



**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**APP. NO. 618/18**

**BETWEEN**

**RUSLAN GENNADYEVICH SOKOLOVSKIY**

**Applicant**

**- and -**

**THE RUSSIAN FEDERATION**

**Respondent Government**

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**THIRD-PARTY INTERVENTION SUBMISSION BY**

**ARTICLE 19: GLOBAL CAMPAIGN FOR FREE EXPRESSION**

**AND**

**THE HUMAN RIGHTS CENTRE OF GHEENT UNIVERSITY**

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## INTRODUCTION

1. This third-party intervention is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19) and the Human Rights Centre of Ghent University (jointly the Interveners). The Interveners welcome the opportunity to intervene in the case, by leave of the President of the Court, granted on 19 June 2020 pursuant to Rule 44 (3) of the Rules of Court. As directed, the submission does not address the facts or merits of the Applicant's case.
2. The Applicant's case concerns the prosecution of the Applicant for a series of videos posted on his YouTube and VKontakte channel on a variety of subjects. For instance, the videos contained the Applicant's comments on a ban of an atheist group from a social network in the Chechen Republic, comments on hate mail from religious believers, his criticism of the Russian Orthodox church and showed the Applicant playing Pokémon in a church. The Applicant was prosecuted and convicted under the provisions of the Russian Criminal Code for the offences of 'public actions insulting religious beliefs' and 'incitement of hatred or enmity', and sentenced to three and a half years' imprisonment conditional on two-year probation.
3. The Interveners find that the case raises important questions on the permissibility and scope of restrictions on freedom of expression in the name of protecting religious beliefs, the feelings of religious believers and inter-religious harmony. It also concerns the degree to which freedom of expression may be restricted in order to protect individuals and groups against incitement, i.e. 'incitement of hatred and enmity' as defined under the domestic legislation. They believe that the case offers the opportunity for the European Court of Human Rights (the Court) to provide guidance on the distinction between prohibitions of blasphemy (that are not permitted under international human rights law) and incitement to discrimination, hostility and violence (that States are obliged to prohibit under international human rights law). In order to assist the Court in determining these issues, in this third-party intervention, the Interveners provide:
  - i) The overview of international and comparative standards on freedom of expression insofar as they apply to religious insult, i.e. expression deemed offensive to religious believers or denigrate or disparage religious beliefs or dogmas;
  - ii) The analysis of permissible scope for restricting incitement to hatred, in particular in cases where the aim is to protect others' right to freedom of religion, under international freedom of expression standards;
  - iii) The criteria that the international freedom of expression standards provide for distinguishing between incitement and expression deemed offensive to religious believers, including the analysis of the permissible scope for imposition of prison sentences;
  - iv) Wider contextual information on how the relevant provisions - under which the Applicant was prosecuted - are interpreted and enforced by the national authorities of the Respondent Government and the possible ramifications of this case for freedom of expression in the country.
4. The Interveners hope that this information will provide ample evidence in support of their concerns that the types of speech restrictions involved in the present case are overbroad and open to arbitrary and discriminatory application.

## SUBMISSION

- i) Freedom of expression and protection of religious beliefs**
5. From the outset, the Interveners highlight that the Court has consistently stated that freedom of expression, as provided under Article 10 of the Convention, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for an

individual's self-fulfilment.<sup>1</sup> Article 10 has been interpreted by the Court as being 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."<sup>2</sup> Such ideas, which should be openly discussed, are protected in view of the values of pluralism, tolerance and broadmindedness on which a democratic society is based. Freedom of expression does not imply that an individual is to be protected from exposure to a religious view simply because it is not his or her own.<sup>3</sup> For these reasons, the Court has found, in a number of cases concerning religious insult, a violation of freedom of expression under Article 10 of the Convention.<sup>4</sup>

