



**RADA FUNDACJI**

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**GANBAROVA AND OTHERS V. AZERBAIJAN  
(APPLICATION NO. 1158/17)**

**WRITTEN COMMENTS  
BY  
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS<sup>1</sup>**

**25 JANUARY 2018**

**1. Introduction. Scope of the intervention**

Pursuant to the letter by the Section Registrar from 5 January 2018, we would like to present a third-party intervention of the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland (HFHR) on the case *Ganbarova and Others v. Azerbaijan* before the Court.

The Applicants in the communicated case have been subjected to travel bans imposed on them by the Azerbaijani authorities. Such a restriction clearly interfered with their freedom of movement protected both by the International Covenant on Civil and Political Rights (ICCPR) (Article 12.2-3) and the European Convention for Human Rights (ECHR) (Article 2 of Protocol no. 4). However in our intervention we would like to set aside the question of limitations to the freedom of movement and focus on the possible violation of another human right involved, namely the freedom of expression (Article 19 of the ICCPR and Article 10 of the ECHR). In our view, the travel bans in this case may have been applied by the State authorities with an aim to stifle journalistic criticism and silence civil society activism.

The HFHR believes that this case is of precedential nature, therefore we would like to present a number of comments relating to the core of the complaint. So far the ECtHR has not had an opportunity to explicitly rule whether a travel ban imposed on journalists or/and human rights defenders may constitute a violation of their freedom of expression. In our intervention we would like to highlight however certain standards already developed in the existing ECtHR's jurisprudence which may help with resolving the case, even though originally they have not been precisely related to the travel ban problem. Moreover we would like to bring to the Court's attention other human rights standards, created within the United Nations (UN) or the Organisation for Security and Cooperation in Europe (OSCE) systems, which may add a valuable contribution to the Court's deliberations. Furthermore, as we consider the Applicants to act in two roles in the given case, i.e. as journalists and at the same time human rights defenders, we would like to discuss the impact of the travel bans on freedom of expression from the perspective of both

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<sup>1</sup> *The intervention was prepared by Dorota Głowacka and Konrad Siemaszko, lawyers of the Helsinki Foundation of Human Rights.*

vulnerable groups and by referring to both protection frameworks. Finally, our intervention will be grounded in the national contexts of Azerbaijan where legal and practical hindrances to journalistic and civil society activities have become a part of a systematic practice of the public authorities.

## **2. Travel ban as an interference in the journalistic freedom of expression**

### **2.1. Overview of the situation of journalists in Azerbaijan**

The protection of journalists and media freedom forms an integral part of the protection of the freedom of expression under Article 19 of the ICCPR and Article 10 of the ECHR. The Court has repeatedly emphasised that a full exercise of this freedom must allow for free criticism of government by media as it is incumbent on the press “to impart information and ideas on political issues just as on those in other areas 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”<sup>2</sup>. In Azerbaijan fulfilling a “public watchdog” role by media in controlling the authorities’ actions and providing society with information is an extremely difficult task as the constitutional guarantees for press freedom are routinely and systematically violated there. According to the Freedom House Report from 2017<sup>3</sup>, the independent and opposition media outlets in Azerbaijan struggle financially and have faced heavy fines and other hindrances as retaliation for critical coverage. Journalists are threatened, harassed and intimidated with a variety of both legal and non-legal measures, either in order to prevent them from further publishing or as a repression for already published materials. As a consequence many media professionals have been detained or imprisoned on fabricated charges. The report notes also that the Azerbaijani government has increasingly restricted freedom of movement, in particular with respect to foreign travels, for opposition politicians, journalists, and civil society activists. The pressure on independent media outlets outside the country, and those associated with them working from the inside, has been also reported by the United States Department of State in its Human Rights 2016 report<sup>4</sup>.

