**IN THE EUROPEAN COURT OF HUMAN RIGHTS** **Application No. 46883/15**
**BETWEEN:**

**ZB**

**Applicant**

**-v-**

**FRANCE**

**Respondent**

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## WRITTEN SUBMISSIONS OF ARTICLE 19

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### A. Introduction and Summary

1. Freedom of expression, including the freedom to joke, is a bedrock of a democratic society. A free society can thrive only through free expression and the exchange of ideas, even ideas that shock, offend, or disturb.

2. The present case raises important questions about the interpretation of the European Convention on Human Rights (the Convention), particularly as it relates to the protection of the freedom to joke, including in bad taste. In summary, ARTICLE 19 ("the Intervener") argues that:

   a. The protection of Article 10 of the Convention is not limited to speech that is ascribed a certain political or cultural value;

   b. In particular, Article 10 protects the freedom to joke and any interference with such expression must be examined with particular care;

   c. Laws that seek to criminalise "*apologies*" of terrorism or other serious crimes pose particular problems for freedom of expression;

   d. It follows that a strict approach should be taken to proportionality in this application. The Court is invited to examine if there was any evidence of actual incitement to terrorism or the commission of other serious crimes.

### B. The Intervener

3. The Intervener is an international human rights organisation which defends and promotes freedom of expression and information worldwide. Founded in 1987, the organization takes its name from Article 19 of the Universal Declaration of Human Rights. The Intervener has regularly intervened before this Court and

other domestic, regional and international courts and human rights mechanisms.[1]

## C. The Importance of the Right to Freedom of Expression

4. The importance of freedom of expression in the Convention framework is well-recognised. It is instructive to consider why it is so important. As this Court has repeatedly held, "*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.*"[2] Freedom of expression is not therefore limited to speech that plays a particular function in the democratic process; it is important because the ability to speak freely enables "*the development of every man.*"[3] It therefore also necessarily includes speech that may be considered of lower value or is downright trivial, such as speech that may "*offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'*."[4]

5. These are the Court's foundational statements of principle. They are reflected in the approach of the Human Rights Committee to the interpretation of Article 19 of the International Covenant on Civil and Political Rights. General Comment No. 34 states that "*freedom of opinion and freedom of expression are indispensable conditions for the full development of the person.*"[5] It emphasises that "*deeply offensive*" speech is protected.[6]

6. Freedom of expression is not therefore limited to speech of particular value, such as artistic speech or political speech, but includes all forms of speech: "*it means the right to say things which 'right-thinking people' regard as dangerous or irresponsible.*"[7]

7. Regrettably, the Court often tends to ascribe a particular value to a particular form of expression when considering offensive speech cases under Article 10. In one case, the Court suggested that "*gratuitously offensive*" forms of speech fell outside the protection of Article 10 in part because such speech did "*not contribute to any form of public debate capable of furthering human affairs.*"[8] In another case, the Court found a violation of Article 10 as a result of defamation proceedings against a journalist because the journalist's

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[1] For example, *SAS v France* (App. no. 43835/11); *Delfi AS v Estonia* (App. no. 64569/09).
[2] *Delfi AS*, §131, citing, amongst other authorities, *Animal Defenders International v United Kingdom* (App. no. 48876/08). This line of authority stretches back to *Lingens v Austria* (App. no. 9815/82), §41.
[3] *Handyside v United Kingdom* (App. no. 5493/72), §49.
[4] *Handyside*, §49.
[5] United Nations Human Rights Committee [CPR/C/GC/3], adopted on 12th September 2011, §2.
[6] *Ibid.*, §11.
[7] *R v Central Independent Television plc* [1994] Fam 192, Hoffmann LJ, as he then was, at 203. Hoffmann LJ added, "*a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges … think should not be published.*" See also Harris, O'Boyle, and Warbrick, "*Law of the European Convention on Human Rights*" (3rd Ed, 2014), p.622-623.
[8] *Otto-Preminger Institut v Austria* (App. no. 13470/87), §49.

