

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Yuriy SAMODUROV and
Lyudmila Vasilovskaya

Applicants

v

Russia

Respondent

Application Number 3007/06

WRITTEN COMMENTS

by

ARTICLE 19: Global Campaign For Free Expression

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I. INTRODUCTION

1. These written comments are submitted by ARTICLE 19, in accordance with the permission to intervene (with revised date of submission) granted by the President of the Chamber by letter of 20 April 2010 in accordance with the Articles 35 para 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”) and Rule 44 para 2 of the Rules of the Court.
2. The present case, *Samodurov and Vasilovskaya v Russia*, concerns the degree to which freedom of expression may be restricted in order to protect individuals and groups against incitement to religious hatred.¹ It raises critical issues which fundamentally affect the extent to which the Convention provides meaningful protection to individuals in the exercise of their freedom to express their opinions, including criticisms, about religions or belief systems. Whilst the Court has well-developed jurisprudence concerning the permissible restrictions on freedom of expression, it has not developed a clear approach on cases of incitement to hatred, including on the grounds of religion or belief.
3. Laws on incitement to hatred, often referred to as “hate speech”, are regarded as essential to protecting and promoting substantive equality, and the realisation of rights such as the right to be free from discrimination, the right to mental and physical integrity, the right to be free from torture or inhuman and degrading treatment, and the right to life. However, incitement laws need to be narrowly tailored so that they do not infringe on other human rights, including freedom of expression.
4. To assist the Court in the case, this brief addresses one of the key legal issues – the circumstances in which freedom of expression should be restricted to protect individuals and groups from hate speech on the ground of religion. It does so by examining relevant international and regional human rights law and jurisprudence and non-binding international standards (Part III), the jurisprudence of the Court to date (Part IV), and comparative approaches to laws concerning incitement to religious hatred (Part V). These authorities indicate that laws on incitement to religious hatred should be carefully defined and construed to only limit particular forms of expression which have the potential to cause harm to individuals and which are incompatible with the underlying values of human rights, such as respect for pluralism. They should not limit freedom of expression in order to protect or support a particular religious group or point of view as such.

II. INTEREST OF ARTICLE 19

5. ARTICLE 19 is an international human rights organisation which defends and promotes freedom of expression and freedom of information all over the world. ARTICLE 19 takes its name and mandate from the Universal Declaration of Human Rights, which proclaims the right to freedom of expression, including the right to receive and impart information and ideas. Over the past two decades, ARTICLE 19 has gained significant legal expertise and international experience on protection of this fundamental right. ARTICLE 19 frequently engages in litigation by providing amicus curiae briefs, representing clients directing and/or working with local lawyers to prepare briefs in cases before national courts. ARTICLE 19’s briefs, which are based on relevant

¹ Hate speech is a broad term which has been used to mean expression which is abusive, insulting, intimidating, harassing and/or which incites to violence, hatred or discrimination against groups identified by characteristics such as national or ethnic origin, race, colour, descent and religion. There is no clear definition of what constitutes “hate speech” as such in international law. The International Criminal Court for Rwanda defined hate speech as “stereotyping of ethnicity combined with its denigration” in *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, paras 1020-1021. The Council of Europe Committee of Ministers has indicated that the term “hate speech” includes “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin”. Committee of Ministers Recommendation, October 30, 1997. This definition was referred to by the European Court of Human Rights in *Gündüz v Turkey*, judgment of 4 December 2003, Application No 35071/97, para 22.

international human rights law and comparative standards, aim to assist courts to elaborate the specific meaning of freedom of expression in the context of the particular case in a manner which best protects this fundamental human right. At the European Court of Human Rights, ARTICLE 19 has been an intervener in *numerous cases including Goodwin v United Kingdom*², *Incal v Turkey*³, *Observer and Guardian v United Kingdom*⁴, and *Wingrove v United Kingdom*⁵, and is currently an intervener in *Kassabova v Bulgaria*⁶ and *Sanoma Uitgevers BV v the Netherlands*⁷.

