AS TO THE ADMISSIBILITY OF

Application No. 28202/95
by Bart A. MIDDELBURG, Sytze VAN DER ZEE
and HET PAROOL B.V.
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 21 October 1998, the following members being present:

MM J.-C. GEUS, President
M.A. NOWICKI
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
I. CABRAL BARRETO
D. ŠVÁBY
P. LORENZEN
E. BIELIŪNAS
E.A. ALKEMA
A. ARABADJIEV

Ms M.-T. SCHOEPFER, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 5 July 1995 by Bart A. MIDDELBURG, Sytze VAN DER ZEE and HET PAROOL B.V. against the Netherlands and registered on 10 August 1995 under file No. 28202/95;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 25 November 1997 and the observations in reply submitted by the applicants on 13 February 1998;

Having deliberated;

Decides as follows:

THE FACTS

The first and second applicants are Dutch nationals, born in 1956 and 1939 respectively, and reside in the Netherlands. They are both journalists. The third applicant is a Dutch legal person and publisher of "Het Parool", a Dutch national daily newspaper founded in the Second World War as an illegal newspaper, at that time printed and distributed by members of the Resistance movement. The second applicant is the editor-in-chief of this newspaper.

The facts of the case, as submitted by the parties, may be summarised as follows.

a. Particular circumstances of the present case

On 15 June 1944, the Regional Court (Arrondissementsrechtbank) of Amsterdam convicted Mr X., the son of a well-known actor, of having killed in May 1943 Mr Y., a Jewish "onderduiker" (specific term in Dutch for a person who has gone into hiding, in particular during the Second World War in order to escape Nazi persecution on grounds of ethnicity, resistance activities or evasion from forced labour in Germany), hiding in X.'s apartment at B. street in Amsterdam with the latter's consent, and of having concealed the body. X. was sentenced to four years' imprisonment. The Regional Court rejected X.'s plea that he had acted in legitimate self-defence and used excessive force (noodweerexces), although in its determination of the sentence it did consider that the victim's anxiety could have irritated X. who, according to psychiatrists' findings, was inclined to resort to violence sooner than the average person. It acquitted X. of the remaining charges which had been brought against him in connection with the events at issue in these proceedings, i.e. murder and theft.

On 14 January 1946, the Dutch Minister of Justice (Minister van Justitie) addressed a request for a pardon for X. to the Queen. In this request it was stated, inter alia, that X. had been active in the Resistance and had saved several Jewish lives and that it was plausible, albeit not proven, that Y.'s killing had been caused by the latter's provocative attitude and, to a certain extent, blackmail. By Royal Decree of 17 January 1946, nr. 17, X. was pardoned. This pardon was reported in an article published on 26 January 1946 in the newspaper "Het Algemene Dagblad". In this article X.'s name was mentioned in full.

In the 1960's, X. became a well-known film maker. His conviction in 1944 and pardon in 1946 were no subjects he himself ever mentioned in public nor were they referred to in the media in such a way that X. could be identified by the general public. It was not before an interview, published in the Dutch national daily newspaper "NRC Handelsblad" on 1 December 1989, that X. mentioned Y.'s death and the subsequent events. In that article it was stated, inter alia,:

<Translation>

"X. has never spoken before about his detention for the liquidation of a 'life-threatening' onderduiker. ... "It took six months before I could share in the joy of the

liberation. My problem was not foreseen by the Dutch legislator. In this country there have been two persons, who as a result of resistance activities came into contact with the Dutch justice system at that time. One of them is me. I refused to be judged by the Supreme Court as I remembered the moment on which the Jews were expelled from the Supreme Court ... I did not want to be judged by this not-corrected institution. Finally, at the instigation of the Great Advisory Board of the Resistance, I was released after I had been granted a pardon." X. has plans to use this episode of his life in a movie to be called There is no plane for Zagreb. "I have already filmed and reconstructed things, collected material from the war, even about the liquidation of that onderduiker who was simply life-threatening - not only for me, but also for others - and who had, after joint consultations, to be liquidated. It is also linked to Osewout and Dorbeck, the heroes from the novel The dark room of Damocles in whom I recognise myself of course ..." ... The part of the International Documentary Festival Amsterdam devoted to the <post war> period of reconstruction includes a large number of documentaries of national and foreign reputedly rebellious movie makers, who often wished to contribute to the post war reconstruction in a highly idealistic tone. ... In the beginning of the sixties X. was part of the rising youth culture ... "The rise of the scene and Provo (term indicating Dutch anti-authoritarian, progressive and rebellious youth movement in the sixties) saved my life. Meeting people who also rebelled because they did not accept society, ironically enough to a large extent NSB-children (children whose parents were members of the Dutch Nazi Party in the Second World War) - always that war - helped me to survive." ... "One is quickly regarded as a querulous person. I think this applies to my case. I resist until at present, because I consider myself competent to judge about certain matters, in my position as an outsider more than others. I witness horrible things, amongst others falsification of history. And then, as a documentary maker, I come into the picture."

On 27 January 1990, "Het Parool" published an article written by the first applicant and headlined "A murder in the B. street". The subheading read:

<Translation>

"In the bathroom of an apartment at the Amsterdam B. street, the German-Jewish onderduiker Y. was murdered on 24 May 1943 - that much has been established. Also the perpetrator is known: the then electrician and later movie maker X. Last month he even announced his plans to make a movie about the liquidation, to be called 'There is no plane for Zagreb'. Almost fifty years later it has still never become clear whether the liquidation was an act of resistance or a common robbery with murder. Osewoudt and Dorbeck in the B. street."

