



MEMORANDUM

on

the Russian Draft Federal Law
“On Combating the Rehabilitation of Nazism, Nazi
Criminals or their Collaborators in the Newly
Independent States Created on the Territory of Former
Union of Soviet Socialist Republics”

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I. INTRODUCTION

The Memorandum analyses a draft Federal Law of the Russian Federation “On Combating the Rehabilitation of Nazism, Nazi Criminals or their Collaborators in the Newly Independent States on the Territory of Former Union of Soviet Socialist Republic” (*hereinafter* “the Draft Law”).¹ The Draft Law was prepared by a working group set up by the Duma’s Parliamentary Committee on the Commonwealth of Independent States and Relations with Nationals Abroad, with the task of drafting legislation combating acts of “heroisation” of Nazi criminals and collaborators, and “the humiliation” of Soviet war veterans, mainly in Estonia, Latvia, Ukraine and other new independent states which were former USSR republics.

The Draft Law is proposed at time of several political and diplomatic confrontations between the Russian Federation and some of its neighbours, former republics of USSR. These include the character of the Molotov-Ribbentrop pact signed between Soviet Union and Nazi Germany about the division of Eastern Europe into spheres of influence and the consequent invasion of the Red Army of the Baltic States and parts of Poland. The governments and historians from the newly independent states call for re-examination of the official Soviet history of the Second World War, including the role of individuals and groups who were libelled as “Nazi collaborators” for their fighting against the Soviet occupation and for independence of their countries.

The ongoing reassessment of the history is part of the process of national identity building in the newly independent states and an attempt to lay the foundations of new governments on past democratic traditions. The Russian Federation, however, regards the reappraisals of the official Soviet history as inimical to it. On 15 May 2009, commemorating the anniversary of victory in the Great Fatherland War², the President of the Russian Federation issued a decree setting up a so-called “the Historical Truth Commission” with the purpose of counteracting the attempts to “falsify historical facts and events with the purpose of inflicting harm to the Russian interests”.

In view of this “war of histories”, the Draft Law can be regarded as a weapon against individuals, legal entities, media and governments of newly independent states which question or deny “the official history” of the Russian Federation concerning the Second World War. The Draft Law regards the reassessment of history as acts of rehabilitation of Nazism, Nazi Criminals and Nazi Collaborators and provides for harsh sanctions for such acts.

Mindful that the proposed law affects freedom of expression, and in particular the right to seek historical truth, in this Memorandum, ARTICLE 19 analyses its compliance with international freedom of expression standards. ARTICLE 19 is concerned that – in the event this Draft Law were adopted in its current form, it would seriously undermine Russia’s commitments under international law to protect and promote freedom of expression and would be a retrograde step in the development of democracy and media freedom in Russia.

¹ This Memorandum analyses the original Russian language version of the Draft Law, available on the Internet at: <http://www.regnum.ru/news/1153517.html> (last visited on 21 September 2009). ARTICLE 19 takes no responsibility for the accuracy of this version of the Draft Law.

² The Great Fatherland War or Great Patriotic War (in Russian: Вели́кая Оте́чественная война́, *Velikaya Otechestvennaya Voyna*) is a term coined in the former Soviet Union to describe the portion of the Second World War from June 22, 1941 to May 9, 1945, during which the Soviet Union fought against Nazi Germany and its allies. The term originates from the Patriotic War, referring to the liberation of the territory of Russia from French occupation under Napoleon in 1812 and was intended to motivate the population to defend Soviet territory.

The analysis of ARTICLE 19 reveals that the Draft Law fails to take into account that some actions proscribed by its provisions such as public calls for restoration of the reputation of persons deemed as Nazi collaborators by the official history of the USSR are linked to the right to freedom of expression, including to the right to seek historical truth. This right belongs not only to historians, but also to everyone who wishes to learn the history of the Second World War or express alternative views about it. Even though this right is not absolute, any restriction of the right by the State should be in accordance with international law: it should aim at achieving a legitimate aim and be necessary in a democratic society.

ARTICLE 19 submits that this is not the case with the Draft Law. It allows restrictions on freedom of expression for purposes which are not regarded as legitimate under international law, such as the protection of the memory of the victims of the Second World War. Further, the Draft Law fails to require that any interference with the right to freedom to seek historical truth should be proportionate to legitimate interests protected by the state. As a result, the Draft Law prohibits acts without taking into account whether there is a pressing social need for such prohibitions. ARTICLE 19 is also concerned about the sanctions stipulated by the Draft Law, in particular about the bans on legal activities and dissolutions of legal entities. These sanctions are excessive and can be used to silence alternative views on historical events and personalities. Finally, the Draft Law holds the media responsible for aiding rehabilitation of Nazism through the distribution of materials or dissemination of facts related to Nazism, Nazi criminals or their collaborators. As a result, the media might be prevented from carrying out its role to impart information and ideas of public interest.

Our analysis draws upon the international and regional standards and jurisprudence on freedom of expression. Hence, this Memorandum first outlines Russia's obligations to promote and protect freedom of expression under international law, and describes the permissible limitations on debates on historical issues. It then provides an in-depth analysis of the Draft Law.

II. INTERNATIONAL STANDARDS ON FREEDOM OF EXPRESSION

1. Guarantees of freedom of expression

Article 19 of the Universal Declaration on Human Rights (*hereinafter* "UDHR") guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.³ The International Covenant on Civil and Political Rights (*hereinafter* "ICCPR"),⁴ to which the Russian Federation as a successor of the USSR has been party since 1976, imposes formal legal obligations on State parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression in the following terms:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of

³ See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).

⁴ UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976.

frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Article 10 of the European Convention on Human Rights (*hereinafter* “ECHR”)⁵, which Russia ratified in 1998, guarantees the right to freedom of expression in similar terms.

2. Restrictions on freedom of expression

It is recognised under international law that the right to freedom of expression is not absolute and may be restricted in favour of other important interests. Any restriction must, however, comply with the conditions laid down in the ECHR and the ICCPR. The relevant provisions are broadly similar in each of these treaties; Article 10(2) of the ECHR can be used as an example:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This translates to a three-part test, according to which interferences with freedom of expression are legitimate only if they (a) are prescribed by law; (b) pursue a legitimate aim; and (c) are “necessary in a democratic society”.

Each of these elements has a specific legal meaning. The first requirement will be fulfilled only when the restriction is ‘prescribed by law’. This implies not only that the restriction is based in law, but also that the relevant law meets certain standards of clarity and accessibility.

The European Court of Human Rights (*hereinafter* “the ECtHR”) has interpreted the phrase “prescribed by law” under the ECHR:

*[A] norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.*⁶

The second requirement relates to the legitimate aims listed in Article 10(2) of the ECHR. To satisfy this part of the test, any restriction must genuinely pursue one of these aims, and the underlying intention of a restriction on freedom of expression may not be to pursue a political agenda or other unrecognised interest.⁷

The third requirement holds that any restriction should be “necessary in a democratic society”. The word “necessary” means that there must be a “pressing social need” for the limitation.⁸ The reasons given by the State to justify the limitation must be “relevant and sufficient”; the State should use the least restrictive means available⁹ and the limitation must

⁵ Adopted on 4 November 1950, entered in force on 3 September 1953.

⁶ *The Sunday Times v. United Kingdom*, Judgement of 26 April 1979, Application No. 6538/74, para.49 (European Court of Human Rights).

⁷ See ECHR, Article 18.

⁸ See, for example, *Handyside v. the United Kingdom*, Judgement of 7 December 1976, Application No. 5493/72, para. 48 (European Court of Human Rights).

⁹ UN Human Rights Committee, General Comment No. 27 (1999), para 14.

be proportionate to the aim pursued.¹⁰ The nature and severity of the penalties imposed are taken into consideration when assessing the proportionality of the interference.¹¹

Article 10 of the ECHR must be read in conjunction with Article 17, which prohibits the interpretation of the Convention as implying for “any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the ECHR.

In addition, the right to freedom of expression should be in conjunction with Article 20 of the ICCPR, which prohibits “any propaganda for war,” and - of crucial importance for present purposes - “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

3. Freedom of expression and democracy

All the greatest man-made calamities that have plagued the world for centuries involved and required full control over expression and opinions. For this reason, the right to freedom of expression has been recognised as central to the international human rights treaty regimes. As early as 1946, at its first session, the UN General Assembly adopted Resolution 59(I) which states:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

This has been echoed by other courts and bodies, which has also highlighted its vital role of underpinning democracy. For example, the UN Human Rights Committee (*hereinafter* “UN HRC”) has said: “[t]he right to freedom of expression is of paramount importance in any democratic society”¹² whereas the ECtHR has affirmed that “[f]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.”¹³

State control over freedom of expression is therefore anti-democratic. Moreover, it is an attack on human dignity and “the extension of physical power into the realm of the mind and spirit.”¹⁴

4. Protection of debates on historical issues

One of the long-lasting arguments in defence of the right to freedom of expression is based on the importance of open discussion to the discovery of truth, including the truth about historical personalities and events. Truth is an autonomous good without which progress and the development of a society are not possible.¹⁵ As the general public has a right to know its own history, it is undesirable for States to prohibit the search for truth.