III. INTERNATIONAL AND REGIONAL LAW ON RELIGIOUS INCITEMENT

A. International human rights law

6. Several provisions of the Universal Declaration of Human Rights (UDHR) have been interpreted to permit state action to prohibit hate speech, although the UDHR does not expressly address incitement. The legal authority to proscribe hate speech has been inferred from Article 1 of the UDHR, which provides that “[a]ll human beings are born free and equal in dignity and rights”, Article 2, which provides for equal enjoyment of the rights and freedoms proclaimed in the UDHR “without distinction of any kind, such as race, colour, (and) sex” and Article 7, which more explicitly provides for protection against discrimination and incitement to discrimination. Article 29 of the UDHR, on the other hand, refers to the duties that everyone holds to the community, and recognizes that certain limitations on rights may be necessary and legitimate to secure, among other things, “due recognition and respect for the rights and freedoms of others.”
7. The Genocide Convention of 1948 goes further and in Article 3 (c) explicitly includes “public incitement to commit genocide” among punishable acts. The Statute of the International Criminal Tribunal for the Former Yugoslavia, as well as the Statute of the International Criminal Tribunal for Rwanda, repeat Articles 2 and 3 of the Genocide Convention verbatim. The Rome Statute of the International Criminal Court replicates Article 3(c) of the Genocide Convention and provides for liability for anyone who, “directly and publicly incites others to commit the crime” of genocide.
8. Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”) protects freedom of opinion and expression. Like Article 19 of the Universal Declaration on Human Rights (“UDHR”) and Article 13 (1) of the American Convention on Human Rights, Article 19 guarantees freedom to seek and receive information.⁸
9. The right to freedom of expression applies not only to information and ideas generally considered to be useful or correct, but to any kind of fact or opinion which can be communicated. The UN Human Rights Committee has emphasised that Article 19 encompasses “news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression”.⁹ Moreover, the right to freedom of expression also extends to controversial, false or even shocking material; the mere fact that an idea is disliked or thought to be incorrect cannot justify preventing a person from expressing it.
10. Article 19(3) sets out the test for assessing the legitimacy of restrictions on freedom of expression. First, the interference must be in accordance with the law; second, the legally sanctioned restriction must protect or promote an aim deemed legitimate (respect for the rights and reputation of others, and protection of national security, public order, public health or morals); and third, the restriction must be necessary for the protection or promotion of the legitimate aim.

² Judgment of 23 March 1996, Application No 16/1994/463/544.

³ Judgment of 9 June 1998, Application No 22678/93.

⁴ Judgment of 26 November 1991, Application No. 13585/88.

⁵ Judgment of 25 November 1996, Application No. 17419/90.

⁶ Application no. 22385/03.

⁷ Application No 38224/03.

⁸ As of 13 May 2010, 165 states had ratified the ICCPR, including all the Member States of the Council of Europe.

⁹ *Ballantyne and Davidson v Canada*, Communication No 359/1989 and *McIntyre v Canada*, Communication No 385/1989, UN Doc CCPR/C/47/D/359/1989 and 385/1989/Rev 1, 5 May 1993 Annex para 11.3.

11. Article 20 of the ICCPR also sets limitations on freedom of expression and requires states to prohibit certain forms of speech which are intended to sow hatred. Article 20(2) states: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Article 20(2) does not require states to prohibit all negative statements towards national group, races and religions, but as soon as a statement “constitutes incitement to discrimination, hostility or violence” it should be banned.
12. In its jurisprudence, the UN Human Rights Committee has stated that there is no contradiction between the duty to adopt domestic legislation against incitement under Article 20(2) and the right to freedom of expression.¹⁰ In *Ross v Canada*, the Committee recognised the overlapping nature of Articles 19 and 20, stating that it considered that “restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.”¹¹ This reflects the conclusion that any law seeking to implement the provisions of Article 20(2) ICCPR must not overstep the limits on restrictions to freedom of expression set out in Article 19(3). Thus, a law properly designed to implement Article 20(2) would automatically serve the aim of protecting the rights of others, specifically to equality, thereby satisfying the test for restrictions on freedom of expression.
13. In *JRT and the WG Party v Canada*, the Committee held that application was inadmissible under Article 19(3), but reasoned that “the opinions which [the applicant] seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit”.¹² In *Faurisson v France*, concerning the criminal conviction of a French university professor for denying the existence of Nazi gas chambers, the Committee declared the communication admissible and decided the case on its merits in applying Article 19(3). However, in deciding that there was no violation of Article 19, the Committee indicated that it had “read [the statements made by the author] in their full context”.¹³
14. Besides the ICCPR, a number of other international human rights instruments are relevant to issues of incitement to religious hatred. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) goes substantially further than Article 20(2) of the ICCPR and requires states parties, among other things to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred [and] incitement to discrimination”.¹⁴ Whilst the ICERD, by virtue of its special focus on racial discrimination, does not guarantee the right to freedom of expression, it does require that measures taken pursuant to Article 4 have due regard for the principles set out in the UDHR – which include equality, non-discrimination as well as freedom of expression – and in Article 5 which provides for equality before the law in the enjoyment of a range of rights, including freedom of expression.
15. Other international human rights bodies have interpreted international human rights law on incitement to religious hatred, notably the Special Procedures of the Human Rights Council. In Joint Statement in December 2008, the UN Special Rapporteur on Freedom of Opinion and Expression 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

