IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 16354/06

BETWEEN: -

MOUVEMENT RAELIEN SUISSE **Applicant**

v.

SWITZERLAND **Respondent Government**

THIRD PARTY INTERVENTION SUBMISSIONS

BY ARTICLE 19: Global Campaign for Free Expression

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INTRODUCTION

1. This third-party intervention is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), an independent human rights organisation that works around the world to protect and promote the right to freedom of expression and the right to freedom of information. It takes its name from Article 19 of the Universal Declaration on Human Rights. ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends and develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression, nationally and globally.

2. ARTICLE 19 welcomes the opportunity to intervene as a third party in this case, by the leave of the President of the Court which was granted on 5 September 2011 pursuant to Rule 44 (3) of the Rules of Court. As directed, these submissions do not address the facts or merits of the applicant's case.

3. In these submissions, ARTICLE 19 addresses the following: (i) the importance of freedom of expression on the Internet under international law and the appropriate scope of the margin of appreciation in cases involving Internet speech; (ii) the proper approach to be taken by the Court to the practice of linking to other websites on the basis of comparative law material; and (iii) the proportionality of restrictions on freedom of expression relating to websites containing unlawful content.

I. FREEDOM OF EXPRESSION AND THE INTERNET UNDER INTERNATIONAL LAW

a) The importance of freedom of expression on the Internet under international law

4. The importance of the Internet as a medium for sharing and disseminating ideas has been widely recognised at international level. In a recent report on freedom of expression and the Internet published in May 2011[1], the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression expressed his belief that "*the Internet is one of the most powerful instruments of the 21st century for increasing the transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies*" (para.2). In his view, "*the Internet ha[d] become a key means by which individuals can exercise their right to freedom of expression"* (para.20). Furthermore, "*by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet facilitates the realisation of a range of other human rights"* (para. 22). The Special Rapporteur also noted that "*the vast potential and benefits of the Internet [were] rooted in its unique characteristics, such as its speed, worldwide reach and relative anonymity"* (para.23).

5. The special nature of the Internet was equally recognised by the four international special rapporteurs on freedom of expression in their June 2011 Joint Declaration on Freedom of Expression and the Internet.[2] The Declaration stressed *'the transformative nature of the*

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[1] The report was published on 16 May 2011; available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

[2]The 2011 Joint Declaration; available at: http://www.article19.org/data/files/pdfs/press/international-mechanisms-for-promoting-freedom-of-expression.pdf

Internet in terms of giving voice to billions of people around the world, of significantly enhancing their ability to access information and of enhancing pluralism and reporting'.

6. Similarly, the Human Rights Committee ("the Committee") recently emphasised the importance of new information and communication technologies in its General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights 1966 ("ICCPR")[3]. General Comment No. 34 was adopted in July 2011 and constitutes the most recent authoritative interpretation of the right to freedom of opinion and expression under the ICCPR. Addressing the issues raised by new media, the Committee said that:

> 15. States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network to exchange ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.

7. This statement was echoed in a recent report published by the OSCE Special Representative on Freedom of Media which called for a right of access to the Internet[4]. In particular, the report stated: "*Everyone should have a right to participate in the information society and states have a responsibility to ensure that citizens' access to the Internet is guaranteed*".

8. While underlining the importance of freedom of expression on the Internet, and especially access to the Internet, each of these international human rights bodies have recognised that such freedom may also be restricted. However, they have highlighted that any such restrictions are only acceptable to the extent that they comply with established international standards, including that the restrictions are provided for by law, and that they are necessary to protect an interest which is recognised under international law. In particular, the Human Rights Committee said in its General Comment No. 34 that the relation between right and restriction and between norm and exception should not be reversed (para.21). The Committee went on to state that:

> 43. Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3...

9. Furthermore, in their June 2011 Declaration the four special rapporteurs on freedom of expression stated that in assessing the proportionality of a restriction on freedom of expression on the Internet, "*the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other interests*". They added that "*Greater attention should be given to developing alternative, tailored approaches, which are adapted to the unique characteristics of the Internet, for responding to illegal content, while recognising that no*

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[3] General Comment No. 34 is available here: http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf.