¹⁰ See, for example, *Lingens v. Austria*, Judgement of 8 July 1986, Application No. 9815/82, paras 39-40 (European Court of Human Rights).

¹¹ *Sürek v Turkey*, Judgement of 8 July 1999, Application No. 26682/95, para 64 (European Court of Human Rights).

¹² *Tae-Hoon Park v. Republic of Korea*, Decision of 20 October 1998, Communication No. 628/1995, para 10.3.

¹³ *Handyside v. United Kingdom*, see *ibid.* footnote 7.

¹⁴ Michael Scammell, *Censorship and its History – A personal view* in the ARTICLE 19 1988 World Report. Available at <http://www.article19.org/speaking-out/world-report-1988> (last accessed on 20 August 2009).

¹⁵ The argument in support of freedom of expression relating to the importance of discovery of truth is associated with the philosopher John Stuart Mill and his work *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644).

This right has been recognized by the ECtHR on several occasions. In the case of *Chauvy v. France*¹⁶, concerning the conviction of the applicant for defamation in relation to statements in a book by which he questioned the “official version” of the history of French resistance during the Second World War, the ECtHR has acknowledged that “it is an integral part of freedom of expression to seek historical truth”¹⁷ and has recognised the right of individuals to be informed of the circumstances of historical events.¹⁸ Furthermore, it recognised that debates on historical issues justify higher protection with respect to freedom of expression as they relate to matters of general interest.¹⁹ The ECtHR has held that the state has limited powers to restrict the publication of historical books, as the principles concerning press freedom apply equally to the authors of these books.²⁰

Similarly, in the case *Giniewski v France*, in which the applicant complained against a court decision finding him guilty of racial defamation in relation to an article in which he argued that there were possible links between Catholic anti-Semitism and the Holocaust, the ECtHR held that the applicant's statements “contributed to a recurrent debate of ideas between historians, theologians and religious authorities.”²¹ Also, in an earlier case of *Lehideux and Isorni v France*, concerning the convictions of the applicants for publicly defending crimes of collaboration with the enemy by means of an advertisement promoting Marshal Petain's achievements, the European Commission on Human Rights emphasised the importance in a democratic society of historical debate about public figures in respect of whom, as was the case with Marshal Petain, different opinions had been and might continue to be expressed.²²

Prohibiting false arguments inevitably affects historical debates as well as the ability of historians to establish the truth. In addition, such prohibition suggests that the States are better placed than historians to discover truth. It also suggests an “assumption of infallibility” on the part of States. As academia and science have their own procedures in place to establish the truth, for example, peer review of articles or books submitted for publication, there is no need for State control over scientific expression.

Further, historical truth cannot be equated with mathematical certainty. Debates on historical matters often include expressions of beliefs or opinions. In contrast to mathematical facts, the latter cannot be proven.

5. Restrictions on Debates on History

Due to its essential role for democracy, international law safeguards particularly expression concerning matters of public interest. The ECtHR has repeatedly stated that “there is little scope under Article 10(2) for restrictions on political speech or on debate of matters of public

¹⁶ *Chauvy and Others v. France*, Judgment of 29 September 2004, Application No. 64915/01 (European Court of Human Rights).

¹⁷ *Ibid.* para 69.

¹⁸ *Ibid.* para 69.

¹⁹ *Ibid.* para 68.

²⁰ *Ibid.* para 68.

²¹ *Giniewski v France*, Judgment of 31 January 2006, Application no. 64016/00 (European Court of Human Rights), para 24.

²² *Lehideux and Isorni v France*, Judgment of 23 September 1998, Application No. 24662/94 (European Court of Human Rights).

interest”.²³ Accordingly, it has established that “*very strong reasons* are required to justify restrictions on political speech [italic added]”.²⁴

Historical views in general, and on the role of certain individuals in particular, cause heated debates. In *Lehideux and Isorni vs. France*, the ECtHR recognised that certain historical facts may be regarded as a “painful page” of history which may justify restriction on expression for protection of the rights of others, as in the case in question. However, the ECtHR observed that as time goes by, public concerns diminish. In view of the fact that the authors discussed events that took place forty years ago, the ECtHR stated:

*Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately.*²⁵

In that connection, the ECtHR reiterated that, subject to paragraph 2 of Article 10 of the ECHR, freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.²⁶

The ECtHR’s case-law demonstrates that the despite their higher protection, expression concerning history can be limited in two cases. The first one relates to denials of established historical facts, such as the Holocaust. The second case concerns intentional misrepresentation of historical facts.

a) Denials of Established Historical Facts

Both the ECHR and the UN HRC have taken similar attitudes toward Holocaust denial. They have regarded the suffering of the Jews during the Second World War as a universally-recognised historical reality and have found that restrictions on revisionist theses denying the Holocaust are not in violation of the right to freedom of expression.

In the case of *Honsik v Austria*²⁷, concerning the conviction of the applicant for publication and distribution of articles in which he denied the systematic killing of Jews in National Socialist concentration camps by use of toxic gas, the European Commission on Human Rights held that Mr. Honsik’s statements “run counter to one of the basic ideas of the Convention, as expressed in its preamble, namely justice and peace, and further reflect racial and religious discrimination”²⁸. The Commission found that the applicant was essentially seeking to use freedom of information as enshrined in Article 10 as a basis for activities which were “contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention.”²⁹

²³ *Surek v. Turkey (No. 4)*, Judgement of 8 July 1999, Application No. 24762/94, para 57 (European Court of Human Rights).

²⁴ *Feldek v Slovakia*, Judgment of 12 July 2001, Application No. 29032/95 (European Court of Human Rights).

²⁵ *Ibid.* para 55.

²⁶ *Ibid.* para 55.

²⁷ *Honsik v Austria*, Decision of 18 October 19985, Application No. 25062/94 (European Commission of Human Rights).

²⁸ *Ibid.* The paragraphs of the decision are not numbered.

²⁹ *Ibid.* The application was declared inadmissible as manifestly ill-founded.

Similarly, in the case of *Garaudy v France*³⁰, concerning the applicant's conviction of denial of the Holocaust and publishing of statements which were racially defamatory and constituted incitement to racial hatred, the ECtHR noted that:

[T]here is a category of clearly established historical facts - such as the Holocaust - whose negation or revision would be removed from the protection of Article 10 by Article 17.

*. . . Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.*³¹

b) Intentional Misrepresentation of Historical Facts

In the case of *Chauvy v France*³², discussed above, the ECtHR accepted the French courts' analysis of a historical book as well as their conclusion that the author failed to "respect the fundamental rules of historical method". Unfortunately, the ECtHR did not elaborate on what was meant by 'fundamental rules of historical method'.³³ A closer look at the assessment by the ECtHR provides some insight into the matter.

In this case, the ECtHR sought to balance the public's interest in being informed of national history, on one hand, and the reputation of Mr and Mrs Aubrac, on the other. Significant weight was given to two facts. First, Mr and Mrs Aubrac were "important members of the Resistance". Second, the author of the book, which gave grounds for the dispute, raised the possibility, albeit by way of innuendo, that Mr Aubrac had betrayed one of his comrades and had therefore been responsible for his arrest and death. In these circumstances, the judges treated the Aubrac's reputation as equally important to the public's interest in being informed of history. Consequently, the ECtHR did not allow a limited margin of appreciation of the State. Rather, it relied on the domestic courts' examination of the case.

The ECtHR observed that the domestic courts had carried out a detailed and very thorough examination of the book, in particular in regards to the manner in which the facts were presented. They applied standards which were in conformity with the principles embodied in Article 10, and based their decisions on an acceptable assessment of the relevant facts. For this reason, the ECtHR accepted the finding of the Paris Tribunal de Grande Instance that the author was "sowing confusion by combining a series of facts, witness statements and documents of different types and varying degrees of importance which together serve to discredit the accounts given by the civil parties." Further, it credited the observation of the same domestic court that the author did not act in good faith as he gave excessive importance to the Barbie testament, failed to critically analyse the German sources and documents, and neglected the statements of those who took part in the events. The author's manipulative handling with the historical facts and the lack of good faith gave

³⁰ *Garaudy v France*, Judgment of 24 June 2003, Application No. 65831/01 (European Court of Human Rights). In *Garaudy*, the ECtHR observed that in his book, the applicant called into question the reality, degree and gravity of historical facts related to the Second World War which are clearly established, such as the persecution of Jews by the Nazi regime, the Holocaust and the Nuremberg trials. That is why the application was found manifestly ill-founded and declared inadmissible.

