal Code. As stated in paragraph 2.3 of the facts presented by the authors of the Communication they were allowed to join the criminal proceedings as an aggrieved party and to claim compensation.

2. On 23 June 2011 the District Court decided that the case against Wilders could not be proved and dismissed all the charges. This resulted in a dismissal of the authors’ claim as well. The prosecutor chose not to appeal against the decision. Under Dutch law the authors had no right to appeal in such proceedings.

3. Normally a complaint in a communication to the Human Rights Committee is directed at a State Party for not having taken action against a perpetrator of a violation of human rights or for having taken unjustified action against an author in violation of the Covenant. The present complaint is directed at a State Party because a Court of Law dismissed a criminal case against an alleged perpetrator. The authors took the calculated risk of joining their civil claim to the criminal action. Due to the joinder of actions the civil claim was completely dependent on the outcome of the criminal action and the conduct of such criminal action was under the control of the Prosecutor. Furthermore, the standard of proof required for a successful outcome of a criminal action was undoubtedly higher than that required for a tort action, which compounded the risk taken by the authors.

4. What the authors are now requesting the Committee to do is to enjoin the State Party to punish the perpetrator in spite of the decision reached by an independent Court of Law in the State Party. The latter is not the wrongdoer. It took the steps that it was required to take under its own Criminal Code by prosecuting the wrongdoer. The Committee cannot compel the State Party to punish the alleged wrongdoer in spite of an acquittal.

5. Reference has been made to the decision of the Committee in *Andersen v. Denmark (Communication No. 1868 of 2009)* to justify a finding of admissibility of the authors’ communication. However their case can be easily distinguished from Andersen’s case. Ms. Andersen reported a case to the Danish authorities concerning racially discriminating statements in violation of a specific provision of the Danish Criminal Code. The Public Prosecutor General declined to prosecute and his decision could not be appealed. The State Party contended that Ms. Andersen could have entered a private prosecution under a different provision of the Criminal Code and that she had not thereby exhausted all available domestic remedies. The Committee considered that it would be unreasonable to expect the author to start separate proceedings under the Criminal Code on her own initiative and found the plaint admissible. In the present case, however, we are concerned with the failure of an action under criminal law and with the possibility of entering a difference case under civil law where rules of evidence may vary and where the authors would have greater latitude in substantiating their case.

6. The stand taken by the State Party is absolutely clear on this issue and is enunciated in paragraph 4.4 State Party's Observations on admissibility. The authors still have the option of bringing a civil action in tort against Wilders pursuant to article 6:162 of the Civil Code. The State Party goes further in stating that a successful civil action would give the authors the opportunity to seek an injunction preventing Wilders from making future statements of the same nature and also to request a declaratory decision that Wilders' statements were contrary to law. In taking this stand the State Party agrees that the authors may still claim victim status before a Civil Court. It is our view that the authors may well make out their case as victims and have a fair chance to secure the civil remedies available to them. They would even be able to appeal to higher courts should they fail to convince the Court at first instance.

7. In paragraph 4.8 of the State Party's case it is mentioned that criminal proceedings have been instituted against Mr. Wilders for making similar statements in 2014. Thus an earlier independent civil action by the authors could have had a strong restraining effect on the subsequent conduct of Mr. Wilders.

8. For the above mentioned reasons, the authors' claim is inadmissible under article 5(2)(b) of the Optional Protocol as they have failed to show that they have exhausted the domestic remedies available to them.

Annex II

Individual opinion (dissenting) of Committee member Mr. Fabián Salvioli

1. El dictamen del Comité en la comunicación 2124/2011 *Rabbae vs. Países Bajos* es pertinente y adecuado en el análisis de la admisibilidad, con el que estoy plenamente de acuerdo. Sin embargo, no puedo compartir la valoración ni las conclusiones de la mayoría del Comité sobre el fondo del asunto. Me refiero a ambas cuestiones en los párrafos que siguen.

2. El Comité acierta al rechazar la excepción preliminar interpuesta por el Estado en torno a la falta de agotamiento de los recursos internos debido a que los autores no acudieron a la vía prevista en el artículo 6:162 del Código Civil. Dicho recurso no es el pertinente para remediar la violación alegada, y el Comité – de haber seguido la posición del Estado – habría generado un precedente penoso y una exigencia inédita para el acceso al plano internacional.

3. También estoy de acuerdo con lo expresado en los párrafos 9.5 y 9.6 del dictamen, en lo relativo a la condición de presunta víctima que debe acreditarse a los efectos de presentar un caso ante el Comité. Si en el presente caso el Comité hubiese negado la admisibilidad por no reconocer el status de posible víctima a los autores, se le quitaría el debido efecto jurídico al artículo 20 del Pacto, resultando consecuentemente una tutela más débil, o directamente nula, de dicha disposición.

4. Todos los derechos contenidos en el Pacto poseen una dimensión de respeto y otra de garantía; en este sentido, toda persona tiene derecho – conforme al artículo 20.2 – a que se le proteja debidamente contra la apología del odio nacional, racial o religioso, cuando dicha apología está dirigida a un colectivo del cual forma parte. Por ello los autores de la presente comunicación no incurrir en *actio popularis*, y los discursos bajo análisis no se dirigían en contra de la sociedad en general sino respecto de un colectivo específico; la naturaleza del artículo 20 es, en dicho sentido, similar a la que posee el artículo 27 del Pacto.

5. El modo de protección a brindar a las personas pertenecientes a dichos colectivos lo elige el Estado, ya que el artículo 20 del Pacto Internacional de Derechos Civiles y Políticos no impone una forma determinada; en este caso, los Países Bajos optaron por sancionar la apología del odio a través de la vía criminal, tipificándola como delito en el artículo 137.d del Código Penal.

6. En el caso que nos ocupa, la insuficiente valoración conjunta de las declaraciones y hechos que fueron objeto de la querrela, ha llevado al Tribunal local a emitir una decisión que dejó a los autores sin la protección debida frente a la apología del odio.

7. En efecto: si bien es cierto que la libertad de expresión engloba incluso declaraciones que puedan considerarse profundamente ofensivas, aquí se ha superado dicho umbral. Dichas expresiones, entendiendo como tales no solamente las declaraciones públicas sino también el contenido de la película *Fitna*, en su conjunto constituyen apología del odio, que debió ser sancionada para garantizar debidamente los derechos de los autores de la presente comunicación. A mi entender los autores contaron con un recurso que es eficaz en teoría pero que en la práctica no resultó efectivo.

8. Comparto el criterio del Comité respecto de que el Pacto no obliga a que toda persona acusada de apología del odio sea condenada penalmente, porque una acusación puede recaer sobre personas que resulten inocentes o culpables. Sin embargo, en caso de

que efectivamente se haya incurrido en apología del odio la garantía no puede consistir en un mero enjuiciamiento, sino en la sanción efectiva de la conducta; ello es consistente con lo que ha señalado el Comité en diversas ocasiones²⁷.

9. Por eso, en el caso bajo análisis el Comité no debió limitarse a valorar en general si se habían cumplido los requisitos relativos al debido proceso, sino considerar los hechos denunciados para evaluar si quedaban comprendidos en la conducta que el artículo 20 del Pacto ordena prohibir.

10. Ello no significa funcionar como una cuarta instancia; el Comité en muchas ocasiones considera que los tribunales internos no han tenido en cuenta debidamente todos los elementos a su disposición, lo que les ha conducido a una valoración inadecuada de los hechos²⁸.

