

THE SPECIAL TRIBUNAL FOR LEBANON

BEFORE THE CONTEMPT JUDGE

Case number STL-14-05/T/CJ

Before Judge Nicola Lettieri, Contempt Judge

IN THE CASE AGAINST

AL JADEED [CO.] S.A.L./ NEW T.V. S.A.L. (N.T.V.)

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AMICUS CURIAE BRIEF BY

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I. Introduction

1. This amicus brief is respectfully submitted by ARTICLE 19, the Global Campaign for Free Expression, in accordance with the Rules of Procedure and Evidence (« the Rules ») of the Special Tribunal for Lebanon, and with the decision of the President, of 23 February 2012, on "Practice Direction on *Amicus Curiae* Submissions before the Special Tribunal for Lebanon". ARTICLE 19 is an international human rights organisation. It takes its name and mandate from Article 19 of the Universal Declaration of Human Rights, which proclaims the right to freedom of expression, including the right to receive and impart information and ideas. ARTICLE 19 seeks to develop and strengthen international standards that protect freedom of expression. ARTICLE 19 is a registered UK charity (No. 32741) with headquarters in London.
2. As an organization whose work contributes to the application and reinforcement of international law on freedom of expression, ARTICLE 19 regularly submits legal opinions, written comments and amicus curiae briefs, either directly or through the commissioning of expert opinions, to both international and national courts in cases involving freedom of expression and freedom of information. ARTICLE 19's briefs, which are based on relevant 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.

3. In June 2014, a number of amicus curiae briefs were filed in answer to the invitation from the Special Tribunal for Lebanon. Although some of those dealt with issues relating to freedom of expression,¹ ARTICLE 19 considers that a more detailed analysis would assist the Tribunal. In particular, ARTICLE 19 is concerned that the existing discussion appears to frame the legal debate as an opposition between two rock-solid principles, freedom of expression on the one hand, and the authority of the judiciary and the rules on contempt of court on the other hand. We submit, however, that it is not a question of whether one principle trumps the other in abstract, and that what is required by international law is having regard to the specific circumstances of each case. Under international law, rules on contempt of court may be considered legitimate restrictions on freedom of expression so long as they pursue the objective of maintaining the authority of the court. At the same time, however, their application must be balanced against the requirements of freedom of speech, taking into account the context of the case, notably the role of the press in a democratic society. In the absence of proper consideration of this issue, we are concerned that the present proceedings

¹ See the *Consolidated Response to Amicus Curiae Briefs*, from the Amicus Curiae Prosecutor, 30 June 2014.

may have a negative impact upon the freedom and capacity of press organizations to play their necessary role as watchdogs of democratic societies and institutions.

4. Our understanding of the present case is based on the case documents made publicly-available on the Special Tribunal for Lebanon's website. Members of ARTICLE 19 staff also had meetings and telephone conversations with the defendants and their counsel.
5. The person to contact about this amicus curiae brief is Pierre François Docquir, Senior Legal Officer, ARTICLE 19, at +44 20 7324 2500 or email: pierre@article19.org .

II. Summary of submissions

6. The role of the press as a watchdog in democratic society has been repeatedly recognised under international law, which also sets out the rights and duties of journalists. In order to benefit from the protection of freedom of speech under international law, journalists need to act in good faith and in conformity with their professional ethics when publishing or broadcasting information on matters of public interest.
7. It is equally well-established that the operation of the judiciary is, under international human rights law, a matter of public interest that the press has the right to cover, and about which the public has the right to be informed.
8. International law recognises the authority of the judiciary as one of the legitimate aims that a restriction on freedom of expression may pursue, and that rules on contempt of court generally serve that purpose. Nevertheless, any application of

a rule that may restrict freedom of speech must be carefully tailored in order to respect the principles of necessity and proportionality.

III. Submissions

III.1. International Law

9. Article 19 of the International Covenant on Civil and Political Rights ('ICCPR') protects the right to freedom of expression in broad terms. Under that article, States parties are required to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds and regardless of frontiers. Notwithstanding the importance of the right to freedom of expression, that right is not absolute and may be restricted in certain circumstances. General Comment No 34 of the UN Human Rights Committee sets out the authoritative view of the Committee on Article 19:

11. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression

may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.²

10. Article 19(3) of the ICCPR indicates that the exercise of freedom of expression carries with it special duties and responsibilities. For this reason, restrictions on the right are permitted to ensure the respect of the rights or reputations of others (Article 19(3)(a)), or the protection of national security or public order (*ordre public*), or of public health or morals (Article 19(3)(b)). However, when a State party imposes restrictions on the exercise of freedom of expression, these restrictions may not jeopardize the right itself. Indeed, the Committee has recalled « that the relation between right and restriction and between norm and exception must not be reversed. »³ Article 19(3) also lays down specific conditions, and it is only subject to these conditions that restrictions may be imposed (the "three-part test"): *first*, the restrictions must be "provided by law"; *second*, they may only be imposed for one of the grounds set out in Article 19(3)(a) or (b) of the ICCPR; and *third*, they must conform to the strict tests of necessity and proportionality.⁴ Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.⁵ The permissible restrictions on freedom of expression are expressed

² General Comment No. 34 is available here: <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>. (References omitted).