³¹ *Ibid.* The ECtHR has translated only extracts of the judgment whereas the numbers of the original paragraphs are not provided.

³² *Chauvy v. France*, see *ibid.* footnote 16.

³³ In a concurring opinion, Judge Thomassen rightly criticised the majority for this failure.

grounds to the ECtHR to conclude that he had "failed to respect the fundamental rules of historical method in the book" and had made grave allegations. Consequently the Strasbourg judges concluded that the conviction of the applicants did not violate Article 10 of the Convention.

III. ANALYSIS OF THE DRAFT LAW

1. Background of the Draft Law

On 11 December 2008, the Russia's Parliamentary Committee on the Commonwealth of Independent States and Relations with Nationals Living Abroad set up a working group consisted of high level historians, diplomats, lawyers and heads of organisations focused on relations with Russians abroad. The working group was tasked with drafting a law against acts of "heroisation" of Nazi criminals, collaborators and traitors, and against "the humiliation and even persecution of Soviet war veterans" mainly in Estonia, Latvia, Ukraine and other new independent states which were former USSR republics.³⁴

In April 2009, the working group presented to the media the draft Federal Law on Combating Rehabilitation in the Newly Independent States on the Territory of Former Union of Soviet Socialist Republics ("the Draft Law")³⁵. According to the reports in media, during the presentation, the working group "highlighted the historical responsibility of the Russian Federation as a successor of the USSR and the leading participant of the Anti-Hitler Coalition to counteract the new historical revisionism in the post Soviet area".³⁶ Mihail Demurin, Deputy Head of the History and Archives Department of Russia's Ministry of Foreign Affairs and a member of the working group, was quoted in the press stating that "[a]ccording to Article 107 of the UN Charter, an enemy state is any state which fought during the Second World War with any of the states in the Anti-Hitler Coalition. Sanctions with respect to such a state can be undertaken by any UN Member State, and in particular by the Victorious States, without authorisation by the UN Security Council."³⁷

On 15 May 2009, commemorating the anniversary of victory in the Great Fatherland War³⁸, the President of the Russian Federation issued a decree setting up a Commission for Actions against Falsification of History in Contrary to the Interests of Russia, known as "the Historical Truth Commission".³⁹ The Committee is headed by Sergei Naryshkin, President Medvedev's

³⁴ *В России могут учредить Антифашистскую палату* ("An Antifascist Chamber May be Established in Russia"), REGNUM, Information Agency, <http://www.regnum.ru/news/1138005.html> (last visit on 12 August 2009).

³⁵ The full name of the Draft Law in Russian is Федеральный закон "О противодействии реабилитации в новых независимых государствах на территории бывшего Союза ССР нацизма, нацистских преступников и их пособников".

³⁶ *Ibid.* 35.

³⁷ *Ibid.* 35.

³⁸ The Great Fatherland War or Great Patriotic War (in Russian: Вели́кая Оте́чественная война́, *Velikaya Otechestvennaya Voyna*) is a term coined in the former Soviet Union to describe the portion of the Second World War from June 22, 1941 to May 9, 1945, during which the Soviet Union fought against Nazi Germany and its allies. The term originates from the Patriotic War, referring to the liberation of the territory of Russia from French occupation under Napoleon in 1812 and was intended to motivate the population to defend Soviet territory.

³⁹ The full name of the Commission in Russian is: Комиссия при президенте Российской Федерации по противодействию попыткам фальсификации истории в ущерб интересам

Chief of Staff, and consists of 28 members. Some of the members are former members of the working group that had produced the Draft Law six months earlier.⁴⁰

Since then, criticism against the Draft Law and the establishment of the Historical Truth Commission appeared in the Russian and international press.⁴¹ Concerns were voiced that Russian and foreign citizens could be sent to prison for up to three years for accusing the Red Army of atrocities or illegal occupation during the Second World War. Other concerns related to the longer period of imprisonment stipulated for officials or media workers who disseminate such accusations.⁴² It was reported that foreign countries' officials, including ambassadors, would be also responsible under the Draft Law. Other sanctions like severing diplomatic relations with offending nations, and full transport and communication blockades against them were mentioned.⁴³

2. General Description of the Draft Law

The Draft Law establishes the basic purposes, principles, methods and powers of federal and state bodies over the subjects of the Russian Federation, local self-governing bodies, and public associations to combat rehabilitation of Nazism, Nazi criminals or their collaborators.⁴⁴

The Draft Law consists of 23 Articles grouped into six Chapters. Chapter 1 includes basic provisions. Chapter 2 regulates the powers of federal, state and municipal bodies, and public associations, in combating rehabilitation of Nazism, Nazi criminals, or their collaborators. Chapter 3 regulates the establishment and powers of the Public Commission (Tribunal), which is entrusted with the realisation of the purposes of the law. Chapter 4 sets out the counteracting measures. Chapter 5 deals with the responsibility of individuals and state officials for infringements of the Federal Law. Chapter 6 includes provisions on international cooperation in counteracting the rehabilitation of Nazism, Nazi criminals, or their collaborators⁴⁵.

3. Purposes

a) Outline

Article 2 of the Draft Law enlists the purposes of the proposed legislation:

Россуу. The foundation decree of the President is available in Russian on the President's website <http://document.kremlin.ru/doc.asp?ID=052421> (last visit on 12 August 2009)

⁴⁰ Other members of the Commission include representatives of the Federal Security Service, the Security Council, the Foreign Intelligence Unit, the Ministry of Foreign Affairs and the Ministry of Justice, and even the Chief of the General Staff of the Russian Army. Only a handful of historians are members of the Commission.

⁴¹ Yevgeny Kiselyov, *When Interpreting History Becomes a Crime*, The Moscow Times, 3 June 2009 and Adrian Blomfield, *Russia Threatens to Bar Europeans who Deny the Red Army 'Liberated' Them*, Daily Telegraph, 19 May 2009, available at <http://www.telegraph.co.uk/news/worldnews/europe/russia/5350777/Russia-threatens-to-bar-Europeans-who-deny-Red-Army-liberated-them.html> (last accessed on 12 August 2009).

⁴² Nabi Abdullaev, *Commission to Guard against False History*, St Petersburg Times, 26 May 2009, available online at http://www.sptimes.ru/index.php?action_id=100&story_id=29113 (last visit 12 August 2009).

⁴³ See article in Daily Telegraph, *ibid* note 41

⁴⁴ See Preamble of the Draft Law.

⁴⁵ For brevity the phrase "rehabilitation of Nazism, Nazi criminals, or their collaborators" used repeatedly in the law is abridged in this analysis and expressed as "rehabilitation of Nazism".

- i. combating attempts to re-examine the decisions of the international Military Tribunal at Nuremberg, or decisions of national courts or tribunals based on the decisions of the Nuremberg Tribunal, and also related actions in violation of the UN Charter;
- ii. combating rehabilitation of Nazism, Nazi criminals, or their collaborators on the territory of the newly independent states of the former USSR;
- iii. protecting the rights and freedom of persons and citizens;
- iv. Combating manifestation of Nazism in any form;
- v. participating in international cooperation for peace and security, as well as combating the rehabilitation and spread of Nazism; and
- vi. combating the desecration of and preserving the memory of the victims of the "Great Fatherland War".

b) Analysis

All purposes of the Draft Law, save one - participating in international cooperation and peace - can be used to restrict freedom of expression. ARTICLE 19 submits that it is legitimate to restrict freedom of expression for the protection of rights of persons and for combating the rehabilitation of Nazism. The other purposes of the law are either illegitimate restrictions or could serve as abusive limitations on free expression. ARTICLE 19's explanation follows.

- i. Combating attempts to re-examine the decisions of the International Military Tribunal at Nuremberg, or decisions of national courts or tribunals based on the decisions of the Nuremberg Tribunal, and also related actions in violation of the UN Charter;*

ARTICLE 19 finds this first purpose of the Draft Law to be vague and broadly defined. Re-examination of court decisions⁴⁶ can be interpreted in different ways. First, in strictly legal terms, re-examination of court decisions is a legitimate act regulated in every country by codes of procedural law, and is permissible under specific conditions. Second, in broader terms, re-examination of court decisions could mean disapproving or criticising court decisions. Given that, it is not possible to re-examine legally the decisions of the Military Tribunal in Nuremberg, the drafters apparently seek to restrict criticism or disapproval of the decisions of the Nuremberg Tribunal or domestic court decisions based on the decisions of the latter. This is an illegitimate restriction on freedom of expression, inasmuch as it does not correspond to any of the legitimate aims of interference with freedom of expression recognised by international law. (*See above section II.2.*)

Moreover, the decisions of the Nuremberg Tribunal, like the decisions of any other court, cannot be considered perfect, i.e. they have weaknesses and shortcomings which one should be allowed to criticise. In fact, many respected authors from different countries have expressed disapprovals of a different kind with respect to the decisions of the Military Tribunal at Nuremberg.⁴⁷ In fact, critical views have had a positive effect on the development of international criminal justice, which like any other human activity, improves from lessons which have been learned in the past. Similarly, it does not make sense to treat domestic courts' decisions differently if they are based on the decisions of the Military Tribunal.