¹⁰ General Comment No 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Article 20), 29 July 1983, UN Doc HRI/GEN/1/Rev 6 at 133 para 2. The Human Rights Committee has also addressed the issue of incitement to religious hatred in its examination of state reports. For example, in response to a report of Italy, the Human Rights Committee expressed concern about “reported instances of hate speech, including statements attributed to certain politicians, targeting foreign nationals, Arabs and Muslims, as well as the Roma”. The Committee accordingly requested Italy to “recall regularly and publicly that hate speech is prohibited under law and take prompt action to bring those responsible to justice”. See Human Rights Committee, Concluding Observations on Italy, 24 April 2006, CCPR/C/ITA/CO/5 para 12.

¹¹ Communication No 736/1997, UN Doc CCPR/C/70/D/736/1997, 18 October 2000.

¹² *JRT and the Western Guard Party v Canada* Communication No 104/1981, UN Doc CCPR/C/18/D/104/1981, 6 April 1983.

¹³ *Faurisson v France*, Communication No 550/1993, UN Doc CCPR/C/58/D/550/1993, 8 November 1986. In *Vassilari v Greece*, Communication 1570/2007, a case concerning alleged dissemination of hate speech against a group of Roma, the Human Rights Committee deemed the facts to have been insufficiently substantiated for the purposes of admissibility. CCPR/C/95/D/1570/2007, 29 April 2009, para 6.5.

¹⁴ Article 4(a).

Special Rapporteur on Freedom of Expression and Access to Information emphasised that restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.¹⁵

16. Furthermore, the UN Special Rapporteur on the Freedom of Religion or Belief has taken the view that “expressions should only be prohibited under article 20 [of the ICCPR] if they constitute incitement to *imminent acts of violence or discrimination against a specific individual or group*” (emphasis added).¹⁶ Hate speech laws cannot be used to justify measures which have the effect of restricting forms of speech which challenge the doctrines or practices of particular forms of religion or belief. This underlines the place of the individual and of the particular threats they face at the heart of the scheme of protection. Indeed, to do otherwise could well be counterproductive. As the Special Rapporteur emphasised that: “... any attempt to lower the threshold of article 20 of the Covenant would not only shrink the frontiers of free expression, but also limit freedom of religion or belief. Such an attempt could be counterproductive and promote an atmosphere of religious intolerance.”¹⁷

B. Regional human rights law

17. Reflecting Article 20 of the ICCPR, Article 13(5) of the American Convention on Human Rights states: “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”
18. Similarly, the African Charter on Human and Peoples’ Rights (“ACHPR”) has no express reference to racial and religious hatred. Nevertheless, several provisions of ACHPR that provide for limitations on people’s right to receive and disseminate information, as well its recognition of duties as well as rights, which include requirements that rights should be exercised with due regard for the rights of others (Article 27), and to respect others and to maintain relations aimed at promoting respect and tolerance (Article 28), could be relied upon to justify hate speech laws.