"*statements contribute to a recurrent debate of ideas between historians, theologians, and religious authorities.*"[9] More recently, the Court found no violation of Article 10 in respect of a speech that was critical of the prophet Mohammed. It seemed to contrast political speech or speech on debate on questions of public interest with expression that is offensive and profane.[10]

8. It is submitted that this instrumental test, which seeks to identify permissible forms of expression by reference to their contribution to public debate, is not only theoretically flawed, but also inconsistent with the Court's own jurisprudence on the importance of protecting all forms of speech, including the offensive.

9. Instead, the Court is invited to re-emphasise its foundational principles and clarify that a restriction on expression can only be justified where the high standard of necessity is met. The test is not whether a restriction is useful, reasonable, or desirable.[11] Exceptions to freedom of expression must "*be construed strictly*" and their need must be "*established convincingly.*"[12]

## D. Humour

10. In ancient Greece, Democritus was known as the "*laughing philosopher*." He had a tendency to "*[laugh] at the stupidity of his fellow citizens.*"[13] Put simply, the joke has been a primary form of expression in European culture for as long as democracy itself. Nowhere is this more apparent than in France. From Voltaire's *Candide* to the cartoons of *Charlie Hebdo*, humour and ridicule has proven to be an effective way of making even a serious point. As Pascal put it, "*se moquer de la philosophie c'est vraiment philosopher.*"[14]

11. It is therefore no surprise that jokes have been granted special protection by this Court. Satire is a form of artistic expression and social commentary that, due to its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Any interference with the right to such expression must be examined with particular care.[15] The Court's jurisprudence on jokes establishes the following principles:

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[9] *Giniewski v France* (App. no. 64016/00), §50.
[10] *ES v Austria* (App. no. 38450/12), §§42-3. The Court's approach has been heavily criticised (see, for example, Stijn Smet, "*Free Speech versus religious feelings, the sequel*" E.C.L. Review 2019, 15(1), 158-170) and was obviously influenced by the need to balance article 10 rights with those arising under article 9; a balance that does not arise in this case.
[11] *Handyside*, §48.
[12] *Zana v Turkey* (App. no. 18954/91), §51(i).
[13] Jan Bremmer, "*Jokes, jokers and jokebooks in Ancient Greek culture*", in J. Bremmer and H. Roodenburg, (Eds.), "*A Cultural History of Humor*" (Polity, 1997), p.17.
[14] Blaise Pascal, *Pensées*, *Géométrie-Finesse II – Fragment n° 2 / 2.*
[15] *Eon v France* (App. no. 26118/10), §60. See also, *Vereinigung Bildender Künstler v Austria* (App. no. 68354/01), §33; *Grebneva and Alisimchik v Russia* (App. no. 8918/05), §59; *Alves da Silva v Portugal* (App. no. 41665/07), §27; *Ziembiński v Poland (no. 2)* (App. no. 1799/07), §44; *Tuşalp v Turkey* (App. nos. 32131/08 and 41617/08), §48; *Welsh and Silva Canha v Portugal* (App. no. 16812/11), §30; *Sousa Goucha v Portugal* (App. no. 70434/12), §50; *M'Bala M'Bala v France* (App. no. 25239/13), §31. See also the well-reasoned three-judge minority judgment in *Sinkova v Ukraine* (App. no. 39496/11).

a. Criminal penalties for making a joke in public are likely to have a chilling effect on satirical forms of expression relating to topical issues. This is particularly problematic given that satire can play a very important role in free debate on questions of public interest;[16]

b. A particularly wide margin of appreciation should be given to parody in the context of freedom of expression.[17] Where jokes are involved, the margin of appreciation granted to the state is narrowed;[18]

c. When assessing proportionality, it is relevant that a joke is not a gratuitous or malicious personal attack on an individual.[19] An assessment of the *intention* of the person making the expression is required;[20]

d. Exaggeration and immoderation are allowed. In one case, a criminal conviction for calling individuals (including civil servants who were not public figures) a "*numbskill,*" a "*poser,*" a "*dim-witted official.*" and "*dull bosses*" was disproportionate.[21] So too was an injunction prohibiting the display of an "*offensive,*" "*outrageous,*" and sexualised satirical painting of an obscure politician;[22]

