Estonia

Statement to the Harju County Court on the criminal prosecution of

Dmitry Linter, Dmitry Klenski, Maksim Reva and Mark Siryik

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Introduction

ARTICLE 19, Global Campaign for Freedom of Expression, understands that four men – Messrs. Linter, Klenski, Reva and Siryik – accused of instigating the riots which rocked Tallinn in April 2007 will go on trial on 14 January 2008, charged with "organising a disorder involving a large number of persons, ... [resulting] in desecration, destruction, arson or other similar acts", an offence which is punishable by up to five years' imprisonment under Article 238 of the Estonian criminal code.

ARTICLE 19 is an international non-governmental organisation (NGO) dedicated to the promotion of freedom of expression, which takes its name from Article 19 of the *Universal Declaration of Human Rights*.[1] From its London headquarters and regional offices, ARTICLE 19 works globally to protect and promote the right to freedom of expression. ARTICLE 19 is well known for its expertise on international law and standards on freedom of expression, and regularly intervenes in court proceedings at national, European and other international court levels.[2]

Through this short Statement, ARTICLE 19 aims to assist the Harju County Court, which is hearing the cases against Messrs. Linter, Klenski, Reva and Siryik, by providing an overview of international standards applicable to restrictions on freedom of expression on the basis of the need to maintain public order. Particular attention will be given to the relevant jurisprudence of the European Court of Human Rights.

Summary of facts as understood by ARTICLE 19

According to information and translations made available to us,[3] the charges against the first three defendants stem from their roles as leaders of the Night Watch (*Öine Vahtkond* or *Ночной дозор*) group, which was established in 2007 in order to prevent the relocation of the Bronze Soldier memorial from the Tõnismägi hillock in central Tallinn to the city's Defence Forces Cemetery. The demonstrations against the removal descended into riots between 26-28 April 2007, in which about 50 people were wounded, one person was killed and substantial material damage was caused. The fourth defendant, Mr Siryik, who was at the material time a minor, is charged for his role as the leader of the 'Nashi' Russian youth group, which participated in the organisation of the protests.

The Soviet-era Bronze Soldier monument, originally named the 'Monument to the Liberators of Tallinn', commemorates the Soviet war dead in the battle against German occupying forces, and as such was perceived by many Estonians as a symbol of Soviet occupation. The riots surrounding its relocation were interpreted in the international

[1] UN General Assembly Resolution 217A(III), 10 December 1948.
[2] For an overview of these interventions, see http://www.article19.org/publications/law/court-interventions.html.
[3] ARTICLE 19 takes no responsibility for any comments based on a mistaken translation or an incorrect or incomplete understanding of the facts, as they are set out in this Statement.

media as an expression of frustration by ethnic Russian residents and citizens of Estonia against perceived discrimination, with the removal of the monument being seen as a deliberate insult.[4] Indeed, the indictment of Mr Linter states that "Linter deliberately started from the beginning of 2007 to create among the population an atmosphere of protest … [by] establishing a connection between the project of relocating the memorial located at Tõnismägi and discrimination against Russians by state authorities."

The indictment against Mr Linter sets out in detail the steps taken by the accused to organise the protests around the Bronze Soldier. It does not allege that Mr Linter himself committed violent acts, nor does it, in our reading, argue that Mr Linter directly encouraged the use of violence. Rather, it seeks to establish that the accused organised an illegal gathering, and created an atmosphere of hostility amongst the Russian minority towards the authorities which led to a willingness amongst the participants to use violence.

The indictment illustrates how Mr Linter allegedly fostered the willingness to resist the authorities illegally by citing from a leaflet circulated by the Night Watch Group. The passages cited are as follows:

> They spat us in our soul … they humiliated the honour and respect of the monument's defenders … they want to root the Russianness from the Russians living in Estonia, interrupt their connection with the homeland … make us slaves of the national elite … yesterday the soldier protected us, today we should protect him … The former leader of Night Watch, Vladimir Studenetsky, gave his life in the battle for the monument.

