

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**  
**Third Section**

**OOO Flavus v. Russia, Application no. 12468/15 and four related Applications (nos. 20159/15, 23489/15, 19074/16 and 61919/16)**

**INTERVENTION**

Pursuant to Article 36(2) of the European Convention on Human Rights, read together with Rule 44(3) of the Rules of Court

**By the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression**

**Professor David Kaye**

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**A. Introduction**

1. This is the intervention of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (“**the Special Rapporteur**”) in connection with the applications nos. 12468/15 20159/15, 23489/15, 19074/16 and 61919/16 made by OOO Flavus and others against Russia. The intervention is submitted in accordance with Article 36 of the European Convention on Human Rights (“**the Convention**”) and Rule 44 of the Rules of Court. Leave to intervene was granted on 6 December 2017.

**B. Background**

***The Special Rapporteur***

2. The Special Rapporteur is an independent expert appointed by the Human Rights Council of the United Nations. He is mandated by Human Rights Council resolution 7/36 to, *inter alia*, gather all relevant information, wherever it may occur, relating to violations of the right to freedom of opinion and expression, discrimination against, threats or use of violence, harassment, persecution or intimidation directed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression, including, as a matter of high priority, against journalists or other professionals in the field of information.
3. The Special Rapporteur’s mandate draws upon Article 19 of the International Covenant on Civil and Political Rights<sup>1</sup> (“**the Covenant**”). In discharging his mandate, the Special Rapporteur has collected and continues to collect evidence, and to report, on the extent,

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<sup>1</sup> International Covenant on Civil and Political Rights, 999 U.N.T.S .171 (1966) ( “Covenant” ).

nature and severity of restrictions and violations of freedom of expression in different countries, as well as the remedies available to address such violations by State actors.

*A pattern of abuse in State practice of the restriction of online expression*

4. The Special Rapporteur has become increasingly concerned by State practices that abuse the legitimate restrictions under Article 19(3) of the Covenant to undermine the freedom of expression. Restrictions arise from over broad reliance on ill-defined national security and public order grounds and by reference to supposed ‘extremism,’ which is often merely pretext to stifle dissent. His reports to the Human Rights Council in 2016<sup>2</sup> and 2017<sup>3</sup> reflect this concern as does his report to the UN General Assembly<sup>4</sup> in 2016, which are relied on and inform this Intervention.
5. The Intervention is presented as follows:
  - a. The Intervention deals first with the general recognition in international human rights instruments and their interpretation that the protection of online expression is equivalent to, and afforded the same protection as, other forms of expression.
  - b. Secondly the Intervention identifies examples of State practice which fail to adequately protect online expression or even impermissibly allow encroachment on such expression on weakly defined grounds.
  - c. Thirdly the Intervention explains the requirements imposed by the Covenant and other human rights instruments for assessing the lawfulness, necessity and proportionality of interferences with online expression such as website blocking and content restriction, emphasising clear limits on such restrictions and the need for practical and effective remedies to test restrictions when they are imposed.
  - d. Fourthly and finally the Intervention draws conclusions from the common requirements of these international instruments which together constrain State practice to ensure freedom of expression online.

**C. RESTRICTIONS ON FREEDOM OF EXPRESSION WHETHER ON OR OFFLINE ARE JUSTIFIED IN INTERNATIONAL HUMAN RIGHTS LAW ONLY IF THEY ARE LEGAL NECESSARY AND PROPORTIONATE**

6. As with Article 10 of the Convention, Article 19(2) of the Covenant<sup>5</sup> establishes the right to freedom of expression, which includes the ‘freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers ... or through any ... media of his choice.’ The Human Rights Committee (“the HRC”) has stressed in General Comment 34 that the ‘value placed by the Covenant upon uninhibited expression is particularly high in the circumstances

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<sup>2</sup> <https://freedex.org/new-report-on-freedom-of-expression-states-and-the-private-sector-in-the-digital-age/>

<sup>3</sup> <https://freedex.org/report-on-freedom-of-expression-and-the-internet-and-telecommunications-access-industry/>