e. "*Strong criticisms,*" "*offensive language,*" and "*vulgar phrases*" are also permitted. Style constitutes part of communication as a form of expression and is protected together with the content. It is necessary to set the impugned remarks within the context and form in which they were expressed[23] and to assess how a reasonable reader interprets them;[24]

f. It is only where a joke is so extreme as to engage Article 17 of the Convention, that a conviction for satire will be upheld. A "*preposterously grotesque*" and "*blatant display of a hateful and anti-Semitic position*" from a comedian, which was intended to "*go further*" than the "*biggest anti-Semitic rally since the Second World War*" is a rare example of a joke that fell outside the protection of Article 10.[25]

12. The Interveners highlight that these are the standards that must be applied. The Court must satisfy itself that the national authorities have applied standards which are in conformity with the principles embedded in Article 10.[26]

13. These principles are echoed in the jurisprudence of Council of Europe member states and around the world. For example:

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[16] *Eon*, §61; *Alves da Silva*, §29.
[17] *Sousa Goucha*, §50.
[18] *Welsh and Silva Canha*, §30.
[19] *Eon*, §57; *Grebneva and Alisimchik*, §§58-9.
[20] *Tuşalp*, §48. The issue was whether the "*sole intent of the offensive statement is to insult.*"
[21] *Ziembiński*, §§41-45.
[22] *Vereinigung Bildender Künstler*, §§31-39.
[23] *Tuşalp*, §48.
[24] *Sousa Goucha*, §50.
[25] *M'Bala M'Bala*, §§34-42.
[26] *Tuşalp*, §42.

a. In Spain, two recent cases have underlined the protection provided to jokes, even in the context of terrorism. In April 2017, a 21-year-old student, received a suspended one-year prison sentence and a seven-year ban from working in the public sector for a series of jokes relating to the 1973 murder of the Spanish Prime Minister by ETA. The Criminal Chamber of the Supreme Court overturned her sanction for glorifying terrorism and humiliating victims of terrorism. It held that, "*in the context of speech… there are many expressions or statements that might offend groups in society, but the mere fact that statements cause offence does not justify criminalising them.*" Restricting the right to freedom of expression was only justifiable if "*statements glorifying terrorism pose a real threat against national security, territorial integrity or public safety."*[27] To equal effect, when a lawyer joked online about the killing of a prime minister by ETA, he was acquitted of glorifying terrorism. The National Court noted that his messages had not incited anyone, either directly or indirectly, to commit a terrorism-related offence. The Supreme Court confirmed the acquittal.[28] In contrast, when a popular Spanish singer, César Strawberry, tweeted his support for the kidnapping of a prison guard by ETA and called for the King of Spain to be sent a "*cake bomb"* on his birthday, the Supreme Court upheld his conviction.[29] Laws criminalising the glorification of terrorism in Spain cause concern to specialist non-governmental organisations[30] and have had a chilling effect on artists and satirists;[31]

b. In the United Kingdom, freedom of expression has "*the status of a constitutional right with attendant high normative force.*" It is "*a fundamental right*" which "*has been recognised at common law for very many years."*[32] "*Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence".*[33] Jokes ought to be recognised as jokes. In *R (Chambers) v Director of Public Prosecutions*, a man was prosecuted for joking on twitter that he was going to blow up an airport. The Lord Chief Justice noted that, "*if the person or persons who receive or read it, or may reasonably be expected to receive, or read it, would brush it aside as a silly joke, or a joke in bad taste, or empty bombastic or ridiculous banter, then it would be a contradiction in terms to describe it as a message of a menacing character."*[34]

c. In the USA, jokes are protected by the First Amendment. It does not matter if a joke is in bad taste or obscure. "*First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose*