The article contained an account of the events surrounding Y.'s death. In his article, the first applicant sought an answer to the question whether Y.'s killing had been an act of resistance aimed at preventing the rounding up of a Resistance group or just a robbery with murder. He relied on statements of various persons either made in connection with the proceedings before the Regional Court in 1944 or to him directly, the latter including a leader of a resistance group.

It appears from this article that the first applicant had contacted X. by telephone, that X., however, had refused to answer certain questions like why the matter had never

been publicly clarified or to which Resistance group X. had belonged in the war, and had added that he did not wish to be interviewed by the first applicant. In the article doubt was expressed as to whether Y.'s killing had in fact been related to the Resistance and it explained that although X. had been granted a pardon after the war, he had not been rehabilitated. The conclusion of the article was:

<Translation>
"The dividing line between good and bad becomes blurred in times of war. In the novel "The Dark Room of Damocles" by W.F. Hermans the cigar trader Henri Osewoudt carries out a number of killings during the occupation at the orders of a certain Dorbeck, whom he takes to be a Resistance leader. However, after the war Osewoudt is arrested because he has made victims on both sides, good and bad, and he is accused of extensive collaboration. Dorbeck, the only person able to clear him <from this accusation>, has disappeared without a trace, without the slightest indication of his ever having existed. Osewoudt's only chance is a war time picture he has made via a mirror of himself and Dorbeck. When Osewoudt has this picture developed, there is nothing on it.

In NRC Handelsblad, X. compares the case of Y. with the story of Osewoudt and Dorbeck - the umpteenth mystification, just like "The Dark Room of Damocles" may be interpreted in many ways. Did X. mean that the liquidation was considered an act of resistance in a time of war, and that only after the war it appeared to have been a wrongdoing? Did he mean to say that he carried out the liquidation upon instructions without knowing precisely whether he acted good or bad? It is to questions such as these that X. also refuses to give any kind of answer.

Or did he only wish to keep open the possibility that once he has completed "There is no plane for Zagreb", there will be nothing on the film?"

On 5 February and 24 February 1990, the first applicant published two further articles in "Het Parool" about the case of X. The article published on 5 February 1990 constituted a reply to reactions published in "Het Parool" from Mr J., a columnist, and Mr V., a former member of the Great Advisory Board of the Resistance (Groote Adviescommissie der Illegaliteit), who were both of the opinion that the first applicant's article was uncalled for and who had submitted their views on the matter.

The article published on 24 February 1990 was intended to close the polemic on X.'s case. It included a copy of the first formal record (proces-verbaal) dated 29 May 1943 of the police of Amsterdam on the finding of Y.'s body, which was part of the file on Y.'s killing provided to the first applicant by a former police inspector, and two reactions from readers, one in support of the first applicant's initiative and one opposing it. The article further contained a reconstruction of the events leading to Y.'s death based on various statements. The article concluded that:

<Translation>
"On grounds of the above, a number of conclusions can be drawn. In the first place that the murder of Y. was no liquidation in order to prevent 'the rounding up of

resistance lines' ... In fact it was premeditated murder; his sister stood on guard and X. himself admits that Y. 'after joint consultations had to be liquidated'."

On 23 February 1990, X. filed a complaint against the first and second applicants with the Netherlands Press Council (Raad voor de Journalistiek), which is a self-regulating institution founded by newspaper editors and journalists. It consists of eight journalists and eight non-journalists. The President of the Press Council and his or her substitute are members of the judiciary. The Press Council cannot impose sanctions, but following adversarial proceedings it may state an opinion about an alleged violation of good journalistic practice. Such an opinion will be published in the professional magazine for journalists. It is further transmitted to the General Dutch Press Agency (Algemeen Nederlands Persbureau) and to the media. The newspaper or magazine concerned is further requested to publish the opinion.

Following both written and oral proceedings, in which X.'s request to deal with his complaint in proceedings in camera was rejected, the Board of Journalism issued its opinion on 1 October 1990. After having acknowledged that X., as a known film maker and as such a public figure, by his own public statements in an interview had given cause to new publicity about the matter, it found that:

<Translation>
"... those involved exceeded the bounds of what, given their journalistic responsibilities, is acceptable in society by putting forward as an unavoidable conclusion, in an article about a criminal case against the complainant which has been closed 45 years ago concerning a homicide committed by him during the <Second World> War, the suggestion that the killing was not connected to resistance activities but was in fact robbery with murder (roofmoord), without backing this suggestion up with concrete facts that are also susceptible of proof."

On 25 January 1991, X. started civil proceedings against the applicants before the Regional Court of Amsterdam, seeking a declaratory judgment that the articles published in "Het Parool" on 27 January, 5 February and 24 February 1990 were defamatory and thus constituted a tort (onrechtmatige daad) and requesting the Regional Court to order the applicants to pay damages and costs.