<sup>4</sup> <https://freedex.org/report-on-critical-contemporary-challenges-to-freedom-of-expression/>

<sup>5</sup> The Russian Federation ratified the Covenant on 16 October 1973.

of public debate in a democratic society concerning figures in the public and political domain.’<sup>6</sup>

7. Article 19(3) permits restrictions only if they are ‘provided by law,’ and ‘necessary: (a) [f]or the respect of the rights or reputations of others; [or] (b) [f]or the protection of national security or of public order (ordre public), or of public health or morals.’<sup>7</sup> In General Comment 34, the HRC has cautioned that these criteria ‘may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.’<sup>8</sup>
8. The rights expressed in Article 19 are reinforced by their presence in regional human rights regimes, beyond the European Convention. Article 13(1) of the American Convention on Human Rights (“the American Convention”) and Article 9 of the African Charter on Human and People’s Rights establish a similar right to freedom of expression.<sup>9</sup> Notably, Article 13(1) of the American Convention establishes similar criteria for permissible restrictions on free expression. Perhaps cognizant of the need for human rights law to adapt to website blocking and other novel forms of censorship, Article 13(3) specifies that ‘the right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.’<sup>10</sup>
9. The UN General Assembly and Human Rights Council have recognised that the ‘same rights that individuals exercise offline must also be protected online.’<sup>11</sup> Similarly, the Inter-American Commission on Human Rights (“IACHR”) has concluded that ‘the right to freedom of expression in the terms established by article 13 of the American Convention equally protects both traditional media and the widespread expression via Internet.’<sup>12</sup>

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<sup>6</sup> U.N. Human Rights Comm., General Comment No. 34, Art. 19, Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34, ¶ 43 (Sept. 12, 2011) (“General Comment 34”), available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

<sup>7</sup> Covenant, *supra* n. 1 at Art. 19(3).

<sup>8</sup> General Comment 34, *supra* n. 6 at ¶ 23.

<sup>9</sup> Organization of American States, American Convention on Human Rights, art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“American Convention”); African Charter on Human and Peoples’ Rights, art. 9, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

<sup>10</sup> American Convention, *supra* n. 9, Art. 13(3).

<sup>11</sup> G.A. Res. 68/167, The Right to Privacy in a Digital Age, ¶ 3 (Dec. 18, 2013), available at <http://undocs.org/A/RES/68/167>; H.R.C. Res. 26/13, The Promotion, Protection and Enjoyment of Human Rights on the Internet, ¶ 1 (July 14, 2014), available at <https://undocs.org/en/A/HRC/RES/26/13>.

<sup>12</sup> Inter-Am. Comm’n H.R., Complaint before the Inter-American Court of Human Rights against Costa Rica. Case No. 12.367, “la Nación” Mauricio Herrera Ulloa and Fernan Vargas Rohmoser, ¶ 97 (28 January 2002); available at <http://www.corteidh.or.cr/docs/casos/herrera/demanda.PDF>; see also Inter-Am. Comm’n H.R., Office of the Spec. Rapporteur for Freedom of Expression, Standards for a Free, Open and Inclusive Internet, ¶ 82 (Dec. 31, 2013), available at

