In the Case of

Dareskizb Ltd v Armenia
Application No. 61737/08

A Submission to the European Court of Human Rights on behalf of the Media Legal Defence Initiative.

15 March 2012

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IN THE EUROPEAN COURT OF HUMAN RIGHTS

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WRITTEN COMMENTS OF MEDIA LEGAL DEFENCE INITIATIVE

Pursuant to permission granted on 9 February 2012 by the President of the Third Section acting under Rule 44(2) of the Rules of Court, the Media Legal Defence Initiative ("MLDI") hereby submits written observations on the permissibility of false news provisions under Article 10 of the Convention.

1. MLDI is grateful for the opportunity to make these submissions, which seek to avoid addressing the specific facts of the case, aiming instead to provide the Court with useful background international material to assist it in its resolution of the questions before it.

2. Nevertheless, MLDI notes that the provisions with which this case is concerned are a paradigm example of wholly objectionable provisions, even assuming a state of emergency (as to the legitimacy of which MLDI does not make submissions). The Presidential Decree of 1 March 2008 states that:

> "Mass media outlets can provide information on State and internal affairs exclusively within the perimeters of official information provided by State bodies."

3. The Presidential Decree of 13 March 2008 that amended the 1 March 2008 Decree provided for a

> "ban on publication or dissemination by mass media outlets of obviously false or destabilizing information on State and internal issues, or of calls to participate in unsanctioned (illegal) activities, as well as publication and dissemination of such information and calls by any other means and forms."

4. Both provisions are self-evidently unacceptably wide in their restrictive effects. The first provision does not come close to meeting the basic requirements of freedom of expression and could on no basis meet any necessity threshold. MLDI says nothing further about it. As to the second provision, namely the ban on publication of false or destabilising information, that provision again, is on its face unacceptably vague, is unlikely to serve any legitimate aim, and bears no rational connection to any aim one might posit for it. For the reasons set out below, MLDI submits that the Court should be extremely reticent in accepting any kind of false news ban let alone one as wide as this, even (and perhaps particularly) in states of emergency. Such provisions have largely been used by repressive regimes and are neither found nor necessary within true democracies. Indeed, on the contrary, MLDI submits that such provisions are an anathema to democracy and risk undermining its very foundation.

5. Whilst national courts have examined the legality of false news provisions, so far as MLDI is aware, this is the first case in which an international court has done so. It is therefore an

extremely important case that countries and international courts across the world will look to for guidance.

6. In summary, MLDI submits:

    a. That false news provisions have been rejected by all true democracies as being contrary to the essential requirements of free speech, as inoperable and as open to State abuse.

    b. The existence of a state of emergency cannot justify false news provisions, which are unlikely to be of any material efficacy in preventing public disorder and/or are more likely to be used by the authorities to repress dissent, particularly at times of elections. Provisions governing incitement to violence should be sufficient to deal with any true public order issues.

    c. This Court should, in accordance with the approach adopted by national supreme courts in Canada,[1] Uganda,[2] Zimbabwe,[3] USA,[4] Antigua and Barbuda (Privy Council)[5] and the UN Human Rights Committee[6] hold that false news provisions are incompatible with Article 10 and, further, that no derogation from the Convention can render them lawful.

False news is entitled to full protection

7. The right to freedom of expression extends to protect the dissemination of all information and opinions, including false information. As the Court stated in *Salov v Ukraine*:

> "Article 10 does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information may not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on freedom of expression."[7]

8. The Ugandan Supreme Court, referring to Article 9 of the African Charter on Human and Peoples' Rights and Article 10 of the ICCPR concluded that:

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[1] *R v Zundel* [1992] 2 SCR 731.

[2] *Onyango-Obbo and Mwenda v Attorney General of Uganda* Constitutional Appeal No. 2 of 2002 11 February 2004 (Supreme Court of Uganda).

[3] *Chavunduka and Choto v Minister of Home Affairs & Attorney General of Zimbabwe* 22 May 2000, Judgment SC 36/2000 (Supreme Court of Zimbabwe).

[4] *New York Times Co v Sullivan* 376 US 264 (1964) (Supreme Court of the United States).

[5] *Hector v AG of Antigua and Barbuda* [1990] 2 AC 312 (judicial committee of Privy Council).