ARTICLE 19 considers that the Draft Law should be distinguished from laws that make it a criminal offence to challenge the decisions of the International Military Tribunal at Nuremberg

⁴⁶ In Russian "пересмотр приговора".

⁴⁷ For example, US Supreme Court Justice William O. Douglas wrote that the Nuremberg trials were unprincipled as the law was created *ex post facto* "to suit the passion and clamour of the time." See H. K. Thompson, Jr. and Henry Strutz, *Dönitz at Nuremberg: A Reappraisal*, Torrance, Calif.: 1983.

concerning crimes against humanity.⁴⁸ These laws refer to the definition of crimes against humanity in the Statute of the Nuremberg Tribunal and to the final decisions in which the latter and domestic courts have found people or organisations responsible for these kinds of crimes.

Both the ECtHR and the UN HRC have recognised that restriction of denials of crimes against humanity (also known as “Holocaust denials”) are legitimate restrictions on freedom of expression, as the denials violate the rights and reputations of the victims of these crimes, and the community as a whole by raising or strengthening anti-Semitic feelings.⁴⁹

In the case of *Faurisson v France*⁵⁰, the HRC examined whether the French law on Holocaust denial (*hereinafter* “the Gausstot Act”) was necessary in a democratic society. Mr Faurisson was an academic who argued that there had been no gas extermination chambers in Nazi death camps. He was convicted under the Gausstot Act. Before the UN HRC, France contended that the introduction of the Gausstot Act was intended to serve the struggle against racism and anti-Semitism. Further, the French government maintained that denials of the existence of the Holocaust were “the principle vehicle for anti-Semitism”. In the absence of any argument to undermine the validity of that position, the UN HRC was satisfied that the restriction of Mr Faurisson was necessary.

In contrast to the Gausstot Act in France and Holocaust denial laws elsewhere, the Draft Law has a broader scope, as it aims to combat re-examination of all decisions of the International Military Tribunal. While prohibition of denials of crimes against humanity may be regarded as legitimate inasmuch as they affect the rights of victims of the Holocaust, the prohibition of criticism of the decisions of the Nuremberg tribunal does not fall within the scope of Article 10, paragraph 2 of the ECHR, and therefore cannot be considered a legitimate restriction on freedom of expression. Criticism of the Tribunal and its decisions does not affect any personal or group rights.

Finally, it is not clear what is meant by combating ‘related actions in violation of the UN Charter’ in the context of re-examination of the decisions of the Nuremberg Tribunal.

ii. Combating the rehabilitation of Nazism, Nazi criminals, or their collaborators on the territory of the newly independent states of the former USSR

ARTICLE 19 finds this purpose of the Draft Law in compliance with freedom of expression standards. Laws prohibiting Nazism as an ideology or acts inspired by Nazism exist in many countries. For example, Austria’s National Socialism Prohibition Act was adopted in 1945, right after the re-establishment of a democratic and independent Austria. It was designed to eliminate with its concrete penal measures all traces of Nazism from the newly established

⁴⁸ For example Article 24 bis of the amended French Press Act of 29 July 1881 states: “Those who have disputed, by one of the means stated in article 23A, the existence of one or more crimes against humanity as they are defined by the article of the statute of the International Military Tribunal, annexed to the London Agreement of 8 August 1945, and which were committed by members of an organisation declared criminal by the application of Article 9 of the above-mentioned statute or by a person found guilty of such crimes by a French or an international tribunal, will be punished with the penalties foreseen by the sixth paragraph of the Article 24.”

Similar references to the definitions of crimes against humanity and prohibition of the trivialisation of these crimes have been adopted in Article 6 of the Additional Protocol to the Council of Europe’s Convention on Cybercrime and Articles 6, 7 and 8 of the European Council Framework Decision (2008) on Combating Racism and Xenophobia.

⁴⁹ See for example, *Robert Faurisson v France*, Communication No. 550/993, U.N. Doc. CCPR/C/58/5501993 (1996) (United Nation Human Rights Committee).

⁵⁰ *Ibid.*

republic and to protect the democratic system. Seen in the light of Austria's involvement in the Second World War, the State Treaty of Vienna from 1955, which re-established the full independence of Austria, obliged Austria to keep the Prohibition Act in legal force as is. The Constitutional Court of Austria justifies the restriction of freedom of speech imposed by the Prohibition Act by interpreting the Constitution as requiring appropriate regulation against actions and persons who fight against fundamental principles and the democratic republic.⁵¹ Likewise, the ECtHR considers that restrictions on freedom of expression based on the Prohibition Act in Austria are necessary in a democratic society. The ECtHR also has referred to Article 17, which prohibits the abusive use of convention rights.⁵² This article is interpreted to allow limited tolerance towards enemies of liberty.⁵³

In the case of *Ochensberger v Austria*⁵⁴, concerning the conviction of the applicant under the Prohibition Act for having edited, published and distributed articles in a periodical, which constituted National Socialist activities, the European Commission of Human Rights established that the limited tolerance toward National Socialism should be seen in light of European history. The Commission held that "the prohibition against activities involving the expression of National Socialist ideas is lawful in Austria and, in view of the historical past forming the immediate background of the Convention itself, can be justified in the interests of national security and territorial integrity, as well as for the prevention of crime. It is therefore covered by Article 10 para 2 (Art. 10-2) of the Convention"⁵⁵

Similar is the position of the ECtHR. In the case of *Hans Jorg Schimanek v Austria*⁵⁶, concerning the conviction of the applicant under the Prohibition Act for founding an association whose purpose, through its members' activities, was inspired by National Socialist ideas, the Strasbourg Court held that:

*National Socialism is a totalitarian doctrine incompatible with democracy and human rights and its adherents undoubtedly pursue aims of the kind referred to in Article 17 of the Convention.*⁵⁷

iii. Protection of the rights and freedom of persons and citizens

⁵¹ Felix Muller, *The Nazi Prohibition Act in Relation to Freedom of Speech, A survey on Austrian Constitutional Law*, Revue en ligne Etude Europeenes, 30/30/2006, available at www.etudes-europeennes.fr.

⁵² Article 17 states: "Nothing in this Convention may be interpreted as implying for any State, or group of persons any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

⁵³ The Commission has repeatedly held that Article 17 "covers essentially those rights which will facilitate the attempt to derive there from a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention". In particular, the Commission has found that the freedom of expression enshrined in Article 10 of the Convention may not be invoked in a sense contrary to Article 17. See, for example, *Kuehnen v. the Federal Republic of Germany*, concerning the conviction of the applicant for spreading propaganda directed against the basic order of democracy and freedom in connection with his leadership of an organisation that attempted to re-institute the Nazi party, which is prohibited in Germany. He was found to have advocated fighting for an independent, socialist Greater Germany, and had published pamphlets arguing for a 'racially pure' Germany. He had also stated publicly that his group would fight and eliminate any opponents to their ideology. Decision No. 12194/86, Dec. 12.5.88. (European Commission of Human Rights).

⁵⁴ *Ochensberger v Austria*, Decision of 2 September 1994, Application No. 21318/93. The application was declared manifestly ill founded (European Commission of Human Rights).

⁵⁵ *Ibid.* The paragraphs of the decision are not numbered.

⁵⁶ *Schimanek v Austria*, Decision of 1 February 2000, Application No. 32307/96. The application was declared manifestly ill founded. (European Court of Human Rights).

⁵⁷ *Ibid.* The paragraphs of the decision are not numbered.

Restrictions of freedom of expression for the protection of the rights of other persons are permissible under international law. Paragraph 2 of Article 10 of the ECHR has explicitly included protection of the rights of others as a legitimate purpose for the restriction of freedom of expression. (See above section II.2). For example, it has been established that the prohibition of denials of crimes against humanity is a legitimate restriction on freedom of expression because such denials violate the rights of victims of the Holocaust.

iv. *Combating the desecration of and preserving the memory of the victims of the “Great Fatherland War”*

The Draft Law aims to protect the memory of the Soviet victims of the Second World War. ARTICLE 19 considers that this aim of the law does not qualify as a legitimate restriction on freedom of expression because the list of legitimate restrictions under Article 10, paragraph 2 does not include protection of historical memory. (See above section II.2).