11. El Comité debió, en consecuencia, hacer lugar al reclamo de los autores, disponer que el dictamen representa en sí mismo una forma de reparación, y señalar como garantía de no repetición la capacitación de funcionarios de la justicia en materia de protección de las personas frente a la apología del odio, desde una perspectiva de derechos humanos.

12. Detrás del sano debate sobre las políticas públicas, que permite declaraciones ofensivas y las críticas más fuertes - incluso injustas - a quienes gobiernan en un Estado, no deben escudarse los discursos de odio nacional, racial o religioso. Los artículos 19 y 20 del Pacto son perfectamente compatibles, y tengo la esperanza de que en adelante las jurisdicciones nacionales de los Estados Partes actuarán de forma debida frente a la apología del odio, reaccionando a tiempo y sancionando adecuadamente los discursos que derivaron – hace no demasiado tiempo – en la comisión de hechos atroces para la humanidad.

²⁷ Por ejemplo, Observaciones Finales del Comité sobre Austria (2007) párr 20; Suecia (2009), párr. 19; y Armenia (2012) párr 6.

²⁸ Fundamentalmente en casos de “no devolución”.

Annex III

Individual opinion (partly concurring and partly dissenting) of Committee members Mr. Yuval Shany and Sir Nigel Rodley.

1. We agree with the Committee that there is no basis to find a violation of the Covenant in the present case. The Committee does not serve as a court of final appeal, and has no reason to doubt the outcome of a criminal case, involving the application in good faith by an independent court of a criminal law provision, which the authors themselves consider to meet the requirements of article 20 of the Covenant.

2. We are, however, not persuaded that the Committee should have taken jurisdiction over the case to begin with, since the failure of the authors to bring civil proceedings against Mr. Wilders pursuant to article 6:162 of the Dutch Civil Code represents in our view a failure to exhaust domestic remedies.

3. The majority of members took the position that the authors sought “that Mr. Wilders’ conduct be evaluated and characterised as criminal within the definition contained in section 137d CC”, and that “this determination could most appropriately be obtained in criminal proceedings” (para. 9.4.). As a result, they were of the opinion that the initiation of separate civil proceedings by the authors would not have constituted an effective remedy. This position stands, however, in marked contrast to the holding by the Committee on the merits (para. 10.4.) that article 20 of the Covenant does not expressly require criminal penalties to accompany the prohibition of incitement to discrimination, hostility of violence, and that a legal prohibition effectively enforceable by administrative or civil remedies may also meet the requirements of article 20.²⁹

4. To our mind, the authors have not adequately explained why proceedings based on article 6:162 of the Civil Code, in which civil remedies for acts contrary to article 20 of the Covenant could be sought, would not offer them an effective remedy in the particular circumstances of the case. The authors have not contested the State party’s assertion that civil proceedings may result not only in the award of monetary compensation, but may also entail a legal ban on future statements by Mr. Wilders and a declaratory judgment proclaiming the illegality of his statements (para. 4.4). Such a set of remedies could be deemed, in principle, a reasonable way to implement the State party’s obligations under article 20, especially when complemented by the ‘chilling effect’ achieved by the mere existence of a criminal law prohibition, which can be applied in suitable cases.

5. Thus, the question is not, as implied by the majority, what remedies the authors *sought* to achieve, but rather what effective remedies the State party made available to them for enforcing their rights under the Covenant. In the circumstances of the case, we do not consider it refuted that the remedies offered in civil proceedings were sufficiently robust to be regarded as effective to implement the State party’s article 20 obligations. In fact, the lower burden of proof applicable in civil proceedings (which falls short of the criminal

²⁹ For support in the *travaux préparatoires*, see Marc Bossuyt, Guide to the “*Travaux Préparatoires*” of the International Covenant on Civil and Political Rights (1987) 406 (“The view was expressed that states parties would be free to enact whatever legislation they deem appropriate to put the article into effect”).

‘beyond reasonable doubt’ standard) may render such proceedings more effective in curbing hate speech for aggrieved individuals than the ‘aggrieved parties’ procedure pursued by the authors, which allowed them to join as civil parties the criminal case against Mr. Wilders.

6. Finally, we wish to register our position, according to which article 20(2) of the Covenant does not create an independent human right to be protected by legislation prohibiting hate speech. Instead, the article imposes an obligation on States parties to pass legislation in order to protect national, racial or religious groups against discrimination, hostility and violence – i.e., to prohibit an infringement of certain aspects of Covenant rights, such as articles 6 (right to life), 7 (prohibition of ill-treatment), 9 (right to security of person) and 26 (prohibition of discrimination).

7. Like in the case of article 2(2) of the Covenant,³⁰ which lays out a general duty to implement the Covenant through laws or other measures, we consider the obligation to pass implementing legislation protecting Covenant rights a ‘second-order obligation’ incapable of creating a right for individuals that is independent of the rights which the implementing legislation purports to protect. Thus, article 20(2) merely reinforces certain aspects of Covenant rights by requiring States parties to adopt specific legislative measures to prohibit their infringement. And it is only when these other rights have actually been put at risk of infringement or actually infringed – e.g., when hate speech had been in fact uttered – that the failure by the State party to pass prohibiting legislation may have contributed to a human rights violation occurring.

8. Consequently, we are of the view that victims of human rights violations should not be able to invoke article 20(2) separately, but only in conjunction with other Covenant rights, such as articles 6, 7, 9 and 26, which the prohibiting legislation was designed to protect.³¹

³⁰ See e.g., Comm. No. Poliakov v. Belarus, Views of the Committee of 17 July 2014, para. 7.4.

³¹ For support in the *travaux préparatoires*, see *supra* note 1, at p. 407 [“[the article] contained no provision setting forth any particular right or freedom”].

Annex IV

Individual opinion (concurring) of Committee members Ms. Sarah Cleveland and Mr. Mauro Politi

1. We support the Committee's conclusion that the Netherlands did not violate its obligations under article 2(3) in conjunction with articles 20(2) and 26 in this case. As this is the first time the Committee has had occasion to address article 20(2) on the merits, we write separately to elaborate on the meaning of that provision.

2. Advocacy of hatred and incitement to violence, hostility and discrimination, including on grounds of race, ethnicity, religion, or nationality, has no place in a pluralistic and human rights respecting society, and should be vigorously countered. It is axiomatic, however, that a human rights protective society must also tolerate speech that deeply offends.³² In addition, societies have numerous positive and negative tools available to address hateful speech. To the extent that restrictions on speech are warranted, a State must employ the least restrictive means available to secure that legitimate end.³³

3. Article 20(2) obligates States to "prohibit by law" the "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." This provision originally was drafted as one of the obligations imposed by article 19 regarding freedom of expression, and it thus relates closely to that article. Moreover, the obligation to prohibit conduct by law is not unique under the Covenant. Other articles likewise obligate States parties to prohibit certain conduct, including article 8(1) (obligating States parties to prohibit slavery and the slave trade), article 26 (obligating States parties to prohibit discrimination), and article 6(1) (requiring protection by law of the right to life). Article 20 is unique, however, in that it requires prohibition of conduct in an area that otherwise is highly protected freedom of expression under article 19.

4. For this reason, article 20(2) is narrowly circumscribed and sets a high bar for the expression that must be prohibited. On its face, Article 20(2) does not require legal prohibition of all "advocacy of national, racial or religious hatred," but only of such advocacy that also "constitutes *incitement* to discrimination, hostility or violence."³⁴ In other words, advocacy of national, racial or religious hatred alone is not sufficient. It must also have the intention of inciting to discrimination, hostility or violence.³⁵ Article 20(2)

³² General Comment No. 34, Article 19: Freedoms of opinion and expression (2011), para. 11.