What is more, despite univocal international condemnation, harassment of independent journalists and bloggers continue. For instance, in March 2017, Mehman Huseynov, a popular video-journalist and blogger in Azerbaijan, known for his hard-hitting video reports of alleged corruption by senior Azerbaijani officials was sentenced by a Baku court to two years in prison on charges of defaming a police chief of the Nasimi police station, after he gave a statement in front of the courthouse in which he described the violence he had suffered at that police station. In the same year in May, Afgan Mukhtarli – journalist and political dissident who covered social and political issues, including corruption cases in the highest echelons of power in Azerbaijan, was abducted on the streets of Tbilisi and reappeared in Azerbaijani custody, where he now awaits trial on fabricated charges of alleged illegal border crossing, smuggling, and resisting arrest. Although he reports having been brought through the border by force and that his passport remained at his home in Tbilisi that day, Afgan Mukhtarli was accused of attempting to cross the border illegally and to bring in 10.000 EUR to Azerbaijan. On 12 January 2018, he was sentenced to 6 years in prison.

The imposition of the travel bans on the Applicants in the communicated case cannot be analysed in isolation from the context described above but should take into consideration that it may be an element of routinely targeting independent media by public authorities in Azerbaijan.

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<sup>2</sup> The ECtHR’s judgment from 8 July *Lingens v. Austria*, Application no. 9815/82, par. 103.

<sup>3</sup> Freedom House, *Freedom in the World 2017. Azerbaijan profile*.

<sup>4</sup> United States Department of State, *Human Rights Report 2016*.

## 2.2. The impact of restriction of freedom of movement on freedom of expression

The relationship between freedom of movement and other human rights has been already subject to analysis in the Court's jurisprudence. First, it should be noted that the Court has accepted that where freedom of movement is restricted in connection with the exercise of another right, this may constitute an interference also with that other right. For example, in the case *Nolan and K. v. Russia* in which the ECtHR examined an expulsion from Russia and a denial of re-entry imposed on the activist of the Unification Church in the context of freedom of religion, the Court stated that "[it] follows that, in so far as the measure relating to the continuation of the applicant's residence in a given State was imposed in connection with the exercise of the right to freedom of religion, such measure may disclose an interference with that right"<sup>5</sup>.

Second, the Article 10 (1) of the ECHR guarantees the freedom to receive and impart information and ideas without interference by public authorities and regardless of frontiers. Therefore any restriction on the freedom of movement which may affect effective exercise of freedom of expression, especially in the cross-border context (including the imposition of a travel ban), should be first analysed in the light of the paragraph 1 of Article 10 as it appears that such measures may be in direct conflict with its actual wording. Especially that the Court has previously broadly interpreted the expression "regardless of frontiers", using this concept to question for example a Turkish legislation blocking access to an internet site<sup>6</sup> or a French legislation conferring "wide-ranging powers on the Minister of the Interior to issue administrative bans on the dissemination of publications of foreign origin or written in a foreign language"<sup>7</sup>.

Finally, it has been already explicitly recognised on several occasions in the Court's case-law that certain restrictions of freedom of movement of a person may amount to interference with the Article 10. These restrictions included *inter alia*: 1) prohibition of an entry of a ship whose crew intended to launch a campaign in favour of the decriminalization of abortion into Portuguese territorial waters<sup>8</sup>, 2) application of an expulsion measure coupled with the ban on re-entering French Polynesia on account of that Applicant's statements criticising French police<sup>9</sup>, and 3) prohibition from re-entering Turkey on account of the contents of the Applicant's opinions on Kurdish and Armenian issues expressed in the past at a university in Turkey<sup>10</sup>. Even though these examples refer to prohibition of entry, they could be easily extended to other forms of restriction of cross-border movement, such as travel bans.

Accordingly, it is clear that any restrictions imposed upon the freedom of movement may at the same time affect other human rights, such as freedom of expression, and thus should be subject to review on the grounds that they may inhibit these other rights as well.