[4] See OSCE report on Freedom of Expression on the Internet, July 2011, page 9. The report is available here: http://www.osce.org/fom/80723.

special content restriction should be established for materials disseminated over the Internet". In this regard, they deplored that many of the efforts by governments to impose restrictions on freedom of expression on the Internet *'fail[ed] to take into account the special characteristics of the Internet'.*

b) The margin of appreciation should be narrow in cases involving freedom of expression on the Internet

10. In light of the above, it is respectfully submitted that the margin of appreciation in cases involving freedom of expression on the Internet should be a narrow one contrary to the Court's conclusion at paragraph 52 of the judgment. In this connection, we note that in order to justify the wide margin of appreciation in the present case, the Court relied on the fact that the Government could be seen as endorsing, or at least tolerating, the applicant's views if it were to allow the poster campaign. In our view, however, this is not an appropriate consideration to be taken into account under the margin of appreciation in such cases. While we agree that the margin of appreciation may be broader in certain circumstances, especially where the protection of children[5] or public morals[6] are concerned, the fact that a Government may be seen to support a particular viewpoint ought not to have a bearing on the scope of the margin of appreciation. Indeed, to hold otherwise would encourage Governments to allow only those poster campaigns whose content they approve. This, in our view, would be a highly undesirable development and goes well beyond any legitimate need to regulate public space. It would not be appropriate for a state to refuse to permit a peaceful protest to take place, for instance, on the grounds that this might otherwise be construed as state endorsement of the views expressed.

11. Moreover, we are particularly concerned by the following passage of paragraph 54 of the Court's judgment in which it said:

> As those websites were per se accessible to everyone, including minors, the impact of the posters on the general public would have been multiplied and the State's interest in prohibiting the poster advertising campaign was thus all the greater.

It seems to us, however, that this is to mistake the exception for the general principle, which is that any restriction on freedom of expression must be narrowly construed. The logic of the Court's approach, by contrast, is that the larger the potential audience, the less protection the expression at issue enjoys from state interference. In our submission, this sets a dangerous precedent with potentially far-reaching consequences for the free flow of information on the Internet. As noted by the special rapporteurs on freedom of expression and the Human Rights Committee, the principle should remain in favour of freedom of expression on the Internet and any restriction on such freedom should be narrowly construed.

II. COMPARATIVE LAW APPROACHES TO LIABILITY FOR HYPERLINKS

[5] See *G v. the United Kingdom,* no. 37334/08, 30 August 2011.

[6] See *Handyside v the United Kingdom,* no. 5493/72, 7 December 1976.

12. One of the primary reasons for the refusal of the Swiss authorities in the present case to allow the applicant to put up posters on public billboards was that the poster contained a link to the Movement's website and that this site contained a link to another website – Clonaid – whose content was said to be contrary to public order in Switzerland.

13. In our view, the decisions of the Swiss authorities and the Chamber's judgment reflect an inadequate understanding of the nature and function of hyperlinks. They fail, moreover, to adequately explain why a website whose content is itself lawful may nonetheless be penalised on account of the unlawful content of a third party's website for which it is not responsible.

a) What is a hyperlink?

14. One of the features of the Internet is its intrinsically global nature. In particular, it is a network connecting a vast number of computers. Central to the success of the Internet however is the World Wide Web and hyperlinks. As Pumfrey J explained in a case before the High Court of England and Wales:

> 15. The Web consists of a network of computers connected by means of the internet and communicating by means of the applications layer protocol, HTTP. Broadly speaking, the computers are either servers, which make 'web pages' available, or client computers, which call for them. The web pages are written in a language called HTML (Hypertext Markup Language). The browser is software on the client that interprets the web pages and displays their contents. HTML permits so-called links to other material such as images to be included in the text of a web page. Such links may be permanent, or clickable. When the browser software encounters a permanent link in the page that it is interpreting, it sends a request for the file specified by the link. If the link is clickable it does so when the link is clicked. The link may point to any item accessible from the internet, so I could include a link to the Mars Explorer photographs in the HTML version of the judgment, if I thought it might help**. These links, so-called hypertext links, are central to the success of the Web**."[7]

15. Hyperlinks thus help Internet users find information and as such, they play a crucial role in the right to receive or impart information and ideas. Without these links – and in particular without the search engines that are based on the technique of hyperlinking – most of the information available on the Web would be of little value as it would be very difficult or even impossible to find. As the Superior Court of California, County of Santa Clara, said: "*Links to other websites are the mainstay of the Internet and indispensible to its convenient access to the vast world of information*".[8]

16. Hyperlinks may also be understood as a basic reference mechanism. In the case of *Crookes v Wikimedia Foundation*, 2008 BCSC 1424, before the British Columbia Supreme Court, Kelleher J described them in the following terms:

> 29. A hyperlink is like a footnote or a reference to a website in printed material such as a newsletter. The purpose of a hyperlink is to direct the reader to additional material

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[7] See *Research in Motion UK Ltd v Inpro Licensing SARL and Others,* [2006] EWHC 70 (Pat). Emphasis added.