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[27] Judgment No. 95/2018, Tribunal Supremo Sala de lo Penal (2018).
[28] Amnesty International, "*Tweet… If you dare: how counter-terrorism laws restrict freedom of expression in Spain"*, March 2018, p.7.
[29] Judgment No. 4/2017, Tribunal Supremo Sala de lo Penal (2017).
[30] Amnesty International, "*Tweet… If you dare…"*, *op.cit.*
[31] See, for example, the attempted prosecution of two puppeteers in 2016: *New York Times*, "*Spain Dismisses Terror and Hate Crime Case Against Puppeteers*", 11 January 2017.
[32] *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, per Lord Steyn, at 297; *R v Shayler* [2003] 1 AC 247, per Lord Bingham, §21.
[33] *Redmond-Bate v DPP* [2000] HRLR 249, Sedley LJ, §20.
[34] *R (Chambers) v Director of Public Prosecutions* [2013] 1 WLR 1833, §30.

*parodies succeed."*[35] The Supreme Court has recognised that satire, even when used as "*a weapon of attack, of scorn"*, has "*played a prominent role in public and political debate"*. It is inappropriate to assess a joke based on a standard of "*outrageousness"* because, in the area of "*social discourse"*, outrageousness *"has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."*[36] The fact that society may find speech offensive is not a sufficient reason for suppressing it.[37]

## D. The Dangers of Overbroad Anti-Terrorism and Related Legislation

14. Terrorism constitutes a serious threat to human rights and democracy and action by states is necessary to prevent and effectively sanction terrorist acts. However, ARTICLE 19 respectfully agrees with the Council of Europe Commissioner for Human Rights that "*the misuse of anti-terrorism legislation has become one of the most widespread threats to freedom of expression … in Europe."*[38] Recent experience suggests that laws that criminalise "*apologies*" of "*terrorism*" and other serious crimes can inappropriately chill freedom of speech and may disproportionately target minority groups.

15. The Applicant was convicted of the offence of "*apology of mass violence and deliberate offences against life"* in the Press Law of 1881, an offence in similar terms to the offence of "*apology of terrorism.*" As the Council of Europe Commissioner explains, "*the variety of cases dealt with under provisions criminalising apology of terrorism*" in France suggests that this "*catch-all label"* is being used to punish statements that are simply "*non-consensual, shocking or politically embarrassing.*"[39] The Council of Europe Commissioner has been equally critical of similar laws in Spain, describing them as "*too broad and too vague".*[40] These criticisms reflect the concerns of civil society[41] and three United Nations Special Rapporteurs[42] at the proposed European Union Regulation on preventing the dissemination of terrorist content online, which includes, at article 2(5), a proposed offence of "*the glorification of terrorist acts.*"

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[35] *Yankee Publishing, Inc v News America Publishing, Inc.,* 809 F. Supp. 267, Leval J, at 280; approved by the Supreme Court in *Campbell v Acuff-Rose Music* 510 US 569 (1994).
[36] *Hustler Magazine, Inc. v Falwell,* 485 US 46, Chief Justice Renquist, para 51-6.
[37] *FCC v Pacifica Foundation*, 438 US 726, 745-6. See also *Street v New York,* 394 US 576, at 592: "*It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.*"
[38] Council of Europe Commissioner for Human Rights, "*Misuse of anti-terror legislation threatens freedom of expression"*, 4th December 2018.
[39] *Ibid.*
[40] *Ibid.*
[41] Amnesty International, the European Network Against Racism, European Digital Rights, the Fundamental Rights European Experts Group, Human Rights Watch, the International Commission of Jurists, and the Open Society Foundations, '*EU Counterterrorism Directive Seriously Flawed'*, 30th November 2016.
[42] Letter from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the right to privacy and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 7th December 2018 (OL OTH 71/2018).

16. There are good reasons for these criticisms, particularly as regards the law governing the apology of terrorism in France:

a. Relevant provisions under the French law are frequently used. In 2016, there were 306 convictions for the offence, with prison sentences for 232 of those;[43]

b. The penalties for the apology of terrorism are severe. The offence is punishable with up to five years' imprisonment or a fine of 75,000 euros. A year in prison is the average sentence;[44]

c. According to reports, 20% of those investigated for this offence in 2016 were minors; 6% were between the ages of 10 and 14.[45] These include a 16-year-old who posted a joke about *Charlie Hebdo* on Facebook;[46]

d. Many cases do not involve direct incitement to violence but rather revolve around drunken interactions with the police or provocative statements in school courtyards or on social media;[47]

e. The provisions on apology for terrorism are vague and lack legal certainty. They may be applied arbitrarily to limit legitimate political debate or dissenting opinions, to "*target … minority groups,*"[48] or even to prohibit commentary on broader issues in the public interest.