## 2.3. Freedom of movement as an essential element of free and independent newsgathering

The concept of freedom of movement as a pre-condition for an effective exercising of freedom of expression by journalists is already a well-grounded and historically recognised principle in the existing human rights standards. In the Helsinki Final Act from 1975 the participating States agreed to improve the conditions under which journalists from one participating State practice

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<sup>5</sup> The ECtHR's judgment from 12 February 2009, Application no. 2512/04, paras. 62-67.

<sup>6</sup> The ECtHR's judgment from 18 December 2012 *Ahmet Yildirim v. Turkey*, Application no. 3111/10, par. 67.

<sup>7</sup> The ECtHR's judgment from 17 July 2001 *Association Ekin v. France*, no. 39288/98, par. 58, 62.

<sup>8</sup> The ECtHR judgement from 3 February 2009 *Women On Waves And Others v. Portugal*, Application no. 31276/05, par. 30.

<sup>9</sup> The ECtHR's judgment from 27 April 1995 *Piermont v. France*, Application nos. 15773/89 and 15774/89, paras.51-53.

<sup>10</sup> The ECtHR's judgment from 20 May 2010 *Cox v. Turkey*, Application no. 2933/03, paras. 30-31.

their profession in other participating States. They, *inter alia*, committed to “ease, on a basis of reciprocity, procedures for arranging travel by journalists of the participating States in the country where they are exercising their profession, and to provide progressively greater opportunities for such travel, subject to the observance of regulations relating to the existence of areas closed for security reasons”. The participating States also affirmed that “the legitimate pursuit of their professional activity will neither render journalists liable to expulsion nor otherwise penalize them”<sup>11</sup>. Similarly in a *Written declaration from 1998 on the freedom of the press in the Federal Republic of Yugoslavia*<sup>12</sup>, the Council of Europe Parliamentary Assembly (PACE) expressed its concern with respect to “situation as regards the gathering and dissemination information” in the country. The PACE noted that “the Yugoslav authorities are restricting the free movement of journalists, particularly foreign journalists”, and that “some have been expelled from Yugoslav territory while others have, for weeks, been refused entry visas”. The signatories of the declaration called these events “massive violations of the principles of the Council of Europe in a field of information and the media” and appealed for denouncing them on the international forum.

The free movement of journalists as an essential element of exercising freedom of expression is also explicitly mentioned in several more contemporary human rights documents, developed both at the global and regional levels. According to the General Comment no. 34 to the Article 19 of the ICCPR, “[i]t is normally incompatible with paragraph 3 to restrict the freedom of journalists and others who seek to exercise their freedom of expression (such as persons who wish to travel to human rights-related meetings) to travel outside the State party, to restrict the entry into the State party of foreign journalists to those from specified countries or to restrict freedom of movement of journalists and human rights investigators within the State party (including to conflict-affected locations, the sites of natural disasters and locations where there are allegations of human rights abuses)”<sup>13</sup>. There are also documents which refer to restrictions to journalistic freedom of movement as a threat to media freedom in particular national contexts. For example the OSCE Representative on Freedom of the Media has reacted on a number of occasions when an OSCE participating States denied entry to journalists from other countries. The most recent instances of such incidents concerned journalists from Russia who were denied entry into Ukraine, as well as reports of de facto authorities in Crimea denying entry to a number of journalists crossing the border of the peninsula. In April 2014 the OSCE Representative expressed her “serious concerns about undue limitations on such travel which affects the free flow of information and free media” and added that “journalists negatively affected by denials of entry should be given the opportunity to appeal”<sup>14</sup>. Finally there are also documents emphasising the importance of freedom of movement of particular groups of journalists, such as for example investigative journalists. In the *Declaration on the protection and promotion of investigative journalism*<sup>15</sup> the Committee of Ministers called the Member States to “protect and promote investigative journalism (...) and in this context (...) to ensure the freedom of movement of media professionals and their access to information in line with Council of Europe standards and facilitate critical and in-depth reporting in service of democracy”.