6. Similarly, the UN Human Rights Committee (Human Rights Committee), the treaty body constituted by independent experts tasked with monitoring implementation of the International Covenant on Civil and Political Rights (ICCPR), has determined in its General Comment No. 34 that the scope of protection afforded to the right to freedom of expression by Article 19 para 2 of the ICCPR is similarly broad; and it also covers "religious discourse."<sup>5</sup> Importantly, the Human Rights Committee has stated authoritatively that "the scope of [Article 19 paragraph 2 of the ICCPR] embraces expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of Article 19, para 3 and Article 20."<sup>6</sup> The Human Rights Committee's approach is therefore consistent with that of the European Court: any expression that pertains to religious discourse, even when it may be deeply offensive, falls within the protective scope of Article 10 of the European Convention on Human Rights (the Convention), subject to the permissible limitations set out in Article 10(2) of the Convention.
7. The Interveners recall that under the conditions for restrictions of the right to freedom of expression under Article 10 para 2 of the Convention (so called three-part test), laws prohibiting 'religious insult' raise two connected concerns: i) they do not pursue a legitimate aim, and ii) they are not necessary in a democratic society. An analysis of international human rights standards shows (see in more detail below) that to resolve these concerns, it would be necessary to assume the legitimate aim of such laws is to protect individuals from the advocacy of religious hatred constituting incitement to hostility, discrimination, or violence (per Article 20 para 2 of the ICCPR), and also read into the law the essential elements of the offence of "incitement." Where Article 20 para 2 of the ICCPR is properly implemented in national laws in more generic "incitement" offences, however, specific "religious insult" laws would be duplicative and therefore redundant.
8. Under Article 10 para 2 of the Convention, and under Article 19 para 3 of the ICCPR, any restriction of the right to freedom of expression must pursue one of a series of exhaustively listed "legitimate aims." "The protection of the reputation or rights of others", within this listing in both instruments, has a narrow meaning. The Human Rights Committee has clarified that, for Article 19 para 3 of the ICCPR, "rights of others" means *the rights of persons*, either individually or as members of a community. While this may apply to individuals as defined by their religion or belief, the right does not attach to religions or beliefs as such.<sup>7</sup> It follows from this that there is no human right to be free from exposure to ideas or opinions that are offensive, even if they are offensive to a person's religion or belief. It is, therefore, not a legitimate aim to impose limitations on the right to freedom of expression to protect individuals' feelings from offense, including in relation to ideas or opinions that offend their religion or belief.
9. The HR Committee has been unambiguous, in General Comment No. 34, in making clear that "religious insult" laws do not comply with the ICCPR, except in the specific narrow circumstances under Article 20 para 2 of the ICCPR (see below).<sup>8</sup> This legal position on religious insult laws has been supported by other UN human rights bodies. Even before the General Comment was adopted, successive UN Special Rapporteurs on the promotion and protection of the right to freedom of expression and opinion (Special Rapporteur on FoE) indicated that limitations on the

right to freedom of expression were “designed in order to protect individuals against direct violations of their rights” and “are not designed to protect belief systems from external or internal criticism.”<sup>9</sup> The 2008 Joint Statement of the Special Rapporteur on FoE together with the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information, stated:

The concept of defamation of religions does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have reputations of their own.

Restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones.<sup>10</sup>

10. Further, since 2011, the UN Human Rights Council has refrained from adopting highly contentious resolutions urging States “combating defamation of religions” and dropped any reference to defamation of religions or religious insult since the adoption of Resolution 16/18 of 24 March 2011 on “combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief”.<sup>11</sup> By deliberately omitting any reference to “defamation of religions,” Resolution 16/18 embodied a *de facto* rejection of the term and denial of its legitimacy in the UN human rights system; and has since been consolidated through similar resolutions adopted by the Human Rights Council and General Assembly.<sup>12</sup>
11. The UN Working Group on Arbitrary Detention also held that “international law does not permit restrictions on the expression of opinions or beliefs which diverge from the religious beliefs of the majority of the population or from the State prescribed one.”<sup>13</sup>
12. The 2012 Rabat Plan of Action (Rabat Plan), that elaborates on the nature of States’ international human rights obligations on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,<sup>14</sup> also noted the “negative impact of anti-blasphemy laws”, the Rabat Plan indicates that such laws are incompatible with States’ international human rights obligations and recommended that States repeal defamation of religion laws as such laws “have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion.”<sup>15</sup>
13. European human rights bodies have also repeatedly pointed to the incompatibility of the protection of religions and beliefs with international human rights law. In its Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion, the Parliamentary Assembly of the Council of Europe considered that “national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence” and recommended that:

In view of the greater diversity of religious beliefs in Europe and the democratic principle of the separation of state and religion, blasphemy laws should be reviewed by the governments and parliaments of the member states.<sup>16</sup>
14. The Council of Europe’s Venice Commission subsequently recommended inter alia that:
  - a. [I]ncitement to hatred, including religious hatred, should be the object of criminal sanctions as is the case in almost all European States ...