³ General Comment No. 34, at para 21.

⁴ See Human Rights Committee, Communication No 1022/2001, *Velichkin v Belarus*, CCPR/C/85/D/1022/2011, Views adopted on 20 October 2005.

⁵ See Human Rights Committee, General Comment No 22, Freedom of Thought, Conscience and Religion (Article 18), CCPR/C/21/Rev.1/Add.4, para 8.

in similar terms in the international and regional instruments, but the European Convention on Human Rights ("ECHR") is more explicit than the others in setting out the protection of the administration of justice as a legitimate exception. The "rights of others" referred to in Article 19(3)(a) undoubtedly includes rights linked to the administration of justice, such as the right to a fair trial and the presumption of innocence. Article 10(2) of the ECHR goes even further, making express reference to the need to maintain the authority and impartiality of the judiciary.

11. It follows that the need to protect the authority of the judiciary may warrant restriction upon an individual's freedom of expression, but only if such a limitation is justified on the grounds that it is provided by law and is necessary and proportionate. Restrictions must be "necessary" for a legitimate purpose, in the sense that there must be a "pressing social need" for the restriction.⁶ The principle of proportionality also has to be respected in the sense that any restriction "must be the least intrusive measure to achieve the intended legitimate objective and the specific interference in any particular instance must be directly related and proportionate to the need on which they are predicated".⁷ The law framing the restrictions must respect the principle of proportionality, as must the administrative and judicial authorities when applying the law.⁸ The UN Human

⁶ *Handyside v United Kingdom*, Eur Ct HR, Application No 5493/72, Judgment of 12 December 1976, at para 48.

⁷ Human Rights Committee, General Comment No 22, Freedom of Thought, Conscience and Religion (Article 18), CCPR/C/21/Rev.1/Add.4, para 8.

⁸ Human Rights Committee, General Comment No 27, Freedom of Movement (Article 12), CCPR/C/GC/21/Rev.1/Add.1, 2 November 1999, paras 14 and 15. See also Human Rights Committee, Communications No 1128/2002, *Marques v Angola* CCPR/C/83/D/1128/2002, Views adopted on 29 March

Rights Committee has expressly considered the issue of contempt of court in General Comment No 34 where it has recognized that contempt of court orders may be justified on the grounds of public order, specifically in order to maintain order within courtrooms as long as there is no limitation on defense rights:

31. On the basis of maintenance of public order (*ordre public*) it may, for instance, be permissible in certain circumstances to regulate speech-making in a particular public place. Contempt of court proceedings relating to forms of expression may be tested against the public order (*ordre public*) ground. In order to comply with paragraph 3, such proceedings and the penalty imposed must be shown to be warranted in the exercise of a court's power to maintain orderly proceedings. Such proceedings should not in any way be used to restrict the legitimate exercise of defense rights.⁹

12. The UN Human Rights Committee has expressly recognized the role of the press in a democratic society:

13. A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of

2005; Human Rights Committee, Communication No 1157/2003, *Coleman v Australia* CCPR/C/87/D/1157/2003, Views adopted 17 July 2006.

9 General Comment No. 34. (References omitted).

information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.¹⁰

13. These principles are further clarified by international case law that, although not strictly binding upon the Special Tribunal for Lebanon, nonetheless provides important guidance for the understanding of the intricate and sometimes tense relationship between the press and the courts.

¹⁰ *Ibid.*(References omitted).