C. Non-binding international standards

19. The *Camden Principles on Freedom of Expression and Equality* (“Camden Principles”) emphasise, among other things, that restrictions on harmful speech should be narrowly construed. The *Camden Principles* were drafted on the basis of discussions involving a high-level group of UN, Council of Europe and EU officials, as well as civil society and academic experts on freedom of expression and equality. They represent a progressive interpretation of international law, general principles of law and accepted state practice. The *Camden Principles* are founded on the understanding that freedom of expression and equality are fundamental and mutually reinforcing human rights.¹⁸ Building on international human rights law on incitement to hatred, specifically Article 20(2) of the ICCPR, Principle 12.1 states:

All States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate speech). National legal systems should make it clear, either explicitly or through authoritative interpretation, that:

- (i) The terms ‘hatred’ and ‘hostility’ refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.
- (ii) The term ‘advocacy’ is to be understood as requiring an intention to promote hatred publicly towards the target group.

¹⁵ 10 December 2008 <http://www.article19.org/pdfs/other/joint-declaration-on-defamation-of-religions-and-anti-terrorism-and-anti-ext.pdf>; See also Joint Statement of 27 February 2001 <http://www.article19.org/pdfs/igo-documents/three-mandates-statement-1999.pdf>

¹⁶ See Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diene, further to Human Rights Council decision 1/07 on incitement to racial and religious hatred and the promotion of tolerance, UN Doc HRC 2/3 20 September 2006, para 47.

¹⁷ Above at para 50.

¹⁸ ARTICLE 19, *Camden Principles on Freedom of Expression and Equality*, April 2009 <http://www.article19.org/advocacy/campaigns/camden-principles/index.html>

- (iii) The term ‘incitement’ refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.

IV. THE CONVENTION AND INCITEMENT TO RELIGIOUS HATRED

20. 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.¹⁹ Article 10 has been interpreted 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”.²⁰ 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.²¹
21. Article 10 paragraph 2 of the Convention provides for imposing restrictions on freedom of expression. Any restriction must: (1) be prescribed by law; (2) pursue one of the listed legitimate interests and be proportionate to that aim; (3) be necessary in a democratic society or meet a pressing social need.²² The purpose of any restriction on freedom of expression must be to protect individuals holding specific beliefs or opinions, rather than to protect religions or belief systems from criticism. The Convention does not have a provision specifically requiring states to ban hate speech.
22. Restrictions on freedom of expression may also be imposed under Article 17 in circumstances when the author of hate speech “may not benefit from the protection afforded by Article 10 of the Convention”.²³ In *Gündüz v Turkey* the Court stated that “there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.”²⁴
23. The Court’s jurisprudence indicates that individuals should be allowed to scrutinise, openly debate and criticise, even harshly and unreasonably, belief systems, opinions and institutions, as long as this does not amount to inciting hatred against individuals or groups.²⁵ At the same time, there is no requirement under the Convention to legislate in order to protect individuals from incitement to religious hatred. In the case of *Gündüz v Turkey*, the Court has stated that “tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance) *provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued*” (emphasis added).²⁶

¹⁹ *Sürek v Turkey* (No 1), judgment of the Grand Chamber of 8 July 1999, Application No 2668/95, para 58.

²⁰ *Handyside v the United Kingdom*, judgment of 7 December 1976, Application No 5493/72; *Giniewski v France*, judgment of 31 January 2006, Application No 64016/00 para 43.

²¹ *Murphy v Ireland*, judgment of 10 July 2003, Application No 44179/98, para 72.

²² *Zana v Turkey*, judgment of the Grand Chamber of 25 November 1997, Application No 18954/91 para 51; *Lingens v Austria*, Judgment of 8 July 1986, Application No 9815/82, paras 39–40.

²³ *Refah Partisi (the Welfare Party) and Others v Turkey*, judgment of the Grand Chamber of 13 February 2003, Application Nos 41340/38, 41342/98, 41343/98, 41344/98, paras 86–89.

²⁴ *Gündüz v Turkey*, judgment of 4 December 2003, Application No 35071/97, para 41. See also *Jersild v Denmark*, judgment of 23 September 1994, Application No 15890/89 para 35; *Feret v Belgium*, Judgment of 16 July 2009, Application No 15615/07 para 64.