The indictment further cites several intercepted phone conversations, which show how Mr Linter coordinated a number of meetings and spoke to several journalists, telling them repeatedly that the authorities had used brutal force against peaceful protestors. In one conversation, Mr Linter speaks of how the "wave will hit" when people come together, in another he tells a certain Andrei Gontsarov that if he wants to battle then he should come to Tallinn, where there will be "fun". We understand that the indictments against the remaining defendants are similar in content.

ARTICLE 19 is of the view that the facts of the case, as represented above, clearly fall within the protection of the guarantee of freedom of expression as enshrined in human rights treaties to which Estonia is a party. The relevant legal standards are elaborated below, followed by an application of the law to the facts of the present case. We respectfully urge the Harju County Court to uphold Estonia's international obligations in the area of freedom of expression, and accordingly to acquit the defendants.

Relevant International Law

The legitimacy of restrictions on freedom of expression

[4] See, for example, "Tallinn tense after deadly riots", BBC News, 28 April 2007, available at http://news.bbc.co.uk/2/hi/europe/6602171.stm.

It is recognised in international law that the right to freedom of expression is not absolute and may be restricted to protect certain important social interests, including public order. Any restriction must, however, comply with the conditions laid down in two major human rights treaties to which Estonia is a party, the *European Convention on Human Rights* (ECHR)[5] and the *International Covenant on Civil and Political Rights* (ICCPR).[6] The relevant provisions are broadly similar in each of these treaties; Article 10(2) of the ECHR states:

> 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.

This translates to a three-part test, according to which interferences with freedom of expression are legitimate only if they (a) are prescribed by law; (b) pursue a legitimate aim; and (c) are "necessary in a democratic society".

Each of these elements has specific legal meaning. The first requirement will be fulfilled only where the restriction is 'prescribed by law'. This implies not only that the restriction is based in law, but also that the relevant law meets certain standards of clarity and accessibility. The European Court of Human Rights has elaborated on the requirement of "prescribed by law" under the ECHR:

> [A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.[7]

The second requirement relates to the legitimate aims listed in Article 10(2), which include 'the prevention of disorder or crime'. To satisfy this part of the test, a restriction must genuinely pursue one of these aims; the underlying intention of a restriction, either as set out in law or as that law is applied in a specific case, on freedom of expression may not be to pursue a political agenda or other unrecognised interest.[8]

The third requirement requires any restrictions to be "necessary in a democratic society". The word "necessary" means that there must be a "pressing social need" for the restriction.[9] The reasons given by the State to justify the restriction must be "relevant and

[5] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.
[6] UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.
[7] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para.49.
[8] See Article 18 of the ECHR.
[9] See, for example, *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 48 (European Court of Human Rights).

sufficient"; the State should use the least restrictive means available and the effect on freedom of expression must be proportionate to the aim pursued.[10]

Principles applicable to restrictions for the prevention of disorder

International courts have dealt with a significant number of cases involving restrictions on freedom of expression in the area of public order. The great majority of these cases have been decided on the 'necessity test', giving rise to a body of jurisprudence from which a number of general principles can be drawn.

1. Freedom of expression extends to unpopular and controversial ideas

The European Court of Human Rights has consistently held that freedom of expression is not limited to opinions considered correct or constructive. The following statement appears in many of its decisions in public order cases:

> Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "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".[11]

The protection of public order may thus not be used as a cover for the suppression of ideas which are considered unpalatable.