[6] In relation to Tunisian penal law criminalizing false news likely to disrupt public order: Annual General Assembly Report of the Human Rights committee, UN Doc. A/50/40, 3 October 1995, para. 89. Further concern in relation to charges imposed on Khemais Ksila: Annual Report to the UN Commission on Human Rights, Promotion and Protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1998/40, para. 99.

[7] App. No. 65518/01, judgment of 6 September 2005, 113.

> "from the foregoing definitions, it is evident that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas or truthful information."[8]

9. In that case Mulenga JSC explained that:

> "the prohibition in criminal law on publishing false news criminalises conduct that is otherwise a legitimate exercise of the constitutionally protected right to freedom of expression…[T]he issue is not whether under democracy citizens are required or permitted to make demonstrably untrue and alarming statements under any guise. A democratic society respects and promotes the citizens' individual right to freedom of expression, because it derives benefit from the exercise of that freedom by its citizens. In order to maintain that benefit, a democratic society chooses to tolerate the exercise of the freedom even in respect of "demonstrably untrue and alarming statements", rather than suppress it. I should stress that applying the constitutional protection to false expressions is not to 'uphold falsity' as implied in the majority judgment [of the lower court]. The purpose is to avoid the greater danger of 'smothering alternative views' of fact or opinion."[9]

10. Similarly, the United States Supreme Court in *New York Times Co. v Sullivan*[10] emphasized the need for erroneous statement to be protected and the consistent rejection by the United States courts of any exception to the right of freedom of expression based on a test of 'truth'.

11. In *Chavunduka & Choto v Republic of Zimbabwe* the Zimbabwean Supreme Court struck down Zimbabwe's false news provision stating:

> "Plainly embraced and underscoring the essential nature of freedom of expression, are statements, opinions and beliefs regarded by the majority as being wrong or false.[…] Mere content, no matter how offensive (save where the expression is communicated in a physically violent form), cannot be determinative of whether a statement qualifies for the constitutional protection afforded to freedom of expression."[11]

12. Similarly, the Canadian Supreme Court in *Zundel* rejected the submission that "those who publish deliberate falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech."[12]

Provisions that restrict the expression of 'false news' should not be permitted

13. Whilst reporting in a truthful and balanced way is, of course, an important professional goal for journalists, writing this goal into national law by way of false news provisions poses

[8] *Onyango-Obbo* cited above, p.10 (Mulenga JSC).
[9] *Onyango-Obbo*, cited above, at pp10-11.
[10] 376 US 264 (1964).
[11] *Chavunduka and Choto v Minister of Home Affairs & Attorney General of Zimbabwe*, cited above.
[12] *R v Zundel*, cited above, at p. 733.

unacceptable dangers to freedom of expression, with direct consequences for democratic health in the relevant state. Such provisions are objectionable on a number of fronts.

14. **First,** they have a serious chilling effect on the work of reporters. This is particularly so in situations of rapidly developing news, or where different sources contradict each other, such as where there is public unrest or civil war. In such a situation, journalists may be reticent in reporting 'news' on the basis that they are not absolutely certain as to its veracity, and fear repercussions if the veracity cannot ultimately be proved in a court of law. Consequently, individuals are deprived of potentially vital information on current developments. As Mr. Justices Goldberg and Mr. Justice Douglas said in their concurring opinions in the Supreme Court of the United States:[13]

> "It may be urged that deliberately and maliciously false statements have no conceivable value as free speech…[However] [i]f individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished….To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect "the obsolete doctrine that the governed must not criticise their governors."

15. As Mr. Justice Brennan stated: [14]

> "a rule compelling a critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to comparable "self-censorship". Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so"

16. Similarly, in *Zundel* the Canadian Supreme Court expounded at some length on the chilling effect of false news provisions: [15]

> "The danger is magnified because the prohibition affects not only those caught and prosecuted, but those who may refrain from saying what they would like to because of the fear that they will be caught. Thus worthy minority groups of individuals may be inhibited from saying what they desire to say for fear that they might be prosecuted. Should an activist be prevented from saying the "the rainforest of British Columbia is being destroyed" because she fears criminal

[13] *New York Times Co. v Sullivan* 376 US 254 (1964) at p.300-301.
[14] Ibid at p.279.
[15] *R v Zundel*, above, at p.772.

prosecution for spreading "false news" in the event that scientists conclude and a jury accepts that the statement is false…"

