IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Case No. 12.661

NÉSTOR JOSÉ, LUIS UZCÁTEGUI ET AL.

v

VENEZUELA

Written Comments

of

ARTICLE 19

ARTICLE 19
Free Word Centre
60 Farringdon Road
London EC1R 3GA
UK
Tel: +44 207 324 2500
Fax: +44 207 490 0566
www.article19.org

ARTIGO 19
Rua Barão de Itapetininga
3 - 5o andar República
São Paulo
Brasil
Tel +55 11 3057 0042 / 0071
Tel: +52 55 1054 6500 ext. 102
www.artigo19.org/
www.livreacesso.net

ARTICULO 19
Oficina para México y Centroamérica
José Vasconcelos 131 Col. San Miguel Chapultepec
México D.F. C.P.11850
www.articulo19.org

November 2011

I. Introduction

1. The signatory organizations respectfully submit this amicus brief for the benefit of the Court's consideration of the salient issues raised by the above-referenced case.

2. ARTICLE 19, Global Campaign for Free Expression, is an international freedom of expression NGO, based in London with regional and national offices in Brazil, Mexico, Bangladesh, Senegal and Kenya. ARTIGO 19 and ARTICULO 19 are regional offices of ARTICLE 19 in the Americas. ARTICLE 19, which takes its name from Article 19 of the Universal Declaration of Human Rights, works globally to protect and promote the right to freedom of expression, including the right to information.

3. The Amici have extensive experience of working to promote freedom of expression and other human rights around the world. They have contributed to the elaboration and advocacy of international law and standards, and have been engaged in litigation concerning states' obligations on freedom of expression and other human rights at national, regional and international fora. They have an international reputation for their work in elaborating the implications of the guarantee of freedom of expression in different thematic areas. The Amici regularly contribute amicus briefs to international, regional and national courts, including this Court in the *Marcel Claude Reyes and Others v Chile*, *Ulloa and Rohrmoser v Costa Rica* and *Gonzalez and Fries vs. Chile* and, most recently, *Jorge Fontevecchia and Héctor D'Amico v Argentina*.

4. The present case before the Court involves the criminal case against Luis Uzcátegui on the grounds that he publicly revealed the complaints he had filed with the Venezuelan state authorities in connection with extrajudicial executions which were presumed to have been carried out by death squads in Falcón state and his belief that those killings were led by two public officials, specifically two law enforcement commanders. The central issue in the case is whether the commencement of criminal proceedings against Luis Uzcátegui in response to his allegations regarding the involvement of the two law enforcement officers in death squads in the Falcón state violated his freedom of expression. At the outset it is noted that the matter at issue is of public interest because of the alleged criminal activity and the involvement and the abuse of authority by public officials.

5. The Court is required to address the question of whether criminal defamation proceedings initiated in response to a matter in the public interest, in and of themselves, violate the right to freedom of expression, particularly where they are based on an imprecise criminal provision. This question involves consideration of important issues related to the scope and limits of the right to freedom of expression, particularly in the context of criminal defamation laws.

6. It is the amici's overriding argument that *any* law criminalising defamation is, in and of itself, a violation of freedom of expression. Not only are criminal defamation laws outmoded and unduly harsh, they are also unnecessary and disproportionate measures to protect the reputation of others. In our view, criminal defamation proceedings commenced in response to a statement about a matter in the public interest, such as in this case, are a particularly serious attack on freedom of expression. The amici argue that the Court should hold that the criminal defamation proceedings against Mr Uzcátegui are in violation of Article 13 of the American Convention on Human Rights and, in doing so, reinforce and build on its own progressive jurisprudence on the use of the criminal law to penalise individuals for statements made in the public interest.

7. In support of these arguments, the Amici rely on the decisions and statements of international and regional courts and authorities – including the UN Human Rights Committee and the UN Special Rapporteur on Freedom of Opinion and Expression – as well as evidence of a global trend towards decriminalization of defamation and progressive standards endorsed by civil society organisations and experts.

8. While the amici's primary contention is that criminal defamation laws are in violation of freedom of expression and should be decriminalized, they would submit that, if the offence of defamation is to be retained, certain minimum requirements to restrict its application and scope must be applied, in accordance with international standards on freedom of expression.

9. The remainder of the amicus is set out as below:

    a. The right to freedom of expression and its permissible limits including with respect to defamation laws, including the requirement that any restrictions on freedom of expression are provided by law;

b. International, regional and comparative law, including judicial decisions, on the right to freedom of expression and the permissibility of criminal defamation specifically, particularly when an issue involving the public interest is involved;

c. International standards developed by non-governmental organisations for the decriminalization of defamation.

II. Discussion

1. The Right to Freedom of Expression

a. The Fundamental Importance of Freedom of Expression

10. The right to freedom of expression is protected by a range of international and regional instruments and constitutional laws around the world. It is guaranteed, most notably, by the Universal Declaration of Human Rights (Article 19), the International Covenant on Civil and Political Rights (Article 19), the American Convention on Human Rights (Article 13), the European Convention on Human Rights (Article 10), as well as the African Charter on Human and Peoples' Rights (Article 9).