- b. That it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component [and]
  - c. That the offence of blasphemy should be abolished (which is already the case in most European States) and should not be reintroduced.<sup>17</sup>
15. Notably, although some the Council of Europe Member States maintain criminal or administrative laws punishing blasphemy and/or religious insult,<sup>18</sup> there is arguably emerging movement towards the abolition of blasphemy prohibitions in Europe. Several Member States, such as Denmark, the United Kingdom, Iceland, Norway and Malta have all repealed criminal prohibitions on blasphemy.
16. Last but not least, the Interveners also observe that religious insult laws have often a discriminatory impact on the freedom of expression of atheists and believers of minority religions or beliefs. As the Parliamentary Assembly of the Council of Europe (PACE) has recognised, “national law and practice concerning blasphemy and other religious offences often reflected the dominant position of particular religions in individual states. In view of the greater diversity of religious beliefs in Europe and the democratic principle of the separation of state and religion, blasphemy laws should be reviewed by the governments and parliaments of the member states.”<sup>19</sup>
17. These concerns are shared by special procedures of the Human Rights Council. In his report to the UN General Assembly, the UN Special Rapporteur on freedom of religion or belief observed:
- Anti-blasphemy laws often give States licence to determine which conversations on religion are admissible and which ones are too controversial to be voiced. The Special Rapporteur notes that when governments restrict freedom of expression on the grounds of “insult to religion”, any peaceful expression of political or religious views is subject to potential prohibition. In practice, those laws can be used for the suppression of any dissenting view in violation of international human rights standards protecting freedom of opinion and expression and freedom of religion or belief.
- [...] Legislation on religious offences is thus often used to facilitate the persecution of members of religious minority groups, dissenters, atheists and non-theists. In many States, individuals whose beliefs constitute dissent from religious doctrine or beliefs held by the State have been subjected to criminal sanctions, including life imprisonment or capital punishment, under the auspices of ‘fighting religious intolerance’ or ‘upholding social harmony.’<sup>20</sup>
18. The Interveners share these concerns and submit that, in their experience, “religious insult” laws are rarely applied to protect persons with minority religions or beliefs from attacks. As such, these prohibitions violate the right to freedom of expression as well as guarantees against discrimination.
- ii) Permissible scope for restricting incitement to hatred, including to religious hatred**
19. Article 20 para 2 of the ICCPR obliges States to prohibit “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” The Human Rights Committee has explained that restrictions imposed under Article 20 para 2 must be also compliant with the test set out in Article 19(3).<sup>21</sup> As already briefly mentioned earlier, the scope of State obligations to prohibit incitement to violence, discrimination and hostility under Article 20 para 2 of the ICCPR is authoritatively clarified in the Rabat Plan of Action, the outcome document of a series of expert meetings convened by the Office of the UN High Commissioner for Human Rights (OHCHR). According to the Rabat Plan, any restrictive measures imposed under Article 20 must not only meet the three-part test of Article 19(3) but should also take into account the following key criteria:

- *The context of the expression*: the expression should be considered within the political, economic, and social context in which it was communicated;
- *The speaker*: in particular, the position of the speaker, and their authority or influence over their audience. The speaker must address a public audience and their expression include advocacy of hatred targeting a protected group based on protected characteristics and constituting incitement to, inter alia, violence;
- *The intent of the speaker*: the speaker must specifically intend to engage in advocacy of violence and intend for or have knowledge of the likelihood of the audience being incited to violence;
- *The content of the expression*: what was said, including the form and the style of the expression, whether the expression contained direct or indirect calls for discrimination, hostility or violence, and the nature of the arguments deployed and the balance struck between arguments;
- *The extent and magnitude of the expression*: the analysis should examine the public nature of the expression, the means of the expression and the intensity or magnitude of the expression in terms of its frequency or volume;
- *The likelihood of harm occurring*, including its imminence.