III.2. Case Law

III.2.1 The role of the media and the authority of the judiciary

14. The jurisprudence of the European Court of Human Rights has established that the media play a preeminent role in a democratic society as public watchdog, including of the administration of justice and courts. Leading scholars have noted that "free speech serves the ends of justice since it plays an informing and scrutinizing role. The exercise of both roles by the media is generally viewed as enhancing the moral authority of the justice system. Restrictions on reporting aimed at ensuring the fairness of court hearings are intended to secure the integrity of the criminal or civil system, but the legal significance attached to the principle of open justice is also aimed at ensuring such integrity, and a key reason for insisting upon open justice is to allow for media scrutiny of the workings of the justice system."¹¹ It is important to note that political expression may also cover speech on matters of public concern, including allegations of bias against any court.¹² The UK Law Commission has recently pointed out the significance of this with respect to issues of contempt.¹³

15. Laws on contempt of court may amount to an interference with freedom of expression: Anything that "impedes, sanctions, restricts or deters expression

¹¹ H. Fenwick, G. Phillipson, *Media Freedom under the Human Rights Act*, (Oxford: OUP, 2006), pp 167-168.

¹² *Barfod v Denmark*, Eur. Crt. HR, Application no. 11508/85, judgment of 22 February 1989.

¹³ "Political expression is obviously of particular significance for contempt by publication because it is highly likely that reporting on matters which are relevant to or occur during court proceedings could amount to political expression. Indeed, imparting information to the public, and the public's right to receive information, about the operation of courts, civil and criminal justice policy, and the like, are clearly serious

constitutes an interference¹⁴ with that right. This includes any form of prior restraint which require particular scrutiny as "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest".¹⁵ It also includes sanctions after publication even where they do not amount to a criminal conviction or financial penalty. Laws on contempt of court, which impede publications, ban reporting on certain matters and deliberations or prevent jurors from undertaking research, would interfere with the right to freedom of expression. Laws on contempt of court must meet the test for permissible restrictions on freedom of expression. In particular, the concept of "maintaining the authority and impartiality of the judiciary" has been interpreted fairly broadly¹⁶ and the European Court has indicated that the protection of the justice system and not the protection of individual judges from criticism was the issue.¹⁷ In *De Haes and Gijssels v. Belgium*, the Court stated: "The courts — the

matters of public concern. Likewise, depending on the circumstances and the content of the disclosure, a breach ... by a juror could amount to political expression." *Contempt of Court*, Law Commission, Consultation Paper No 209, para 5. The document is available at http://lawcommission.justice.gov.uk/docs/cp209_contempt_of_court.pdf

¹⁴ R. Clayton, H. Tomlinson, *The Law of Human Rights* (2nd ed, Oxford: OUP, 2009), at para 15.267.

¹⁵ *Sanoma Uitgevers BV v The Netherlands*, Grand Chamber, Application no. 38224/03, judgement of 14 September 2010, para 70; *Sunday Times v UK*, Application no. 6538/74, judgment of 26 April 1979.

¹⁶ The European Court has accepted that an injunction preventing publication was to protect a suspect's fair trial rights (entitlement to presumption of innocence) and therefore was within the scope of the legitimate aims of maintaining the authority and impartiality of the judiciary and of protecting the reputation or rights of others. See *News Verlags v Austria*, Application no 31457/96, judgment of 11 January 2000, para. 45.

¹⁷ In *Worm v Austria*, Application No 83/1996/702/894, judgment of 29 August 1997, para 40, the Court stated that "the phrase 'authority of the judiciary' includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge; further, the public at large have respect for and confidence in the courts' capacity to fulfil that function."

guarantors of justice, whose role is fundamental in a State based on the rule of law — must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded.”¹⁸

16. The media has a duty to impart information and ideas concerning matters that come before the courts just as in other areas of public interest: In the *Sunday Times* case, the European Court explicitly stated that:¹⁹

[T]he courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialized journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.

III.2.2. The rights and duties of journalists

17. Both Article 10 (2) ECHR and Article 19 (3) ICCPR refer to the ‘duties and responsibilities’ of persons exercising their freedom of expression. With respect to journalists, this notion is tightly linked to the exercise of journalistic activity in

¹⁸ *De Haes and Gijssels v. Belgium*, Application no 19983/92, judgement of 24 February 1997, para. 37.

¹⁹ *The Sunday Times v. UK* (No.2), Application no. 13166/87, judgement of 26 November 1991, para. 50.

good faith to provide accurate and reliable information in accordance with the ethics of journalism. In *Dupuis v. France*, the European Court of Human Rights had to decide a case where journalists had publicized information that they could not ignore was protected by the secrecy of the judicial investigation. The Court held that, even if "journalists cannot, in principle, be released from their duty to abide by the ordinary criminal law on the basis that Article 10 affords them protection",²⁰ it

... is necessary to take the greatest care in assessing the need, in a democratic society, to punish journalists for using information obtained through a breach of the secrecy of an investigation or a breach of professional confidence when those journalists are contributing to a public debate of such importance and are thereby playing their role as "watchdogs" of democracy. Article 10 protects the right of journalists to divulge information on issues of public interest provided that they