10. The institutions of the Council of Europe have reached the same conclusion. In 2012, the Parliamentary Assembly of the Council of Europe (“PACE”) adopted a Resolution<sup>13</sup> and Recommendation<sup>14</sup> on the protection of freedom of expression and information on the internet and online media. PACE noted that the right of freedom of expression under Article 10 ECHR and Article 19 ICCPR is typically exercised through the media, and in particular now through the internet and online media; and it called on member States to ensure respect for freedom of expression and information on the Internet and online media by public and private entities. In its response, the Committee of Ministers stressed the ‘*fundamental importance for people to be able to express themselves and access on the Internet and through online media without restrictions other than those permitted by Article 10*’ of the ECHR, and explained the need to align the freedoms of the online media with those of traditional media actors.
11. In 2016, the Committee of Ministers adopted its own Recommendation to member States,<sup>15</sup> again emphasising that the Convention applies online and that member States must respect, protect and promote fundamental freedoms on the internet. The Committee of Ministers also emphasised the need for any restriction of online rights to be subject to effective remedies: ‘Any national decision or action restricting human rights on the Internet must comply with international obligations and in particular be based on law. It must be necessary in a democratic society, fully respect the principles of proportionality and guarantee access to remedies and the right to be heard and to appeal with due process safeguards.’
12. The Recommendation sets out key internet freedom indicators, which focussed (amongst other things) on the right to freedom of expression and the right to an effective remedy, including that measures taken by State or private actors to block or restrict access to an internet platform, or to filter or remove Internet content, must comply with Article 10 of the Convention. Restrictions on internet platforms or content will only be lawful where there is ‘*pressing social need for the restriction, which is implemented on the basis of a decision by a court or an independent administrative body that is subject to judicial review*’. The restriction must be “*targeted and specific*” and it should be based on assessment of the risks of over-blocking and disproportionate banning of access to internet content.
13. The Committee of Ministers also emphasised the need to ensure that ‘*[l]aws addressing hate speech or protecting public order, public morals, minors, national security or official secrecy or data protection laws are not applied in a manner which inhibits public debate*’.

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[https://www.oas.org/en/iachr/expression/docs/publications/INTERNET\\_2016\\_ENG.pdf](https://www.oas.org/en/iachr/expression/docs/publications/INTERNET_2016_ENG.pdf) ( “IACHR 2016 Report” ).

<sup>13</sup> Resolution 1877 (2012) of 25 April 2012.

<sup>14</sup> Recommendation 1998 (2012) of 25 April 2012.

<sup>15</sup> Recommendation CM / Rec (2016) 5 of 13 April 2016.

14. In relation to remedies, the Recommendation requires that individuals should have access to judicial or administrative procedures that can impartially determine claims of violations of human rights online, without legal, procedural, financial or other barriers to seeking effective remedies. Where the authorities impose restrictions on internet content, the State must provide information ‘*in a timely and appropriate manner*’ – ‘... such as indicating websites that have been blocked or from which information was removed, including details of the legal basis, necessity and justification for such restrictions, the court order authorising them and the right to appeal.’

#### **D. AN INCREASINGLY HOSTILE ENVIRONMENT FOR ONLINE EXPRESSION IN RUSSIA AND OTHER COUNTRIES**

15. A growing number of countries, including Russia, are enacting inadequately drafted and over broad legislation that impose undue restrictions on and surveillance of online expression. The Special Rapporteur has already highlighted concerns about Russia’s ‘Yarovaya law’, which establishes, among other things, a vague criminal prohibition of online statements supporting terrorism, labelling requirements for online content distributed by religious associations, and mandatory data retention requirements for telecommunications and internet companies.<sup>16</sup> The Special Rapporteur has also expressed concerns about comparable legislation in China,<sup>17</sup> Kenya,<sup>18</sup> Malaysia,<sup>19</sup> Pakistan,<sup>20</sup> and Palestine.<sup>21</sup>
16. Characteristics of concerning legislation include failure to recognize that online expression should be accorded the same protection as offline expression; prioritizing restrictions (rather than protections) of free expression as the primary State responsibility; the lack of precisely defined limitations on online expression and justifications for these limitations; and failure to provide effective remedies to promptly determine disputes.
17. The growing legislative crackdown on online expression accompanies a notable uptick in website blocking and network shutdowns worldwide. In 2011, the previous UN Special Rapporteur on freedom of expression raised caution about the ‘emerging trend of timed (or “just-in-time”) blocking to prevent users from accessing or disseminating information at key political moments, such as elections, times of social unrest, or anniversaries of politically or historically significant events.’<sup>22</sup> In recent years, these censorship incidents have been

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<sup>16</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=3261>

<sup>17</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=14423>

<sup>18</sup> [http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL\\_KEN\\_10\\_2017.pdf](http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_KEN_10_2017.pdf)

<sup>19</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=17612>,  
<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=20955>