Following both written and oral proceedings, the Regional Court rejected X.'s claims in its judgment of 10 July 1991. It accepted that the articles as such had affected X.'s honour and good reputation. It did, however, agree with the first applicant that after the war X. had been granted a pardon and that he had not been rehabilitated. It further agreed with the applicants that the general interest justified the challenged publications in that the murder of a Jewish person in the Second World War still constituted an emotionally charged event, in particular to a town like Amsterdam and the B. street neighbourhood where many civilian victims of the war had lived and where a large number of people who had been directly affected by the war were still living. The Court held that in general, and in particular in that area, the war and the persecution of the

Jewish population were still vivid and still constituted an issue of important general interest.

The Regional Court further noted that X. himself had brought the matter into the public domain by mentioning it in the "NRC Handelsblad" interview and announcing his intention of using his experiences for a movie. The Regional Court found that the publications at issue were in principle in the general interest and that they were not needlessly damaging in nature. It concluded that the applicants had apparently acted in the general interest, so that, pursuant to Article 1412 of the Civil Code (Burgerlijk Wetboek), there had been no intent on their part to insult X. Consequently, it rejected X.'s claims based on Articles 1408 and the following of the Civil Code.

Insofar as the applicants had submitted counterclaims, seeking a declaratory judgment that the articles at issue were not unlawful, and an award for costs, the Regional Court concluded that the applicants, in view of the Court's findings on X.'s claims, had insufficient interest in such a ruling and, consequently, rejected it.

On 17 September 1991, X. filed an appeal with the Court of Appeal (Gerechtshof) of Amsterdam. The applicants did not file an appeal against the rejection of their counterclaims.

In its judgment of 26 August 1993, following both written and oral proceedings, the Court of Appeal quashed the Regional Court's judgment of 10 July 1991, insofar as this judgment had found against X. in respect of his claims against the first and the third applicants, and upheld this judgment for the remainder. It concluded that the articles published on 27 January, 5 February and 24 February 1990 were defamatory towards X. The Court of Appeal ordered the first and third applicants to compensate X. for loss of income which he had incurred and which he would still incur in an amount to be specified and paid at some later point in time, and to pay X. 50.000 Dutch guilders for legal aid costs and 50.000 Dutch guilders in compensation for non-pecuniary damages.

The Court of Appeal considered that the social interests involved, i.e. on the one hand the interest of individuals in not being exposed to rash accusations in the press and, on the other, the interest of the press in its informative, opinion forming and alerting activities in the interest of the general public, needed to be balanced against each other.

The Court of Appeal held that in the three articles at issue "so many question marks were raised as to the resistance motive that, as also noted by the Board of Journalism, it led to the almost inevitable suggestion that only one conclusion is possible, namely that it was a (common) robbery with murder".

The Court of Appeal further considered that the nature of the suspicions formulated against X., i.e. the robbery with murder of Y., was exceptionally serious and further exacerbated given the connotation of defencelessness attached to the word (Jewish) "onderduiker". The Court considered that it was obvious that a person against whom such an accusation is levelled can expect to encounter serious repercussions, whereas in this particular case a further important element was to be found in the fact that

X. was a nationally known film maker. The Court of Appeal noted in this respect hate-mail received and submitted by X. and a submitted letter of a known television production company addressed to X. in which it was stated that "the recent publicity about your "war past" negatively influences the finding of sponsors".

As to the question whether the first applicant had exposed an injustice (misstand) which, in view of the general interest, could be considered of a grave nature, the Court of Appeal held that the fact that X. had been convicted and sentenced for manslaughter many years ago, had partially served his sentence and had been pardoned for the remainder only held little current interest. According to the Court, the same applied to X.'s alleged rehabilitation after the war.

As to the question whether the suspicions against X., at the time of the publication of the articles at issue, had been supported by the factual material available at that time, the Court of Appeal held that the statements relied upon by the defendants were all of a hearsay nature and were not corroborated by any solid material. The Court of Appeal added that it was not for X. to make plausible that he had not committed the facts he was being accused of, but to "Het Parool" to prove that he had. This could not be done by off-setting killing for resistance purposes against robbery with murder, following that up by claiming that it could not have been a killing for resistance purposes and then subsequently reaching the inevitable conclusion that it thus must have been robbery with murder.

The Court of Appeal found that X. had made it plausible that he had committed, more or less on an individual basis, acts of resistance, a finding which was held to be substantiated by the request for a pardon of 14 January 1946, a press release of 24 January 1946 from the Secretary of the Advisory Board of the Resistance stating that Y. had been killed by X. in the interest of the Resistance against the oppressor, and a statement of 11 May 1993 by the Foundation 1940-1945 that X. had belonged to the Resistance within the meaning of the Act on Extraordinary Pensions 1940-1945.

The Court of Appeal further found the allegation that X. had purportedly stated that he had been rehabilitated not to be borne out by the facts. The Court also found that, unlike the then Minister of Justice in his request to the Queen for a pardon for X., the first applicant had failed to take into account the nuances of reality or obvious complexity of the situation of persons in hiding and in the Resistance.

After having considered the nature of the published suspicions, the seriousness of the repercussions which the articles could be expected to have for X., the level of the factual support for the suspicions and the presentation of the suspicions, the Court of Appeal concluded that the first applicant's articles lacked due care towards X., that they had been written in unnecessarily offensive terms and that it could therefore not be held that the first and third applicants had acted in the general interest.

The Court of Appeal added that X.'s statements in the interview published in the "NRC Handelsblad" had not warranted a reaction of such rapidity as to justify the skipping of the phase of careful investigation.