11. The right of freedom of expression is crucial for the full development of the human person and the realisation of all other human rights. Regional human rights courts have recognised it as an "essential [foundation] of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment".[1]

12. According to the Office of the OAS Special Rapporteur on Freedom of Expression:

> Inter-American case law has explained that the inter-American legal framework places this high value on freedom of expression because it is based on a broad concept of autonomy and dignity of the individual, and because it takes into account the instrumental value of freedom of expression for the exercise of all other fundamental rights, as well as its essential role within democratic systems.[2]

[1] *Handyside v United Kingdom*, Eur Ct HR, Application No 5493/72, Series A No 24, Judgment of 12 December 1976, 1 EHRR 737, at para 49.
[2] Office of the Special Rapporteur on Freedom of Expression, *The Inter-American Legal Framework regarding the Right to Freedom of Expression* (2010) at p 2.

13. Furthermore, other international human rights instruments should not be used to interpret the IACHR restrictively. Instead, the ACHR should prevail by virtue of the *pro homine* principle, according to which the norm most favourable to human rights should prevail.[3] Given the application of this principle, the amici submit that the Court should ensure the progressive interpretation of freedom of expression which is *at least* as robust as international human rights law on that right.

b. The Right to Freedom of Expression Can Only Be Restricted in Limited Circumstances

14. Article 19 of the ICCPR protects the right to freedom of expression in broad terms. Under that provision, States parties are required to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers.

15. Although the right to freedom of expression has such importance, it is not an absolute right and may be restricted in certain circumstances. General Comment No 34 of the UN Human Rights Committee, which was adopted in July 2011, sets out the authoritative view of Committee on Article 19:

> This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.[4]

16. Article 19(3) of the ICCPR indicates that the exercise of freedom of expression carries with it special duties and responsibilities. For this reason, restrictions on the right are permitted to ensure the respect the rights or reputations of others (Article 19(3)(a)) or the protection of national security or of public order (*ordre public*) or of public health or morals (Article 19(3)(b)). However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The

[3] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Articles 13 and 29 of the American Convention on Human Rights), Inter-Am Ct H R, Advisory Opinion OC-5/85 of 13 November 1985, Series A No 5 para 52.
[4] Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011.

Human Rights Committee has indicated that the relationship between right and restriction and between norm and exception must not be reversed.[5]

17. Article 19(3) also lays down specific conditions and it is only subject to these conditions that restrictions may be imposed (the "three part test"): *first*, the restrictions must be "provided by law"; *second*, they may only be imposed for one of the grounds set out in Article 19(3)(a) or (b) of the ICCPR; and *third*, they must conform to the strict tests of necessity and proportionality.[6] Restrictions are not allowed on grounds not specified in Article 19(3) of the ICCPR, even if such grounds would justify restrictions to other rights protected in the ICCPR. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[7]

18. Thus, the need to protect the reputation of others may warrant restriction upon an individual's freedom of expression, if such a limitation is justified on the grounds that it is provided by law and is necessary. Restrictions must be "necessary" for a legitimate purpose, in the sense that there must be a "pressing social need" for the restriction.[8] The principle of proportionality also has to be respected in the sense that any restriction "must be the least intrusive measure to achieve the intended legitimate objective and the specific interference in any particular instance must be directly related and proportionate to the need on which they are predicated".[9] Proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.[10]

i. Restrictions Must Be "Provided By Law"

[5] See Human Rights Committee, General Comment No 27, Freedom of Movement (Article 12), CCPR/C/GC/21/Rev.1/Add.1, 2 November 1999, para 13.
[6] See Human Rights Committee, Communication No 1022/2001, *Velichkin v Belarus*, CCPR/C/85/D/1022/2011, Views adopted on 20 October 2005.
[7] See Human Rights Committee, General Comment No 22, Freedom of Thought, Conscience and Religion (Article 18), CCPR/C/21/Rev.1/Add.4, para 8.
[8] *Handyside v United Kingdom*, Eur Ct HR, Application No 5493/72, Series A No 24, Judgment of 12 December 1976, 1 EHRR 737, at para 48.
[9] Human Rights Committee, General Comment No 22, Freedom of Thought, Conscience and Religion (Article 18), CCPR/C/21/Rev.1/Add.4, para 8.
[10] Human Rights Committee, General Comment No 27, Freedom of Movement (Article 12), CCPR/C/GC/21/Rev.1/Add.1, 2 November 1999, para. 14 and 15. See also Human Rights Committee, Communications No 1128/2002, *Marques v Angola* CCPR/C/83/D/1128/2002, Views adopted on 29 March 2005; Human Rights Committee, Communication No 1157/2003, *Coleman v Australia* CCPR/C/87/D/1157/2003, Views adopted 17 July 2006.

19. In General Comment No 34 on freedom of expression, the Human Rights Committee gave further guidance on the meaning of "a law" in Article 19(3) of the ICCPR which is particularly relevant to the present case.