20 *Dupuis and Others v. France*, Application no. 1914/02, judgement of 7 June 2007, para. 43.
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are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism.²¹

18. Similarly, the Court has affirmed in two decisions related to whistleblowing that "the interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence."²²

19. Another recent case of the European Court of Human Rights has shed light on the duties and responsibilities of journalists. The case *Haldimann and Others v. Switzerland*²³ concerned 4 journalists who were convicted for having recorded and broadcast an interview of a private insurance broker that was recorded with a hidden camera. The interview was part of a documentary on the topic of misleading advice provided by insurance brokers. The Court first observed that the documentary concerned a matter of public interest. While the broker may legitimately have felt deceived by the journalists, he was not identifiable in the documentary, which focused on specific commercial practices found to be common within his profession. In these circumstances, the interest of the public to be informed about malpractice prevailed over the privacy interest of the broker. The Court then reiterated that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest was subject to the proviso that they were acting in good faith and on an accurate factual basis and provided

21 *Ibid.*, at para 46 (references omitted).

22 *Guja v. Moldova*, Grand Chamber, Application No. 14277/04, judgement of 10 February 2008; *Bucur and Toma v. Romania*, Application No. 40238/02, judgement of 8 January 2013.

23 *Haldimann and Others v. Switzerland*, Application No. 21830/09, judgement of 24 February 2015.

"reliable and precise" information in accordance with the ethics of journalism. The Court found that the journalists had not ignored their professional rules although there had been disagreement among national courts as to the correct understanding of the principles that limit the use of hidden cameras. The Court considered that the journalists deserved the benefit of the doubt in relation to their desire to observe the ethics of journalism as defined by Swiss law. In addition, the veracity of the facts presented in the documentary had not been contested. The case shows that, when producing a television news programme and where no other means are available, it may be justified for journalists reporting on a matter of public interest to resort to a limited degree of trickery, provided that the rights of the individuals concerned and other general interests are sufficiently protected.

III.2.3 Sanctions and chilling effect

20. The European Court has consistently held that "the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of an interference with the exercise of the freedom of expression."²⁴ The Court has also accepted that even "lenient" sanctions are "capable of having a chilling effect on the applicant."²⁵ Where sanctions may have deterring consequences upon the free flow of information, the chilling effect "works to the detriment of society as a whole."²⁶ In a number of cases where they

24 *Axel Springer v. Germany*, Grand Chamber, Application No 39954/08, judgement of 7 February 2012, at para. 95.

25 *Ibid.*, at para. 109.

26 *Reznik v. Russia*, Application No 4977/05, judgement of 4 April 2013, at para. 50.

considered that the applicants were entitled to bring a matter to the attention of the public, the European judges have reiterated that the "chilling effect that the fear of (...) sanctions has on the exercise of journalistic freedom of expression (...), which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on the applicants."²⁷

21. The Inter-American Court of Human Rights ('Inter American Court') has interpreted Article 13 of the Inter-American Convention on Human Rights in a very similar fashion to General Comment No 34 and the case law of the European Court of Human Rights. In particular, the Inter-American Court has held that as freedom of expression is essential to the functioning of a truly democratic system, any imposition of liability by the state in respect of freedom of expression should be expressly, previously and strictly limited by law, should be necessary to ensure "respect for the rights and reputation of others" or "the protection of national security, public order, or public health or morals" and should be proportionate, interfering as little as possible with the effective exercise of the right.²⁸ As with its

27 *Cumpana and Mazare v. Romania*, Grand Chamber, Application No 33348/96, judgement of 17 December 2004, at 114. See also *Kudeshkina v. Russia*, Application No. 29492/05, § 99, judgement of 26 February 2009, at para 99; *Heinisch v. Germany*, Application No. 28274/08, judgement of 21 July 2011.

28 *Palamana-Iribarne v. Chile*, Inter-American Court of Human Rights, Judgement of 22 November 2005, para. 79-85.

European counterpart, a crucial factor for the Inter-American Court is the contribution that the expression in question makes to a debate of public interest.