In the course of the oral pleadings before the Court of Appeal on 26 May 1993, X.'s lawyer had read out in court X.'s statement to a Rapporteur of the Foundation 1940-1945 in connection with his application for a pension of members of the Resistance. In this statement, X. had given an elaborate account of the events leading up to the killing of Y. and the reasons therefor. Insofar as the third applicant had offered, in the oral pleadings on appeal, to submit further evidence, the Court of Appeal stated that this offer was to be rejected as it concerned positions, facts and/or circumstances which, if proven, would not lead to any other decision. It further held in this respect that the offer was also too vague and/or insufficiently specific to warrant acceptance.

The Court of Appeal concluded that the articles at issue were defamatory and thus contrary to Article 1408 of the Civil Code and, consequently, awarded X. damages for lost income, costs incurred and non-pecuniary damages. The applicants filed an appeal in cassation with the Supreme Court (Hoge Raad).

In its judgment of 6 January 1995, the Supreme Court declared the second applicant's appeal inadmissible for lack of interest as the Regional Court had rejected X.'s claims in regard to him and the Court of Appeal had upheld this finding. The Supreme Court rejected the appeal in cassation of the first and third applicants.

The Supreme Court noted that the Court of Appeal had examined the case on the basis of the principles developed in the case-law of the Supreme Court as regards the determination of the lawfulness of publications in the press denouncing injustices and in which context accusations are expressed against certain persons. The Supreme Court found that the Court of Appeal, in conformity with these principles as set out in the judgment of 24 June 1983 of the Supreme Court, had balanced, on the one hand, the nature of the published suspicions and the seriousness of the probable repercussions for the person to whom these suspicions relate and, on the other, the seriousness - from a public interest point of view - of the injustice which the publication seeks to denounce, the extent to which at the time of the publication the suspicions were supported by factual material available, the wording of the suspicions seen in relation to the precited factors and the due care of the first applicant's investigation on which his publications were based. The Supreme Court accepted as legally correct the findings of the Court of Appeal and the reasons stated therefor.

Insofar as the first and third applicants had argued that the Court of Appeal's judgment constituted an unjustified interference with their rights under Article 10 para. 1 of the Convention, the Supreme Court held that the interference complained of was based on and in conformity with the requirements of Article 1408 of the Civil Code, which deals with compensation for defamation (belediging). The Supreme Court considered that this interference was aimed at the protection of X.'s rights and good reputation, including his right not to be publicly confronted, more than forty years after his conviction of the

killing of Y., after he had served <part of> his sentence and had been granted a pardon for the remainder, with an act committed in his youth in a situation of war, and moreover in the form of the offensive as well as defamatory accusation that, notwithstanding the conclusion reached in the criminal proceedings, his act had in fact constituted robbery with murder.

As regards the question whether the interference was "necessary in a democratic society" within the meaning of Article 10 para. 2 of the Convention, the Supreme Court rejected the argument that the freedom of the press should take precedence over X.'s individual rights and accepted the way in which the Court of Appeal had balanced the interests involved and its finding on this point.

The Supreme Court added in this respect that X.'s rights weighed particularly heavily since respect for the individual entailed that the act of a person, for which punishment had been received, should, in principle, not continue to be held against him. This also applied in a situation, like in the present case, where a trial had taken place in exceptional circumstances in the course of which it was likely that not all relevant circumstances had been considered.

According to the Supreme Court, this implied that rendering public, with a great deal of commotion and after a lapse of time as had occurred in the present case, an accusation like the one at issue could only be justified in exceptional circumstances where a demonstrable public interest required that notice be taken of such an accusation. Justification of such publication demanded the existence of compelling reasons of public interest, whilst, in addition, it might be expected that the accusation voiced be based on an investigation carried out in conformity with high standards of due care. The Supreme Court concluded that neither of these conditions had been fulfilled in the present case.

Insofar as the applicants complained that the Court of Appeal had disregarded the applicants' offer to submit evidence in support of their allegations, which according to the Advocate-General to the Supreme Court concerned evidence that X. had deliberately delayed the processing of his application for a pension for members of the Resistance and that the Foundation 1940-1945 had co-operated in this delay, the Supreme Court noted that the Court of Appeal had done so on two grounds, each of which was sufficient to carry that decision. As the applicant had only challenged one of these grounds, the Supreme Court rejected this complaint for lack of interest.

b. Relevant domestic law and practice

Apart from Article 10 of the Convention, which is directly applicable in the Netherlands legal order, the freedom of expression is guaranteed by Article 7 of the Constitution (Grondwet), which provision, insofar as relevant, reads:

<Translation>

"1. No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.

2. Rules concerning radio and television shall be laid down in statutory law. There shall be no prior supervision of the contents of a radio or television broadcast.

3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. ..."

At the relevant time, Articles 1401, 1408 and 1412 of the former Civil Code still applied. On 1 January 1992, a new Civil Code entered into force.

Article 1401 of the former Civil Code read as follows:

<Translation>
"Any wrongful act, as a result of which damage has been inflicted on another person, makes the person by whose fault damage has been caused liable to pay compensation."

Article 1408 of the former Civil Code read:

<Translation>
"1. The civil suit for defamation is aimed at compensation of damages and at redressing damages suffered to honour and good reputation.

2. In his assessment thereof, the judge shall take into consideration, the gravity of the defamation as well as the status, the social and financial position of the parties involved and the circumstances."