[8] See *DVD Copy Control Association Inc. v. A.T. McLaughlin*, No. CV 786804 (Cal. Super. Ct. 2000). The judgment was overturned on appeal but on a different point.

from a different source. The only difference is the ease with which a hyperlink allows the reader, with a simple click of the mouse, to instantly access the additional material.[9]

17. Similarly, in *United States v. Navestrad*, No. 07-0199/AR, Crim. App. No. 20030335, 14 May 2008, the United States Court of Appeal for the Armed Forces compared sending a hyperlink to "*sending someone the address of a store or of a location of a building.*"[10]

18. Finally, it may be noted that hyperlinks come in several different types. For example, one may distinguish between a simple hyperlink that takes the user to the homepage of a site and a direct hyperlink that takes the user to a specific page of a website, e.g. a document hosted in a particular part of the website. In addition, a hyperlink may be "embedded" in a line of text, a practice which some authors and courts have taken to indicate that the author of the text endorses the linked content[11]. For example, in the case of *Crookes v Wikimedia Foundation* mentioned above, Justice Kelleher suggested that a respondent may be found liable for defamation if he wrote "the truth about [Mr X] can be found here" and "here" was hyperlinked to defamatory words. We do not suggest that this particular analysis is correct, however: providing an embedded link is better understood as a matter of convenience on the part of the author, rather than any kind of endorsement of the linked material. In any event, it is important to have regard to the different types of linking techniques when determining liability.

b) Factors to be taken into account in cases involving website linking

19. The use of hyperlinks has given rise to a considerable amount of litigation over the past decade, mainly in the context of defamation and copyright infringement claims[12]. In addition, several cases have addressed the question of criminal liability for linking to a site containing illegal content. While the standards to be applied in defamation, intellectual property or criminal law cases obviously differ, having regard to the different kinds of liability at issue in each case, there are a core number of factors which in our view should be borne in mind when examining a case involving liability for hyperlinks. These are set out below.

i. A hyperlink is primarily a reference, which readers are free to follow or not

20. In the case of *Crookes v Wikimedia Foundation* mentioned above, the question arose whether the publisher of a newsletter should be held liable in defamation for posting hyperlinks to websites containing defamatory material. The trial judge considered that, although a hyperlink provided immediate access to material published on another

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[9] Available at http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1424/2008bcsc1424.html. The judgment was confirmed on appeal and the case is now pending before the Supreme Court of Canada. The British Columbia Court of Appeal judgment is available at http://www.canlii.org/en/bc/bcca/doc/2009/2009bcca392/2009bcca392.html

[10] The judgment is available here: http://pub.bna.com/eclr/070199_051408.pdf

[11] See Alain Strowel and Nicolas Ide, *'Liability with Regard to Hyperlinks'*, 24 Colum.-VLA J.L. & Arts 403 (2000-2001) at 425. The article is available here: http://www.deepblueintel.com/articles/ebooks/1847205623%20Peer-to-peer%20File%20Sharing.pdf

[12] For an overview of US cases, see for example Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years* (2001), available at: http://www.law.berkeley.edu/journals/btlj/articles/vol16/sableman/sableman.pdf

website, this did not amount to republication of the content on the originating site. This was because a reader was free to decide whether or not to follow the hyperlinks provided. Merely providing readers with directions to another website was not the same as being responsible for publishing its content.[13] Moreover, it exaggerated the significance of the link to suppose that every reader would necessarily follow it. As the trial judge said:

> 20. [T]he issue in this case is not how accessible the website is, but rather, if anyone followed the hyperlinks posted on the p2pnet site. Without proof that persons other than the plaintiff visited the defendant's website, clicked on the hyperlinks, and read the articles complained of, there cannot be a finding of publication.

21. A similar approach was followed by the High Court of England and Wales in relation to search engines in the case of *Design Technica Corporation v Google UK Ltd and Ors* [2009] EWHC 1765 (QB)[14]. In that case, Eady J considered that "*when a snippet is thrown up on the user's screen in response to his search, it points him in the direction of an entry somewhere on the Web that corresponds, to a greater or lesser extent, to the search terms he has typed in. It is for him to access or not, as he chooses*"[15]. He went on to hold that:

> Here, an analogy may be drawn perhaps with a search carried out in a large conventional library. If a scholar wishes to check for references to his research topic, he may well consult the library catalogue. On doing so, he may find that there are some potentially relevant books in one of the bays and make his way there to see whether he can make use of the content. It is hardly realistic to attribute responsibility for the content of those books to the compiler(s) of the catalogue.[16]

Eady J concluded that the defendant search engine could not be regarded as a publisher of the words complained of, whether before or after notification of the alleged defamatory material.