Preservation and combating the desecration of the memory of the victims implies that the Soviet victims of the Second World War are entitled to a sacral public memory. By prohibiting the “desecration”⁵⁸ of this memory, the Draft Law turns a religious concept such as desecration into a legal one. At the same time, it does not provide a definition of desecration. The sacral status which the law grants to the memory of the victims can be compared with *lèse majesté* law in Thailand.⁵⁹ However, in comparison with the Draft Law, the *lèse majesté* law enthrones in a position of revered worship the King, rather than the memory of the victims.

ARTICLE 19 is further concerned that the Draft Law does not specify what amounts to “desecration” of the memory of the victims of the Great Fatherland War. This makes it possible to threaten with severe sanctions or punish individuals, legal entities, media and governments who, for example, deny that the Red Army was not a liberator but an occupier of the newly independent states. The regulation therefore would have a chilling effect on debates on the events and personalities directly linked to the history of the newly independent states.

Finally, the protection of the memory of the victims should be distinguished from the protection of victims themselves. As noted above, the ECtHR and the HRC consider that Holocaust denial laws are legitimate restrictions on freedom of expression inasmuch as they protect the rights of the victims of the Holocaust. Similarly, the Hungarian Constitutional Court and the ECtHR recognised that the prohibition of wearing totalitarian symbols in Hungary⁶⁰ was a legitimate restriction on freedom of expression aimed at protecting the rights of victims of totalitarian regimes and maintaining public order.⁶¹

⁵⁸ In Russian “осквернение”.

⁵⁹ Section 112 of Thailand’s Penal Code states: “Whoever defames, insults or threatens the king, the queen, the heir-apparent or the regent shall be punished with imprisonment of three to fifteen years.”

⁶⁰ Section 269/B of the Criminal Code concerning the use of totalitarian symbols states: “(1) A person who (a) disseminates, (b) uses in public or (c) exhibits a swastika, an SS-badge, an arrow-cross, a symbol of the sickle and hammer or a red star, or a symbol depicting any of them, commits a misdemeanour – unless a more serious crime is committed – and shall be sentenced to a criminal fine.

(2) The conduct proscribed under paragraph (1) is not punishable, if it is done for the purposes of education, science, art or in order to provide information about history or contemporary events.

(3) Paragraphs (1) and (2) do not apply to the insignia of States which are in force.”

⁶¹ *Vajnai v. Hungary*, Judgment of 8 July 2008, Application No. 33629/06 (European Court of Human Rights). However, in the case of *Vajnai*, the ECtHR took a hard, deep look at the need to protect the

In view of the above arguments ARTICLE 19 considers that combating the desecration of the memory of the victims of the “Great Fatherland War” along with combating attempts to re-examine decisions of the international Military Tribunal at Nuremberg are illegitimate restriction on the right to freedom of expression.

4. Scope of the Draft Law

a) Outline

The Draft Law applies to individuals, their associations, and the independent states created on the territory of the former USSR, including Russia⁶², which carry out activities aimed at the rehabilitation of Nazism, Nazi criminals or their collaborators, or which encourage such rehabilitation.¹³

b) Analysis

ARTICLE 19 is concerned about the discriminatory scope of the Draft Law. The fact that the latter targets individuals, institutions and governments of Russia’s neighbouring countries raises questions of the *ratio legis* of the Draft Law and its real purposes. ARTICLE 19 recalls that Article 18 of the ECHR prohibits restrictions on freedom of expression pursued for other purposes than those outlined as permissible in the Convention.⁶³ In this respect censorship, obstructing and penalising historical research carried out by individuals and institutions with or without the support of Russia’s neighbours, is unacceptable.

In addition, the Draft Law raises questions concerning respect for the sovereignty of foreign states, inasmuch as it regulates matters which fall within the exclusive powers of the principle bodies of foreign states such as Parliaments, Presidents or Governments.

5. Elements of the Rehabilitation of Nazism, Nazi Criminals and their Collaborators

a) Outline

The Draft Law does not specify which activities can be considered as aimed at the rehabilitation of Nazism, Nazi criminals or their collaborators. Although it defines some terms, it does not provide any guidance as for the activities as such.

According to the definition provided in Article 3, ‘rehabilitation of Nazism’ is “any action ... aiming at revising the results of the trials of the International Military Court in Nuremberg, as well as any other actions or inactions directed at restoring the rights or reputation of, heroising of, establishing privileges or granting state or public awards to, or denying the

victims of the former communist regime in Hungary by convicting the applicant, a politician, for wearing a red star, and established that the restriction was not necessary in a democratic society.

⁶² The independent states, created on the territory of the former USSR are specifically listed in Article 3, and apart from the Russian Federation comprise the Republic of Abkhazia, the Azerbaijan Republic, the Republic of Armenia, the Republic of Byelorussia, Georgia, the Republic of Kazakhstan, the Kirghiz Republic, the Latvian Republic, the Lithuanian Republic, the Republic of Moldova, the Russian Federation, the Republic of Tajikistan, Turkmenistan, the Republic of Uzbekistan, Ukraine, the Estonian Republic, and the Republic of South Ossetia.

⁶³ Article 18 of the ECHR provides: “The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

genocide and other crimes against humanity carried out by, Nazi criminals or Nazi collaborators and their organisations.” The Draft Law also defines a ‘Nazi criminal’ as “anyone who has committed any crime against peace, war crime, or other crime against humanity falling within the jurisdiction of the International Military Tribunal in Nuremberg”.⁶⁴ A ‘Nazi collaborator’ is defined as “a person who, voluntarily or as a result of mobilisation, joined a body, organisation, or institution of the National-Socialist regime of Germany, or co-operated with the occupational administration in the territory of the USSR within the existing borders of June 22nd, 1941.” Finally, a ‘Nazi supporter’ is a person sharing the ideology of Nazism, and also justifying the application of this ideology by Hitler’s Germany, its allies and helpers between 1933 and 1945, and “equally supporting Nazism rehabilitation”. Article 4, paragraph 3 states that private views as well as scientific, literary, artistic and other forms of creativity are excluded from the scope of the law provided that their realisation does not aim at rehabilitating Nazism, Nazi criminals or their collaborators.

b) Analysis

From a freedom of expression point of view. ARTICLE 19 is concerned about the following:

- i. the lack of foreseeability of the Draft Law’s provisions concerning the prohibition of the rehabilitation of Nazism;
- ii. the failure of the Draft Law to take into account the international law requirement that any interference with the right to seek historical truth must be “necessary in a democratic society”; and
- iii. the necessity in the Draft Law to protect the victims of the Second World War.

ARTICLE 19’s concerns are explained below.

i. Lack of foreseeability

ARTICLE 19 considers that the Russian Draft Law fails to meet the “prescribed by law”-prong of the three-part test for lack of foreseeability. This weakness of the Draft Law arises from the vagueness of most provisions or their overly broad scope. The impossibility for Russian and foreign citizens to predict the consequences of their actions could lead to violations of their freedom of expression. (See above Section II.2. regarding the “prescribed by law”-prong of the three part-test).

First and foremost, the Draft Law fails to specify the material elements of activities that trigger the law’s operation. The concept of “rehabilitation” is inordinately broad. Not one specific act of rehabilitation is specified in the Draft Law. Individuals and organisations can be held liable for any action or inaction directed:

- restoration of the rights or reputation of Nazi criminals or Nazi collaborators and their organisations;
- “heroisation” of Nazi criminals or Nazi collaborators and their organisations;
- establishment privileges or granting state or public awards to Nazi criminals or Nazi collaborators; and
- denying the genocide and other crimes against humanity.

In these circumstances, a very wide range of acts, from naming a street after someone deemed to be a Nazi collaborator to drawing Nazi symbols in a school notebook, may lead to accusations of rehabilitating Nazism. Similarly, it would be possible to accuse of rehabilitation of Nazism even foreign state officials whose professional duties include preparation of the necessary documents for restoration of the rights of foreign nationals considered by the

⁶⁴ Article 3 of the Draft Law.

Russian State to be Nazi collaborators. Moreover, it is not clear in what circumstances persons can be held liable for inaction.