> For the purposes of Article 19(3) of the ICCPR, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly[11] and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.[12] Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

20. According to this Court's own jurisprudence on freedom of expression any provisions criminalizing conduct cannot be so ambiguous that one cannot be certain or predict the scope of the right. In *Kimel v Argentina*, the Court stated:

> any limitation or restriction must be both formally and materially provided for by law. Now, should the restrictions or limitations be of a criminal nature, it is also necessary to strictly meet the requirements of the criminal definition in order to adhere to the *nullum crimen nulla poena sine lege praevia* principle. Thus, they must be formulated previously, in an express, accurate, and restrictive manner. The legal system must afford legal certainty to the individuals.[13]

2. Criminal Defamation Proceedings Violate Right to Freedom of Expression

21. The amici submit that laws criminalising defamation are *outmoded* and *unduly harsh*. Criminal defamation is an ancient offence whose origins lay in the need to maintain public order in an era where attacks on reputation might result in breaches of the peace.[14]

22. International and regional human rights authorities have frequently noted the harshness of criminal provisions on defamation. For example, the UN Special Rapporteur on Freedom of Opinion and Expression stated in 2008:

---

[11] See Human Rights Committee, Communication No 578/1994, *de Groot v The Netherlands* CCPR/C/54/D/578/1994, Views adopted on 14 July 1995.
[12] Human Rights Committee, General Comment No 27, Freedom of Movement (Article 12), CCPR/C/GC/21/Rev.1/Add.1, 2 November 1999.
[13] Case of *Kimel v Argentina* (Merits, Reparations and Costs), Inter-Am Ct HR, Judgment of 2 May 2008 Series C No 177, para 63.
[14] G Robertson and A Nicol, *Media Law* (London: Penguin, 2007) p 186. On the origins of English law on criminal and seditious libel see, English Pen/Index On Censorship, *A Briefing on Seditious Libel and Criminal Libel*, July 2009 http://www.englishpen.org/usr/libel/seditious_libel_july09.pdf

> the subjective character of many defamation laws, their overly broad scope and their application within criminal law have turned them into a powerful mechanisms to stifle investigative journalism and silent criticism.[15]

23. This Court has itself recognised that:

> penal laws are the most restrictive and severest means of establishing liability for an unlawful conduct.[16]

24. The amici submit that that laws criminalising defamation directly violate international and regional human rights standards on the right to freedom of expression because they do not meet the criteria for permissible restrictions indicated in the above section. More specifically, criminal defamation laws are *unnecessary* and *disproportionate* responses to providing adequate protection for reputations.

25. In support of the case against criminal defamation laws, the amici rely on the decisions and statements of international and regional courts and authorities, as well as the clear trend towards the decriminalization of defamation across states globally.

a. International human rights authorities

26. International human rights authorities – specifically UN human rights bodies – have called upon States to decriminalize defamation laws on numerous occasions.

27. Although the UN Human Rights Committee, the body that monitors the implementation of the ICCPR, has not stated that criminal defamation laws ought to be repealed as such, its responses to criminal defamation laws over the years suggest that it endorses the decriminalization of defamation. Its authoritative interpretations of Article 19 of the ICCPR indicate the following:

(1) criminal defamation laws must be narrowly circumscribed;
(2) the public interest should provide a defence to a charge of criminal defamation;
(3) states should consider decriminalization of defamation;

[15] Report of the Special Rapporteur on Freedom of Opinion and Expression, Ambeyi Ligabo, A/HRC/7/14, 28 February 2008, para 49.
[16] Case of *Ricardo Canese v Paraguay* Merits, Reparations and Costs, Inter-Am Ct H R, Judgment of 31 August 2004 para 104.

(4) prison is never an appropriate penalty;[17] and

(5) any criminal trial must proceed expeditiously.

28. The Committee indicated this position as recently as September 2011 in General Comment No 34:

> Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties...States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.[18]

29. In its jurisprudence the UN Human Rights Committee has expressed its concern over the misuse of criminal defamation laws in its Concluding Observations in relation to States' periodic reports. Over the past four years, it has criticised criminal defamation laws and has recommended decriminalization of defamation in a number of states including the Mexico (at the state level),[19] Uzbekistan,[20] Cameroon,[21] Russian Federation,[22] Tunisia,[23] Algeria,[24] and Costa Rica.[25] In connection with Macedonia, the Committee has praised decriminalization of defamation.[26]

---

[17] Human Rights Committee, Concluding Observations on Italy, 24 April 2006 CCPR/C/ITA/CO/5 para 19.
[18] Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011 para 47.
[19] Human Rights Committee, Concluding Observations on the Russian Federation, 29 November 2009 CCPR/C/RUS/CO/6.
[20] Human Rights Committee, Concluding Observations on Uzbekistan, 24 March 2010, CCPR/C/ARG/CO/4.
[21] Human Rights Committee, Concluding Observations on Cameroon, 28-29 August 2010, CCPR/C/CMR/CO/4.
[22] Human Rights Committee, Concluding Observations on Mexico, 17 May 2010, CCPR/C/MEX/CO/5 at para 20.
[23] Human Rights Committee, Concluding Observations on Tunisia, 28 March 2008, CCPR/C/TUN/CO/5 at para 18.
[24] Human Rights Committee, Concluding Observations on Algeria, 1 November 2007, CCPR/C/DZA/CO/3, para 24.
[25] Human Rights Committee, Concluding observations on Costa Rica, 1 November 2007, CCPR/C/CRI/CO/5, para 11.
[26] Human Rights Committee, Concluding Observations on the Former Yugslav Republic of Macedonia, 3 April 2008, CCPR/C/MKD/CO/2, para 6.