<sup>20</sup> [http://www.ohchr.org/Documents/Issues/Opinion/Legislation/PAK\\_8\\_2016.pdf](http://www.ohchr.org/Documents/Issues/Opinion/Legislation/PAK_8_2016.pdf)

<sup>21</sup> [http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL\\_PSE\\_16.08.17\\_2.2017.pdf](http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_PSE_16.08.17_2.2017.pdf)

<sup>22</sup> Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, U.N. Doc. A/HRC/17/27, ¶ 30 (May 16, 2011) (“A/HRC/17/27”), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/132/01/PDF/G1113201.pdf?OpenElement>; see also Afr. Comm’n

recorded in, among other countries, Cameroon,<sup>23</sup> Chad,<sup>24</sup> Gambia,<sup>25</sup> India,<sup>26</sup> Turkey,<sup>27</sup> and Venezuela.<sup>28</sup>

#### E. ASSESSMENT OF WEBSITE BLOCKING AND CONTENT RESTRICTION AGAINST INTERNATIONAL HUMAN RIGHTS STANDARDS

18. Website blocking is an extreme measure that must, like all restrictions on expression, satisfy the requirements of legality, necessity, and proportionality. The HRC has concluded that, '[a]ny restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with [Article 19(3) of the Covenant].'<sup>29</sup> Within the Inter-American system, the IACHR's Special Rapporteur for freedom of expression has also observed that 'forcing the blocking or suspension of entire websites, platforms, channels, IP addresses, domain name extensions, ports, network protocols, or any other kind of application, as well as measures intended to eliminate links, information and websites from the servers on which they are stored, all constitute restrictions that are prohibited and exceptionally admissible only strictly pursuant to the terms of article 13 of the American Convention.'<sup>30</sup>
19. The UN, IACHR, and ACHPR Special Rapporteurs and the Organization for Security and Co-operation in Europe ("OSCE") Representative on Freedom of the Media have specified the limited circumstances under which website blocking may establish a permissible restriction on freedom of expression. In their 2011 Joint Declaration on freedom of expression on the internet, they explained that:
- 'Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.'<sup>31</sup>
20. In their 2017 Joint Declaration on freedom of expression and 'fake news,' disinformation and propaganda, the international and regional experts on freedom of expression further

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Hum. & Peoples' Rts., Res. 362(LIX) 2016, *available at*

<http://www.achpr.org/sessions/59th/resolutions/362/>.

<sup>23</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22974>

<sup>24</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22826>

<sup>25</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22941>

<sup>26</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23116>

<sup>27</sup> [http://www.ohchr.org/Documents/Issues/Opinion/A\\_HRC\\_35\\_22\\_Add\\_3\\_EN.docx](http://www.ohchr.org/Documents/Issues/Opinion/A_HRC_35_22_Add_3_EN.docx)

<sup>28</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23103>

<sup>29</sup> General Comment 34, *supra* n. 6 at ¶ 43.

<sup>30</sup> IACHR 2016 Report, *supra* n. 12 at ¶ 87.

<sup>31</sup> International Mechanisms for Promoting Freedom of Expression, Joint Declaration on Freedom of Expression and the Internet, ¶ 3(a) (June 1, 2011), *available at* <http://www.osce.org/fom/78309?download=true>.

specified that website blocking ‘can only be justified where it is provided by law and is necessary to protect a human right or other legitimate public interest, including in the sense of that it is proportionate, there are no less intrusive alternative measures which would protect the interest and it respects minimum due process guarantees.’<sup>32</sup>

21. In the context of countering online extremism, the UN High Commissioner for Human Rights has reiterated these criteria. States resorting to website blocking are required to:

‘...provide evidence-based justification of the necessity and proportionality of such interference with freedom of expression. They must demonstrate how the perceived benefits of these measures outweigh the importance of the Internet as a tool to maximize the number and diversity of voices in the discussion of numerous issues. Any lack of transparency with regard to blocking or content removal measures renders it difficult to assess whether such restrictions were really necessary for the purported aim. Consequently, there is a need for much greater transparency by States to clarify what content they are filtering, blocking or removing and on what basis.’<sup>33</sup>