²⁵ See also Parliamentary Assembly of the Council of Europe Recommendation 1805 (2007), Blasphemy, religious insults and hate speech against persons on grounds of their religion, para 5.

²⁶ In this case, the Court also indicated that expressions that seek to incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection as freedom of expression afforded by Article 10 of the Convention. *Gündüz v Turkey*, judgment of 4 December 2003, Application No 35071/97, para 40. See also European Commission on Racism and Intolerance, General Policy Recommendation No 7 on National legislation to combat racism and racial discrimination adopted on 13 December 2002 which recommends that the law should penalise public incitement to violence, hatred or discrimination when committed intentionally.

24. The Court has emphasised the importance of distinguishing between publications which exhort the use of violence, which are properly categorised as “hate speech”, and those which simply offer a genuine critique on a matter of public interest.²⁷ In *Gündüz v Turkey (No 1)*, the Court considered that the applicant’s comments, which attacked contemporary Turkish institutions from an Islamic perspective, were not in reality “hate speech” based on religious intolerance.²⁸ The Court has in other cases on hate speech looked closely at the material at issue to ensure that it really does contain racial or religious hate speech.²⁹
25. In its case-law, the Court has emphasised two particular elements: the *aim of the author* and the *contents of the expression at issue*. The Court pays attention to the original aim of the author of the statement, including whether it was intended to spread racist or intolerant ideas through the use of hate speech or whether there was an attempt to inform the public about an issue of general interest. This in turn may determine whether the impugned speech falls within the scope of Article 10, or is so destructive of the fundamental values of the Convention system that it is excluded from the protection of the Convention on the basis of Article 17.³⁰ In *Jersild v Denmark* a television journalist was convicted under criminal legislation prohibiting dissemination of racist insults. The Court held that his conviction was not a proportionate means of protecting the rights of others when the speech occurred within the context of a factual programme about the holding of racist opinions, even though the applicant had solicited such racist contributions and had edited them to give prominence to the most offensive. The lack of racist intent was the central consideration for a finding in favour of the journalist.
26. In terms of the content, the Court has condemned speech which has been seen a genuine threat to pluralism, one of the fundamental values of the Convention. In *Norwood v UK*, the hate speech at issue “was incompatible with the values proclaimed by the Convention, notably intolerance, social peace and non-discrimination.”³¹ In *Lehideux v France*, the Court explained that the demands of “pluralism, tolerance and broadmindedness” in a democratic society were such that a debate on matters of history must be permitted despite the memories it might bring back of past sufferings and the controversial role of the Vichy regime in the Nazi Holocaust.³² In such cases, the Court has emphasised the importance of restricting speech where the aim of the speech is to incite hatred towards a particular group along racial or national lines and where it constitutes a threat to public order.³³
27. Absent a direct threat to order, even extreme views on a matter of serious public interest – such as the practices of the Church – deserve protection. An insult to a principle or dogma or representative of a religion does not necessarily incite to hatred against individual believers of that religion. The Court has made clear that an attack on a representative of the church does not automatically discredit and disparage a sector of the population on account of their faith in the relevant religion, and that criticism of a doctrine does not necessarily contain attacks on religious beliefs as such.³⁴
28. 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

²⁷ *Ergin v Turkey* (No 6), judgment of 4 May 2006, Application No 47533/99 at para 34. *Otto-Preminger-Institut v Austria* judgment of 20 September 1994, Application No 13470/87, para 49.

²⁸ *Gündüz v Turkey*, judgment of 4 December 2003, Application No 35071/97, para 51.

²⁹ See for example, *Ceylan v Turkey*, judgment of 8 July 1999, Application No 23556/94 and *Karkin v Turkey*, judgment of 23 September 2003, Application No 43928/98.

³⁰ *Jersild v Denmark*, judgment of 23 September 1994, Application No 15890/89 para 35. See also *Garaudy v France*, 24 June 2003, Application No 65831/01.

³¹ *Norwood v UK*, judgment of 16 November 2004, Application No 23131/03.

³² *Lehideux v France*, judgment of 23 September 1998, Application No 24662/94, para 55.

³³ *Norwood* and *Garaudy* above.