³³ *Id.*, para. 34 (restrictions "must be the least intrusive instrument amongst those which might achieve their protective function"). Moreover, the State must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in article 19(3) that has caused it to restrict freedom of expression. *Id.*, para. 36.

³⁴ This limitation on scope of article 20(2) was intentional. The drafting history indicates that "[f]ears were expressed that an article prohibiting such advocacy might lead to abuse and would be detrimental to freedom of expression." Thus a formulation limiting article 20(2) to "*only* such advocacy ... as 'constitutes incitement'" was adopted. UNGA, Draft International Covenants on Human Rights, Annotation, A/2929 (1955), pp. 185-86, paras. 190-192 (emphasis added).

³⁵ Cf. Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (2001), at 2, <http://www.article19.org/pdfs/igo-documents/three-mandates-statement-1999.pdf> ("[N]o one should be penalized for the dissemination of 'hate speech' unless it has been shown that they did so with the *intention of inciting* discrimination, hostility or violence") (emphasis added).

thus is distinctly more limited than article 4 of the Convention on the Elimination of all forms of Racial Discrimination (CERD), which obligates States parties, *inter alia*, to punish “dissemination of ideas based on racial superiority or hatred”. Moreover, as this Committee correctly notes, not all the conduct that falls within the scope of article 20(2) must be criminalized. The obligation is to “prohibit by law,” and civil or administrative sanctions can suffice (para. 10.4).³⁶

5. It is uncontested in this case that both civil and criminal sanctions were available to address Mr. Wilders’ conduct under Dutch law. Indeed, the State party had established three means for sanctioning Mr. Wilders’ statements: criminal prosecution under articles 137c and d of the Criminal Code, as well as two forms of a civil remedies – a civil claim under article 6:162 of the Civil Code, and an *action civile* appended to a criminal prosecution under section 51(a) and (f) of the Code of Criminal Procedure. The authors in this case chose to attempt to support a criminal judgment against Mr. Wilders by appending an *action civile* to the criminal prosecution – a form of domestic remedy that the Committee makes clear is not required by the Covenant (para. 10.3). In so doing, the authors pursued the most difficult path to a potential remedy. Under the domestic law of the Netherlands, pursuit of an *action civile* is dependent on the success of the underlying criminal prosecution, and the parties to an *action civile* are circumscribed in their ability to participate in the criminal proceedings, for reasons the State party explains. Moreover, securing a criminal conviction requires a higher standard of proof – beyond a reasonable doubt or its equivalent³⁷ – and generally a more demanding *mens rea*, than a civil proceeding. Finally, it is well established under the Committee’s jurisprudence that no individual is entitled to secure the *prosecution* of a particular person as a remedy for a violation of the Covenant. The Committee has made equally clear, *ipso facto*, that no person is entitled to secure the criminal *conviction* of another person.³⁸

6. The Committee has not defined what constitutes either “advocacy” of hatred or “incitement” to discrimination, hostility or violence. Nor has the Committee specifically addressed what conduct should be understood as potentially warranting criminal penalties under article 20(2).³⁹ Dutch law, however, criminally implements the concept of “incitement” under article 20(2) by punishing “inflammatory behaviour that incites the commission of criminal offences or acts of violence” (para. 6.9). The authors do not contest this standard as a proper implementation of article 20(2).

7. Requiring incitement of “criminal offences or acts of violence” for imposition of criminal penalties under article 20(2) is consistent with the article 19 jurisprudence of this

³⁶ The negotiating history indicates that a proposal that incitement to racial hatred should constitute a crime (using the formulation “constitutes a crime and shall be punished under the law of the state”) was rejected in favor of an obligation to provide only for prohibition by law (“shall be prohibited by the law of the State”). UNGA, Draft International Covenants, *supra*, p. 186, para. 194.

³⁷ Netherlands Code of Criminal Procedure, section 338; General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial (2007), para. 30 (“[N]o guilt can be presumed until the charge has been proved beyond reasonable doubt”).

³⁸ Communication No. 1570/2007, Vassilari et al. v. Greece (Views adopted 19 March 2009), para. 7.2 (“An acquittal in itself does not amount to a violation of article 26 and in this regard the Committee recalls that there is no right under the Covenant to see another person prosecuted”); Communication No. 563/1993, Bautista de Arellana v. Colombia (Views adopted 27 October 1995), para. 8.6; Communication No. 213/1986, H.C.M.A. v. The Netherlands (Inadmissibility decision adopted 30 March 1989), para. 11.6.

³⁹ The inadmissibility decision in Communication No. 104/1981, J. R. T. and W. G. Party v. Canada (Indmissibility decision adopted 6 April 1983), para. 8(b), addressed civil proceedings restricting speech.

Committee, which urges great caution in the imposition of criminal penalties that punish speech. The Committee accordingly has called on states to decriminalize defamation, and has concluded that, without more, “laws that penalize the expression of opinions about historical facts are incompatible” with Covenant obligations regarding freedom of opinion and expression.⁴⁰ Limiting criminal penalties to speech that incites the commission of criminal offences or acts of violence is also consistent with the positions of other human rights bodies.⁴¹

8. Such a restrictive standard for imposing criminal punishment is also appropriate. As the UN, OSCE, and OAS Special Rapporteurs have observed, “[i]n many countries, overbroad rules in this area are abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues”.⁴² Hate speech and similar laws ironically are often employed to suppress the very minorities they purportedly are designed to protect. Thus, while appropriately tailored laws addressing hate speech and hate crimes have an important role, around the world today, abuse of overbroad criminal provisions to suppress speech by journalists, human rights defenders, political opponents, and other social critics is a frequent concern of this Committee.⁴³

9. The State party in this case had a robust civil and criminal law framework in place to prohibit speech addressed by article 20(2), both through criminal prohibitions and civil remedies, and pursued a criminal prosecution against Mr. Wilders before an independent court. The authors pursued the remedy they preferred – an *action civile* that depended on the success of the criminal proceeding, with its heightened standard of proof and standard for criminal incitement – and did not pursue the independent avenue for civil remedies available to them. Criminal penalties are not mandated by article 20(2), and the authors had no personal entitlement under article 2(3) or any other provision of the Covenant to secure a successful criminal conviction. Under these circumstances, the authors have not

⁴⁰ General Comment No. 34, para. 49 and note 116. Compare Communication No. 550/93, *Faurisson v. France* (Views adopted 1996), para. 9.7.

⁴¹ See Parliamentary Assembly of the Council of Europe (PACE), Recommendation 1805 (2007), *Blasphemy, religious insults and hate speech against persons on grounds of their religion*, para. 15 (under Article 10 of the European Convention on Human Rights, “national law should only penalise expressions about religious matters which *intentionally and severely disturb public order and call for public violence.*”) (emphasis added); American Convention on Human Rights, art. 13(5) (“any advocacy of national, racial, or religious hatred that constitute *incitement to lawless violence or to any other similar illegal action* against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law”) (emphasis added). The CERD Committee has recognized that “the criminalization of forms of racist expression should be reserved for serious cases” under CERD Article 4, that “incitement characteristically seeks to influence others to engage in certain conduct, including the commission of crime....” and that States parties should take into account, inter alia, “the intention of the speaker, and the imminent risk or likelihood that the conduct intended by the speaker will result from the speech in question”. CERD Committee, General Recommendation No. 35, *Combating racist speech* (2013), paras. 12, 16.