2. There is little scope for restrictions on political expression

The Court views political speech as deserving the highest degree of protection; it has often held that "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention".[12] While it recognises the principle that where "remarks incite to violence … the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression",[13] the Court has been very careful to distinguish remarks and acts which are intended to contribute to democratic debate about the functioning of the government from those whose which rather intend to undermine the democratic order. It has warned that "there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest."[14]

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[10] See, for example, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).
[11] See, for example, *Zana v. Turkey*, 25 November 1997, Application No. 18954/91, para. 51 (European Court of Human Rights); *Sürek v. Turkey* (No. 4), 8 July 1999, Application No. 24762/94, para. 54 (European Court of Human Rights).
[12] See, for example, *Lingens v. Austria*, 8 July 1986, Application no. 9815/82, para. 42.
[13] *Karatas v. Turkey,* 8 July 1999, Application No. 23168/94, para. 50 (European Court of Human Rights).
[14] *Ibid.*, paras. 50-52.

3. The government must tolerate greater criticism than others

Another consistent feature of the jurisprudence of the European Court of Human Rights on freedom of expression is its position that "the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician."[15] This is because, "[i]n a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion."[16] It is a basic principle in any democracy that governments are elected to serve the people; it follows that they should tolerate far greater and more forceful criticism of their functioning than may be expected from a private individual.

4. The Government must utilise the criminal law with restraint

It is well-established in the case law of the European Court of Human Rights that the State should show restraint in use of the criminal law to restrict freedom of expression. The criminal law is a blunt instrument and violations often result in prison sentences or other harsh penalties. It should therefore be used only as a last resort. In *Castells v. Spain*, the Court noted:

> [T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.[17]

In *Sener v. Turkey*, the Court stated that this principle applies even in situations involving threats to public order:

> Contracting States cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.[18]

5. Only the threat of direct harm to public order or national security justifies using the criminal law to restrict expression

In assessing whether a restriction on freedom of expression is 'necessary in a democratic society', the European Court of Human Rights will always "look at the interference in the

[15] See, for example, *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para. 46 (European Court of Human Rights).
[16] *Ibid.*
[17] *Ibid.*
[18] *Şener v. Turkey*, 18 July 2000, Application No. 26680/95, paras. 40, 42 (European Court of Human Rights).

light of the case as a whole, including the content of the impugned statements and the context in which they were made."[19] The purpose of this contextual approach is to assess whether, in the circumstances of the particular case, it was reasonable for the domestic authorities to fear that the statement in question would indeed *be likely to cause direct harm* to public order.

The Court's approach may be illustrated by its decision in *Arslan v. Turkey*.[20] The applicant in this case had been convicted of "disseminating propaganda undermining the indivisibility of the nation" after publishing a book in which he described Turks as "invaders and persecutors who formed Turkey by conquering the lands of other peoples."[21] He also hailed a battle at the village of Silopi as "resistance" of the Kurdish people which announced the "joyful news of the day when they would tear down the fortress of violence of Turkish chauvinism."[22]

The European Court of Human Rights noted that the author "intended to criticise the action of the Turkish authorities in the south-east of the country and to encourage the population concerned to oppose it" but that he had not intended to incite a violent uprising. Therefore, his conviction had not been 'necessary in a democratic society'.[23] Key to this finding was the fact that:

> [A]lthough certain particularly acerbic passages in the book paint an extremely negative picture of the population of Turkish origin and give the narrative a hostile tone, they do not constitute an incitement to violence, armed resistance or an uprising; in the Court's view this is a factor which it is essential to take into consideration..[24]

In a similar vein, the Supreme Court of the United States has repeatedly held that speech may not be prohibited unless it is *directed* to inciting lawless action *and* is in fact likely to do so. In the seminal case of *Brandenburg v. Ohio*, the Supreme Court stated:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[25]

Application of the law to the facts of the present case

The case-law described above demonstrates that the European Court of Human Rights sets a high standard for restrictions on freedom of expression, particularly where political speech is concerned. On its face, Article 238 of Estonia's criminal code may be

[19] See, for example, *Gerger v. Turkey,* 8 July 1999, Application No. 24919/94, para. 46 (European Court of Human Rights).
[20] *Arslan v. Turkey*, 8 July 1999, Application No. 23462/94 (European Court of Human Rights).
[21] *Ibid.,* para. 45.
[22] *Ibid.*
[23] *Ibid.,* para. 50.
[24] *Ibid.,* para. 48.
[25] *Brandenburg v. Ohio*, 395 US 444 (1969) (United States Supreme Court), at 447.

compatible with this standard. ARTICLE 19 believes, however, that any interpretation of Article 238 which leads to a conviction of Mr Linter would place Estonia in breach of its international obligations, since there is no compelling evidence in the indictment that Mr Linter intended the demonstration against the relocation of the Bronze Soldier to be anything other than peaceful. While we have not had an opportunity to study the indictments against the other defendants, we understand they are similar in nature and thus have similar concerns in respect of them.