30. In a case decided in 2004 concerning Sri Lanka where a newspaper editor had a criminal defamation case pending against him for several years, the Committee held that freedom of expression had been violated. It stated:

> To keep pending ... the indictments for the criminal offence of defamation for a period of several years after the entry into force of the Optional Protocol for the State party left the author in a situation of uncertainty and intimidation, despite the author's efforts to have them terminated, and thus had a chilling effect which unduly restricted the author's exercise of his right to freedom of expression.[27]

31. Other UN human rights bodies – notably, the UN Special Rapporteur on Freedom of Opinion and Expression ("UN Special Rapporteur") – have condemned criminal defamation laws in stronger terms. The UN Special Rapporteur has long advocated the repeal of criminal defamation laws. For instance, in his 2001 report, the Special Rapporteur stated:

> 47. In the light of the cases received this year, the Special Rapporteur would like to reiterate the recommendations made in his previous report (E/CN.4/2000/63 para. 52) and to urge Governments to:
> (a) Repeal criminal defamation laws in favour of civil laws;
> (b) Limit sanctions for defamation to ensure that they do not exert a chilling effect on freedom of opinion and expression and the right to information;
> (c) Prohibit government bodies and public authorities from bringing defamation suits with the explicit purpose of preventing criticism of the Government or even of maintaining public order;
> (d) Ensure that defamation laws reflect the importance of open debate on matters of public interest and the principle that public figures are required to tolerate a greater degree of criticism than private citizens…[28]

32. The UN Special Rapporteur has emphasised that civil libel provides an adequate remedy when there has been an unjustified attack on one's reputation. In a Joint Declaration with the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media in 2002, the UN Special Rapporteur affirmed:

> Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.[29]

33. In 2010, these international mechanisms, as well as the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to

[27] Human Rights Committee, Communication No 909/2000, *Kankanamge v Sri Lanka*, 24 August 2004, CCPR/C/81/D/909/2000, para 9.4.
[28] 13 February 2001, E/CN.4/2001/64
[29] Joint Declaration of UN Special Rapporteur on Freedom of Opinion and Expression, OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media of 10 December 2002.

Information, identified criminal defamation laws as one of "Ten Key Challenges on Freedom of Expression" in a Joint Declaration. This states:

> Laws making it a crime to defame, insult, slander or libel someone or something, still in place in most countries (some 10 countries have fully decriminalized defamation), represent another traditional threat to freedom of expression. While all criminal defamation laws are problematical, we are particularly concerned about the following features of these laws:
>
> (a) The failure of many laws to require the plaintiff to prove key elements of the offence such as falsity and malice;
>
> (b) Laws which penalize true statements, accurate reporting of the statements of official bodies, or statements of opinion;
>
> (c) The protection of the reputation of public bodies, of State symbols or flags, or the State itself;
>
> (d) A failure to require public officials and figures to tolerate a greater degree of criticism than ordinary citizens;
>
> (e) The protection of beliefs, schools of thought, ideologies, religions, religious symbols or ideas;
>
> (f) Use of the notion of group defamation to penalize speech beyond the narrow scope of incitement to hatred;
>
> (g) Unduly harsh sanctions such as imprisonment, suspended sentences, loss of civil rights, including the right to practise journalism, and excessive fines.[30]

34. Besides the UN human rights bodies, other parts of the UN system have condemned criminal defamation laws. Most notably, UNESCO has adopted numerous declarations recommending the repeal of criminal defamation laws.[31] The Washington Declaration adopted in May 2011 calls on UNESCO member states to:

> To ensure a legal environment in which free speech is encouraged, and penalized neither by onerous defamation laws, nor excessive monetary penalties.[32]

35. The Doha Declaration of May 2009 also calls on UNESCO member states:

> to remove statutes on defamation from penal codes.[33]

[30] UN Special Rapporteur on Freedom of Opinion and Expression, Tenth Anniversary Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade, 25 March 2010, A/HRC/14/23/Add.2. The UN Special Rapporteur on Freedom of Opinion and Expression has long considered criminal defamation laws a threat to freedom of expression. In 2000, he stated: "[c]riminal defamation laws represent a potentially serious threat to freedom of expression because of the very sanctions that often accompany conviction." Report of the Special Rapporteur on Freedom of Opinion and Expression, Abid Hussain, 18 January 2000, E/CN.4/2000/4/ 63, para 48.

[31] See Dakar Declaration, UNESCO sponsored World Press Freedom Day Conference, 1-3 May 2005.

[32] See Washington Declaration, UNESCO sponsored World Press Freedom Day Conference, 1-3 May 2011.