⁴² Joint Declaration by UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media the OAS Special Rapporteur on Freedom of Expression (2006), and the ACHPR Special Rapporteur on Freedom of Expression, <https://www.article19.org/data/files/pdfs/standards/four-mandates-dec-2006.pdf>.

⁴³ E.g., Concluding Observations on the second periodic report of Kazakhstan (2016), para. 49; Concluding Observations on the third periodic report of Kuwait (2016), para. 40; Concluding Observations on the sixth periodic report of Ecuador (2016), para. 27; Concluding Observations on the fourth periodic report of Rwanda (2016), paras. 39-40; Concluding Observations on the second periodic report of Cambodia (2015), paras. 21-22; Concluding Observations on the seventh periodic report of the Russian Federation (2015), paras. 10, 18-20.

demonstrated that the State party violated its obligation to “prohibit by law” the “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” under article 20(2) in conjunction with article 26. Nor have they demonstrated that it failed to provide them with a remedy for such violation.

Annex V

Individual opinion of Committee members Ms. Anja Seibert-Fohr, Mr. Yuji Iwasawa and Mr. Konstantine Vardzelashvili

1. While we agree with the majority of the Committee that we cannot find a violation of the author's rights under the Covenant in the present case, we are unable to agree, with respect to the admissibility of the communication. We would have found the communication inadmissible in the first place for the following reasons.

2. The authors of the Communication claim to be victims of a violation of their Covenant rights, *inter alia* because the authorities did not convict Mr. Wilders for hate speech. This claim is inadmissible *rationae materiae*. According to the long-established jurisprudence of the Committee, the Covenant does not provide a right for individuals to require that the State criminally prosecute and punish a third party.⁴⁴ Neither does article 20 of the Covenant provide such a right nor can it be claimed under articles 14, 17, 26, 27 or 2 (3). This claim of the authors is therefore incompatible with the provisions of the Covenant and inadmissible under article 3 of the Optional Protocol.

3. The authors effectively claim also that the State party has insufficiently protected them from threats to their physical integrity, from discrimination or advocacy of hatred that constitutes incitement to discrimination, hostility or violence. However, we consider that they have not sufficiently substantiated that the State party did not provide them with adequate protection in the present case. According to Dutch legislation, the authors could have brought a civil action against Mr. Wilders pursuant to article 6:162 of the Civil Code. They have declined to take this path; instead, they decided to resort exclusively to criminal proceedings by joining criminal proceedings against Mr. Wilders as an aggrieved party and claiming compensation. According to the State party's uncontested submission, a successful civil action before a civil court pursuant to article 6:162 of the Civil Code would have enabled the authors to ask for a ban of future abusive statements or to request a declaratory decision that Mr. Wilder's statements were unlawful. This avenue is still available. There is no reason to assume that these proceedings would not offer them the protection required under the Covenant.⁴⁵ Article 20 of the Covenant which requires States parties to *prohibit by law* any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, does not strictly require the imposition of criminal penalties. Without having tried to seek protection in civil proceedings which were available to them, the authors cannot claim their inadequacy just on the basis that they are civil in nature. Thus, in the circumstances of the case, the authors have failed to demonstrate that the State party gave insufficient protection to the authors and that their right to protection under the Covenant was effectively impaired. For these reasons, this part of the author's communication has been insufficiently substantiated for the purposes of admissibility and is inadmissible under article 2 of the Optional Protocol.

⁴⁴ Communication No. 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995, paragraph 8.6; Communication No. 1885/2009, *Horvath v. Australia*, Views adopted on 27 March 2014, para 8.2.

⁴⁵ In order to determine the protection owed to the authors under the Covenant, it would be necessary to examine furthermore the victim status of the authors. But this issue can be left open here because the authors have declined to resort to the remedies available to them under domestic law in the first place.

Annex VI

Individual opinion (partly dissenting) of Committee member Mr. Víctor Rodríguez-Rescia.

1. La presente opinión coincide con la decisión de admisibilidad del Comité de Derechos Humanos, pero difiere de la decisión de fondo, como se desarrollará más adelante. En relación con la admisibilidad, es digno de destacar el avance realizado por el Comité para admitir el estudio del caso en el marco de una supuesta violación relacionada con el artículo 20.2 (la prohibición por ley de la apología del odio nacional, racial o religioso que constituya incitación a la discriminación, la hostilidad o la violencia), en conjunción con otros artículos del Pacto (Artículos 14. 1; 2.3 y 26), y que el Comité considerara que el artículo 20.2 es un derecho justiciable que ofrece protección a personas individualmente y como miembros de grupos contra ese tipo de discriminación. De igual importancia resulta la declaración del Comité de que “el artículo 20.2, no se limita a imponer una obligación formal a los Estados partes para que aprueben leyes que prohíban la discriminación, pues una ley de ese tipo no tendría efecto alguno sin procedimientos de denuncia y sanciones apropiadas”. También es destacable que el Comité haya considerado que la vía más adecuada para la determinación del cumplimiento de las obligaciones que incumben al Estado parte en virtud del 20.2 del Pacto sea la vía penal en el caso concreto (artículo 137.d. del Código Penal), que fue por la que optaron los autores.

2. En relación con el fondo del caso, los autores basaron su reclamación en una supuesta falta de una acción penal eficaz y el papel limitado que les correspondió, como partes lesionadas, en los procedimientos penales, “puesto que no pudieron, por ejemplo, presentar testigos; participar o plantear argumentos durante el examen de los hechos y del fondo de la causa para determinar si las declaraciones del Sr. Wilders suponían una incitación al odio, la discriminación o la violencia; ni recurrir la sentencia del tribunal”. Al respecto considero importante desentrañar los alcances que en mi interpretación corresponden al artículo 20.2 del Pacto, y esto me ayudará a definir si existe o no una violación a alguno de los derechos contemplados en el artículo 14 del mismo.

3. El artículo 20.2 del Pacto no puede ser interpretado como una norma aislada. Si bien impone una obligación dirigida al Estado para que prohíba por ley la apología del odio nacional, racial o religioso que constituya incitación a la discriminación, la hostilidad o la violencia, tal obligación no es más que una manifestación específica de la obligación de garantizar los derechos de las personas que se encuentra contemplado en el artículo 2.1 del Pacto. Tampoco se puede olvidar que la finalidad esencial de la garantía de los derechos, como lo contempla el artículo 2.2. del Pacto, es la efectividad de los mismos. Consecuentemente con ello, el artículo 20.2 no contempla un derecho a la no existencia del discurso discriminatorio, hostil o violento, pero sí contempla un derecho a que no se incite la discriminación, hostilidad o violencia y ese derecho debe ser efectivo, y para ello, garantizado con medidas legislativas “o de otro carácter”.

4. Cuando el Pacto dispone medidas de otro carácter como una generalización de las medidas de garantía que se pueden adoptar, está buscando que se prevenga el discurso que haga aquella incitación. Entonces, lo que las autoridades judiciales debían analizar era si el discurso del señor Wilders incita discriminación, hostilidad o violencia. Deseo hacer hincapié en el hecho que no se trata de comprobar la efectiva producción de actos discriminatorios, hostiles o violentos, pues la prohibición del Pacto es que simplemente los incite.