22. The wholesale blocking of websites rarely, if ever, satisfies the criteria for permissible restrictions on freedom of expression. Given that ‘permissible restrictions generally should be content-specific,’ the HRC has concluded that ‘*generic bans on the operation of certain sites and systems are not compatible with paragraph 3.*<sup>34</sup> Furthermore, it is ‘inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.’<sup>35</sup>
23. A 2016 resolution adopted by the Human Rights Council also ‘[c]ondemns unequivocally measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law and calls on all States to refrain from and cease such measures.’<sup>36</sup>
24. The UN High Commissioner has also found that wholesale blocking of internet platforms is ‘at odds with the individualized assessment required under human rights law.’<sup>37</sup>

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<sup>32</sup>International Mechanisms for Promoting Freedom of Expression, Joint Declaration on freedom of expression and “fake news,” disinformation and propaganda, ¶ 1(f) (Mar 3, 2017), *available at* <http://www.osce.org/fom/302796?download=true>.

<sup>33</sup> Human Rights Council, Report of the High Commissioner for Human Rights, U.N. Doc. A/HRC/33/29, ¶¶ 53 - 54 (Jul 21, 2016), *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/162/55/PDF/G1616255.pdf?OpenElement> ( “H.C. CVE Report” ).

<sup>34</sup> General Comment 34, *supra* n. 6 at ¶ 43 (emphasis added).

<sup>35</sup> *Id.*

<sup>36</sup> H.R.C. Res. 32/13, The Promotion, Protection and Enjoyment of Human Rights on the Internet, ¶ 10 (June 27, 2016), *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/156/90/PDF/G1615690.pdf?OpenElement>.

<sup>37</sup> H.C. CVE Report, *supra* n. 33 at ¶¶ 53 - 54.

**F. THE AVAILABILITY OF EFFECTIVE REMEDIES IS ESSENTIAL TO PROTECT ONLINE FREEDOM OF EXPRESSION**

25. The HRC has concluded that States should give effect to the right to freedom of expression in a manner consistent with their obligation to provide effective remedies for rights violations.<sup>38</sup> Under Article 2(3) of the Covenant, States Parties undertake:

‘(a) To ensure that any person whose rights or freedoms ... are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.’

26. The HRC attaches special importance to ‘States Parties’ establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.’<sup>39</sup> The HRC has observed that ‘the enjoyment of the rights recognised under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.’<sup>40</sup> Administrative bodies, such as internet and telecommunications regulators, ‘are particularly required to give effect to the general obligation to investigate allegations promptly, thoroughly and effectively through independent and impartial bodies.’<sup>41</sup>

27. In the context of the right to freedom of expression online, the Special Rapporteur has concluded that States ‘bear the primary duty to remediate business-related human rights abuses, particularly those they instigate, such as overbroad content restriction, unlawful user data requests and disproportionate surveillance.’<sup>42</sup> The former mandate holder has also emphasized the need for legislation restricting freedom of expression online to include ‘adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.’<sup>43</sup>

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<sup>38</sup> General Comment 34, *supra* n. 6 at ¶ 8 (emphasis added).

<sup>39</sup> U.N. Human Rights Comm., General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), ¶ 15, *available at* [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, U.N. Doc. A/HRC/35/22, ¶ 73 (Mar 30, 2017), *available at* <https://docs.google.com/viewerng/viewer?url=http://freedex.org/wp-content/blogs.dir/2015/files/2017/05/AHRC3522.pdf&hl=en>.

<sup>43</sup> A/HRC/17/27, *supra* n. 22 at ¶ 69.