These key criteria are also effectively applied by the European Court of Human Rights in its case law on Article 10 ECHR, including in some Grand Chamber judgments.<sup>22</sup>

20. From a comparative perspective, almost all of the Council of Europe member states (except for Andorra and San Marino) provide for an offence of incitement. In some of these countries (such as Austria, Cyprus, Greece, Italy and Portugal) the law punishes incitement to acts likely to create discrimination or violence, not incitement to mere “hatred.” In others (such as Lithuania), the law penalises both, though incitement to violence carries more severe penalties.<sup>23</sup>
21. In most member states, incitement to religious hatred is a subset of incitement to hatred generally; as the term “hatred” generally covers racial, national and religious hatred in the same manner. In Georgia, Malta, Slovakia and the former Yugoslav Republic of Macedonia, religion is not specifically seen as a ground for hatred.<sup>24</sup> In several States – such as Armenia, Bosnia and Herzegovina, Latvia, Montenegro, Serbia, Slovenia, Ukraine – the fact that incitement to hatred has been committed or has actually provoked violence constitutes an aggravating circumstance. In the majority of member states, the incitement to hatred must occur in public.<sup>25</sup> In Armenia and France, the fact that the incitement is committed in public represents an aggravating circumstance.<sup>26</sup> In Austria and Germany, the incitement to hatred must disturb the public order in order for it to become an offence.<sup>27</sup> In Turkey, it must clearly and directly endanger the public.<sup>28</sup> Some States provide for specific and more stringent provisions in relation to hatred through the mass media, such as Armenia, Azerbaijan, Czech Republic and Romania.<sup>29</sup>
22. Intent to stir up hatred is a necessary element of the offence of incitement in States such as Cyprus, Ireland, Malta and Portugal.<sup>30</sup> In the UK, the Racial and Religious Hatred Act 2006 inserted into the 1986 Public Order Act a new part 3A entitled “Hatred against persons on religious grounds.” In which the primary offence is to use “threatening words or behaviour or to display any written material that is threatening, if the defendant thereby intends to stir up religious hatred.”<sup>31</sup> “Religious hatred” is defined as “hatred against a group of persons defined by reference to religious belief or lack of religious belief.”<sup>32</sup> Notably, the scope of the act is

circumscribed by the following provision which protects freedom of expression: “Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religious or beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.”<sup>33</sup> Thus, all but the most threatening speech is protected.

23. Outside of the Council of Europe, the US Supreme Court has, through its jurisprudence on the First Amendment of the US Constitution, developed a test for determining the constitutionality of restrictions on free speech. As formulated in *Brandenburg v Ohio*, speech which advocates violation of law is protected except where it is directed to inciting or producing imminent lawless action and is likely to produce it.<sup>34</sup> This development of the “clear and present danger” doctrine serves to prevent restrictions on speech that merely have a remote likelihood of inciting unlawful action by imposing the requirements of imminence and likelihood. This analysis does not consider the element of intent however.
24. In Canada, “the wilful promotion of hatred against any identifiable group” through the communication of statements is an indictable offence under the Criminal Code.<sup>35</sup> Any “identifiable group” covers any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation. Canadian jurisprudence has indicated that this definition is specific enough to be enforceable and its infringement on freedom of expression was minimal. In *R v Keegstra*, the Supreme Court found that, although the law interfered with freedom of expression, it was justified under the Canadian Charter of Rights and Freedoms because it had a rational connection to its objective, it was not unduly limiting, and the seriousness of the violation was not severe as the content of the hateful expression has little value to protect.<sup>36</sup> In *R v Krymowski*, the Supreme Court added that courts should then consider the “totality of the evidence” to conclude whether a group had fallen victim to hate speech.<sup>37</sup>

### iii) Distinctions between incitement to hatred and religious insult

25. As noted earlier, in General Comment No 34, the Human Rights Committee gave the clearest and most authoritative statement that is significant to the current case. It stated that legislation criminalising disrespect to a religion or belief system – including laws on blasphemy, defamation of religions and religious insult and religious offence – are incompatible with international human rights law unless
  - They genuinely constitute prohibitions on incitement to discrimination, hostility or violence *and*
  - Also meet the standards of Article 19 para 3 of the International Covenant on Civil and Political Rights (ICCPR) and other provisions of the ICCPR, including those on non-discrimination.<sup>38</sup>
26. The Interveners are aware that some claim that the boundaries between religious insult and incitement to hatred are sometimes difficult to identify or are “easily blurred.”<sup>39</sup> They therefore recommend the Rabat Plan for the guidance it gives courts in clarifying these “blurred lines.” In particular, the following points of principle are worth noting:
  - “Incitement” under Article 20 para 2 of the ICCPR supposes a focus on the specific intent of the speaker to cause acts of discrimination or violence against individuals targeted because of their religion or belief, as well as the likelihood and imminence of those harms occurring in the particular context. The subjective feelings of persons offended or insulted by that speech is therefore not pertinent to the key elements of this offence, since the focus is instead on preventing specific harmful actions that may be incited by speech, and the culpability of the speaker for those outcomes. Thus, the intent and position of the

speaker and, in particular, their ability to influence their audience to take harmful action, is what is most relevant.