What is more, the Court has also already ruled that restrictions of the freedom of movement may constitute an interference in journalistic freedom of expression if their application hampers journalists’ right to effectively fulfil their “public watchdog” role. Such conclusion may be drawn

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<sup>11</sup> The Helsinki Final Act, 1 August 1975 r.

<sup>12</sup> PACE, *Written declaration on the freedom of the press in the Federal Republic of Yugoslavia*, 5 October 1998, no. 284, doc. 8224.

<sup>13</sup> UN Human Rights Committee, General comment no. 34, Article 19, *Freedom of opinion and expression*, 12 September 2011, CCPR/C/GC/34.

<sup>14</sup> Communiqué by the OSCE Representative on Freedom of the Media on denial of entry of journalists from one OSCE participating State to another, 3 April 2014.

<sup>15</sup> *Declaration by the Committee of Ministers on the protection and promotion of investigative journalism*, 26 September 2007.

from cases such as *Gsell v. Switzerland* (refusal to gain access to Davos during the World Economic Forum by the journalist<sup>16</sup>), *Selmani And Others v. "The Former Yugoslav Republic Of Macedonia"* (removal of journalists from the Parliament gallery<sup>17</sup>) or *Pentikäinen v. Finland* (apprehension of a media photographer during a demonstration and his subsequent detention and conviction for disobeying the police<sup>18</sup>). According to the ECtHR the right to freedom of expression protects a journalist's right to report first-hand from an area where public interest stories are unfolding.<sup>19</sup> In *Selmani*, the Court specifically recognised that a journalist's "first-hand and direct knowledge based on their personal experience of the events unfolding" were "important elements in the exercise of the applicants' journalistic functions, which the public should not have been deprived of".<sup>20</sup> The Court endorsed this position also in *Pentikäinen v. Finland* in which it emphasised that an on-site presence of reporters is a "guarantee that the authorities can be held to account for their conduct vis-à-vis the demonstrators (...) [and] [a]ny attempt to remove journalists from the scene of demonstrations must therefore be subject to strict scrutiny".

A physical presence of journalists at the site of events is also important in the context of the rise of disinformation and propaganda in media (the so-called "fake news" phenomenon). Enabling to provide first-hand information to the public and to counteract disinformation by direct fact-checking on the spot is now perhaps more important than ever. Therefore freedom of movement of journalists and possibility of physical access to events and places is not becoming less important due to developments of new means of mass communication but on the contrary – as the development of new media are perceived as one of the driving forces behind the "fake news" phenomenon, it becomes even more significant for safeguarding the public's right to know (see: *Joint Declaration on Fake News and Propaganda, 2017*<sup>21</sup> and *Report by the Secretary General of the Council of Europe, 2017*<sup>22</sup>).

To conclude, it is clear in the light of the above considerations, that freedom of movement is an essential element of journalistic work, and therefore it is crucial for the exercising freedom of expression, in particular when it comes to political reporting, covering protests and demonstrations, reporting from conflict zones, investigative journalism or fact-checking. Thus an imposition of a travel ban on a journalist without sufficient legal basis or/and when it is not necessary in a democratic society constitutes a serious violation of Article 10, disabling journalists to effectively perform their tasks. In addition, in countries such as Azerbaijan, in face of the domestic situation and current practice of public authorities with respect to independent journalists, imposition of a travel ban on journalists may be also regarded as a "prior restraint" on receiving and imparting information and ideas. That is because oftentimes their journalistic activities rely on cooperation with media outlets based abroad. These journalists are at the same time the only credible sources of news from inside of the country, therefore the travel ban may affect also the public opinion's right to receive independent information. Moreover such a travel ban may be regarded as a subsequent retribution for the journalist's previous publications and as such it is likely to cause "chilling effect", discouraging other Azerbaijani journalists who could

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<sup>16</sup> The ECtHR's judgment from 8 October 2009, Application no. 12675/05, par. 49.