At the outset, it is clear that the caustic criticisms of the authorities made by Mr Linter in the leaflet he disseminated and in interviews with journalists do not in themselves warrant the ongoing prosecution. The European Court of Human Rights' position that freedom of expression extends to statements which "offend, shock or disturb" reflects the understanding that in a democracy expression of a broad range of views is essential and strong language is sometimes used. The Court has often stressed that political expression may entail "recourse to a degree of exaggeration, or even provocation"[26] and that "a certain degree of hyperbole and exaggeration is to be tolerated".[27] Governments should never restrict expression merely because it shocks or because it seems to present an exaggerated point of view.

Nonetheless, restrictions on freedom of expression may still be justified if the expression presents a demonstrable danger to public order. The jurisprudence cited above shows that neither the making of a provocative statement nor the actual occurrence of violence are in themselves sufficient. The authorities must demonstrate that the occurrence of the violence was the intended result of the defendant's statement. It should be recalled that in *Arslan v. Turkey*, the applicant's harsh attacks on the Turkish State and praise of Kurdish insurgents did not justify his criminal conviction, despite their occurrence against the backdrop of 15 years of often violent unrest. An important consideration was the fact that while Arslan had encouraged resistance to official policy, he had not in fact incited violence.

Nothing in the indictment convincingly suggests that Mr Linter intended the demonstrations he was organising to become violent. His statements during phone conversations that a "wave will hit" and that there will be a "fun" battle in Tallinn can be understood in many ways, depending on their context, which is not elaborated on in the indictment. In any case, such remarks, made to one person in a private telephone conversation, can hardly amount to rousing a mass of protestors to violent behaviour. Indeed, the indictment itself tends to focus on the creation of an atmosphere in which participants were willing to use violence, rather than actual incitement to violence. In the context of protection of public order, this is simply not the standards under international law.

Based on the content of the indictment, it is difficult to avoid the conclusion that Mr Linter is being prosecuted as a convenient substitute for those individuals amongst the crowd of protestors who decided to turn violent, and may be difficult to identify in

[26] See, for example, *Bladet Tromso v. Norway*, 20 May 1999, Application no. 21980/93, para. 59.
[27] *Steel and Morris v. United Kingdom*, 15 February 2005, Application no. 68416/01, para. 90.

hindsight. Although this may well be frustrating for the authorities, it cannot justify legal action against Mr Linter.

We note, finally, that an important purpose of the right to freedom of expression is precisely to allow members of and groups in society to express their discontent peacefully, if stridently. In this way, respect for freedom of expression can help avoid just the sort of disruption to public order that forms the backdrop to this prosecution. It is particularly important that minorities, including Estonia's Russian-speaking minority, are not unduly limited in their ability to expression their views, even when these contain frustration and discontent. A criminal conviction in this case, involving a prominent critic of the government, would not only breach international standards on freedom of expression. It would also be likely to inflame the sense of injustice felt by the some of the Russian-speaking minority and might even sow the seeds for more of the very kind of unrest which the prosecution ostensibly seeks to punish.

Recommendations:

ARTICLE 19 urges the Harju County Court to take such steps as are consistent with the applicable rules of criminal procedure to dispense with the case against Mr Linter and his co-defendants. If possible, we recommend summary dismissal of the prosecution. Otherwise, we recommend that Mr Linter and his co-defendants be found innocent and absolved of all charges.