Second, the most important element of the offence of the rehabilitation of Nazism is the intent of the perpetrator.⁶⁵ According to the law, any action aimed at revising the decisions of the Nuremberg trials constitutes rehabilitation of Nazism. The scope of this provision is extremely broad and can lead to unnecessary restrictions on freedom of expression. For example, any critic of the decisions of the Nuremberg Tribunal falls within the scope of the Draft Law. As explained above, many respected authors from different parts of the world have been critical of the decisions of the Nuremberg Tribunal, without being accused of rehabilitating Nazism. The good public reputation of critics of the Nuremberg tribunals was preserved due to the fact that their criticism was not inspired by Nazism, but by their academic findings or moral positions. In this respect, ARTICLE 19 points, again to Austria's Prohibition Act that prohibits acts inspired by Nazism.

The definition of rehabilitation of Nazism implicitly prohibits acts of restoration of the rights or reputations of Nazi criminals and collaborators, their "heroisation", the establishment of privileges and the denial of genocide and crimes against humanity. With the exception of the prohibition of denial of genocide and crimes against humanity⁶⁶, the other prohibitions raise many questions which are not addressed by the Draft Law. For example, since the restoration of rights or reputation and the establishment of privileges or granting of state awards are brought about by sovereign acts of Parliaments, courts, or Presidents worldwide, the Draft Law seems to intervene with and restrict the constitutional powers of these bodies. The problem gets even bigger when these state bodies are foreign. In this case, it is reasonable to claim that the regulation proposed by the Draft Law runs counter to the sovereignty of the new independent states, as former USSR republics and neighbours of the Russian Federation.

Although the Draft Law seeks to exclude from its scope private views as well as scientific, literary, artistic and other forms of creativity ARTICLE 19 notes that intent is still relevant. Scientists, writers and other artists can still be held responsible for rehabilitation of Nazism if "the realisation" of their views aims at rehabilitating Nazism, Nazi criminals or their collaborators." Moreover, it is quite unclear what "the realisation" of the views is meant to be in this context.

Further, the Draft Law vaguely and discriminatorily defines the subjects with respect to which acts of rehabilitation are prohibited. It is possible to conclude from the definition of 'Nazi criminal' – "a person who committed any crime against peace, war crime or other crime against humanity" - that formal conviction by a court is not required for one to be identified as a Nazi criminal.

In addition, ARTICLE 19 is concerned about the over-inclusiveness of the category of "Nazi collaborator". This category consists of two sub-categories. The first sub-category comprises all persons who voluntarily or as a result of mobilisation joined any body, organisation, or institution of the National-Socialist regime in Germany. The definition is inordinately over-inclusive because it encompasses practically all Germans as well as many persons from other countries who during the period 1933-1945 participated in some way in a "body,

⁶⁵ We note that the Draft Law incorrectly defines the intent as an element of the act of rehabilitation. Although the intent characterises the mental state of the perpetrator (*mens rea*) the words "acts. . . aiming at" suggest intent of the acts, which is nonsense. It is therefore incorrect to regulate "acts. . . aiming at". The correct definition should be if "someone conducts acts . . .with the purpose of".

⁶⁶ We note that blanket bans on denial of the Holocaust are problematic from a freedom of expression point of view, as they may be used to prohibit publication of *bona fide* research connected with matters decided by the Nuremberg tribunal.

organisation, or institution” of the Nazi regime. Many were given no choice. Many others participated voluntarily, especially in the early years of the regime, but this is hardly surprising given that the Nazi regime was democratically elected.

The second sub-category comprises all persons who cooperated with the occupational administration on the territory of the USSR within its borders as they existed on 22 June 1941. This category is also unfairly over-inclusive. The Draft Law captures any person who did not actually support the occupational administration but merely followed its instructions in order to save his/her life, or merely continued doing his/her professional duties under the occupational administration.

The term “Nazi supporter” is also over-broad. Anyone who is deemed to support ‘Nazi rehabilitation’, as vague as this definition is, is proclaimed as a ‘Nazi supporter’. The Draft Law therefore places anyone who defends unjustly accused persons under risk of sanctions for rehabilitation of Nazism.

ARTICLE 19 also notes that the Draft Law also lacks clarity as to the timeframe of liability. All actions past, present, and future fall within the scope of the Draft Law, no matter how far in the past or future those actions may occur. For example, the law would render impossible the discussion of facts concerning particular historical personalities or events even if new evidence came to light which tended to disprove allegations of Nazi criminality or collaboration. And indeed, such evidence may well come to light when restrictions on access to historical archives are periodically lifted.

The Draft Law also lacks clarity as to its spatial applicability. It appears to apply even when acts of rehabilitation occur in the privacy of the home, where no public harm may occur. For example, under the Draft Law, any person who remarked casually over dinner that he disagrees with the official version of history regarding some event or personality regarded as Nazi criminal or collaborator, could be accused of rehabilitation of Nazism.

Neither does the Draft Law specify what constitutes encouragement to such rehabilitation.

Finally ARTICLE 19 observes that the Draft Law makes it impossible to restore the reputation of persons regarded as Nazi criminals or Nazi collaborators. Regardless of any new evidence or the unfairness of trials in which they were convicted of Nazi collaboration, these persons would never be able to clear their names. In other words, the Draft Law prohibits seeking legal or public justice for anyone wrongfully accused of Nazi collaboration or crimes.

In view of the above arguments ARTICLE 19 considers that the Draft Law fails to meet the requirement of foreseeability of the justified restrictions on the right freedom of expression in the fight against rehabilitation of Nazism.

ii. No requirement that any interference with the right to seek historical truth must be “necessary in a democratic society”

ARTICLE 19 observes that, from a freedom of expression point of view, the Draft Law affects the right to freedom to seek historical truth. The ECHR requires interference with the right to freedom to seek historical truth to be “necessary in a democratic society”. (See above Section II.2.) This requirement implies the existence of a “pressing social need” in each case to pursue the specific aim. For this purpose, national authorities are obliged to seek the proportionality of interference and to find the balance between the right to seek historical truth and the interests protected by the State – for example, rights of others, public order, national security, etc. - be established.

ARTICLE 19 notes that the Draft Law does not take into account the fact that the prohibition of certain acts affects the right to freedom of expression. This right belongs not only to those who are targeted by the law but also to the people who have a right to receive information. In respect to the latter, the ECtHR has stated that:

*[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.*⁶⁷

Below, ARTICLE 19 sets out the standards which the ECtHR has established in the field of historical research, and discusses the failure of the Draft Law to take these standards into account.

The cases before the ECtHR concerning debates related to history were either Holocaust denial cases (*Garaudy v. France*⁶⁸), defamation cases concerning convictions in relation to racially defamatory statements (*Giniewski v France*⁶⁹), or defamation of historical personalities (*Lehideux and Isorni*⁷⁰). In all cases, the ECtHR carefully examines whether the public's interest in knowing the history is balanced with the need for protection of individuals' reputation.

While the ECtHR has given to state authorities a wider scope of appreciation with respect to Holocaust denial, and thus only examines whether domestic courts have applied standards which were in conformity with the principles embodied in Article 10, it carries out a more rigorous analysis with respect to restrictions on the search of historical truth justified as necessary for protection of individual or group reputation. In these cases, the ECtHR first analyses the general context in which the allegedly defamatory statement has been made, and the particular circumstance of those involved. Then it takes a look at the content of the publication and its author's intent. Further, the Court examines whether the author has acted with good faith and with sufficient caution when describing historical events and discussing the role of historical personalities. Finally, the ECtHR inquires whether the statements in question are racially defamatory or incite racial hatred.

As to general context

As explained in Section II.4.1. above, it is an established position of the ECtHR that there is little scope under Article 10 para 2 of the ECHR for restrictions on debates on questions of public interest. For example, in the case *Giniewski v France*,⁷¹ concerning a court decision by which the applicant was found guilty of racial defamation in relation to an article in which he claimed that there is a connection between a specific papal doctrine and the Holocaust, the ECtHR found that the applicant's statements contributed to a recurrent debate of ideas between historians, theologians and religious authorities. In the case of *Lehideux and Isorni v France*,⁷² concerning the convictions of the applicants for publicly defending crimes of collaboration with the enemy by means of an advertisement promoting Marshal Petain's achievements, the ECtHR took account of the ongoing and unsettled historical debate among historians about the events related to French history during the Second World War in general, and to Marshal Petain in particular. In these cases, the ECtHR allowed limited restriction of freedom of expression due to the public's interest in knowing the history.

As to the particular circumstances of those involved

⁶⁷ *Leander v. Sweden*, Judgment of 26 March 1987, Application No. 9248/81 para 74. (European Court of Human Rights).

⁶⁸ *Garaudy v. France*, see *ibid.* footnote no. 30.

⁶⁹ *Giniewski v France*, see *ibid.* footnote no. 20.

⁷⁰ *Lehideux and Isorni*, see *ibid.* footnote no. 22.

⁷¹ *Giniewski v France*, see *ibid.* footnote no. 20.

⁷² *Lehideux and Isorni v France*, see *ibid.* footnote no. 22.