## E. The Correct Test

17. For the reasons set out above, the Intervener respectfully invites the Court to apply a strict test to any attempt to justify a criminal conviction of individuals for making jokes. Given the importance of freedom of expression, including of jokes, and the risks that are inherent in law that criminalise "*apologies*" for serious crimes, a conviction will not comply with Article 10 unless there is evidence of an intention to incite serious crimes. This not only reflects this Court's case law, as set out above, but it also ensures consistency with:

a. The Council of Europe Commissioner's warning that: "*Any restriction on freedom of expression must be strictly necessary to protect national security and proportionate to the legitimate aim pursued. Anti-terror legislation should only apply to content or activities which necessarily and directly imply the use or threat of violence with the intention to spread fear and provoke terror … The idea according to which restrictions to freedom of expression may be an efficient tool to combat terrorism results in an overly wide application of*

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[43] RMC, "*Apologie du terrorisme: et si la justice était-elle trop sévère?*", 13th April 2018.
[44] *Ibid.*
[45] Human Rights Watch, "*France's creeping terrorism laws restricting free speech*", 30th May 2018.
[46] Christophe Turgis, "*Charlie Hebdo : à Nantes, un adolescent de 16 ans poursuivi pour 'apologie du terrorisme' sur Facebook*," France 3, 17th January 2015.
[47] Human Rights Watch, *France's creeping terrorism laws restricting free speech*, *op.cit.*
[48] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the role of measures to address terrorism and violent extremism on closing civic space and violating the rights of civil society actors and human rights defenders, A/HRC/40/52, 1st March 2019, §34.

*concepts such as terrorist propaganda, glorification or apology of terrorism, including to contents that clearly do not incite to violence;"*[49]

b. General Comment no. 34, which states that "*such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression;"*[50]

c. The Council of Europe's guidance that, "*member states should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined;"*[51]

d. The concern of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism that "*many laws criminalize, often with a lack of precision, acts that do not amount to incitement [to terrorism] because they lack the element of intent and/or of danger that the act will lead to the actual commission of violence. These include the glorification, justification, advocacy, praising or encouragement of terrorism … The element common to these offences is that liability is based on the content of the speech, rather than the speaker's intention or the actual impact of the speech;"*[52]

e. The *Johannesburg Principles on National Security, Freedom of Expression and Access to Information,* which recommend that states can prohibit incitement to terrorist acts, but should ensure that necessary elements of such a prohibition include the following: (i) there is intent to incite imminent violence; (ii) the expression is likely to incite such violence; and (iii) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.[53]

## F. Conclusion

18. The protection of Article 10 should not be limited to speech of particular value, such as artistic speech or political speech, and should apply to protect a joke, however hideous or appalling or trivial. The Court is respectfully invited to apply

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[49] Council of Europe Commissioner for Human Rights, "*Misuse of anti-terror legislation threatens freedom of expression"*, 4th December 2018.
[50] General Comment 34, *op.cit.*, §46.
[51] Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis (26th September 2007), §19.
[52] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 1 March 2019, *op.cit.*, §37.
[53] ARTICLE 19*, Johannesburg Principles on national security, freedom of expression and access to information*, 1995, Principle 6. The Principles authoritatively interpret international human rights law in the context of national security-related restrictions on freedom of expression. They were welcomed and circulated by the UN Rapporteur on Freedom of Expression, and have been widely cited, including by courts, academics, NGOs and government officials. UN bodies continue to transmit the Principles to governments when requested to provide advice concerning the drafting of laws, regulations or policy concerning the classification of information.

a strict test to any attempt to justify a criminal conviction of an individual for making a joke, however in bad taste.

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10th October 2019