[33] See Doha Declaration, UNESCO sponsored World Press Freedom Day Conference, 1-3 May 2009.

b. Regional human rights authorities

i. American Convention on Human Rights

36. The Inter-American legal framework arguably provides the greatest scope of regional protection for freedom of expression, including with respect to criminal defamation laws. The ACHR was designed to reduce to a minimum the restrictions on the free circulation of information, opinions and ideas as a result of the "importance that the authors of the Convention attached to the need to express and receive any kind of information, thoughts, opinions and ideas".[34] It is recalled that Article 13(1) guarantees the right which includes the right to "seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice." Article 13(2) prohibits prior censorship, but provides that the right may be limited if it is "established by law" and "to the extent necessary to ensure (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals".

37. The Inter-American Commission on Human Rights ("IACHR") in support of the Special Rapporteur on Freedom of Expression ("OAS Special Rapporteur") adopted a "Declaration of Principles on Freedom of Expression".[35] This included the following statement:

> 10...The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated or acted with gross negligence in efforts to determine the truth or falsity of such news.
>
> 11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as "desacato laws", restrict freedom of expression and the right to information.

[34] See Report No 11/96 Case 11.230 (Merits) *Francisco Martorell v Chile* Inter-Am Comm HR, 3 May 1996, para 56.
[35] Approved by the Inter-Am Comm HR at its 108th regular session of 19 October 2000 http://www.iachr.org/declaration.htm

38. In interpreting the "Declaration of Principles on Freedom of Expression", the OAS Special Rapporteur has observed that criminal sanctions for defamation exert a chilling effect.

> The fear of criminal sanctions necessarily discourages people from voicing their opinions on issues of public concern particularly when the legislation fails to distinguish between facts and value judgments. Political criticism often involves value judgments.[36]

39. The OAS Special Rapporteur's report on " 'Desacato' Laws and Criminal Defamation" also states:

> 17. In its previous reports the Office of the Special Rapporteur has mentioned its concern over the use of laws on criminal defamation, including slander and libel, for the same purpose as *desacato* laws. Generally speaking, these defamation classifications refer to the false imputation of criminal offences or of expressions that damage the honor of the person. In the Hemisphere, practice has shown that many public officials resort to the use of such norms as a mechanism to deter criticism. As the Office of the Special Rapporteur has said in previous reports, "the possibility of abuse of such laws by public officials to silence critical opinions is as great with this type of law as with *desacato* laws...
>
> 20. The intention here is not to deny that persons in public office have honor, but that its possible injury is outweighed by another right – in this case freedom of expression to which society gives precedence. At all events, attacks on the honor and reputation of persons can be protected by means of civil sanctions, provided they are proportional and take actual malice into consideration.[37]

40. The OAS Special Rapporteur has urged member states to move forward with legislative reform[38] and has expressed concern about the existence and application of criminal defamation laws in such states as Ecuador,[39] Peru[40] and Panama[41] and others.

Inter-American Court of Human Rights

41. This Court has strongly protected the right to freedom of expression in the context of criminal laws on defamation. The Court's general attitude has been "that penal laws are

---

[36] Background and Interpretation of the Declaration of Principles http://www.cidh.org/relatoria/showarticle.asp?artID=132&lID=1 para 50.
[37] See http://cidh.oas.org/relatoria/showarticle.asp?artID=442&lID=1
[38] Ibid at para 46.
[39] Press Release R104/11, 21 September 2011 http://www.cidh.oas.org/relatoria/showarticle.asp?artID=870&lID=1
[40] Press Release R71/11, 20 July 2011 http://cidh.oas.org/relatoria/showarticle.asp?artID=856&lID=1, R113/10, 15 November 2010 http://cidh.oas.org/relatoria/showarticle.asp?artID=826&lID=1, R88/10, 30 August 2010 http://cidh.oas.org/relatoria/showarticle.asp?artID=816&lID=1
[41] Press Release R101/10, 8 October 2010 http://cidh.oas.org/relatoria/showarticle.asp?artID=822&lID=1

the most restrictive and severest means of establishing liability for an unlawful conduct."[42] In more stark terms, Judge Sergio García-Ramírez has stated that the frequent use of criminal defamation proceedings was "cause for alarm". In such proceedings, "the harshest possible measures, which might be immoderate or excessive in general and in particular, are adopted and often turn out to be inefficient and counterproductive".[43]

42. In a series of cases this Court has found that criminal sanctions and criminal proceedings constitute an unjustified violation of freedom of expression, *including* in cases where the defamed party was a public official. Members of the Court have been extremely critical of the impact of criminal defamation laws on the exercise of freedom of expression. The Court has consistently held that criminal defamation suits and the sanctions resulting from a conviction for criminal defamation are unnecessary and disproportionate, and are therefore an illegal restriction on freedom of expression particularly when the statement concerns a person engaged in public activities.[44]

43. In *Kimel v Argentina*, the Court emphasised that:

> … Criminal Law is the most restrictive and harshest means to establish liability for an illegal conduct. The broad definition of the crime of defamation might be contrary to the principle of minimum, necessary, appropriate, and last resort or *ultima ratio* intervention of criminal law. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them.[45]

44. According to the Court, statements on matters of *public interest*, particularly those that hold a public institution accountable, deserve special protection because they are essential to enabling democracy. The Court has indicated that a greater margin of tolerance should be shown towards statements and opinions on matters of the public interest on numerous occasions. In *Canese v Paraguay*, the IACtHR reiterated the need for greater tolerance and latitude towards statements and opinions concerning public officials stating:

> Democratic control exercised by society through public opinion encourages the transparency of State activities and promotes the accountability of public officials in public administration for which there

[42] Case of *Canese v Paraguay, supra* note 16, para 104, and See also *Case of Palamara-Iribarne, supra* note 44, para 79.
[43] Case of *Kimel v Argentina supra* note 13, paragraph 16.
[44] Case of *Palamara Iribarne v Chile*, Inter-Am Ct HR, Judgment of 22 November 2005, Ser C No 135; Case of *Ricardo Canese v Paraguay supra* note 16.
[45] Case of *Kimel v Argentina*, *supra* note 13 para 76.

should be a reduced margin for any restriction on political debates or debates on matters of public interest.[46]

45. The different threshold is because the activities of these figures are a matter of public interest and debate which is crucial in a democracy. The Court stated in *Canese v Paraguay* that:

> in the terms of Article 13(2) of the Convention, a certain latitude in the broad debate on matters of public interest ... is essential for the functioning of a truly democratic system. The same principle applies to opinions and statements of public interest made with regard to an individual who stands as candidate for the presidency of the Republic, thereby voluntarily laying himself open to public scrutiny, and to matters of public interest about which society has a legitimate interest to keep itself informed and to know what influences the functioning of the State, affects general interests or rights, or entails important consequences.[47]

46. In *Herrera Ulloa*, the Court held that the application of a criminal conviction for the defamation of a public official was in violation of freedom of expression. It held that a "different threshold of protection" should be applied in such cases. It stated:

> Those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticised, because their activities go beyond the private sphere and belong to the realm of public debate.[48]

47. In *Canese v Paraguay*, the Court found not only that the criminal conviction was unjustified, but also that the criminal proceedings were an unjustified restriction on Mr Canese's right to freedom of expression. They constituted "unnecessary and excessive punishment" and limited "the open debate on topics of public interest or concern". It was observed that:

> there was no imperative social interest that justified the punitive measure, because the freedom of thought and expression of the alleged victim was restricted disproportionately, without taking into consideration that his statements referred to matters of public interest.[49]

---

[46] Case of *Canese v Paraguay supra* note 16, para 97. See also Case of *Palamara Iribane v Chile, supra* note 44, para 83; Case of *Herrera-Ulloa v Costa Rica*, Inter-Am CtHR, Judgment of 2 July 2004, Series C No 107, para 127.
[47] Case of *Canese v Paraguay supra* note 16, para 98.
[48] Case of *Herrera-Ulloa v Costa Rica*, *supra* note 46, para 129. See also Case of *Kimel v Argentina*, *supra* note 13, para 86.
[49] Case of *Canese v Paraguay supra* note 16, para 106.

48. In *Kimel*, the Court actually ordered the state to amend its criminal defamation laws. Although it left open the possibility of criminal sanctions, the Court emphasised that such sanctions could only be used in the narrowest circumstances possible.

> The broad definition of the crime of defamation might be contrary to the principle of minimum, necessary and appropriate, and last resort or *ultima ratio* intervention of criminal law. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State.[50]

49. The Court emphasised the importance of confining the application of criminal laws to "serious" infringements of another fundamental right and of ensuring proportionality "to the seriousness of the damage caused".[51] Although not entirely ruling out any criminal sanction entirely, it made clear that this was only be used exceptionally. The possibility of criminal sanctions should be "carefully analysed" considering:

> The extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception.[52]

50. In *Donoso v Panama*, the Court found that Panama had violated the right to freedom of expression in imposing a criminal sanction. The Court stated that "greater protection" must be awarded to speech that relates to public officials, because of the public interest in their activities. Whilst the Court did not reject criminal sanctions altogether, it noted that the imposition of day fines unnecessary.[53]

51. It is important to note that the Court and IACHR have also held that a violation of the right to freedom of expression that results from enforcement of a law that is incompatible with the ACHR commences *as soon as criminal proceedings are instituted* and not simply when the penalty is imposed. As the Commission has indicated, the mere fact of criminally prosecuting someone for legitimately exercising his right to freedom of expression constitutes a violation of that right. In *Donoso v Panama*, the Commission agreed to hear the case even before the domestic criminal proceedings were been finalised on the grounds that the arbitrary prosecution in itself violated the victim's right to

[50] Case of *Kimel v Argentina*, *supra* note 13, para 76.
[51] Case of *Kimel v Argentina*, *supra* note 13, para 77.
[52] Case of *Kimel v Argentina*, *supra* note 13, para 78.
[53] Case of *Tristán Donoso v Panama* (Preliminary Objection, Merits, Reparations and Costs), Inter-Am Ct HR, Judgement of 27 January 2009 Series C No 193, paras 115 and 129.

freedom of thought and expression.[54] The Court subsequently found in favor of the individual in the case. In the case of *Kimel*, the Court held that the "effects of the criminal proceedings in themselves, [...] show that the subsequent liability imposed on Mr Kimel was serious".[55]

52. The jurisprudence of the Court thus demonstrates that the coercive power of the state may not be exercised so as to negatively affect the freedom of expression by using criminal laws to silence those who exercise their right to express themselves critically, or to lodge complaints of alleged human rights violations. It is extreme and disproportionate to use criminal laws to protect the honor of public servants from the complaints made against them for serious human rights violations, especially as this could thwart or inhibit the critical and necessary work of human rights defenders when they scrutinise persons who hold public office.

ii. European Convention on Human Rights

53. The bodies of the Council of Europe have urged member states to abolish prison sentences for defamation altogether and to consider decriminalizing defamation completely.