17. Indeed, having regard to the essential need to protect the confidentiality of sources, journalists seeking to prove the truth of their statements may frequently be unable to do so (at least without revealing their sources). Any order requiring them to do so itself has a chilling effect.[16]

18. **Secondly**, facts and opinions are not easily separated. For example, something that may be expressed in satirical terms is potentially subject to censure under false news laws. Likewise pejorative statements about those in government ("the President's actions betray an animal cunning"). A further example is settled views which become in the mind of the public 'fact'. Alternative views are liable in such a situation to be considered as the expression of 'false facts': see *R v Zundel*,[17] where the Canadian Supreme Court referred to this danger. Thus, a ban on false news can easily become a ban on opinions not favoured by the authorities or indeed, by the majority, endangering free confrontation between different points of view, which lies at the heart of democracy.

19. **Thirdly**, fact and truth are not easily separated either. Any provision which proscribes mere falsity is, by definition, impermissibly vague, and thus contrary to the 'prescribed by law' requirement in Article 10(2). Even a well-established particular truth may not always remain so. George Bernard Shaw noted that "new opinions often appear first as jokes and fancies, then as blasphemies and treason, then as questions open to discussion, and finally as established truths. "It is invidious to confer on anybody, whether executive or judicial, the power to decide what constitutes truth in a context in which that information is either to be 'banned' if found to be false or the publisher of that information is to be found liable of an offence.

20. **Fourthly**, false news provisions are objectionable because they are open to abuse by state authorities. That risk cannot be adequately dealt with by protective mechanisms such as judicial review because of the chilling effect of the relevant laws (for every "false" story published many will not be published for fear of the consequences, the trouble and expense of going to court etc.), the difficulty of courts addressing the second and third points raised above, namely separating 'fact' from 'satire' or other opinion and 'fact' from 'truth'. Moreover, there is the additional point that in repressive regimes, judicial independence itself may be open to doubt

21. **Fifthly**, states generally have sufficient power, including access to the media, to enable them to refute false statements. In *Die Spoorbond v South African Railways*[18] the South African Court of Appeal, in holding that the South African Railways (a State enterprise) could not sue in defamation, noted that:

[16] *Goodwin v United Kingdom,* App. No. 28957/95, judgment of 11 July 2002 at [39].
[17] *R v Zundel*, above, at p. 749.
[18] [1946] SA 999 (AD).

> "the normal means by which the Crown protests itself against attacks upon its management of the country's affairs is political action and not litigation, and it would, I think, be unfortunate if that practice were altered."[19]

22. The European Court of Human Rights has stated that:

> "[T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to unjustified attacks and criticisms."[20]

23. As the Privy Council stated in *Hector v AG of Antigua*:

> "… [T]hose who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind…it would on any view be a grave impediment to the freedoms of the press if those who print, or *a fortiori* those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism is based."[21]

24. **Sixthly**, even if it could be said that publication of the relevant "false news" gave rise to a risk of public disorder, such cases are likely to be extremely rare and cannot alone constitute sufficient justification for a prohibition. Indeed, it is just as likely that true statements will pose a threat to public order. Extreme opinions and true statements are at least as likely as "false facts" to cause fear, alarm or despondency and yet these are not prohibited by false news law. There is no rational reason to proscribe false statements but not true ones.

25. Whether the information is true or false is immaterial to whether it is harmful to public order. States have at their disposal a wide variety of other effective means to protect public order without resorting to banning false statements. In particular, general prohibitions in the criminal law of the state relating to public order should be entirely sufficient to deal with any real threats to public order.

26. **Finally**, whilst the publication of false news may be viewed as potentially detrimental to public good, its restriction involves far greater risks to the public good because it undermines democracy itself. This is particularly the case in new democracies where the state institutions necessary to protect democracy, in particular the judicial system, as well as the necessary elements of civil society, and in particular a robust and independent media, remain fragile. It is essential, particularly in that environment, to ensure that any executive control of information that can be released to the public is to the greatest extent possible prohibited. In that regard, MLDI submits that the Court should proceed on the basis that it is necessary and prudent to permit some abuse of freedom of expression in order to ensure that legitimate use of the right is not discouraged. As James Madison, who framed the US Constitution's protection of freedom of expression wrote:

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[19] Ibid at pp. 1012-3.
[20] *Castells v Spain* (1992) 14 E.H.R.R. 445 at [46].
[21] *Hector*, above, at 318 C and F (Lord Bridge of Harwich).