- State responses to incitement under Article 20 para 2 of the ICCPR must be proportionate, with responses restrictive of expression considered only as a measure of last-resort, and less coercive means considered in the alternative. Since Article 20 para 2 of the ICCPR requires States to *prohibit* incitement but not to *criminalise* it, States should apply a variety of legal means to respond to it, including civil, administrative and other measures. The criminal law penalties should be limited to the most severe forms of incitement and “as a last resort measures to be applied in strictly justifiable situations, when no other means appears capable of achieving the desired protection of individual rights in the public interest.”<sup>40</sup> Moreover, the availability of numerous non-coercive measures outside of the criminal law should be considered, in particular as less restrictive means may indeed be more effective in countering intolerance and discrimination.
- The Rabat Plan (as well as the Human Rights Council Resolution 16/18) sets out a series of positive policy measures States should take to create an enabling environment for the rights to freedom of expression and freedom of religion or belief. Several of these actions, for example in the field of education, are preventative. Others are more reactive, for example, the need to speak out against incidents of intolerance. This demonstrates that international human rights law does view religious intolerance as a potential human rights concern, and the obligation of the State is not to do nothing in response to incidents of religious intolerance: certain interventions into public discourse may be necessary, though they do not need to limit the right to freedom of expression, and indeed it may be counter-productive to resort to censorship. The crux of the Rabat Plan of Action is that violence and discrimination, as well as the advocacy of hatred constituting incitement to these acts, is best prevented through open dialogue rather than through censorship.

27. Hence, under international freedom of expression standards, absent the criteria outline earlier, even extreme views on religious issues deserve protection. An insult to religious feelings and sentiments does not necessarily incite to hatred against individual believers of that religion. Moreover, in the view of the Venice Commission “in a true democracy, imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme. Ensuring and protecting open public debate should be the primary means of protecting inalienable fundamental values like freedom of expression and religion at the same time as protecting society and individuals against discrimination. It is only the publication or utterance of those ideas that are fundamentally incompatible with a democratic regime because they incite to hatred that should be prohibited.”<sup>41</sup> This approach is also reflected in the Court’s case law, as the Court at several occasions has reiterated “that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite to hatred or religious intolerance.”<sup>42</sup>

28. The Interveners also highlight that the Court has previously held that when expression did not stir up or justify “violence, hatred or intolerance of believers”, it “should not be made subject to the threat of imposition of a custodial sentence, and that interference with freedom of expression in the form of criminal sanctions may have a chilling effect on the exercise of that freedom.”<sup>43</sup> Importantly, this principle also applies to prison sentences that are suspended or conditional.<sup>44</sup>

#### **iv) Contextual information on interpretation and enforcement of relevant provisions in Russia**

29. The Interveners note that the Russian legislation, in particular the provisions of Article 282, Part



1 of the Criminal Code (incitement to hatred and enmity) and Article 148, Parts 1 and 2 of the Criminal Code (religious insult), under which the Applicant was prosecuted and convicted, do not comply with the international human rights standards, outlined in the previous section; are neither compatible with the standards under Article 10 of the Convention.<sup>45</sup> Together with other provisions of the Criminal Code, the acts under these provisions are typically referred to as acts of “extremism” in the court decisions and in the media or in general perception of the public.<sup>46</sup> The Interveners also observe that these provisions are most frequently used in cases concerning web postings (in particular the sharing of xenophobic videos, songs and memes)<sup>47</sup> and in cases of online statements critical of religion (almost exclusively Orthodox Christianity), for example atheist memes.<sup>48</sup>