54. Parliamentary Assembly Resolution 1577 of 4 October 2007, "Resolution towards decriminalization of defamation" calls on states to

> 17.1. abolish prison sentences for defamation without delay;
> 17.2. guarantee that there is no misuse of criminal prosecutions for defamation and safeguard the independence of prosecutors in these cases;
> 17.3. define the concept of defamation more precisely in their legislation so as to avoid an arbitrary application of the law and to ensure that civil law provides effective protection of the dignity of persons affected by defamation;
> 17.4. in accordance with General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI), make it a criminal offence to publicly incite to violence, hatred or discrimination, or to threaten an individual or group of persons, for reasons of race, colour, language, religion, nationality or national or ethnic origin where those acts are deliberate;
> 17.5. make only incitement to violence, hate speech and promotion of negationism punishable by imprisonment;
> 17.6. remove from their defamation legislation any increased protection for public figures, in accordance with the Court's case law, and in particular calls on:

[54] Case of *Tristán Donoso v Panama ibid,* paras 1 and 107.
[55] Case of *Kimel v Argentina*, *supra* note 13, para 85.

17.6.1. Turkey to amend Article 125.3 of its Criminal Code accordingly;
17.6.2. France to revise its law of 29 July 1881 in the light of the Court's case law;
17.7. ensure that under their legislation persons pursued for defamation have appropriate means of defending themselves, in particular means based on establishing the truth of their assertions and on the general interest, and calls in particular on France to amend or repeal Article 35 of its law of 29 July 1881 which provides for unjustified exceptions preventing the defendant from establishing the truth of the alleged defamation;
17.8. set reasonable and proportionate maxima for awards for damages and interest in defamation cases so that the viability of a defendant media organ is not placed at risk;
17.9. provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury;
17.10. bring their laws into line with the case law of the Court as regards the protection of journalists' sources.

55. Parliamentary Assembly recommendation 1814 of 4 October 2007 calls on the Committee of Ministers "to urge all member states to review their defamation laws and, where necessary, make amendments in order to bring them into line with the European Court of Human Rights, with a view to removing any risk of abuse or unjustified prosecutions".

56. Previously, the Committee of Ministers in its "Declaration on Freedom of Political Debate" of 12 February 2004 stated that defamation or insult published by the media should not lead to imprisonment "unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech".

57. Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe has made several statements in support of the decriminalization of defamation. Most notably, he recently stated at a hearing on "The state of media freedom in Europe" at the Council of Europe's Committee on Culture, Science and Education on 12 September 2011:

> Defamation is still criminalised in several parts of Europe. Laws are in place which make it a criminal offence to say or publish true or false facts or opinions that offend a person or undermine his or her reputation. Journalists can be put in prison for what they have reported.
>
> This happened for instance in Azerbaijan, where Eynulla Fatullayev (among others) had been convicted of defamation and sentenced to imprisonment. The European Court found later on that this was contrary to the European Convention of Human Rights.

> The European Court of Human Rights underlined that "the imposition of a prison sentence for a press offence will not be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention except for exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence".
>
> Offences against "honour and dignity" should be decriminalised and dealt with in civil law courts in a proportionate manner. Prison sentences should no longer be enforced in cases of defamation.

58. He recommended further steps to decriminalize defamation throughout Europe.[56]

European Court of Human Rights

59. Although the European Court on Human Rights (ECtHR) has not ruled that to have the criminal offence of defamation is itself a violation of Article 10 of the ECHR on freedom of expression, it has however subjected the imposition of criminal liability for defamation and any sanction on freedom of expression to very close scrutiny.

60. In *Lingens v Austria*, the ECtHR rejected an argument that criminal libel proceedings did not "strictly speaking prevent [the convicted journalist] from expressing himself" observing that the penalty imposed:

> Amounted to a kind of censure which would be likely to discourage him from making criticisms of this kind again in the future ... In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.[57]

61. In *Raichinov v Bulgaria*, the ECtHR placed "particular reliance" on the fact that the applicant was subject not to a "civil or disciplinary sanction, but instead to a criminal one".[58] It stated:

> It is true that the possibility of recurring to criminal proceedings in order to protect a person's reputation or pursue another legitimate aim under paragraph 2 of Article 10 cannot be seen as automatically contravening that provision, as in certain grave cases – for instance in the case of speech inciting to violence – that may prove to be a proportionate response. However, the assessment

[56] Hearing on "The state of media freedom in Europe" - Committee on Culture, Science and Education Presentation by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Stockholm, 12 September 2011, CommDH/Speech(2011)11 https://wcd.coe.int/wcd/ViewDoc.jsp?id=1840757
[57] *Lingens v Austria*, Eur Ct HR, App No 9815/82, (1986) 8 EHRR 407, para 44.
[58] *Raichinov v Bulgaria*, Eur Ct HR, App No 47579/99, (2008) 46 EHRR 28.