5. La incitación es contextual. Si bien la libertad de expresión es piedra angular de la sociedad democrática, y se debe garantizar el más amplio flujo de información y opiniones,

no se debe perder de vista que ese flujo está pensado para sostener una sociedad democrática, por tanto, diversa, con mayorías y minorías. Es claro que en el ámbito político la libertad de expresión es amplia, precisamente para poder transmitir ideas y generar convicción y seguidores. Pero esa libertad de expresión tiene un límite establecido por el Pacto. Cuando se ejerce un liderazgo político la libertad de expresión no es absoluta.

6. En ese punto es que toma mayor sentido el artículo 14 del Pacto. El artículo 24 del Pacto empuja a la construcción de la igualdad procesal entre víctimas y victimarios, al menos en lo que sea razonablemente equiparable. Las fallas procesales acreditadas en el presente caso no permitieron a las autoridades nacionales de naturaleza judicial contar con el material informativo y argumentativo de las partes para decidir si el discurso incitaba o no. Radica ahí, entonces, que el tratamiento procesal que recibieron las víctimas del presente caso, limitó la capacidad de pleno análisis. Por eso, mi conclusión, es que el Estado sí ha incumplido los artículos 14.1 en relación con el 20.2, y debería implementar reformas normativas para evitar que situaciones similares vuelvan a repetirse. Ello por cuanto el proceso civil ordinario no es el medio más idóneo para cumplir con la obligación de prohibir un acto tan calificado como la apología del odio, especialmente en el contexto de nuestros tiempos. Si así fuera, la prohibición sería una formalidad muy fácil de evadir con el pago de indemnizaciones civiles que no representan un obstáculo suficientemente prohibitivo para evitar su repetición. El impacto de una incitación al odio puede tener efectos incommensurables en perjuicio de grupos de personas en condición de una vulnerabilidad particular, especialmente cuando se hace desde el podio de un personaje público que debiera extremar ciertos cuidados en el uso de su discurso para evitar repercusiones colectivas replicables con impunidad. La indemnización civil como contrapeso no es un medio que sea suficientemente prohibitivo en los términos del artículo 20.2 del Pacto.

Annex VII

Individual opinion of Committee member Mr. Olivier de Frouville.

1. Cette affaire présentait, au-delà du cas particulier de M. Wilders, des enjeux juridiques et sociétaux d'une importance fondamentale. Or le Comité n'a qu'en partie relevé le défi et semble être resté au milieu du gué. J'appuie généralement les conclusions du Comité sur la recevabilité. Je me rallie également à un certain nombre des motifs élaborés par le Comité sur le fond, mais je suis en désaccord avec la conclusion de non-violation à laquelle il parvient au paragraphe 10.7., à savoir que l'Etat partie aurait pris « les mesures nécessaires et proportionnées visant à “interdire” les déclarations formulées en violation du paragraphe 2 de l'article 20 et à garantir le droit des auteurs à un recours utile en vue de les protéger contre les conséquences de telles déclarations ». J'aimerais dans cette opinion expliciter ces points d'accord et de désaccord.

Sur la recevabilité

2. *Premièrement*, j'appuie les motifs relatifs à *l'invocabilité du paragraphe 2 de l'article 20*. Sur ce point, le Comité reprend à son compte l'opinion dissidente de M. Abdelfattah Amor dans l'affaire *Vassilari c. Grèce*. Dans cette affaire, le Comité avait refusé sans beaucoup d'explications de se prononcer sur l'applicabilité du paragraphe 2 de l'article 20 aux cas individuels. Cette « esquivé » avait laissé M. Amor « perplexe ». Il était en effet incompréhensible sur le plan juridique que cet article se retrouve ainsi neutralisé quant à ses effets. Reprenant les termes mêmes de M. Amor, le Comité observe que « l'invocation du paragraphe 2 de l'article 20 par des particuliers lésés s'inscrit donc dans la logique de protection qui sous-tend l'ensemble du Pacte. » (§ 9.7). Il reconnaît ainsi sa justiciabilité, y compris pris isolément. Aussi est-il étrange que le Comité estime nécessaire de déclarer la recevabilité des griefs des auteurs au titre du paragraphe 3 de l'article 2 « conjointement avec les articles 20 (par. 2) et 26. » Le paragraphe 2 de l'article 20 fonde à lui seul un droit d'être protégé contre « tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence ». Comme le précise par ailleurs le Comité, cette disposition « n'impose pas seulement aux Etats parties une obligation formelle d'adopter une législation interdisant les comportements discriminatoires. Une telle loi serait sans effet si elle n'était pas assortie de procédures de plaintes et de sanctions appropriées » (§ 9.7.) Elle constitue par conséquent une *lex specialis* tant à l'égard de l'article 26, qui fonde un droit d'être protégé contre toute forme de discrimination⁴⁶, qu'à l'égard du paragraphe 3 de l'article 2 qui fonde le droit à un « recours utile » en cas de violation des droits reconnus dans le Pacte⁴⁷.

3. *Deuxièmement*, je suis également en accord avec les conclusions du Comité relatifs à la *reconnaissance de la qualité de victime* des auteurs de la communication. Je suis en particulier en accord avec les motifs énoncés au paragraphe 9.6. à savoir « que les auteurs, en tant que membres du groupe expressément visé par les déclarations de M. Wilders, sont des personnes que le paragraphe 2 de l'article 20 a pour objectif de protéger, et que les

⁴⁶ Observation générale n°18 du Comité : Non discrimination, 1989, § 1. L'article 7 de la Déclaration universelle des droits de l'Homme traduit bien le lien qui existe, dans le Pacte, entre l'article 20 et l'article 26 : « Tous ont droit à une protection égale contre toute discrimination qui violerait la présente Déclaration et contre toute provocation à une telle discrimination. »

⁴⁷ Observation générale n° 31: La nature de l'obligation juridique générale imposée aux Etats parties au Pacte, 2004, § 15.

déclarations de M. Wilders ont eu des conséquences spécifiques pour elles, notamment en suscitant dans la société des attitudes discriminatoires à l'égard de ce groupe et à l'égard des auteurs en tant que membres du groupe »⁴⁸.

4. A partir de ces deux points, on peut conclure que sont généralement recevables au titre du Protocole facultatif les griefs a) fondés sur le paragraphe 2 de l'article 20 ; b) présentés par des personnes qui pourront suffisamment étayer leur allégation selon laquelle des déclarations à caractère discriminatoire ou incitant à la haine ont eu des « conséquences spécifiques » pour elles, notamment en tant que membres du groupe visé par de telles déclarations.

Sur le fond

5. Cette affaire présente une configuration inhabituelle. Le Comité, comme d'ailleurs les cours régionales de droits de l'Homme, ont généralement à traiter d'affaires dans lesquelles l'auteur d'un discours de haine se plaint d'une restriction à sa liberté d'expression, notamment sous la forme d'une sanction pénale. Ici, des auteurs se plaignent, à l'inverse, de ce que les recours existant dans le droit national contre les discours de haine ne sont pas effectifs et en tout cas que la décision du tribunal qui a appliqué en l'espèce la loi nationale viole les obligations de l'Etat partie découlant du Pacte, et en particulier celles qui découlent du paragraphe 2 de l'article 20 du Pacte⁴⁹. Autrement dit, est ici en cause non la restriction à l'exercice d'un droit, mais plutôt le manquement à une obligation positive de protection. De ce point de vue, la jurisprudence du Comité des Nations Unies pour l'élimination de la discrimination raciale au regard de l'article 4 de la Convention de 1965 est particulièrement pertinente et il est dommage que le Comité ne s'en soit pas davantage inspiré⁵⁰.