³⁴ *Klein v Slovakia*, judgment of 31 October 2006, Application No 72208/01 paragraph 51; *Giniewski v France*, judgment of 31 January 2006, Application No Application No 64016/00, para 51.

incite to hatred that should be prohibited”.³⁵ In its view, it must be possible to criticise religious ideas, even if such criticism may be perceived by some as hurting their religious feelings.

29. The Venice Commission has also stated that it “does not think it necessary or 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 ... If a statement or work of art does not qualify as incitement to hatred, then it should not be the subject of criminal sanctions”.³⁶ There should only be recourse to the criminal law in cases where no other remedy appears effective. The Venice Commission recognises the problems of defining hate speech, but states that “[t]his problem, however, should be solved through an appropriate interpretation of the notion of incitement to hatred rather than through the punishment of insult to religious feelings.”
30. Whether there has been incitement to religious hatred, whether damage has been suffered and, if so, the extent of such damage is for the courts to determine. The Venice Commission has emphasised that courts are well placed to enforce rules of law in relation to these issues and to take account of the facts of each situation.³⁷ Awards of damages should be carefully and strictly justified and motivated, and should be proportional, so they do not have a chilling effect on freedom of expression.
31. Although Article 10 does not explicitly refer to artistic expression as a form of speech, it is well established as a form of speech within the Convention.³⁸ The Court has held that a wide range of artistic expression including poetry and images is protected. The European Commission noted in its Report in *Müller and others v Switzerland* that artistic expression itself has an important role in society.³⁹ “Freedom of artistic expression is of fundamental importance in a democratic society. Typically it is in undemocratic societies that artistic freedom and the freedom to circulate works of art are severely restricted. Through his creative work the artist expresses not only a personal vision of the world but also his view of the society in which he lives. In that sense art not only helps shape public opinion but is also an expression of it and can confront the public with the major issues of the day”.
32. It may be said that artistic expression is expression in the public interest and a form of political speech.⁴⁰ Recently, the Court has recognised that the novel is a particularly important form of artistic expression which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.⁴¹ The Court rejected the categorisation as hate speech of literary works by Turkish writers who had sought to describe in critical terms the plight of those conscripted into the Turkish army and their families.⁴²
33. In *Vereinigung Bildener Künstler v Austria* the Court held that an injunction which restrained a gallery without limit as to time and space from exhibiting a painting was a disproportionate interference with its rights of freedom of expression. The painting which presented a caricature of various persons was held by the court to be an important form of satire and social commentary which was intended to provoke debate. Accordingly, “any interference with an artist’s right to such expression must be examined with particular care”.⁴³ It has been argued that given that artistic works contribute to promoting the values of pluralism and tolerance underlying freedom of

³⁵ 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 23.

³⁶ Venice Commission, above at p 23.

³⁷ Venice Commission, above at 30.

³⁸ In *Müller and others v Switzerland*, the Court concluded that although confiscation of the artist’s paintings, which depicted sexual relations between men and animals, interfered with the artist’s freedom of expression, it was justified under Article 10(2) as necessary for the protection of morals. Judgment of 24 May 1988, Application 10737/84 para 27.

³⁹ Report of 8 October 1986 E Com HR. See also the judgment of the European Court of Human Rights above at para 33 where it emphasised the role of creative artists in contributing to the exchange of ideas and opinions essential for a democratic society.

⁴⁰ Frederick Schauer, *Freedom of Speech, a Philosophical Inquiry* (Cambridge University Press, 1982) pp 109-110 as to the historic link between political comment and dissent and artistic expression.

⁴¹ *Lindon, Otchakovsky-Laurens and July v France*, judgment of 22 October 2007, Application Nos 21279/02, 36448/02.

⁴² *Ergin v Turkey (No 6)* judgment of 4 May 2006, Application No 47533/99 at para 34.