III.3. The case

III.3.1 On freedom of expression, the role of the press and contempt of court

22. Considering the importance of the Special Tribunal for Lebanon for the country and the region, it is clear that all aspects of its operation – including the protection of confidential witnesses – are topics of legitimate public interest for the Lebanese public and the world at large. Therefore, in accordance with the international standards on freedom of expression, not only does the press have the right to seek and disseminate information: the public also has a right to be informed on such matters. Furthermore, when reporting on courts' proceedings, the press contributes to publicizing the operation of the judiciary, thereby reinforcing the trust of the public in judicial institutions. The corollary of this is that unnecessary or disproportionate restrictions on public scrutiny of criminal proceedings are likely to diminish public confidence in the outcome of those proceedings.
23. In our submission, rules on contempt of court must not impose blanket restrictions on the ability of the press to report on an important dimension of the work of the judiciary, namely the protection of confidential witnesses before the courts. Such a blanket approach cannot be compatible with international law on freedom of expression. Instead, international law requires a detailed analysis of the context and, particularly, whether the journalists have acted in good faith, in accordance

with the ethics of the profession, and in the goal of informing the public on matters of general interest. It is only through that specific reasoning that an application of the rules on contempt of court might be found to be compatible with international standards on freedom of expression, and more precisely the requirements of necessity and proportionality of Article 19(3) of the ICCPR.

24. ARTICLE 19 avers that, in the words of the European Court of Human Rights, "it is necessary to take the greatest care in assessing the need, in a democratic society, to punish journalists for using information obtained through a breach of the secrecy of an investigation or a breach of professional confidence when those journalists are contributing to a public debate of such importance and are thereby playing their role as "watchdogs" of democracy. [International law] protects the right of journalists to divulge information on issues of public interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism."²⁹ In conformity with the case law exposed above, when examining whether

29 *Dupuis v. France*, op. cit., para 46.

journalists have acted in accordance with the ethics of their profession, it is necessary to look into a combination of elements such as:

- Whether the journalists have taken steps to verify the reliability of the information in the course of their investigation;
- Whether the journalists have taken measures to take into account individual interests in privacy or general interests in confidentiality in the course of producing and broadcasting their programme;
- Whether the journalists sought legal or professional advice, notably before media regulatory bodies, in the course of producing and broadcasting their programme.

III.3.2. On Internet-based publication

25. ARTICLE 19 submits that publication via web-based platforms such as YouTube is now a well-established channel for publication throughout the modern world. Whilst broadcasting has historically been subject to more stringent regulation than print media, Internet-based publications are generally subject to print media standards. In our submission, where a broadcast programme is lawful, the subsequent online publication of the same programme should not be subject to

a further, even higher threshold. In our view, there can be no sensible basis for subjecting online publication to a higher standard in such circumstances.

III.3.3. On the criminal liability of corporations under international law

26. ARTICLE 19 notes that in the present case charges for contempt of court have been pressed against a legal entity on the basis of Rule 60 *bis* of the Tribunal's Rules of Procedure and Evidence. The question arises, therefore, whether this constitutes a sufficient legal basis for the purposes of the first limb of the three-part test under international human rights law. In particular, the criteria of legality means that said legal basis must be sufficiently clear and accessible as to allow concerned persons to foresee the consequences of their actions. This is, however, more difficult to establish in circumstances where the relevant legal principle has not previously been applied to legal persons at the international law. The Tribunal should also consider the potential chilling effect of its decision on the capacity of

media companies to provide the necessary entrepreneurial framework for the exercise of the journalists' role as watchdogs of the democratic society.

IV. Conclusions

27. The relevant international law and jurisprudence on freedom of expression establishes the following key principles of particular relevance in the context of this case:

- Freedom of expression is one of the most essential foundations of democratic societies and institutions. Any interference with this fundamental freedom must serve a legitimate aim, be necessary in the sense of serving a pressing social need and be proportionate to the legitimate aim pursued.
- It is the role of the media to act as public watchdog in reporting on matters of public interest, including the operation of the judiciary, and the public has the right to receive such information.
- Media reporting on the operation of the judiciary contributes to the publicity of the administration of justice and is important to inform the public and enable public scrutiny of the functioning of the criminal justice system.
- Rules on contempt of court may constitute a permissible restriction on freedom of expression, as the protection of the judiciary may be a legitimate aim to such

restriction, but only provided that the application of the rules conforms to the requirements of necessity and proportionality set forth in Article 19(3) of the ICCPR.

- International law protects the right of journalists to divulge information on issues of public interest provided that they act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of their profession.
- It is necessary to take the greatest care in assessing the need, in a democratic society, to punish journalists for using information obtained through a breach of the secrecy of an investigation or a breach of professional confidence when those journalists are contributing to a public debate of such importance as the

administration of criminal justice and are thereby playing their role as "watchdogs" of democracy.

- It is necessary to take into account the chilling effect that sanctions may have upon the free flow of journalistic information.

28. ARTICLE 19 respectfully invites the Chamber to have careful regard to these principles in the present case.

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