6. Tout d'abord, je dois dire que j'appuie un certain nombre des motifs développés par le Comité dans son raisonnement au fond. Le Comité rappelle avec justesse quelques points importants contenus dans son Observation générale n° 34⁵¹, relatifs non seulement à la place cardinale de la liberté d'expression dans une société démocratique et à l'articulation entre l'article 20 et l'article 19 (par. 10.4.) Il réaffirme avec force que la liberté d'expression s'applique aussi à des propos qui peuvent être considérés comme profondément offensants, y compris à l'égard des convictions religieuses ou politiques (*id.*) Le Comité aurait pu ajouter que si les bornes à la liberté d'expression doivent être encore plus largement entendues dans le débat public et politique, le fait qu'un propos soit tenu dans le contexte d'un tel débat ne lui confère pas une immunité totale et ne dispense en tout cas pas l'Etat partie de son obligation d'ouvrir une enquête pour déterminer si ces propos

⁴⁸ V. aussi, mais avec une conclusion d'irrecevabilité, l'affaire *Andersen c. Danemark*, comm. n° 1868/2009, 26 juillet 2010.

⁴⁹ V. par. 7.2 et 7.3. des constatations : « 7.2. (...) les auteurs contestent revendiquer un droit à la condamnation de M. Wilders. Ils dénoncent l'absence de poursuite effective. (...) 7.3. Les auteurs admettent que l'Etat partie a correctement transposé le paragraphe 2 de l'article 20 dans sa législation. Le problème réside dans l'application de la loi en l'espèce. »

⁵⁰ V. notamment la Recommandation générale n° 35 du CERD, *Lutte contre les discours de haine raciale*, 2013 et la Recommandation générale n° 30, concernant la discrimination contre les non-ressortissants, 2005, en particulier les §§ 11 et 12 ; de même les affaires ; *Quereschi c. Danemark*, comm. n° 33/2003, 11 décembre 2003 ; *Gelle c. Danemark*, comm. n° 34/2004, 6 mars 2006 ; *Ahmed Farah Jama c. Danemark*, comm. n° 41/2008, 21 août 2009 ; *Saada Mohammad Adan c. Danemark*, comm. n° 43/2008, 13 août 2010.

⁵¹ Observation générale n° 34, Art. 19 : *Liberté d'opinion et liberté d'expression*, 2011.

représentent un acte de discrimination raciale ou, en l'espèce, un propos tombant sous le coup du paragraphe 2 de l'article 20⁵².

7. Enfin, comme je l'ai dit plus haut, j'estime que le Comité a bien interprété le paragraphe 2 de l'article 20, en considérant que cette disposition n'exigeait pas seulement des Etats parties qu'ils adoptent une loi, mais aussi qu'ils mettent en place des procédures de plaintes et de sanctions appropriées, sans quoi une telle loi serait « sans effet » (par. 9.7.). Là encore, le Comité des droits de l'Homme aurait pu s'appuyer utilement sur la jurisprudence du CERD⁵³.

8. Pour autant, je ne peux rejoindre le Comité lorsqu'il parvient à la conclusion « que l'Etat partie a pris les mesures nécessaires et proportionnées visant à « interdire » les déclarations formulées en violation du paragraphe 2 de l'article 20 et à garantir le droit des auteurs à un recours utile en vue de les protéger contre les conséquences de telles déclarations. » (par. 10.7.) Pour parvenir à cette conclusion, le Comité se borne à un exercer un contrôle purement formel, en relevant l'existence d'une incrimination, de voies de recours et le fait qu'en l'espèce de tels recours ont été actionnés par les auteurs et que « le tribunal d'instance a rendu un jugement circonstancié appréciant les déclarations de M. Wilders à la lumière du droit applicable. » (*id.*) Or un tel contrôle, que l'on pourrait qualifier de « restreint » ne répond pas à la question centrale de savoir si le jugement rendu par le tribunal national a violé les droits que les auteurs tiennent du paragraphe 2 de l'article 20.

9. Dans les affaires « classiques » de liberté d'expression, où sont en cause les restrictions apportées par l'Etat à l'exercice de cette liberté, le Comité ne se borne jamais à relever l'existence d'un cadre juridique interdisant les atteintes à la liberté d'expression et l'existence de recours utile, voire l'exercice par les auteurs de ces recours. Quand bien même les juridictions nationales auraient donné raison aux autorités qui ont en premier lieu adopté la mesure restrictive, le Comité ne s'interdit pas de livrer sa propre appréciation de la restriction au regard de la forme d'expression litigieuse ; et en fonction du résultat de cette appréciation, il est amené soit à valider l'interprétation des juridictions nationales et

⁵² V. CERD, *Gelle c. Danemark*, *op. cit.*, § 7.5 ; *Saada Mohammad Adan c. Danemark*, *op. cit.*, § 7.6. V. aussi CERD, Observation générale n°30, § 12. Sur le plan régional, v. aussi l'arrêt de la Cour européenne des droits de l'Homme dans l'affaire *Feret c. Belgique* (req. n° 15615/07, arrêt du 16 juillet 2009), § 77. V. aussi le Rapport de l'ECRI sur les Pays-Bas (quatrième cycle de monitoring), publié le 15 octobre 2013, § 22 : « L'ECRI recommande aux autorités de veiller à ce que la législation en vigueur contre le racisme et la discrimination raciale ainsi que la jurisprudence de la Cour européenne des droits de l'Homme soient appliquées dans tous les cas, dans la sphère publique et privée, même lorsque les affirmations émanent de personnalités politiques. » ; les *Principes de Camden sur la liberté d'expression et l'égalité*, et notamment le Principe 10 : « Politicians and other leadership figures in society should avoid making statements that might promote discrimination or undermine equality, and should take advantage of their positions to promote intercultural understanding, including by contesting, where appropriate, discriminatory statements or behaviour. » ; dans le même sens, v. le *Rabat plan of action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination hostility or violence*, § 36, doc. en annexe du rapport du Haut Commissaire des Nations Unies aux droits de l'Homme sur les ateliers d'experts sur l'interdiction de l'incitation à la haine nationale, raciale ou religieuse, A/HRC/22/17/Add.4.

⁵³ Notamment *Gelle c. Danemark*, *op. cit.*, par. 7.3. : « Le Comité observe qu'il ne suffit pas, aux fins de l'article 4 de la Convention, de déclarer simplement dans un texte de loi les actes de discrimination raciale punissables. La législation pénale et les autres dispositions légales interdisant la discrimination raciale doivent aussi être effectivement mises en œuvre par les tribunaux nationaux compétents et les autres institutions de l'Etat. »

donc la restriction⁵⁴, soit à constater une violation de l'article 19 si cette restriction ne lui paraît finalement ni nécessaire ni proportionnée au regard du but légitime visé⁵⁵. Or dans la présente affaire, le Comité refuse d'exercer un contrôle de degré équivalent : il se borne à constater l'existence d'un recours et s'en remet totalement à l'appréciation du juge national.