> "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It…is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits."[22]

27. It should be added that in the case before the Court there was also prior censorship. This poses special dangers for freedom of expression. Most obviously, if the authorities can prevent the dissemination of information it is impossible for people to verify whether the suppression was justified. A right of appeal to a Court creates another difficulty; namely control over the timing of the release of the relevant information. In both cases there is a serious risk of abuse by state authorities. For this reason, Article 13(2) of the American Convention on Human Rights expressly prohibits prior censorship altogether, save to protect children. This Court too has warned of the dangers in prior restraints and required that they be subject to anxious scrutiny.[23]

Judicial and UN rulings on false news provisions

28. Whilst this is, so far as MLDI is aware, the first international court to consider the legality of 'false news provisions' per se, the Inter-American Court of Human Rights issued an Advisory Opinion in 1985 in which it stated:

> "A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right o information that this same society has."[24]

29. Similarly, the UN Human Rights Committee has consistently stated that false news provisions violate freedom of opinion and expression rights.[25] That position has been adopted even with respect to laws that only prohibit the dissemination of false news that causes a threat of public unrest. In 2000 the UN Special Rapporteur stated:

> "In the case of offences such as…publishing of broadcasting "false" or "alarmist" information prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights."[26]

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[22] Quoted by the US Supreme Court in *Near v Minnesota*, 283 US 697 p. 718 (1931). The original quotation can be found in *Report on the Virginia Resolutions, House of Representatives: Report of the Committee to whom were referred the Communications of the various States, relative to the Resolutions of the Last General Assembly of the State, concerning the Alien and Sedition Laws*, 20 January 1800, at p. 571.

[23] *Observer and Guardian v United Kingdom* (13585/88) [1991] ECHR 49 (26 November 1991) at [60].

[24] Opinion OC-5/85 of 13 November 1985 Series A No. 5 para. 77.

[25] See for example Annual General Assembly Report of the Human Rights Committee UN Doc A/50/40, 3 October 1995, para. 89; Concluding Observations of the Human Rights Committee: Mauritius, UN Doc. CCPR/C/79/Add.60, 4 April 1996 para. 19.

[26] Annual Report of the UN Committee on Human Rights, Promotion and protections of the right to freedom of opinion and expression, 18 January 2000, UN Doc D/CN.4/2000/63, para. 205.

30. In 1998 the Committee criticized both Uruguay and Armenia for false news provisions.[27] In relation to Armenia it stated:

    "The Committee is concerned about the compatibility of the 1991 Press Law with freedom of expression under article 19 of the Covenant, in particular that the notion of "State secrets" and of "untrue and unverified information" (article 6 of the Press Law) are unreasonable restrictions on freedom of expression. Furthermore, the Committee is concerned about the extent of the Government's monopoly in respect of printing and distribution of newspapers." Most truly democratic countries do not have or do not apply false news provisions. In *R v Zundel*, the Canadian Supreme Court noted that it could point to no other free and democratic country that finds it necessary to criminalise false news. [28]

31. In *Chavunduka & Choto v Minister of Home Affairs & Attorney General* the Zimbabwean Supreme Court struck down Zimbabwe's false news provision stating:

> "The effect of overriding the most precious of all protect freedoms, resting as it does at the very core of a democratic society – fails for want of proportionality between its potential reach on the one hand and the 'evil' to which it is claimed to be directed on the other."[29]

National security/derogations

32. The Respondent purported to enact the relevant provision as part of a series of measures said to be necessary to deal with public order during an electoral period. MLDI submits that the Court should be particularly wary of accepting restrictions on freedom of expression, especially within the context of 'news' at such periods, when there is necessarily a particularly high risk of the incumbent regime seeking to control media outlets and repress opposition. Particular risks arise in undeveloped democracies, with immature civil society organizations and a weak independent media. MLDI submits that it is precisely at these times that freedom of expression rights must be most stringently safeguarded. The Court should provide guidance that guards against false news provisions being used to clamp down on free expressions of fact and opinion. MLDI submits that if sufficiently clear and robust, such guidance could effectively bring an end to false news laws with consequent positive effects for democracy. Those positive effects would far outweigh any harm which it may be suggested could ever be caused by the inability of states to resort to false news laws.