Article 1412 of the former Civil Code provided:

<Translation>
"1. The civil suit for defamation cannot succeed where there is no appearance of intention to defame.

2. Intention to defame is considered not to be present insofar as the perpetrator apparently acted in the general interest or in necessary defence."

In a leading judgment of 24 June 1983 (Nederlandse Jurisprudentie 1984, nr. 801), concerning summary proceedings (kort geding) in which, pursuant to Article 1401 of the former Civil Code, an injunction ordering a rectification in a newspaper had been issued, the Supreme Court determined a number of criteria in respect of the lawfulness of publications in which individuals are criticised, in particular as to the manner in which the respective interests involved needed to be balanced against each other.

These criteria include, amongst others:

- the nature of the suspicions published and the seriousness of the probable repercussions for the person to whom these suspicions relate;
- the seriousness - from a public interest point of view - of the injustice which the publication seeks to expose; and
- the extent to which the suspicions were supported by the factual material available at the time of publication.

Insofar as relevant to those cases, these criteria were further applied in two other judgments handed down by the Supreme Court on 27 January 1984 (Nederlandse Jurisprudentie 1984, nr. 802 and nr. 803). Both cases concerned summary proceedings in which an injunction was issued pursuant to Article 1401 of the former Civil Code in connection with the expression of certain accusations in the media.

COMPLAINTS

1. The applicants complain that the judgments of the Court of Appeal and the Supreme Court constitute an interference with their rights under Article 10 para. 1 of the Convention, which cannot be considered as justified under paragraph 2 of Article 10.

2. The applicants further complain under Article 6 of the Convention that they did not have a fair trial in respect of the way in which the Court of Appeal and the Supreme Court interpreted the relevant provisions of the Civil Code (Burgerlijk Wetboek), the way in which they concluded that the suspicions against X. had been insufficiently substantiated, in that in their decisions the domestic courts set unacceptable conditions for publications like the one at issue, in that the domestic courts disregarded important parts of the evidence and other submissions by the applicants, and in that the judgments at issue showed a considerable degree of consideration for X. and a striking hostility towards the applicants.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 5 July 1995 and registered on 10 August 1995.

On 10 September 1997 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 25 November 1997. The applicants replied on 13 February 1998. The applicants made further submissions by letter of 25 March 1998.

THE LAW

1. The Government submit at the outset that the second applicant cannot be regarded as a victim within the meaning of Article 25 of the Convention as X.'s claims against him had been dismissed by the Regional Court, a finding which was upheld on appeal. On this ground, the Supreme Court declared the second applicant's appeal in cassation inadmissible.

The applicants submit that according to Dutch law and the rules on editorial responsibility the editor-in-chief of a newspaper is liable or responsible for the contents of an article even where in fact he has not been involved in the actual production of the article in question. Given the second applicant's responsibility for the editorial contents of the articles at issue, his freedom of expression was restricted just as much as that of the journalist and publisher. To exclude him from the scope of the Convention as a result of positions taken by the domestic judicial authorities and X. seems, in the applicants' opinion, indefensible.

The Commission recalls that the concept of "victim" within the meaning of Article 25 of the Convention is autonomous. It is to be interpreted independently of concepts of domestic law concerning such matters of interest. The word "victim", in the context of Article 25 of the Convention, denotes the person directly affected by the act which is at issue (cf. No. 28204/95, Dec. 4.12.95, D.R. 83, p. 112). The Commission examines only the personal situation of applicants and not the general scope of the laws applicable to them (cf. No. 21132/93, Dec. 6.4.94, D.R. 77, p. 75).

The Commission notes that the Supreme Court declared the second applicant's appeal in cassation inadmissible for lack of interest as the Regional Court had rejected X.'s claims in regard to him and the Court of Appeal had upheld this finding. In these circumstances, the Commission is of the opinion that the second applicant cannot claim to be a victim within the meaning of Article 25 of the Convention as regards the facts at issue in the present case.

It follows that the application, insofar as it has been brought by the second applicant, is inadmissible for being manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The first and third applicants (hereinafter referred to as "the applicants") complain that the outcome of the proceedings at issue constituted an unjustified interference with their rights under Article 10 para. 1 of the Convention.

Article 10 of the Convention reads as follows:

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

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

The Government accept that there has been an interference with the first and third applicants' rights under Article 10 para. 1, but submit that this interference is justified under paragraph 2 of this provision.

Referring to the Supreme Court's judgment of 24 June 1983 (Nederlandse Jurisprudentie 1984, nr. 801), the Government submit that the interference is prescribed by law in that the case at issue was exclusively determined on the basis of an application of established Dutch case-law. No new or otherwise unforeseeable criteria were applied in the applicant's case. The interference was aimed at the protection of the reputation or rights of others as laid down in Article 10 para. 2 of the Convention. In this connection the Government submit that even the applicants have never disputed that the publications were damaging to X.'s good name and reputation.

As to the question whether the interference was necessary in a democratic society, the Government submit in the first place that X., although he is a well-known person in the Netherlands, cannot be compared to a politician and thus is not required to tolerate criticism or accusations to the extent that politicians are. In the Government's opinion X. is not required simply to accept that a 45 year old criminal conviction is used against him again, in particular where charges are laid at his door of which he was not convicted but acquitted. The Government consider that raking up old matters of this kind is irrelevant to the question whether X. is able to practise his profession as a film maker.