⁴³ *Vereinigung Bildener Künstler v Austria*, judgment of 25 January 2001, Application No 68354/01 at para 33.

expression, artistic works should be accorded a much higher degree of protection than is currently afforded by the Court.⁴⁴

V. COMPARATIVE APPROACHES TO RELIGIOUS INCITEMENT

34. This section offers a survey of laws and jurisprudences of a number of selected countries.

A. Member States of the Council of Europe

35. According to the Venice Commission, almost all of the Council of Europe member states (except for Andorra and San Marino) provide for an offence of incitement to hatred. 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.⁴⁵

36. In most member states, incitement to religious hatred is a subset of incitement to hatred generally. The term “hatred” generally covers racial, national and religious hatred in the same manner, and often also covers hatred on the grounds of sex, sexual orientation, political convictions, language, social status or physical or mental disability. In Georgia, Malta, Slovakia and the former Yugoslav Republic of Macedonia, religion is not specifically seen as a ground for hatred.

37. 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.⁴⁶ In Armenia and France, the fact that the incitement is committed in public represents an aggravating circumstance.⁴⁷ In Austria and Germany, the incitement to hatred must disturb the public order in order for it to become an offence.⁴⁸ In Turkey, it must clearly and directly endanger the public.⁴⁹ 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.⁵⁰

38. Intention to stir up hatred is a necessary element of the offence of incitement in states such as Cyprus, Ireland, Malta and Portugal.⁵¹ 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”. 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”.⁵² Religious hatred is defined as “hatred against a group of persons defined by reference to religious belief or lack of religious belief”.⁵³ 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

⁴⁴ Anthony Lester QC, David Pannick QC and Javan Herberg, *Human Rights Law and Practice* (Butterworths Law, 2009) at 501.

⁴⁵ Venice Commission, *Blasphemy, Insult and Hatred: Finding answers in a democratic society*, Science and technique of democracy, No 47, (Council of Europe, March 2010) pp 20-21.

⁴⁶ 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).

⁴⁷ Article 226 of the Criminal Code (Armenia); Articles 132-76 of the Criminal Code (France).

⁴⁸ Section 283 of the Criminal Code (Austria); Section 130 of the Criminal Code (1998) (Germany).

⁴⁹ Article 216 of the Criminal Code.

⁵⁰ 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).

⁵¹ 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).

⁵² Section 29B of the Racial and Religious Hatred Act 2006.

⁵³ Paragraph 29A of the Racial and Religious Hatred Act 2006.

religion or belief system to cease practising their religion or belief system.”⁵⁴ Thus, all but the most threatening speech is protected.

39. In some member states, recklessness is also taken into account. In Ireland, it is a defence for the accused to prove not to have intended to stir up hatred or not have intended or not have been aware that the words, behaviour or material concerned might be threatening, abusive or insulting.⁵⁵ In Norway, the offence of incitement to hatred may be committed willingly or through gross negligence.⁵⁶ In the view of the Venice Commission, it would be appropriate to introduce an explicit requirement of intention or recklessness where it is not currently present.⁵⁷
40. The maximum prison sentence incurred for incitement to hatred ranges from one to ten years among the member states: one year (Belgium, France, the Netherlands); eighteen months (Malta); two years (Austria, Cyprus, Czech Republic, Denmark, Georgia, Iceland, Ireland, Lithuania, Slovenia, Sweden); three years (Azerbaijan, Bulgaria, Croatia, Estonia, Hungary, Italy, Latvia, Moldova, Norway, Poland, Slovakia, Spain, Turkey); four years (Armenia); five years (Bosnia and Herzegovina, Germany, Monaco, Montenegro, Portugal, Serbia, the former Yugoslav Republic of Macedonia, Ukraine); ten years (Albania).⁵⁸ In all countries, a prison term is imposed as an alternative or additional to a pecuniary fine.

B. Non-European states

41. The United States Supreme Court has, through its jurisprudence on the First Amendment of the United States Constitution, developed an extremely strict test for determining the constitutionality of restrictions on free speech. As formulated in *Brandenburg v Ohio*, the leading case on inflammatory speech in the US, 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.⁵⁹ 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.
42. In Canada, “the wilful promotion of hatred against any identifiable group” through the communication of statements is an indictable offence under the Criminal Code.⁶⁰ 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.⁶¹ 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.⁶²
43. In Australia, hate speech laws vary from one jurisdiction to another. At the federal level hate speech is prohibited on several grounds, though not on religious grounds expressly.⁶³ Section 19 of Tasmania’s Anti-discrimination Act 1998 prohibits anyone from inciting hatred on the ground of “the religious belief or affiliation or religious activity of the person or any member of the group”.⁶⁴

⁵⁴ Paragraph 29J of the Racial and Religious Hatred Act 2006.