22. Similarly, while the inclusion of a hyperlink provides an opportunity to visit a website, the reader remains free to decide whether to go to the website. The simple act of calling attention to something should not, on its own, be enough to attract liability.[17]

23. Equally, a hyperlink should not, of itself, be regarded as an endorsement. To quote from Sir Tim Berner-Lee, the inventor of the HTTP protocol: *"Normal hyperlinks do not of themselves imply that the document linked to is part of, is endorsed by, or endorses, or has related ownership or distribution terms as the document linked from."* [18]Sir Tim

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[13] See paras .30-32.

[14]Full text of the judgment is available here: http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2009/1765.html&query=%22hyperlink%22+and+%22defamation%22&method=boolean.

[15] A snippet is the small part of relevant text that comes up on the screen in response to a search. It usually features under the main hyperlink.

[16] See paragraph 52 of the judgment.

[17] See the third party submission before the Supreme Court in the *Crookes v Wikimedia Foundation* cited above: http://www.bccla.org/othercontent/10Crookes_argument.pdf.

[18] See Sir Tim Berners-Lee, *Commentary on Web Architecture: Links and Law* (April 1997), available at: http://www.w3.org/DesignIssues/LinkLaw. Emphasis added.

further commented that "*the intention in the design of the web was that normal links should simply be references, with no implied meaning*".[19] Whether a person endorses the content of another website is something to be determined by his or her explicit language, for example "I agree with what website X says about Y", not from the mere provision of a link. Even where a person appears to endorse the content of another website, it must still be shown that the person knew of the specific content alleged to be unlawful, and that it was unlawful.

ii. The content of a website may vary over time

24. Establishing knowledge of the unlawful content of the linked site is especially important given that the content of a website may vary over time. In the *Radikal* case,[20] the defendant was prosecuted for having provided a link to an online magazine that was banned in the Federal Republic of Germany, on the basis that the magazine had published guidance on how to sabotage railway lines. The German public prosecutor argued that the creation of the link was akin to an act of distribution of illegal texts. However, the prosecution ultimately failed because the defendant had created the link before the article in question was published. In particular, the court found that the defendant could not be found guilty for failing regularly to check the content of the online publication. To have held otherwise would have placed a very heavy burden on any person who published links to other sites. It would also have raised difficulties in determining how often a person should be required to check sites that he had previously linked to, for the sake of identifying any illegal content. In order to establish criminal liability, it would also be necessary to show that the person who created the link knew that the content of the site was illegal in the first place.

iii. No liability without knowledge of the unlawful content on the linked site

25. A number of intellectual property cases make it clear that knowledge of the illegal nature of the content being hyperlinked is a necessary element of a finding of liability. For example, in *IFPI v Belgacom Skynet*, no. 1999/AR/3372, 13 February 2001[21], the Brussels Court of Appeal considered that the creation of links to MP3 files, which allowed the reproduction of musical recordings without the consent of the rights holders, *when one knew or should have known they were illegal,* constituted an unlawful act. We do not agree that liability can arise from constructive knowledge rather than actual knowledge of illegal content. Nonetheless, the case is relevant in showing the importance of establishing knowledge as a necessary element of liability for any link to obviously unlawful content.

26. The principle that liability should not be imposed without establishing knowledge of the unlawful material is also well-established in defamation cases. Thus, in *Bunt v Tilley* [2006] EWHC 407 Q.B., which concerned the liability of Internet Service Providers for defamatory postings made on Internet chat rooms, Eady J held that:

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[19] Ibid.

[20] *Amstgericht Berlin-Tiergarten*, June 30, 1977, MMR, 1998/1, p. 49, note St. Htftig, available at http://www.online-recht.de/vorent.html?AGBerlin-Tiergarten970630+ref=Strafrecht.

[21] Available at: http://www.article19.org/resources.php/resource/2235/en/index.php?lang=en.

> to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as has long been recognised in the context of editorial responsibility...
>
> [F]or a person to be held responsible there must be knowing involvement in the process of publication of the relevant words. It is not enough that a person merely plays a passive instrumental role in the process.[22]

27. It is respectfully submitted that the same principles apply in all cases involving the use of hyperlinks to material determined by a court to be unlawful, i.e. knowledge of the unlawful material should always be a necessary element of liability.