The Government further submit that if an author of an article intends to present facts, they should be based on a careful investigation. If then the facts are linked with a value judgment, it too should be properly substantiated by the results of the investigation. In the present case, the first applicant had largely based his article, which was written in a highly suggestive manner, on hearsay evidence and had so framed his article that it implied an accusation of robbery with murder, whereas in the 1944 judgment X. had been convicted of manslaughter and acquitted of murder and theft. Not only had the facts been previously assessed by a court, but the so-called new facts were based on an insufficiently thorough investigation.

The Government further refer to the conclusion reached by the Press Council that the applicants had exceeded the bounds of what, given their journalistic responsibilities, is acceptable in society in that the suggestion, put forward as an unavoidable conclusion, that Y.'s killing by X. was in fact robbery with murder was not backed up with concrete facts that were susceptible of proof. They further refer to the findings of the Court of Appeal, reached following the application of pertinent criteria established in the Supreme

Court's case-law, that not only the articles had been lacking in due care in respect of X., but they were also worded in unnecessarily offensive terms whereas the Supreme Court came to similar conclusions including a finding that the interference with X.'s rights could not be justified on grounds either that compelling reasons relating to the public interest existed or that high standards of care had been met.

The Government finally submit that the amount awarded to X. in compensation for non-pecuniary damages, i.e. 50,000 Dutch guilders, cannot be regarded as disproportionate given the seriousness of the allegations, the fact that they were inadequately supported and the harm suffered by X. as a result of the articles.

The applicants submit, as regards the question whether or not the interference with their right to freedom of expression at issue can be regarded as being "prescribed by law" within the meaning of Article 10 para. 2 of the Convention, that, since there is far less case-law relating to defamation under Article 1408 et seq. of the former Civil Code than case-law relating to violation of the due care requirement under Article 1401, the rules applied in the present case cannot be regarded as being in compliance with the requirement of foreseeability.

As regards the legitimate aim of the interference at issue, the applicants submit that, under Article 1408 et seq. of the former Civil Code, there is deemed to be no intent to defame where action has been taken in the public interest. The applicants have argued throughout the proceedings to have acted in the public interest and thus have continuously denied to have defamed X.

The applicants further submit that the interference cannot be considered as being necessary in a democratic society. They argue that the Court of Appeal and the Supreme Court have considerably restricted the freedom of the press to report on a highly emotive event which took place during the Second World War by granting X. the right not to be confronted with his past even though he himself had confronted the general public with his case and his forthcoming film on the subject, by giving X. the rights to inspect articles in advance even though X. had refused all contact with the first applicant, by demanding proof of theft whereas X. had already admitted this, by failing to mention or to discuss many important facts and circumstances adduced by the applicants, and by uncritically accepting opinions and reports which the applicants had criticised in detail and which can be traced back to one single source, namely X. himself.

The applicants consider that, as the legal assessment of items published in the press depends so heavily on the circumstances of the case and therefore on facts, the care with which the national courts deal with circumstances and facts adduced must also be examined if the freedom of the press is to be protected effectively.

The applicants further submit that, although X. is not a politician or holder of a public office, he may be regarded as a public figure. In Dutch case-law, members of the royal family, criminals and artists have been deemed as public figures in relation to articles published about them. The fact that a public figure does not hold a public office

may make a difference where articles published about such a person concern that persons's conduct in private life. The applicants are, however, of the opinion that the present case does not concern private conduct in that the murder cannot be regarded as private conduct and in view of the publicity given to the affair by X. himself. Moreover, as X. was already making the film shows that the affair is still much of topical interest, even for X. himself.

As to the Government's argument that X. should not have to accept that his conviction in 1944 should be used against him once again, the applicants submit that they have not used that conviction against him. They submit that even X. himself has admitted that the case was not well tried in 1944 and that he, although acquitted of murder and theft in 1944, has since admitted both.

The applicants further submit that, unlike facts, the truth or untruth of value judgments cannot be established. Leaving aside the question whether or not a value judgment should be based on an examination of facts, the applicants point out that neither the Court of Appeal nor the Supreme Court identified any inaccuracy in the articles at issue. The courts' objections are in fact directed against the first applicant's value judgment that the facts and circumstances found by him justify serious doubts as to the alleged resistance past, resistance activity and rehabilitation, and that they point towards robbery. Also the respondent Government fail to identify a single example of insufficiently thorough investigation of the facts or an example of wholesale criticism. The applicants submit that the article of 27 January 1990 does not contain any definite accusation or robbery with murder, let alone that the article is dominated by such an accusation. What dominates is doubt whether it was a resistance act. There may have been a suggestion of robbery with murder, but this suggestion cannot be considered as "inevitable". In this connection the applicants stress that X. declined to have any contacts with the first applicant about the matter.

As to the compensation awarded, the applicants submit that they have not argued that, if the courts had justly found against them, the compensation for non-pecuniary damages of 50,000 Dutch guilders would be disproportionate. They are, however, of the opinion that they have been unjustly ordered to compensate non-pecuniary damages since this order is based on the finding that the articles have been published with the intent to insult X.