<sup>17</sup> The ECtHR's judgment from 9 February 2017, Application no. 67259/14, par. 61.

<sup>18</sup> The ECtHR's judgment (Grand Chamber) *Pentikäinen v. Finland*, Application no. 11882/10 par. 89

<sup>19</sup> *Gsell v Switzerland*, op. cit., par. 49.

<sup>20</sup> *Selmani and Others v. The Former Yugoslav Republic of Macedonia*, op. cit., par. 84.

<sup>21</sup> Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information., 3 March 2017.

<sup>22</sup> On the importance of "independent, accurate and professional journalism" in the context of fake news – see: State of democracy, human rights and the rule of law. Report by the Secretary General of the Council of Europe, 2017.

provide first-hand information on the situation in the country to cooperate with foreign-based media.

### **3. Travel ban as an interference in the human rights defenders' freedom of expression**

Since the Applicants repeatedly reported on violations of human rights and government corruption in Azerbaijan, in our view they should not only be seen as journalists, but also as human rights defenders. As noted by the UN Special Rapporteur on the situation of human rights defenders, "in their general role, journalists are not human rights defenders. However, many journalists do act as defenders, for example when they report on human rights abuses and bear witness to acts that they have seen"<sup>23</sup>. In the third part of the intervention, we would like to emphasise that restrictions on the freedom of movement may heavily impede human rights defenders' ability to fulfil their role as they hinder dissemination of information about human rights violations regardless of frontiers and, more specifically, restrain their right to communicate with international bodies.

#### **3.1. Enhanced protection of human rights defenders**

The role of human rights defenders has been widely recognised in the international law. By adopting the Declaration on Human Rights Defenders, the United Nations General Assembly acknowledged "the valuable work of individuals, groups and associations in contributing to the effective elimination of all violations of human rights"<sup>24</sup>. At the same time it has been observed that "human rights defenders, including journalists, are all too often victims of violations of their rights, threats and attacks"<sup>25</sup> and therefore "they need specific and enhanced protection at local, national and international levels"<sup>26</sup>, what led to adoption of several international instruments aimed at protecting their rights in the face of the heightened risk they are exposed to due to their work<sup>27</sup>. The Court also on several occasions noted that when a non-governmental organisation is involved in matters of public interest – including human rights protection<sup>28</sup>, it is exercising a public watchdog role of similar importance to that of the press and therefore its activities warrant similar Convention protection to that afforded to the press<sup>29</sup>. In addition the Court has acknowledged in this very context of Azerbaijan that NGO activists may be intentionally targeted for their activities in the area of human rights<sup>30</sup>. It seems, however, that the Court case-law still leaves a room for a further development regarding the protection of human rights defenders,

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<sup>23</sup> UN Special Rapporteur on the situation of human rights defenders, Fact Sheet No. 29, Human Rights Defenders: Protecting the Right to Defend Human Rights, April 2004, No. 29, p. 7.; see also OSCE Guidelines on the Protection of Human Rights Defenders, 2014, par. 54.

<sup>24</sup> The United Nations Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognised human rights and fundamental freedoms of 9 December 1998, preamble.

<sup>25</sup> Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities, 2008, preamble.

<sup>26</sup> OSCE Guidelines on the Protection of Human Rights Defenders, 2014, par 4.

<sup>27</sup> E.g. the UN Declaration on Human Rights Defenders (1998) , Recommendation CM/Rec(2007)14 of Committee of Ministers to member states on the legal status of non-governmental organisations in Europe (2007), European Union Guidelines on Human Rights Defenders (2008) , Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities (2008) or OSCE Guidelines on the protection of human rights defenders (2014).

<sup>28</sup> The ECtHR's judgement from 14 April 2009 *Társaság a Szabadságjogokért v. Hungary*, Application no. 37374/05, par. 27.