For example, in the case of *Feldek v Slovakia*,⁷³ concerning a court order against the applicant to pay for the publication of a court decision finding that he wrongfully accused a minister for having “a fascist past”, the ECtHR recalled that the limits of acceptable criticism are wider as regards the Government, a politician or a public figure, than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his words and deeds by journalists and the public at large, and he must consequently display a greater degree of tolerance.⁷⁴

In the case of *Chauvy v. France*,⁷⁵ concerning the conviction of an author of the book who raised the possibility, albeit by way of innuendo, that a well-known member of the Resistance had betrayed one of his comrades and had thereby been responsible for his arrest and death, the Strasbourg Court took into account that the person in question and his wife were “important members of the Resistance”.

The content of the publication and the author’s intent

For example, in the case of *Giniewski v France*⁷⁶ the ECtHR found that although the published text contained conclusions and phrases which may offend, shock or disturb some people, the applicant’s criticism was directed toward the papal encyclical, or in other words, the Pope’s position, rather than Christianity as a whole. Further, the ECtHR established that the applicant sought primarily to develop an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust.

Good faith and sufficient caution when describing historical events and discussing the role of historical personalities

For example, in *Chauvy*⁷⁷, the ECtHR credited the observation of the same domestic court that the author did not act in good faith as he gave excessive importance to the Barbie testament, failed to critically analyse the German sources and documents, and neglected the statements of those who took part in the events.

Bona fide research concerning genocide or crimes against humanity is acceptable under international law. In the decision of the case of *Faurisson v France*⁷⁸, discussed above, the HRC members Ms Evatt, Mr. Kretzmer and Mr Klein highlighted that the intent of the author, not the tendency of the publication to incite anti-semitism, should be regarded as more important.

Whether the statements are racially defamatory or incite racial hatred

For example, in *Garaudy v France*⁷⁹, concerning the conviction of the author of a book entitled *The Founding Myths of Israeli Politics* in which he discussed “Shoah business” suggesting the Jews deceitfully fabricated evidence of the extent of the Holocaust for financial gain, the ECtHR found that the applicant did not limit himself to political criticism of the State of Israel, but in fact pursued a proven racist aim.

The Draft Law does not take into account any of the above principles and standards by which the ECtHR assesses the limits of historical research. Although the Draft Law seeks to exclude from its scope private views as well as scientific, literary, artistic and other forms of creativity ARTICLE 19 notes that the test of exclusion does not guarantee a fair balance

⁷³ *Feldek v Slovakia*, see *ibid.* footnote no. 24.

⁷⁴ Reference to the case of *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, para 42, (European Court of Human Rights).

⁷⁵ *Chauvy v. France*, see *ibid.* footnote no. 16.

⁷⁶ *Giniewski v France*, see *ibid.* footnote no. **Error! Bookmark not defined..**

⁷⁷ *Chauvy v. France*, see *ibid.* footnote no. 16.

⁷⁸ *Faurisson v France*, see *ibid.* footnote no. 49.

⁷⁹ *Garaudy v. France*, see *ibid.* footnote no. 30.

between freedom of expression and the protection of other public interests. For example, the intent of scientist, writers and other artists is irrelevant. The Draft Law focuses instead on 'the realisation' of their views or in other words on the tendency of their research, art or books to rehabilitate Nazism, Nazi criminals or their collaborators. Moreover, it is unclear what is meant by "the realisation" of private views in this context.

Consequently, statements concerning historical personalities and events which would be permissible under the ECHR are prohibited by the Draft Law. For example, the over-broad prohibition of restoration of the reputation of "Nazi collaborator" restricts any discussions by historians on new facts shedding light onto the life of a historical personality accused of being a Nazi collaborator. It is irrelevant that the statements are neutral and do not defame historical personalities or incite racial hatred. Neither are the intent of the historians and the objectivity of their research of importance. At the end of the day, what matters is that the discussion initiated by the historians contributes to the restoration of the reputation of a "Nazi collaborator".

In view of the above, ARTICLE 19 considers that the Draft Law fails to require that any interference with the right to freedom to seek historical truth should be proportionate to the value or the interest protected by Article 10, paragraph 2 of the ECHR. As a result, domestic courts are not required to assess whether any measure under the Draft Law which affects the right to freedom of expression is "necessary in a democratic society".

iii. It is not necessary to interfere with the right to seek historic truth to protect the victims of the Second World War.

Mindful of the fact that one of aims of the Draft Law is to protect the victims of the Second World War, ARTICLE 19 considers that more than 60 years after the end of this war, it is not longer necessary to interfere with the right to seek historic truth in order to protect the victims of the war.

In this respect, ARTICLE 19 refers to the case of *Vajnai v. Hungary*⁸⁰ concerning the question of the protection of victims of past crimes. The applicant in this case was convicted for wearing a red star during a political demonstration. The particular provision of the Hungarian Criminal Code²⁹ under which the applicant was convicted criminalised the wearing of symbols of totalitarian regimes (both Nazism and Communism). The provision was adopted in view of the historical situation in Hungary and in particular "because twentieth century dictatorships had caused much suffering to the Hungarian people."³⁰

According to the Government's submission before the ECtHR "the display of symbols related to dictatorships created uneasy feelings, fear or indignations in many citizens, and sometimes even violated the rights of the deceased." The ECtHR found that the conviction of Mr Vajnai was not necessary in a democratic society pointing out the following with respect to the feeling of the victims:

[T]he display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful. [The ECtHR] nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression. Given the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of Communism, such emotions cannot be regarded as rational fears. In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society

⁸⁰ *Vajnai v. Hungary*, see *ibid.* footnote no. 61.

*must remain reasonable in its judgement. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto.*⁸¹

6. Monitoring and Measures for Combating the Rehabilitation of Nazism

a) Outline

Article 14 of the Draft Law stipulates that monitoring for its enforcement will be carried out on the territory of the Russian Federation as well as on the territories of the newly independent states of the former USSR. The monitoring is envisaged to include collection, analysis and assessment of information concerning acts of rehabilitation of Nazism, the creation of a database, prognosis and scientific research.

The Draft Law⁸² provides for the following five measures in combating the rehabilitation of Nazism, Nazi criminals and their collaborators:

- i. Adoption of preventive measures;
- ii. Cautions;
- iii. Warnings;
- iv. Liquidations; and
- v. Bans.

These measures have an administrative character and can be undertaken if the acts of rehabilitation do not justify recourse to criminal proceedings.

i. Preventive measures

Article 15 of the Draft Law states that all federal state bodies and state bodies of the subjects of the Russian Federation, as well as local self-governing bodies and public and religious organisations shall take preventive measures, including educational measures, intended as warnings of acts of rehabilitation of Nazism. When a citizen of the new independent state of the former USSR violates the law, the Office of the General Prosecutor of the Russian Federation, or other authorised state authority of the Russian Federation, shall notify the corresponding bodies of the independent state that the act is illegal and that if the person in question enters the territory of the Russian Federation, the current legislation shall apply.⁸³

ii. Cautions

If there is sufficient and confirmed evidence for the preparation of acts aimed at the rehabilitation of Nazism which do not justify recourse to criminal proceedings, the General Public Prosecutor of the Russian Federation, his/her assistant, or corresponding public prosecutor shall caution in writing the head of the legal person, political party, public or religious organisation, or mass media organisation about the inadmissibility of such activity, including the concrete grounds of the caution.⁸⁴ If, within 30 days from the moment of the announcement of caution, the individual or legal person or mass media organisation in question fails to execute the requirements stated in it, another measure provided by the Draft Law shall be imposed.⁸⁵ Cautions can be appealed before courts.⁸⁶

iii. Warnings

⁸¹ See *ibid.* para. 57.

⁸² Article 5 of the Draft Law.

⁸³ Article 15, paragraph 2 of the Draft Law.