The applicants finally submit that the articles are about the murder of a Jewish person in hiding during the occupation of the Netherlands during the Second World War. Like many other questions concerning this occupation and in particular the fate of the Jews, this is still very much a matter of topical interest, a "public issue", as can be seen from the huge emotion generated at the end of 1997 by the discovery of archive documents about goods stolen from Jews in the Netherlands during the occupation and how after the Second World War property still unclaimed by or on behalf of the owners appears to have been auctioned off by the Dutch Ministry of Justice. In the applicant's opinion the present case involves judgments by Dutch courts which have attracted a great

deal of attention and which have had a negative effect on the freedom of the press not only to report on Second World War issues, but with far wider implications.

The Commission agrees with the parties that there has been an interference with the first and third applicants' exercise of their freedom of expression within the meaning of Article 10 para. 1 of the Convention. Such interference is in breach of Article 10, unless it is justified under paragraph 2 of this provision, i.e. it must be "prescribed by law", have an aim or aims that is or are legitimate under Article 10 para. 2 of the Convention and be "necessary in a democratic society".

As to the question whether the interference was prescribed by law, the Commission recalls that the phrase "prescribed by law" in Article 10 para. 2 of the Convention must be given the same interpretation as the phrase "in accordance with the law" in Article 8 para. 2 of the Convention (cf. Eur. Court HR, Silver and Others v. United Kingdom judgment of 25 March 1983, Series A no. 61, p. 33, para. 85). Where the Convention refers to domestic law, it is primarily the task of the national authorities to apply and interpret domestic law. The Convention organs have a limited jurisdiction in controlling the manner in which this is done (cf. Eur. Court HR, Otto-Preminger-Institut v. Austria judgment of 20 September 1994, Series A no. 295-A, p. 17, para. 45).

The phrase "prescribed by law", or the equivalent phrase "in accordance with the law" does not, however, merely refer back to domestic law, but also relates to the quality of the law. A norm must be formulated with sufficient precision, but a law conferring a discretion is not in itself inconsistent with the requirement of foreseeability provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity (cf. Eur. Court HR, Olsson v. Sweden judgment of 24 March 1988, Series A no. 130, p. 30, para. 61; and Kruslin and Huvig v. France judgments of 24 April 1990, Series A no. 176 A and B respectively, pp. 22-25, paras. 30-36, and pp. 54-57, paras. 29-35).

The Commission does not exclude that the case-law under Article 1408 of the former Civil Code is more limited than the case-law under Article 1401 of the former Civil Code. However, even assuming that Article 1408 would have given rise to problems of interpretation, this does not mean that this statutory provision must, therefore, be regarded as so vague and imprecise as to lack the quality of "law" (cf. No. 21472/93, Dec. 11.1.94, D.R. 76, p. 129).

Noting the wording of Article 1408 of the former Civil Code and the fact that, according to the Supreme Court, the decision at issue was based on and in conformity with the relevant case-law, the Commission is satisfied that the interference at issue was "prescribed by law" within the meaning of Article 10 para. 2 of the Convention.

As to the question whether the interference complained of had a legitimate aim, the Commission accepts that it was "for the protection of the reputation or rights of others" within the meaning of Article 10 para. 2 of the Convention.

As to the question whether the interference at issue was "necessary in a democratic society" within the meaning of Article 10 para. 2 of the Convention, the Commission recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (cf. Eur. Court HR, Jersild v. Denmark judgment of 23_September 1994, Series_A no._298, p._23, para._31).

Subject to paragraph 2 of Article 10, freedom of expression is applicable not only to "information" and "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (Eur. Court HR, Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, para. 41). Journalistic freedom in particular also covers possible recourse to a degree of exaggeration, or even provocation (Eur. Court HR, Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, p. 19, para. 38).

The Commission further recalls that the press plays a predominant role in a State governed by the rule of law. It is incumbent on it to impart - in a way consistent with its duties and responsibilities - information and ideas on matters of public interest. At the same time it must not overstep certain bounds set, inter alia, for the protection of the reputation of others (cf. Eur. Court HR, Prager and Oberschlick v. Austria judgment, loc. cit., p. 17, para. 34). The limits of permissible criticism are narrower in relation to a private citizen than in relation to politicians or Governments (cf. Eur. Court HR, Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 23, para. 46; and Incal v. Turkey judgment of 9 June 1998, para. 54, to be published in Reports of Judgments and Decisions 1998).

The adjective "necessary" within the meaning of Article 10 para. 2 implies the existence of a "pressing social need" which must be convincingly established. In this matter as in others, it is primarily for the national authorities to determine the need for an interference with the exercise of freedom of expression. What they may do in this connection is, however, subject to a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (cf. Eur. Court HR, De Haes and Gijsels v. Belgium judgment of 24 February 1997, Reports 1997-I, p. 233-234, para. 37; Worm v. Austria judgment of 29 August 1997, Reports of Judgments and Decisions 1997-V, pp. 1550-1551, para. 47).

The Convention organs' task, in exercising their supervisory function, is not to take the place of the national authorities but rather to review under Article_10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Convention organs must look at the "interference" complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (cf. Eur. Court HR, Worm v. Austria judgment of 29 August 1997, Reports of Judgments and Decisions 1997-V, p. 1550-1551, para. 47).

Factors to be analysed in this respect, in a case of a journalist convicted for defamation, may include the seriousness and the breadth of the accusations made by the journalist, the question whether there had been adequate previous research and factual basis for the accusations, the journalist's good faith and respect for the ethics of journalism (cf. Eur. Court HR, Prager and Oberschlick v. Austria judgment of 26 April 1995, loc. cit., p. 18, para. 37; and Fressoz and Roire v. France, Comm. Report 13.1.98, para. 74; currently pending before the Court).