<sup>29</sup> Among others in the judgement from 25 June 2013 *Youth Initiative For Human Rights v. Serbia*, Application no. 48135/06, par. 21; judgement from 22 April 2013 *Animal Defenders International v. the United Kingdom*, Application no. 48876/08, par.103, *Társaság a Szabadságjogokért*, op. cit., par. 27.

<sup>30</sup> The ECtHR's judgement from 17 March 2016 *Rasul Jafarov v. Azerbaijan*, Application no. 69981/14 par. 162.

especially having in mind their deploring situation in many Council of Europe member states on the one hand, and on the other the quickly evolving relevant international soft law on this issue.

### **3.2. Human rights defender's freedom of movement in the light of the right to communicate with international bodies**

The importance of the freedom of movement for human rights defenders has been reaffirmed on several occasions in international law<sup>31</sup>, while the use of travel restrictions has been recognised as one of common means employed for hindering work of civil society activists<sup>32</sup>. However, it is equally important to notice that the imposition of a travel ban restricts human rights defenders' right to communicate with international bodies, guaranteed e.g. by Article 5<sup>33</sup> and Article 9(4)<sup>34</sup> of the UN Declaration on Human Rights Defenders, which, in our view, falls within the scope of Article 10 of the Convention. For instance, the travel ban imposed on the applicant in Application no. 44031/17 (Khadija Ismayilova), directly prevented her from speaking at a number of events she was invited to, such as international conference organised by the OSCE to be held in Tbilisi in Georgia in July 2016 or the ceremony of the Right Livelihood Award that she had received, to be held in Stockholm, Sweden on November 23, 2017.

It is true that with the developments of modern means of communication, there are ways of contacting the international bodies that do not require traveling abroad in person. However, it has been clearly established by the Court that the Article 10 protects also the form in which information and ideas are conveyed<sup>35</sup>. What is more, the electronic means of communications are prone to government shutdowns (for instance when Khadija Ismayilova was invited to make a speech at the European Parliament on 6 February 2017 from Azerbaijan via Skype, shortly before the start of the hearing electricity and internet access had been cut off in the Khadija Ismayilova apartment<sup>36</sup>) and more viable to surveillance<sup>37</sup>.

In our opinion, a ban on travelling abroad hinders human rights defenders capacity of "alerting the international community on the threats to human rights and providing information about

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<sup>31</sup> OSCE Guidelines on the Protection of Human Rights Defenders, 2014, paras. 76-84.

<sup>32</sup> OSCE Guidelines on the Protection of Human Rights Defenders, 2014, explanatory memorandum par. 289; EU Fundamental Rights Agency, *Challenges facing civil society organisations working on human rights in the EU*, 2018; R. Youngs and Ana Echagüe, *Shrinking space for civil society: the EU response*, 2017; Report of the European Parliament Committee on Development on addressing shrinking civil society space in developing countries (2016/2324(INI)), 5 September 2017; Amnesty International, *Human rights defenders under threat – A shrinking space for civil society*, 2017.

<sup>33</sup> „Article 5: For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: (a) To meet or assemble peacefully; (b) To form, join and participate in non-governmental organizations, associations or groups; (c) To communicate with non-governmental or intergovernmental organizations”

<sup>34</sup> Article 9(4) In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, (...)and in accordance with applicable international instruments and procedures, everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms

<sup>35</sup> The ECtHR's judgement from 23 May 1991 *Oberschlick v. Austria*, Application no. 11662/85 par.. 57.

<sup>36</sup> *Khadija Ismayilova Hindered from Joining European Parliament Hearings via Skype*, 6 February 2017, <https://www.irfs.org/news-feed/khadija-ismayilova-hindered-from-joining-european-parliament-hearings-via-skype/>, [accessed on 25.01.2018]; on measures blocking access to Internet, see also: *Ahmet Yildirim v. Turkey*, op. cit.; the ECtHR's judgement from 1 December 2015 *Cengiz and Others v. Turkey*, Applications nos. 48226/10 and 14027/11.