10. Rien ne vient pourtant justifier ce *self-restraint*. Certes, selon une jurisprudence constante du Comité, « il appartient généralement aux juridictions des Etats parties au Pacte d'examiner les faits et les éléments de preuve ou l'application de la législation nationale dans un cas d'espèce, sauf s'il peut être établi que l'appréciation des éléments de preuve ou l'application de la législation ont été de toute évidence arbitraires, manifestement entachées d'erreur ou ont représenté un déni de justice, ou que le tribunal a par ailleurs violé son obligation d'indépendance ou d'impartialité. »⁵⁶ Mais un tel principe vaut dans les affaires où les faits sont controversés ou font à tout le moins l'objet d'interprétations divergentes. Or ce n'est nullement le cas ici. M. Geert Wilders ne conteste pas avoir prononcé les paroles qui sont dénoncées par les auteurs comme tombant sous le coup du paragraphe 2 de l'article 20, bien au contraire. On ne peut pas non plus invoquer une quelconque « marge d'appréciation » laissée à l'Etat partie en la matière : le Comité a explicitement rejeté cette doctrine s'agissant notamment de la liberté d'expression⁵⁷. Il incombait par conséquent au

⁵⁴ V. par ex. l'affaire *Robert Faurisson c. France*, comm. n° 500/1993, 8 novembre 1996, § 9.5. Le Comité examine dans ce paragraphe la question de savoir si la loi du 13 juillet 1990 (« la loi Gayssot ») qui a servi de fondement à la condamnation de l'auteur est compatible avec les dispositions du Pacte. Il cite les déclarations litigieuses de l'auteur et en déduit que la condamnation de l'auteur « n'a pas porté atteinte à son droit d'avoir une opinion et de l'exprimer, en général : le tribunal a condamné M. Faurisson pour avoir attenté aux droits et à la réputation d'autrui. » Et il en déduit que la « loi Gayssot », « telle qu'elle a été lue, *interprétée et appliquée* dans le cas de l'auteur par les tribunaux français, est compatible avec les dispositions du Pacte. » (nous soulignons.) Dans l'affaire *J.R.T. et le W.G. Party c. Canada*, comm. n° 104/1981, 5 avril 1983, le Comité se place sur le plan de la recevabilité, en jugeant « incompatible » avec les dispositions du Pacte les griefs de l'auteur, car « les opinions que M.T. cherche à diffuser par téléphone constituent nettement une incitation à la haine raciale ou religieuse, que le Canada est tenu d'interdire en vertu du paragraphe 2 de l'article 20 du Pacte. » (par. 8.b) La jurisprudence de la Cour européenne offre évidemment de nombreux autres exemples, dans lesquels la Cour examine soigneusement la qualification des propos litigieux opérée par le juge national avant de conclure à l'absence de violation de l'article 10 de la Convention. V. par ex. parmi beaucoup d'autres la décision rendue dans l'affaire *M'Bala M'Bala c. France*, req. n° 25239/13, 20 octobre 2015, dans laquelle la Cour examine minutieusement les motifs des juridictions internes et juge que leurs constats sont fondés « sur une appréciation des faits qu'elle peut partager » (§ 35) ; ou encore dans l'affaire *Feret c. Belgique (op. cit.)*, particulièrement pertinente dans le cas d'espèce, puisqu'elle concernait les propos tenus par une personnalité politique : la Cour « a examiné les textes litigieux divulgués par le requérant et considère que les conclusions des juridictions internes concernant ces publications étaient pleinement justifiées. »

⁵⁵ V. par ex. l'affaire *Patrick Coleman c. Australie*, comm. n° 1157/2003, 17 juillet 2006 : la condamnation par une Magistrates Court de l'auteur pour avoir prononcé un discours dans un lieu public sans permission est confirmée par les juridictions supérieures, notamment la Cour d'appel qui a estimé que l'arrêt sur la base duquel l'auteur avait été condamné avait pour « objet légitime d'éviter aux usagers de la petite galerie piétonne de subir des discours publics et qu'il était raisonnablement approprié et adapté à cette fin étant donné qu'il s'appliquait à "un périmètre très restreint, ce qui laissait suffisamment d'autres espaces où tenir de tels discours. » (par. 2.3.) Ceci n'a pourtant pas empêché, à la suite d'une évaluation détaillée des propos de l'auteur et des circonstances dans lesquelles ceux-ci avaient été tenus, de considérer que « la réaction de l'Etat partie face au comportement de l'auteur a été disproportionnée et a constitué une restriction à la liberté d'expression de celui-ci qui est incompatible avec le paragraphe 3 de l'article 19 du Pacte. » (par. 7.3.)

⁵⁶ Observation générale n° 32, Article 14 : *Droit à l'égalité devant les tribunaux et les cours de justice et à un procès équitable*, § 26.

⁵⁷ Observation générale n° 34, Art. 19 : *Liberté d'opinion et liberté d'expression*, 2011, § 36.

Comité de déterminer si la qualification opérée par les auteurs était exacte et, dans l'affirmative, de rechercher si l'Etat partie avait manqué à son obligation positive d'« interdire » par la loi « tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence ».

11. En ne procédant pas de la sorte, le Comité introduit une distinction douteuse entre obligations négatives et positives de l'Etat partie en vertu du Pacte : seules les premières se verraient appliquer un contrôle « entier » de nécessité et de proportionnalité, tandis que pour les secondes, le Comité se bornerait à exercer un contrôle « restreint » limité à la vérification de l'existence d'une loi et de recours disponibles, mais s'interdisant de contrôler au cas par cas la décision adoptée par les juges nationaux.

12. Or en l'espèce, l'analyse des passages cités combinée à l'examen de la jurisprudence du Comité, du CERD ou encore de la Cour européenne des droits de l'Homme aurait dû conduire le Comité à la conclusion que ces propos relevaient effectivement du paragraphe 2 de l'article 20 et que le tribunal national avait fait sur ce point une évaluation erronée. L'Etat partie avait indiqué que selon l'interprétation donnée par les juridictions nationales, une critique ne constituait au sens du droit national une infraction pénale que si elle visait « de manière non équivoque les personnes elles-mêmes et non simplement leurs opinions, convictions et comportements. » Or les propos de l'auteur n'étaient pas dirigés uniquement contre l'Islam en tant que religion, mais aussi contre les Musulmans en tant que personnes, et plus généralement contre les « résidents non occidentaux ». Les auteurs ont raison de soutenir que le tribunal de district qui a eu à connaître de l'affaire a de ce point de vue accentué, dans son appréciation des propos litigieux, la distinction entre la critique de la religion et l'incitation à la haine contre des personnes en raison de leurs convictions ou de leur appartenance à un groupe⁵⁸. Par exemple, des déclarations du type : « Un jeune Marocain sur cinq a un casier judiciaire. Leur comportement découle de leur religion et de leur culture »⁵⁹, ou encore « Ces Marocains sont vraiment violents »⁶⁰ ne relèvent nullement d'une critique à l'égard de l'Islam, mais visent les Marocains et les Musulmans installés aux Pays-Bas dans leur ensemble. Ces déclarations procèdent par assimilations et glissements, en établissant des équivalences entre Marocains et délinquants, ou « islamique », Marocains et délinquants (« On ferme les frontières, on ne laisse plus entrer d'islamiques aux Pays-Bas, on renvoie beaucoup de musulmans des Pays-Bas, on dénature les délinquants islamiques »)⁶¹, autant de réductions des personnes à des stéréotypes qui les réifient et en font par conséquent des objets à mépriser, voire à éliminer physiquement. On retrouve le même type de dynamique dans les discours génocidaires qui procèdent à la réification par assimilation à une identité elle-même décrite comme dangereuse, hostile, ou encore à un animal perçu comme invasif ou répugnant (« cafard », « vermine »...) ⁶² Ces propos démontrent par conséquent une intention de la part de Geert

⁵⁸ Constatations, par. 3.1., b).