30. In particular, these provisions employ terminology that is either vague or so subjective as to empower an arbitrary or abusive interpretation. The provisions of Article 282 of the Criminal Code go beyond the provisions of Article 20, para 2 of the ICCPR. Prohibited action includes “the incitement of hatred or enmity, as well as abasement of dignity.” There is no reference to incitement to discrimination, and violence; although “enmity” in Russian is a synonym of “hostility.” Moreover, Article 148 does not pursue a legitimate aim as it provides protection to ideas or beliefs *themselves*, and not to the rights of people on the basis of their religion or belief.
31. The Interveners observe that the Russian criminal law does not outline a specific test for assessing incitement cases, in September 2018, the plenary meeting of the Supreme Court of the Russian Federation adopted a Resolution on the use of several articles of the Criminal Code, including Article 282 of the Criminal Code.<sup>49</sup> Importantly, the Resolution stressed that whenever these articles are applied, fundamental freedoms may only be restricted as a last resort, in accordance with the Constitution and international law. The Resolution also clarified the process for evaluating the context of a public statement in relation to the motive of a defendant or the assessment of whether a statement constitutes a danger to society. The Supreme Court recommended to take into account a number of factors outlined in the Rabat Plan, such as the form, content and number of published materials in question, the context of the publication, the presence of any commentary describing the publisher’s attitude toward the material, the entire content of the defendant’s online presence and any personal data or information, the size and composition of the post’s audience, and readers’ reactions to the publication. Although the Interveners welcome the Supreme Court’s affirmation of a number of criteria set out in the Rabat Plan, they note that the Resolution was adopted after the proceedings in the Applicant’s case have been completed. It also remains to be seen whether this will improve the practice of the lower courts: in the past, the latter have largely ignored the guidance of the Supreme Court concerning similar cases.<sup>50</sup>
32. Further, the Interveners also note that when assessing ‘extremism cases’ - cases under provisions of Articles 282 and 148 of the Criminal Code - the Russian courts over-rely on expert opinions, rather than assessment of the six-part test set out in the Rabat Plan. Same as in the present case, since the 2000s, all ‘extremism’ cases almost indispensably involve academic expert opinion.<sup>51</sup> Typically, law enforcement and courts seek linguistic expertise or may also consider reports from social psychologists and other experts. In practice, however, the experts do not only clarify certain linguistic or other aspects of the evidence that require specialist expertise, but also answer questions concerning the legality of the impugned materials. These questions are sometimes formulated indirectly and/or using alternative wording, in order to circumvent the legal provision that limits experts’ input to matters within their specific competence.<sup>52</sup> Thus, in practice experts determine the criminality of the impugned speech in place of judges, who merely refer to the experts’ conclusions and let those substitute their own assessment. In such circumstances the relevant assessment by experts clearly goes far beyond resolving mere language and religious issues, such as, for instance, defining the meaning of

particular words and expressions or their religious importance. The Interveners recall that in cases where expert opinions provide in essence a legal characterisation of the impugned remarks, the Court at earlier occasions found a violation of Article 10: it found that situation unacceptable and stressed “that all legal matters must be resolved exclusively by the courts.”<sup>53</sup>

33. Moreover, Russian courts mostly limit their assessment to checking whether the impugned statements meet the definition of the offence as set out in the law. If the act is found to meet such criteria, the necessity of imposing a restriction on freedom of expression is automatically assumed. There is no assessment whether impugned acts present a risk to a democratic society, or if there is an actual danger posed by the expression under consideration. The Interveners note that in its earlier cases, the Court found that because of a lack of “a clear and imminent danger,” the restrictions of ‘extremist speech’ violated Article 10 of the Convention.<sup>54</sup>

## CONCLUSIONS

34. The Interveners hope that the Court will reflect on these standards in its deliberations on the present case. Clear guidance from the Court that delineates between expression which incites harmful acts (and may be restricted), and expression that is insulting towards religions (which may not be restricted) will encourage better compliance with existing international freedom of expression standards. In particular, the Interveners respectfully invite the Court to clearly and unequivocally state that as a matter of principle, prohibitions on “religious insult” to protect the “feelings” of religious believers through the criminal law, where there is no incitement to discrimination, hostility or violence is incompatible with Article 10 of the Convention.

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ARTICLE 19

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<sup>1</sup> *Sürek v Turkey* (No 1), App. No 2668/95, 8 July 1999 [GC], para 58.