The Commission observes that, in the articles at issue, the applicants did not merely recall X.'s conviction for manslaughter as a historical fact but expressed doubts as to X.'s motives for having killed Y., who - according to the Court of Appeal - belonged to a category of particularly vulnerable persons. It is true that X. himself mentioned this killing in a newspaper interview and made certain allusions as to the motives for this killing and, therefore, could expect a reaction to his statements.

The articles at issue were obviously a reaction to these statements. In these articles it was suggested that there were in fact only two possible motives for the killing of Y. by X, i.e. either in order to protect the resistance movement or a common robbery with murder. Having discarded the first possible motive as untenable, it was clearly implied that it had in fact been a premeditated murder.

In the subsequent proceedings before the domestic courts no justification was found for the manner in which the applicants had reacted to X.'s statements in that the matter was held to lack the required public interest and that a serious accusation had been made whilst no due care had been exercised in the first applicant's investigation of the matter. Also the Press Council had previously found that the applicants had fallen short of their journalistic responsibilities by publishing an insufficiently substantiated conclusion.

As regards the question as to what extent events which have taken place during the Second World War still constitute important matters of public interest, the Commission is of the opinion that this is a matter which is to be determined primarily at the national level as this might vary from country to country and will depend largely on the specific facts involved. The Commission cannot find that the domestic courts' answer to this question in the present case can be regarded as arbitrary or wholly unreasonable.

The Commission notes that X. is not a politician whose previous conviction may be relevant as a factor in assessing his fitness to exercise political functions (cf. Eur. Court HR, Schwabe v. Austria judgment of 28 August 1992, Series A no. 242-B, p. 33, para. 32). However, X. is a well-known film maker, attracting as a public figure the interest of the media.

The Commission further notes that the Supreme Court held that X.'s right to have his reputation protected against disparagement in public weighed particularly heavily in view of the fact that he had been convicted of Y.'s killing and had served part of the sentence imposed already many years ago.

In this light, and having regard to the duties and responsibilities inherent in the right of freedom of expression guaranteed by Article 10 of the Convention and to Contracting States' obligation to provide a measure of protection to right of privacy of an individual affected by others' exercise of their freedom of expression (cf. mutatis mutandis, No. 10871/84, Dec. 10.7.86, D.R. 48, p. 154; and Nos. 28851/95 and 28852/95, Dec. 16.1.98, D.R. 92, p. 56), the Commission cannot find it unreasonable that, after having examined and balanced the interests at issue, the domestic courts rejected the argument that the applicants' right to freedom of expression should outweigh X.'s right to protection of his good name and reputation and reached the opposite conclusion.

Also taking into account the findings reached by the Netherlands Press Council that the bounds of acceptable behaviour in professional journalism had been exceeded in the articles at issue in that the suggestion made was not backed up with concrete facts, the Commission accepts that the interference at issue was justifiable and proportionate to the legitimate aim pursued.

It follows that the interference complained of can reasonably be regarded as "necessary in a democratic society" within the meaning of Article 10 para. 2 of the Convention.

This part of the application is, therefore, manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

3. The second and third applicants further complain under Article 6 of the Convention that they did not have a fair trial in respect of the way in which the Court of Appeal and the Supreme Court interpreted the relevant provisions of the Civil Code, the way in which these courts assessed the evidence and reached their findings, and their attitude towards the applicants.

Article 6 of the Convention, insofar as relevant, reads:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law...."

Insofar as the applicants complain of the way in which the domestic courts interpreted the relevant provisions of Dutch law, the assessment by these courts of the evidence and other submissions by the parties to the proceedings at issue, and the subsequent judicial findings, the Commission recalls that it is not competent to examine alleged errors of fact or law committed by national courts, except where it considers that such errors might have involved a possible violation of the rights and freedoms set forth in the Convention (cf. No. 21283/93, Dec. 5.4.94, D.R. 77, p. 81).

The Commission does not find it established that in the proceedings at issue the applicants were given insufficient opportunity to state their case, to submit whatever they

found relevant to their case or that they were in a disadvantaged procedural position vis-à-vis the other party.

It is true that the Court of Appeal decided to disregard the third applicant's offer of evidence on a particular point, holding that this offer concerned positions, facts and/or circumstances which, if proven, would not lead to any other decision and that the offer was also too vague and/or insufficiently specific to warrant acceptance. However, Article 6 para. 1 of the Convention does not lay down rules on admissibility of evidence, which is primarily a matter for regulation under national law (cf. No. 13800/88, Dec. 1.7.91, D.R. 71, p. 94).

The Commission notes that the issue before the Dutch courts concerned the question whether or not the articles at issue were defamatory and thus entailed the question whether, at the time of publication, the applicants had sufficient evidence to publicly express doubts as to X.'s motives to kill Y. The Commission cannot find that the reasons given by the Court of Appeal for its decision on this point can be regarded as unreasonable or arbitrary.

Finally, the Commission has found no indication that the Court of Appeal and the Supreme Court were biased in their attitude towards the applicants.

It follows that this part of the application must also be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER	J.-C. GEUS
Secretary	President
to the Second Chamber	of the Second Chamber