⁵⁹ *Id.*, par. 2.7., a)-4).

⁶⁰ *Ibid.*, par. 2.7., a)-7).

⁶¹ *Ibid.*, par. 2.7., c)-11).

⁶² La chambre de première instance du Tribunal pénal international pour le Rwanda saisie de l'*Affaire des Médias* a bien saisi la nature de ce type de discours dans le passage suivant de son jugement : « Un discours de haine constitue une forme discriminatoire d'agression qui anéantit la dignité des membres du groupe visé. Il crée un statut inférieur, non seulement aux yeux des membres du groupe proprement dit mais également des autres qui les regardent et les traitent comme moins qu'humains. Envisagé en soi et en ses autres conséquences, le dénigrement de personnes en raison de leur identité ethnique ou de leur appartenance à tel autre groupe peut causer un tort irréversible. » *Le Procureur c. Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze*, affaire n° ICTR-99-52-T, jugement et sentence, 3 décembre 2003, § 1072. Sur le discours de haine comme violation du droit à la dignité, v. notamment Wibke K. Timmermann, *Incitement in International Law*, Routledge, 2015, pp. 39-53.

Wilders de promouvoir publiquement la haine à l'encontre des « résidents non occidentaux »⁶³. Par ailleurs il est incontesté que ces propos ont eu une influence directe sur la conduite d'au moins une partie de la population aux Pays-Bas, conduisant à des manifestations de discrimination ou d'hostilité ou même de violence à l'encontre des personnes appartenant à ces groupes⁶⁴. Ces deux éléments auraient dû, selon moi, conduire le Comité à conclure que les propos litigieux relevaient bien du paragraphe 2 de l'article 20⁶⁵.

13. Dans les affaires classiques de liberté d'expression, le Comité examine les propos litigieux de l'auteur et le raisonnement de la Cour et en déduit si les restrictions apportées à la liberté d'expression de l'auteur étaient nécessaires et légitimes au regard du but légitime poursuivi (les droits d'autrui dans ce type d'affaire). Symétriquement, le Comité aurait dû ici s'interroger sur la question de savoir si l'acquiescement de l'auteur était en l'espèce justifiée, autrement dit sur le caractère approprié et proportionné au regard de l'objectif légitime visé, de l'absence de réaction des juridictions nationales aux propos de l'auteur.

14. A mon sens, le Comité aurait dû arriver à la conclusion que l'acquiescement pur et simple de l'auteur, compte tenu de la nature de ses propos, ne pouvait être considérée comme approprié au regard du but légitime visé, à savoir la protection du droit de toute personne d'être protégée contre l'appel à la haine raciale constituant une incitation à la discrimination, à l'hostilité ou à la violence.

15. Il en résulte que l'Etat partie a, du fait de ce manquement de la juridiction nationale saisie à sanctionner un propos tombant clairement sous le coup de l'article 20, violé cet article. Subsidiairement, il était également loisible au Comité de constater une violation, sur cette même base, de l'article 26, lu seul et conjointement avec l'article 2 § 3.

16. L'opinion qui précède est fondée exclusivement sur des considérations juridiques, portant sur l'appréciation des dispositions du Pacte, à la lumière de l'évolution de la jurisprudence d'autres organes de protection des droits de l'homme. Qu'il me soit permis

⁶³ *Ibid.*, par. 2.7., a).

⁶⁴ V. notamment les observations finales du CERD sur les Pays-Bas (2015), § 11.

⁶⁵ La jurisprudence de la Cour européenne et la pratique de la plupart des pays d'Europe établit que « l'incitation à la haine ne requiert pas nécessairement l'appel à tel ou tel acte de violence ou à un autre acte délictueux. » (arrêt *Feret c. Belgique*, *op. cit.*, par. 73). La Cour poursuit : « Les atteintes aux personnes commises en injuriant, en ridiculisant ou en diffamant certaines parties de la population et des groupes spécifiques de celle-ci ou l'incitation à la discrimination, comme cela a été le cas en l'espèce, suffisent pour que les autorités privilégient la lutte contre le discours raciste face à une liberté d'expression irresponsable et portant atteinte à la dignité, voire à la sécurité de ces parties ou de ces groupes de la population. Les discours politiques qui incitent à la haine fondée sur les préjugés religieux, ethniques ou culturels représentent un danger pour la paix sociale et la stabilité politique dans les Etats démocratiques. » Cette conception peut sans doute être opposée à celle qui prévaut aux Etats-Unis d'Amérique, telle qu'exprimée notamment par la Cour suprême dans l'affaire *Virginia v. Black*, 123 S. Ct. 1536 (2003) qui exige que « l'appel » à la haine soit accompagné d'une « incitation » à commettre des actes préjudiciables pour l'intégrité physique de la victime potentielle. Comme l'observe justement le professeur Patrick Wachsman : « La différence radicale sur ce point entre les approches américaine et européenne tient sans doute au fait que les conséquences du discours raciste ont été tragiquement déployées sur le sol européen ; elles culminent dans la Shoah, l'extermination parachevant la stigmatisation, l'exclusion, l'humiliation et les sévices divers. L'argument qui tiendrait cette différence historique pour purement contingente, comme une donnée à éliminer du débat nous paraît inacceptable : on n'est jamais irrecevable, en matière de libertés publiques, à invoquer les données de l'expérience. » P. Wachsman, « Faut-il incriminer les discours de haine ? Le cas français. », *Revue générale du droit*, avril 2015, <http://www.revuegeneraledudroit.eu/blog/2015/04/21/faut-il-incriminer-les-discours-de-haine-le-cas-francais/>

toutefois d'ajouter un mot tenant au contexte dans lequel le Comité était appelé à rendre cette décision. Depuis un peu moins d'une dizaine d'années, dans les pays européens et sur d'autres continents, on a vu céder progressivement toutes les digues qui avaient été érigées après la Seconde Guerre Mondiale pour préserver le débat public au sein des sociétés démocratiques des discours de haine et d'intolérance qui avaient accompagné la consolidation ou l'établissement des totalitarismes dans l'entre-deux guerre. Pas à pas, interventions après interventions, les démagogues et les populistes repoussent les bornes qui visaient à préserver le respect mutuel et l'inter-compréhension et, pour tout dire, la possibilité même d'une communication à la fois libre et de nature à produire un accord rationnel au sein des sociétés sur des questions d'intérêt public. Aujourd'hui, nous voyons ces mêmes populistes s'appuyer sur la haine de l'autre et la politique du bouc-émissaire pour accéder au pouvoir. En Europe et ailleurs, la haine des migrants, de l'Islam et des Musulmans constitue leur principal fond de commerce. Leur discours conforte celui des groupes islamistes extrémistes qui prônent la violence et le djihad. En fait, les démagogues européens sont les alliés objectifs des djihadistes qui sèment la mort et la terreur à travers le monde, mais fascinent et attirent aussi une jeunesse déracinée, sans repère, et victime de discriminations multiples. Ces deux mouvances qui s'épaulent mutuellement poursuivent en fait un même projet qui est celui de la destruction des droits de l'Homme universels comme projet des Lumières et de la Modernité. Même si ce contexte ne doit pas à lui seul déterminer la solution à donner au cas d'espèce, il me semble qu'il doit néanmoins être pris en compte par le Comité dans son interprétation de l'article 20, qui avait notamment pour objet, dans l'esprit de ses rédacteurs, de prévenir autant que possible le retour des démons du passé.