<sup>2</sup> *Handyside v the UK*, App. No 5493/72, 7 December 1976; *Giniewski v France*, App. No 64016/00, 31 January 2006, para 43; *Tagiyev and Huseynov v. Azerbaijan*, App. No. 13274/08, 5 December 2019, para 36 and *Baldassi a.o. v. France*, App. Nos. 15271/16, 15280/16, 15282/16, 15286/16, 15724/16, 15842/16 and 16207/16, 11 June 2020, para 47.

<sup>3</sup> *Murphy v Ireland*, App. No 44179/98, 10 July 2003, para 72.

<sup>4</sup> *C.f. Giniewski v France, op.cit.*; or *Klein v Slovakia*, App. No 72208/01, 31 October 2006.

<sup>5</sup> Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, 11 September 2011, para 11.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, para 28.

<sup>8</sup> *Ibid.*, para 48.

<sup>9</sup> E.g. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 28 February 2008 A/HRC/7/14, para 85.

<sup>10</sup> Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, 15 December 2008.

<sup>11</sup> Resolution 16/18 on “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief,” 12 April 2011.

<sup>12</sup> See, Human Rights Council Resolutions 19/25 of 23 March 2012, 22/31 of 22 March 2013, 25/34 of 28 March 2014, 28/29 of 27 March 2015 as well as General Assembly resolutions 66/167 of 19 December 2011, 67/178 of 20 December 2012, 68/169 of 18 December 2013 and 69/174 of 18 December 2014.

<sup>13</sup> UN Working Group on Arbitrary Detention, Opinion No 35/2008 (Egypt), 6 December 2008, para 38.

<sup>14</sup> Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 5 October 2012, appendix in the Annual Report of the UN High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013.

<sup>15</sup> *Ibid.*, para 25.

<sup>16</sup> Council of Europe Recommendation 1805 (2007), Blasphemy, religious insults and hate speech against persons on grounds of their religion, 29 June 2007, para 15.