<sup>37</sup> The ECtHR's judgement from 12 January 2016 *Szabó and Vissy v. Hungary*, Application no. 37138/14.

violations to the intergovernmental human rights organizations”<sup>38</sup> and as such restrains them from exercising one of the essential elements of their role. As stressed in the Report of the Special Representative of the Secretary-General on the situation of human rights defenders, “United Nations human rights treaty bodies and the various special procedures of the Commission depend to a very great extent on the information provided to them by human rights NGOs, and where civil society is weak this whole United Nations human rights framework is weakened as a result”<sup>39</sup>. In our view, the same can be said of other human rights systems, including the Council of Europe. Furthermore, as the human rights “are not only an internal affair but are of direct and legitimate concern to all participating States”<sup>40</sup>, it is important to take into consideration that travel restrictions limit the possibility to contribute to the *international* public debate by disseminating information and ideas on matters of general, *international* public interest<sup>41</sup>.

In addition, we notice an increasing need for a strong and clear acknowledgement by the Court that dissemination abroad of information about human rights violations in one’s country and more generally, participation in an international discussion about the observance of human rights and the principles of “effective and meaningful democracy governed by the rule of law”<sup>42</sup> is not only a legitimate activity that is protected under Article 10, but – more than that – it is vital for the proper functioning of a democratic society. This need for explicit reaffirmation stems from the fact that in a growing number of the Council of Europe member states governments tend to present communicating one’s concerns about domestic violations of human rights – especially to the international organs – as an act of “betrayal”, being “disloyal to one’s nation” or even compare it to collaboration with Nazis.

### **3.3. Right to communicate with international bodies in Azerbaijani context**

The right to communicate with international bodies (be it intergovernmental or non-governmental) – that is heavily impeded by an imposition of a travel ban – is even of the greater importance for human rights defenders in Azerbaijan for at least two reasons: (1) there has been a systemic crackdown on civil society in the country and 2) domestic judicial system is misused as tool of oppression.

#### **3.3.1. Crackdown on civil society in Azerbaijan**

A pattern of systematic restriction of fundamental rights in Azerbaijan is well documented, especially the punishment for the exercise of freedom of expression through arbitrary arrests and detentions. However, in recent years the situation has grown increasingly dire, as evidenced by the almost complete shut-down of independent human rights organisations, a striking expansion in scope and severity of specious criminal charges used against civil society leaders and the adoption of legislation regulating and controlling NGOs. Therefore the present case should not be seen in isolation, but rather – just as in the case of *Rasul Jafarov v. Azerbaijan* – as a part of a larger campaign to “crackdown on human rights defenders in Azerbaijan, which had intensified over the summer of 2014”<sup>43</sup>. Moreover, in the same judgement the Court has already noticed that

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<sup>38</sup> UN Special Rapporteur on the situation of human rights defenders, Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, July 2011, p. 51

<sup>39</sup> Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, 7 September 2005, A/60/339, para. 65

<sup>40</sup> Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow 1991,

<sup>41</sup> M. Castells, *The New Public Sphere Global Civil Society Communication Networks and Global Governance*, “The Annals of the American Academy of Political and Social Science”, vol. 616, 2008”

<sup>42</sup> The ECtHR’s judgement from 6 October 2005 *Hirst v. the United Kingdom* (no. 2), no. 74025/01, par. 58

<sup>43</sup> *Rasul Jafarov v. Azerbaijan*, op. cit.

Azerbaijan authorities specifically targeted human rights activists who have cooperated with international organisations for the protection of human rights<sup>44</sup>. As a result of the crackdown, many civil society activists were forced to leave the country and now operate from abroad. This is, for instance, the case of the Meydan TV founder and managing director, Emin Milli. In this context, possibility of communication between domestic NGOs and those who are active internationally is particularly significant.