⁸⁴ Article 16, paragraph 1 of the Draft Law.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

A warning in writing is issued by the General Public Prosecutor of the Russian Federation or his/her subordinated prosecutors to a legal person, individual entrepreneurs, political parties, public or religious associations or other organisations which carry out activities on the territory of the Russian Federation on rehabilitation of Nazism. A warning toward a public or religious association can also be issued by a body of the federal government responsible for the registration of any non-commercial organisation, political party, public association or religious organisation.⁸⁷ The warning contains measures which should be taken for the elimination of the infringement within a prescribed period of no less than two months.⁸⁸ If the measures are not fulfilled within 30 days, other measures provided by the Federal Law can be imposed. Warnings can be appealed before courts.⁸⁹

iv. Dissolution of legal entities

If no action is taken to eliminate the infringements or if within 12 months from the date of the elimination of the infringement, new facts testifying to the rehabilitation of Nazism are elicited from the corresponding legal body, the individual entrepreneur, public or religious association, mass media or other organisation is subject to dissolution, and the activity of the public or religious association which are not the legal body, shall be banned.⁹⁰ The decision of dissolution of the legal persons, public or religious associations or mass media organisations is made by the courts.⁹¹ Until the court's decision, these bodies should suspend their activities.⁹²

In the case of suspension of the activities of any legal person, individual businessman, public or religious association, mass media or other organisation, the latter loses their right to use state and municipal mass media, organise and hold meetings, demonstrations, processions, picketing and other mass actions or public actions, take part in elections and referenda, and use bank contributions.⁹³

v. Bans

The activities of foreign legal bodies, individual entrepreneurs, political parties, public and religious associations, commercial and non-commercial organisations and their structural divisions whose activity is recognised as aiming at the rehabilitation of Nazism shall be banned on the territory of the Russian Federation.⁹⁴

According to Article 17, the ban of the activity of foreign organisations shall involve:

- cancellation of state accreditation and registration;
- deprivation of the right of foreign citizens and persons without citizenship to reside on territories of the Russian Federation as representatives of the organisation;
- prohibition of any economic and other activities on the territory of the Russian Federation;
- prohibition of the publication in mass media of any materials of the banned organisation;
- prohibition of the distribution within the territory of the Russian Federation of materials of the banned organisation;
- prohibition of representatives of the banned organisation (or its official representatives) to organise or participate as representatives of such an organisation in public actions and events; and

⁸⁷ Article 17, paragraph 2 of the Draft Law.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Article 17, paragraph 2 of the Draft Law.

⁹¹ Article 19 of the Draft Law.

⁹² Ibid.

⁹³ Article 19 of the Draft Law.

⁹⁴ Article 17, paragraph 3 of the Draft Law.

- prohibition on succeeding a banned organisation in any legal form.

When the activity of a foreign legal person carrying out economic activities on the territory of the Russian Federation is recognised as aiming at the rehabilitation of Nazism, the measures of economic influence provided by the Federal law of the Russian Federation "On special economic measures" can be applied.⁹⁵

b) Analysis

ARTICLE 19 is seriously concerned about these sanctions provided by the Draft Law, in particular about the bans on legal activities and dissolutions legal entities. These can be used to silence certain type of views or restrict historical research. It should be noted that in cases involving any form of expression, the imposition of a sanction – whatever their character is – engages the right to freedom of expression. This restricts the type of sanctions that may be imposed, or their amount or length. Under international law, it is well established that excessive sanctions, even for otherwise legitimate restrictions, represent a breach of the right to freedom of expression. The ECtHR, for example, has noted that excessive sanctions exert an unacceptable chilling effect on freedom of expression.⁹⁶

Further, the measures specified in the Draft Law for counteracting acts of rehabilitation are unclear. For example, the Draft Law provides that if an individual fails to fulfil the requirements specified in the caution, a “warning” may be subsequently issued. However, the Draft Law remains silent about the content of these requirements.

Finally, ARTICLE 19 criticises the Draft Law for prescribing temporary restrictions on certain rights of legal persons, individual businessmen, public associations and mass media during the suspension of their activities. ARTICLE 19 notes that the rights to use state and municipal mass media, organise and hold meetings, demonstrations, processions, and take part in elections and referenda are human rights, and as such cannot be limited except in extraordinary circumstances, and in any case only by independent courts.

In view of the above, ARTICLE 19 considers that the sanctions provided by the Draft Law are not in compliance with international standards concerning the protection of the right to freedom of expression.

7. Regulation of the Responsibility of the Mass Media

a) Outline

The Draft Law explicitly includes the mass media in the provisions applying to individuals and organisations. Therefore it would be possible to hold the media liable for rehabilitation of Nazism in similar fashion as individuals and organisations. The sanctions provided for individuals and organisations apply to the mass media too, including dissolution. Moreover in contrast to individuals and organisations, the media would be liable not only for the principle act of rehabilitation, but also for aiding rehabilitation of Nazism through the distribution of materials or dissemination of facts. If the media accused of such distribution do not take the measures prescribed, their activities shall be suspended.⁹⁷

⁹⁵ Article 17, paragraph 4 of the Draft Law.

⁹⁶ See *Tolstoy Miloslavsky v. the United Kingdom*, Judgment of 13 July 1995, Application No. 18139/91, para. 51 (European Court of Human Rights).

⁹⁷ Article 18.

b) Analysis

ARTICLE 19 is concerned that the Draft Law does not take into account the role of the media in democratic society. We recall that the guarantee of freedom of expression applies with particular force to the media. The ECtHR has consistently emphasised the “pre-eminent role of the press in a State governed by the rule of law.”⁹⁸ It has further stated that it is incumbent on the media to impart information and ideas in all areas of public interest. The position of the Strasbourg Court is that in cases concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. The latter weighs heavily in the balance in determining whether the restriction was proportionate to the legitimate aim pursued.⁹⁹

In the case of *Jersild v. Denmark*¹⁰⁰, which concerned the conviction of a journalist for disseminating hate speech by means of an interview with a group of extreme racists, the ECtHR highlighted the significant role of the media in combating racism and Nazism. The ECtHR found that Danish courts failed to take account of the manner in which the feature was prepared, its contents, the context in which it was broadcast and the purpose of the programme. In contrast to the domestic authorities, the ECHR considered that the applicant could not be treated as equal to the young Nazi, whose views he aimed to expose and analyse. The ECtHR stated:

*Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.*¹⁰¹

ARTICLE 19 criticises the provision which imposes responsibility on the media for aiding rehabilitation of Nazism through distribution of materials or facts. First, the provision is vague. There is a real risk for a broader interpretation which can lead to serious consequences for the media. Second, the rule is in conflict with the position of the ECtHR that the media should not be held responsible for reporting of facts and views which they aim to expose and analyse. The judgment in *Jersild* made it clear that this position applies to all information of public importance, including information concerning new views about historical facts or personalities.

ARTICLE 19 considers that there is no justification for special provisions for the media. Laws of general application prohibiting incitement to an act of violence, hatred or discrimination on the grounds of race, are applicable to the media. The media should be free to inform about acts of racism and Nazism. The special provisions for the media restrict its freedom to impart information and ideas of public interests. At the same time, they restrict the right of the public to receive them.

ARTICLE 19 is concerned that the State is given the power to interfere with the editorial independence and autonomy of the media by imposing specific policies on them. Such

⁹⁸ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63 (European Court of Human Rights).

⁹⁹ *Thoma v. Luxembourg*, Judgment of 29 March 2001, Application No. 38432/97, para. 48 (European Court of Human Rights).

¹⁰⁰ *Jersild v. Denmark*, Judgment of 23 September 1994, Application No. 15890/89 (European Court of Human Rights)

¹⁰¹ *Ibid.* para. 31.

policies represent excessive interference in the media. The limitation will make impossible any debate about certain historical events and will lead to total state control of history.

Finally, the Draft Law's measures aimed at mass media organisations are disturbing. They are grossly disproportionate to the purported aims, and amount to censorship. Liquidation or suspension of mass media organisations entails a restriction of other fundamental rights as well. These restrictions affect all Russian citizens, including those involved in the mass media organisation.

In view of the above, ARTICLE 19 considers that if the Draft Law were adopted, the media would be hindered from reporting on issues of big public interests such as acts of Nazism and racism.

IV. CONCLUSIONS AND RECOMMENDATIONS

ARTICLE 19 makes the following conclusions with respect to the compliance of the Draft Law with the international standards of freedom of expression:

1. The scope of the Draft Law is discriminatory and raises questions concerning the respect of the sovereignty of foreign states, inasmuch as it regulates matters which fall within the exclusive powers of the principle bodies of foreign states such as Parliaments, Presidents or Governments.
2. Combating the re-examination of the decisions of the international Military Tribunal at Nuremberg and the desecration of the memory of the victims of the "Great Fatherland War" are illegitimate restriction on the right to freedom of expression. In addition, as more than 60 years have passed since the end of Second World War, it is not longer necessary to interfere with the right to seek historic truth in order to protect the victims of the war.
3. The Draft Law fails to require that any interference with the right to freedom to seek historical truth should be proportionate to the value or the interest protected by the State in accordance with Article 10, paragraph 2 of the ECHR.
4. The sanctions provided by the Draft Law in particular the bans of activities of legal entities and the dissolution of the latter are not in compliance with international standards of freedom of expression.
5. In violation of international law the Draft Law hinders the reporting by the media on issues of big public interests such as acts of Nazism and racism.

In view of these conclusions, ARTICLE 19 recommends that the Draft Law be rejected by the Russian Parliament.