28. The importance of effective remedies in respect of restrictions on freedom of expression is underlined in the Court's case law. The Court has made clear that an applicant must have the ability to challenge the infringement of his rights in a manner that is effective in practice as well as in law, and which provides for proper redress in the light of the particular context and importance of the right to freedom of expression.<sup>44</sup> Thus in *Mackay & BBC Scotland v UK*, the Court held that the applicant did not have an effective remedy to challenge a prohibition on reporting certain court proceedings because the date fixed for hearing the applicant's representations was some three months after the relevant court proceedings had been determined.<sup>45</sup> By this time, the impact of any report would have been seriously diminished.
29. In other cases involving both Articles 10 and 13, the Court has confirmed the importance of having regard to the fact that news is a perishable commodity and that to delay its publication or dissemination may well deprive it of all value and interest.<sup>46</sup> These principles have also been applied to the publication of books or other written texts.<sup>47</sup> The ability to seek a remedy which is effective promptly is therefore particularly important.
30. To be effective a remedy must be sufficient to enforce the substance of his right to freedom of expression. There is no effective remedy if the national authority simply relies on the discretion of the decision-maker as to any restriction imposed (for example, a decision not to grant a broadcasting license); a review of the substance of the decision is required.<sup>48</sup>

## G. CONCLUSIONS

31. The following conclusions may be drawn based on the above legal analysis:
  - a. All of the sources of international human rights law that have weighed in on this issue point in one common direction: individuals enjoy the freedom of expression in online space to the same extent that they enjoy it offline. It is important that the central institutions of human rights law, such as the Court, emphasise this in specific instances, such as those at issue in these cases.
  - b. States are increasingly restricting expression online in contravention of human rights law. In particular, two major concerns predominate: First, States frequently adopt laws governing "extremism" and other security-related issues that are so broad that they provide excessive discretion for authorities to restrict expression,

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<sup>44</sup> For example, see *Mackay & BBC Scotland v UK*, judgment of 7 December 2010, application no 10734/05; also, *Szel v Hungary*, judgment of 16 September 2014, application no 44357/13, §93.

<sup>45</sup> Judgment of 7 December 2010, application no 10734/05, §35.

<sup>46</sup> *Guseva v Bulgaria*, judgment of 17 February 2015, application no 6987/07, §49.

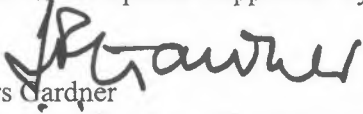
<sup>47</sup> *Association Ekin v France*, application no 39288/98, §57.

<sup>48</sup> *Glas Nadezhda Eood and Elenkov v Bulgaria*, judgment of 11 October 2007, application no 141134/02, §65-70.

contrary to the requirement that restrictions be 'lawful'. Secondly, States are adopting tools that, even if a restriction were legitimate in a narrow sense, disproportionately interfere with individuals' rights to impart information and to seek and receive it.

- c. The Court has a critical opportunity to highlight how the breadth of legal proscriptions subject to disproportionate measures (such as those countering "extremism") and their application to block access to websites and platforms interfere with fundamental rights to the exercise of freedom of opinion and expression. It is an opportunity to recognise and assess these forms of censorship as systemic violations of the Convention in the digital age.
  - d. The Court should emphasise the rule of law and the central imperative of legal process. The trends identified here undercut the rule of law and run counter to basic principles of Article 19(3), and Article 10 of the Convention, and they also highlight how individuals lack the ability to appeal and remedy such violations. In turn, without effective national remedies, national authorities are immune from accountability for actions that are manifestly inconsistent with freedom of expression.
  - e. These cases present an important opportunity to take a decision that reinforces the rule of law in the digital age. Failure to emphasise the unacceptability of digital censorship through unaccountable website blocking would be a major missed opportunity for the Court to exercise leadership in this key area of Article 10 rights.
32. Finally, in participating in any legal proceedings the Special Rapporteur must note the following. In the performance of his mandate as United Nations Special Rapporteur, he is accorded certain privileges and immunities as an expert on mission pursuant to Article VI of the Convention on the Privileges and Immunities of the United Nations adopted by the United Nations General Assembly on 13 February 1946. This application to submit a third party intervention is made by the United Nations Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied of the privileges and immunities of the United Nations.

Filed for the Special Rapporteur by his representative in this Intervention

  
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11 January 2018