⁵⁵ Section 2 of the Prohibition of Incitement to Hatred Act 1989.

⁵⁶ Paragraph 135(a) of the Criminal Code.

⁵⁷ Conclusions of Report of the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008) in Venice Commission, *Blasphemy, Insult and Hatred: Finding answers in a democratic society*, Science and technique of democracy, No 47, (Council of Europe, March 2010) at p 32.

⁵⁸ See comparison of penalties in Venice Commission, *Blasphemy, Insult and Hatred* at p 22.

⁵⁹ *Brandenburg v Ohio* 395 US 444 (1969).

⁶⁰ Section 319(2) of the Criminal Code.

⁶¹ *R v Keegstra* [1990] 3 SCR 697.

⁶² *R v Krymowski* [2005] 1 SCR 101

⁶³ Racial Discrimination Act 1975.

⁶⁴ Section 19.

Queensland's Anti-Discrimination Act 1991 and its amendments include similar provisions. Victoria's Racial and Religious Act 2001 states a "person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against ... other person or class of persons."⁶⁵ Significantly, the Act provides a person does not contravene this law if the person establishes that the person's conduct was engaged in reasonably and in good faith ... (a) in the performance, exhibition or distribution of an artistic work ...for ... (i) any genuine academic, artistic, religious or scientific purpose; or (ii) any purpose that is in the public interest".⁶⁶

44. The Israeli Supreme Court has found that freedom of expression may be restricted only when there is an imminent probability that the statement will cause damage to public order.⁶⁷

VI. CONCLUSION

45. As international human rights standards on religious hate speech indicate, only forms of expression which actually constitute "incitement to discrimination, hostility or violence" should be banned. Although there is not a vast jurisprudence from the Human Rights Committee, the authoritative statements of the UN Special Rapporteurs on Freedom of Opinion and Freedom of Expression, and on Freedom of Religion or Belief, indicate that speech which does not meet the criteria of Article 20 of the ICCPR should not be prohibited. In its jurisprudence on limiting expression on the grounds it incites hatred and hostility, the Court has consistently chosen to closely examine the material at issue and emphasised the importance of the intention or aim of the expression to ensure that it really does contain racial or religious hate speech. Moreover, whilst historically artistic expression has been less well-protected in Strasbourg jurisprudence than either political or commercial expression, recent jurisprudence suggests a more robust protection of artistic expression.⁶⁸ While most member states of the Council of Europe have offences on incitement to religious hatred, the Venice Commission has opined that criticism of religious ideas must be permitted, even if it may be perceived as hurtful to religious feelings. Comparative jurisprudence indicates no consistent approach to hate speech on the grounds of religion. However, comparative law from states such as the US, Canada and Australia indicates legislatures and courts developing law which curtails freedom of expression to the minimal possible degree in order to protect individuals against discrimination on account of their religion.
46. International human rights law has long emphasised the indivisibility and interdependence of all human rights.⁶⁹ Freedom of expression is not only of fundamental importance in its own right, but also essential to the realisation of other rights including the right to equality.⁷⁰ It is respectfully submitted that the Court provides clear guidance on the proper scope of laws on incitement to religious hatred and, in doing so, ensures that the right to freedom of expression is duly protected.

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ARTICLE 19

⁶⁵ Section 8(1).

⁶⁶ Section 11.

⁶⁷ *Meir Kahane and others v Board of Directors of the Broadcasting Authority*, Israeli Supreme Court, 41(3) PD 255 (1987).

⁶⁸ *Vereinigung Bildener Künstler v Austria*, judgment of 25 January 2001, Application No 68354/01.

⁶⁹ UN Vienna Declaration and Programme of Action, 25 June 1993, World Conference on Human Rights (1993) UN Doc A/CONF 157/23.

⁷⁰ ARTICLE 19, *Camden Principles on Freedom of Expression and Equality*, April 2009
<http://www.article19.org/advocacy/campaigns/camden-principles/index.html>