33. A further factor which should be taken into account when considering whether to sanction such laws is their likely efficacy. We do not live in the 19th or early 20th centuries, in which newspapers were the main means by which news was disseminated. Rather we live in the 21st century in which mobile communications, the internet and social media generally permit dissemination of information at great speed. This has two relevant effects. First, the effect of "controllable" print and broadcast news is lessened, because people look to other media.

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[27] Concluding Observations of the Human Rights Committee: Uruguay, UN Doc. CCPR/C/79/Add. 90 4 August 1998 para. 10. Concluding Observations of the Human Rights Committee Armenia UN Doc CCPR/C/79/Add.100, 19 November 1998 para. 20.

[28] *R v Zundel*, above, at p. 766.

[29] *Chavunduka and Choto v Minister of Home Affairs & Attorney General of Zimbabwe*, cited above.

Second, falsity is much harder to get away with, because it is more rapidly discoverable and discovered, thus the efficacy of false news (if any) is greatly lessened.

34. Moreover, the UN Human Rights Committee has made it clear that suppression of democratic discourse and human rights cannot be justified on grounds of national security. In *Mukong v Cameroon*[30] it stated:

> "The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; in this regard, the question of deciding which measures might meet the "necessity" test in such a situation does not arise."

35. Principle B(iv) of the Siracusa Principles[31] defines when a restriction on freedom of expression can be said to serve the needs of national security:

> "National Security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
>
> National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.
>
> National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse."

36. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information developed in 1995 by a group of 36 experts and considered an important source of authority in international law[32] state in Principle 6:

> "[E]xpression may be punished as a threat to national security <u>only</u> if a government can demonstrate that:
>
> (a) the expression is intended to incite imminent violence."[33]

37. The Supreme Court of India has held expression can only be restricted if justified by a direct and proximate nexus with the anticipated danger: "*the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'*".[34] Similarly, the United States Supreme Court has held that even advocacy of the use of force or

[30] Communication No. 458/1991, 21 July 1994 UN Doc. CCPR/C/51/D/458/1991 para. 9.7.
[31] Siracusa Principles on the Limitation and Derogation of Provision in the ICCPR, Annex UN Doc E/CN.4/1984/4.
[32] The Johannesburg Principles have been approved by the UN Special Rapporteur on Freedom of Opinion and Expression: *Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression*, 29 January 1999 paragraph [23].
[33] 1 October 1995 UN doc E/CN.4/1996/39.
[34] *S. Rangarajan v P J Ram* [1989] (2) SCR 204 at 226.

for the violation of law can only be restricted where both direct advocacy of disorder and a likelihood of imminent lawless action are proved.[35]

Conclusion

38. The right to freedom of expression extends to protect the dissemination of all information and opinions, including "false" information. Falsity is difficult to define and thus laws which ban false news are both inherently unjust and open to abuse by state authorities, which already have sufficient power to enable them to refute false statements. Such laws also have a serious chilling effect on the work of reporters. It is also important to remember, in this context, that any prohibition on the reporting of false news affects not only material which is actually banned but material which is not reported for fear of it being banned or of criminal penalty. That is why false news laws have been rejected by all true democracies.

39. The need for unrestricted freedom of expression is, if anything, greater in states of emergency than at other times. In any event, falsity is an irrelevance to any need to prevent public disorder and banning the publication of "false news" is unlikely to achieve that end in any realistic circumstances, in particular in an age of rapid communication. Even if it could, the threat to democracy posed by permitting such bans, including but not confined to the risk of them being abused by those in control, is so great that they cannot be countenanced. The relevant question for the purposes of restricting information in order to protect national security is not truth or falsity; it is whether the restriction is <u>strictly and the minimum necessary</u> to achieve that purpose, something that must be established to a high level of proof by the relevant State authorities.

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[35] *Brandenburg v Ohio* 395 US 444 (1969) at 447; see also *Whitney v California* 274 US 357 (1927) at 377.

Annex I - BACKGROUND INFORMATION ABOUT THE INTERVENER

The Media Legal Defence Initiative is a non-governmental charity which works in all regions of the world to provide legal support to journalists and media outlets who seek to protect their right to freedom of expression. It is based in London and works closely with a world-wide network of experienced media and human rights lawyers, local, national and international organisations, donors, foundations and advisors who are all concerned with defending media freedom.