III. UNLAWFUL CONTENT ONLINE AND PROPORTIONALITY

a) Potential chilling effect on the use of hyperlinks

28. As we have made clear above, the use of hyperlinks is part of the basic grammar of the Internet. ARTICLE 19 is therefore concerned that the Grand Chamber should have regard to their importance when determining the issues in the present case. In particular, any undue restriction on material containing hyperlinks or web addresses is likely to set a deeply unwelcome precedent.

29. As noted above, hyperlinks refer readers to other sources and while the link remains static, the content of those sources may change over time. By restricting the freedom of groups and individuals to publish links to other websites, the Court would effectively be indicating to a wide range of groups, including advertisers, internet service providers, hosting services and website publishers that they could be penalised for the content of websites over which they have no control[23]. As such, the Court should be slow to establish principles that inhibit or discourage the practice of linking, as it is likely to have profound implications for the free transmission of information and ideas. As Alain Strowel and Nicolas Ide point out in *'Liability with Regard to Hyperlinks'* (24 Colum.-VLA J.L. & Arts 403 (2000-2001)), imposing constraints on linking would be akin to *'restricting the thesaurus of the ever-expanding encyclopedia formed by the Web'.*

b) The proper approach to unlawful online content and proportionality

30. In any case involving a website whose content is alleged to be illegal, the starting point for determining what measures may be proportionate is to consider those actions taken against the site itself. If, for example, a site is said to contain illegal content, then the most proportionate action will be civil or – where sufficiently serious – criminal measures directed against the person responsible for the content, who in many cases will not be the

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[22] Para. 22 and 23.

[23] See, *mutatis mutandis, Carter v British Columbia Federation of Foster Parents,* 2005 BCCA 396. The British Columbia Court of Appeal concluded that the defendant could not be held liable in defamation for publishing a newsletter containing a link to an Internet Forum which itself contained defamatory materials. The reason for this was that the defendant had no control over the contents of the Internet Forum containing the defamatory materials. The judgment is available here: http://www.canlii.org/en/bc/bcca/doc/2005/2005bcca398/2005bcca398.html.

publisher or host of the site. Only if measures against the person responsible are not practicable will it be proportionate to apply to a court for an order requiring the publisher, host or internet service provider to remove the content in question.

31. In ARTICLE 19's view, the principle of proportionality means that only in the most exceptional cases will it be reasonable to seek removal of a link to another site, i.e. where (i) the content in the linked site is clearly unlawful; and (ii) the linking site knew or can be reasonably taken to have known that the content in the linked site was unlawful. This would for example be the case if a person put a link to a child pornography site on his webpage. In such circumstances, the act of providing a link to such a site would itself constitute a criminal act, e.g. knowingly facilitating child sexual abuse.

32. In other cases not involving such serious criminality, i.e. the overwhelming majority of cases, it will not be proportionate to impose restrictions on a website due to the links it contains to other sites. In particular, requiring the removal of a link without first addressing the source of the illegal content will always be a disproportionate step. If, for instance, the illegal content is removed from the linked site, the link ceases at the same time to connect to illegal content. On the other hand, if only the hyperlink is removed, this will not prevent the illegal content from continuing to be accessible via the linked site's web address. Therefore, to attack the provider of the link is aiming at the wrong target. Action should instead always be directed against the offending site in the first place. As such, ARTICLE 19 believes that any restriction on the freedom of expression of an organisation in circumstances such as those of the present case where the original website does not appear to have been the subject of either civil or criminal measures is both disproportionate and counter-productive.

33. Moreover, we take the view that penalising an organisation for the illegal content contained in a third-party website, in circumstances where it has not been established that the organisation knew or ought to have known that the content of the third party's website was illegal is a disproportionate interference with that organisations' right to freedom of expression. This is especially so when the unlawful content of the third-party website has not been taken down and there is therefore no clear evidence to suggest that that content is unlawful.

CONCLUSION

34. This case is important because the Internet is a primary means of freedom of expression. Hyperlinks are a very important part of the internet because everyone uses them. It is no exaggeration to say that the Internet itself is a series of hyperlinks.

35. In considering liability for hyperlinks, regard must be had to the fact that hyperlinks are primarily used for reference purposes; users always have a choice whether or not to follow them; the content of a website changes over time; and knowledge is a crucial ingredient for establishing liability.

36. Measures aimed at websites for the links that they contain to other sites are almost certainly bound to be disproportionate in circumstances in which: (i) there is no indication that civil or criminal measures have been directed against the original website; (ii) there is no indication that the person providing the link knew that the content was illegal.

37. For the Court to hold otherwise would produce an insidious chilling effect on the future use of hyperlinks, and thereby restrict the very basis of freedom of expression on the Internet itself.

Submitted on 29 September 2011