### 3.3.2. Misuse of judicial system as a tool of oppression

All the Applicants in the present case are subject to travel bans imposed in relation to judicial proceedings, either as witnesses in proceedings related to activities of Meydan TV or as conditionally convicted by the Supreme Court. This should not be seen as isolated abuses, but rather as an illustration of a wider phenomenon of selective justice in Azerbaijan<sup>45</sup>. Several cases already adjudicated by the Court reveal that the arbitrary application of criminal legislation to curtail freedom of expression is widespread in Azerbaijan<sup>46</sup> and as the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) observed, it is closely linked lack of independence of the judiciary<sup>47</sup>. In a situation when the domestic judicial system not only fails to provide adequate protection against the government's abuses, but even is misused as a tool of oppression by the executive, it becomes vital to be able to seek justice at the international level, what necessarily requires possibility of communication<sup>48</sup>.

## 4. Conclusions

In light of the above considerations, we would like to present the following conclusions to the Court:

1. When journalist report on human rights violations, they should also be considered as human rights defenders. Both groups need an enhanced protection, as they are exposed to a high risk of retaliation for their work.
2. A travel ban imposed on particular journalist may constitute an interference with the freedom of expression. Such a ban impedes essential tasks of media as “public watchdog” such as newsgathering on issues of general public interest and disseminating information. In particular it hampers first-hand reporting which is critical for certain types of journalism that are particularly beneficial for the society and vital in face of contemporary threats to media freedom. It also causes “chilling effect” among other media professionals. In case of human rights defenders, the travel ban prevents them from communication with an international community which is also crucial for their work.
3. Cross-border freedom of movement in the context of freedom of expression is of special importance in states, where human rights are systematically violated and where journalists, human

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<sup>44</sup> Ibidem.

<sup>45</sup> Monitoring Committee, The functioning of democratic institutions in Azerbaijan, Report Doc. 1440, 25 September 2017.

<sup>46</sup> E.g. the ECtHR's judgement from 18 December 2008 *Mahmudov and Agazade v. Azerbaijan*, Application no. 35877/04; the ECtHR's judgement from 22 April 2010 *Fatullayev v. Azerbaijan*, Application no. 40984/07.

<sup>47</sup> Monitoring Committee, The functioning of democratic institutions in Azerbaijan, Report Doc. 14403, 25 September 2017.

<sup>48</sup> Dominika Bychawska-Siniarska, *The Functioning of the Judicial System in Azerbaijan and its Impact on the Right to a Fair Trial of Human Rights Defenders*, Netherlands Helsinki Committee and Helsinki Foundation for Human Rights, September 2016.

rights defenders and other vulnerable groups cannot freely operate domestically, face a variety of legal and non-legal repressions and – at the same time – cannot rely on the domestic judiciary. Where journalistic activities rely on cooperation with media outlets based abroad, a travel ban may be also regarded as a “prior restraint” on receiving and imparting information and ideas.

4. Imposition of the travel ban on the Applicants and other cases recently resolved by the Court mentioned in the intervention may suggest an increasing trend of hindering of journalistic activities by other measures than legal means of protection of reputation. These other measures include, apart from the travel bans, limiting access of media to parliamentary buildings or hindering media coverage of demonstrations and protests. Since these measures constitute practical impediments to work of media and civil society organisations when performing their “public watchdog” role, they should be treated as posing an equal threat to freedom of expression as one posed by more “traditional” perils to free speech (such as e.g. libel proceedings).

5. In sum, a travel ban imposed on the members of a vulnerable groups such as journalists and/or human rights defenders, without appropriate legal basis, or/and when it is not necessary to fulfil one of the legitimate aims listed in Article 10.2, or/and when there is no sufficiently compelling justification that the restriction is proportionate, leads to a serious violation of freedom of expression, among possible violations of other rights such as freedom of movement.

On behalf of the Helsinki Foundation for Human Rights,

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