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- <sup>17</sup> The European Commission for Democracy through Law (Venice Commission), Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, 23 October 2008, para 89.
- <sup>18</sup> Those are Austria, Cyprus, Denmark, Finland, France (Alsace-Moselle only), Germany, Greece, Ireland, Italy, Malta, Poland, Portugal, Spain and the UK Northern Ireland only. See International Press Institute, *Out of Balance: Defamation Law in the European Union: A Comparative Overview for Journalists, Civil Society and Policy Makers*, January 2015.
- <sup>19</sup> Council of Europe Recommendation 1805 (2007), *op. cit.*, para 10.
- <sup>20</sup> Interim report of the Special Rapporteur on freedom of religion or belief, A/72/365, 28 August 2017, paras 28-29.
- <sup>21</sup> General Comment No. 34, *op. cit.*, para 50.
- <sup>22</sup> *Morice v. France*, Appl. No. 29369/10, 23 April 2015 (GC), paras 124-174; *Perinçek v. Switzerland*, Appl. No. 27510/08, 15 October 2015 (GC), paras 228-280 and recently *Monica Macovei v. Romania*, App. No., 28 July 2020; also *Savva Terentyev v. Russia*, Appl. No. 10692/09, 28 August 2018, paras 66-85 and *Tagiyev and Huseynov v. Azerbaijan*, *op. cit.*, paras 41-49.
- <sup>23</sup> Venice Commission, *Blasphemy, Insult and Hatred: Finding answers in a democratic society*, Science and technique of democracy, No 47, Council of Europe, March 2010, p. 20-21.
- <sup>24</sup> *Ibid.*
- <sup>25</sup> *Ibid.* Exceptions to this include Albania, Estonia, Malta, Moldova, Montenegro, the Netherlands, Poland, Serbia, Slovenia and Ukraine, and the United Kingdom with the exception of one's private dwelling.
- <sup>26</sup> Article 226 of the Criminal Code (Armenia); Articles 132-76 of the Criminal Code (France).
- <sup>27</sup> Section 283 of the Criminal Code (Austria); Section 130 of the Criminal Code (1998) (Germany).
- <sup>28</sup> Article 216 of the Criminal Code.
- <sup>29</sup> Article 226(2) of the Criminal Code (Armenia); Article 283 of the Criminal Code (Azerbaijan); Paragraph 260 of the Criminal Code (Czech Republic); Articles 2 and 39 of Law on Radio and Television Broadcasting 1992 (Romania).
- <sup>30</sup> Section 47.2 of the Criminal Code (Cyprus); Section 2 of the Prohibition of Incitement Act 1989 (Ireland); Paragraph 82A.1 Criminal Code (Malta); Article 240 of the Criminal Code/Law Number 65/98 (Portugal).
- <sup>31</sup> Section 29B of the Racial and Religious Hatred Act 2006.
- <sup>32</sup> Paragraph 29A of the Racial and Religious Hatred Act 2006.
- <sup>33</sup> Paragraph 29J of the Racial and Religious Hatred Act 2006.
- <sup>34</sup> *Brandenburg v Ohio*, 395 US 444 (1969).
- <sup>35</sup> Section 319(2) of the Criminal Code.
- <sup>36</sup> *R v Keegstra* [1990] 3 SCR 697.
- <sup>37</sup> *R v. Krymowski* [2005] 1 SCR 101
- <sup>38</sup> *Ibid.*, paras 48-49.
- <sup>39</sup> Venice Commission, 2008, *op. cit.*, paras 64, 68 and 89.
- <sup>40</sup> *Ibid.*
- <sup>41</sup> Venice Commission, March 2010, *op. cit.*, p. 23.
- <sup>42</sup> *Tagiyev and Huseynov v. Azerbaijan*, *op. cit.*, para 44.
- <sup>43</sup> *Mariya Alekhina and Others v. Russia*, App. No 38004/12, 17 July 2018, para 227.
- <sup>44</sup> *Mătăsaru v. the Republic of Moldova*, App. Nos 69714/16 and 71685/16, 15 January 2019, para 35.
- <sup>45</sup> *Savva Terentyev v. Russia*, *op. cit.*, para 85; *Tagiyev and Huseynov v. Azerbaijan*, *op. cit.*, para 44.
- <sup>46</sup> In Russia, the concept of 'extremism' is applied very broadly: it is an umbrella term, which is used to conflate various types of activity, including ideologically motivated violence, incitement to hatred or violence, denial of some historical events or blasphemy/defamation of religion/religious insult.
- <sup>47</sup> See, e.g., N. Yudina, *Countering or Imitation: The state against the promotion of hate and the political activity of nationalists in Russia in 2017*, SOVA Center, 19 March 2018.
- <sup>48</sup> See, e.g., Kravchenko, *Inappropriate Enforcement of Anti-Extremist Legislation in Russia*, *op. cit.*
- <sup>49</sup> The Supreme Court, Resolution No. 32 of the plenary meeting of the Supreme Court, 20 September 2018.
- <sup>50</sup> In particular, most lower courts have ignored the Supreme Court's Resolution No. 11 of the plenary meeting of the Supreme Court "Concerning Judicial Practice in Criminal Cases Regarding Crimes of Extremism," 28 June 2011.
- <sup>51</sup> *C.f.* e.g. European Commission for the Efficiency of Justice, Working Group on the Quality of Justice, Study on the role of experts in judicial systems of the Council of Europe Member States, CEPEJ-GT-QUAL82014)2Rev, 1 September 2014; T. Decaigny, *Inquisitorial and adversarial expert examinations in the case law of the European Court of Human Rights*, *New Journal of European Criminal Law*, Vol. 5 – issue 2, 2014, pp. 149 *et seq.*
- <sup>52</sup> *C.f.* Article 8 of the Law No. 73-FZ "On State Forensic Expertise in Russian Federation," 31 May 2001 which stipulates that experts should make their conclusions "within the corresponding competence;" or Article 57 Part 3 para 6 of the Criminal Procedure Code which states that an expert has the right "to refuse to submit a conclusion on issues outside the limits of special knowledge as well as in the cases when the materials supplied to him, are insufficient for giving out the conclusion." The Resolution No. 11, *op. cit.*, summarises these provisions and stipulates that "when a court examination is being assigned in extremist cases, the expert should not be questioned on legal issues concerning the assessment of an offence, which is outside their competence and within the competence of the court only. In particular, experts cannot be asked whether a text contains calls for extremist activity or whether informational materials are aimed at incitement of hatred or enmity."
- <sup>53</sup> *Tagiyev and Huseynov v. Azerbaijan*, *op. cit.*, para 47; *Dmitriyevskiy v. Russia*, Appl. No. 42168/06, 3 October 2017, para 113 and *Mariya Alekhina and Others v. Russia*, *op. cit.*, para 262.
- <sup>54</sup> *Savva Terentyev v. Russia*, *op. cit.*, para 84.