> of the proportionality of an interference with the rights protected thereby will in many cases depend on whether the authorities could have resorted to means other than a criminal penalty, such as civil and disciplinary remedies.[59]

62. The ECtHR found that criminal proceedings and the applicant's conviction were "disproportionate" to the incident at issue. It observed that:

> In this connection, the Court reiterates that the dominant position which those in power occupy makes it necessary for them to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified criticisms of their adversaries ... The applicant's resulting sentence – a fine and a public reprimand – while being in the lower range of the possible penalties, was still a sentence under criminal law, registered in the applicant's criminal record.[60]

63. The ECtHR noted that the victim of the insult was a high-ranking public official, the "bounds of acceptable criticism" geared toward him were wider than in relation to a private individual (although they were not "limitless"). The ECtHR accepted that he "needed to enjoy confidence in conditions free of undue perturbation when on duty" but the

> Need to ensure that civil servants enjoy public confidence in such conditions can justify an interference with the freedom of expression only where there is a real threat in this respect.

64. In the circumstances the ECtHR found that there were "no sufficient reasons" for the interference with the right to freedom of expression and the restriction "failed to answer any pressing social need and could not be considered necessary in a democratic society.[61]

65. The jurisprudence of the ECtHR suggests that the Strasbourg court will apply an especially high level scrutiny of any restriction or penalty imposed through criminal sanction for defamation, particularly where a public figure/public official complains that they have been defamed. Persons involved in activities that fall within the domain of *public interest* should have a greater tolerance and openness to criticism. This reflects the principle of the ECtHR that a public official who "lays himself open to close scrutiny of his every word and deed" must show a "greater degree of tolerance".[62]

---

[59] Ibid para 50.
[60] Ibid para 51.
[61] Ibid para 52.
[62] *Dichand et al v Austria*, Eur Ct HR, App No 29271/95, Judgment of 26 February 2002, para 39.

66. In the case of *Plon Society v France*, the ECtHR ruled that a book publishing the medical information of the French President which revealed that he had been hiding his terminal medical condition from the public was in the public interest:

> The Court considers that the book was published in the context of a wide-ranging debate in France on a matter of public interest, in particular the public's right to be informed about any serious illnesses suffered by the head of State, and the question whether a person who knew that he was seriously ill was fit to hold the highest national office. Furthermore, the secrecy which President Mitterrand imposed, according to the book, with regard to his condition and its development, from the moment he became ill and at least until the point at which when the public was informed (more than ten years afterwards), raised the public-interest issue of the transparency of political life.[63]

67. In the case of *Mamere v France* the European Court of Human Rights considered that "the eminent value of freedom of expression, especially in debates on subjects of general concern, cannot take precedence in all circumstances over the need to protect the honour and reputation of others, be they ordinary citizens or public officials."[64]

68. The ECtHR has highlighted the problematic nature of criminal defamation laws and their application in many cases including:

- *Fatullayev v Azerbaijan* (criminal penalties for defamation were found not to be justified);[65]

- *Marchenko v Ukraine* (criminal penalty was found to be excessive)[66];

- *Gavrilovici v Moldova* (criminal sanctions on a person exercising his freedom of expression could be considered compatible with Article 10 "only in exceptional circumstances, notably where other fundamental rights have been seriously impaired");[67]

- *Bodrozic and Vujin v Serbia* (where the ECtHR stated "recourse to criminal prosecution against journalists for purported insults raising issues of public debate …

[63] *Edition Plon v France*, Eur Ct HR, App No 58148/00, Judgment of 18 May 2004 at para 44.
[64] *Mamere v France*, Eur Ct HR, App No 12697/03, para 27.
[65] *Fatullayev v Azerbaijan*, Eur Ct HR, App No 40984/07, Judgment of 22 April 2010, (2011) 52 EHRR 2 at 102-103.
[66] *Marchenko v Ukraine*, Eur Ct HR, App No 4063/04, Judgment of 19 April 2010, (2010) 51 EHRR 36 at 52.
[67] *Gavrilovici v Moldova*, Eur Ct HR, App No 25464/05, Judgment of 15 December 2009 at 59-60.

should be considered proportionate only in very exceptional circumstances involving a most serious attack on an individual's rights");[68]

- *Mahmudov v Azerbaijan* (a prison sentence would be proportionate "only in exceptional circumstances, if other fundamental rights have been seriously impaired, as for example in cases of hate speech or incitement to violence);[69]

- *Krasulya v Russia* (the threat of imprisonment and suspended sentence imposed a chilling effect on applicant, restricting his journalistic freedom and reducing his ability to impart ideas and information in the public interest);[70]

- *Dabrowski v Poland* (the imposition of a criminal penalty, even if it is "light", leads to a criminal record and has serious implications);[71]

- *Lyashko v Ukraine* (state needs to exercise "restraint in resorting to criminal proceedings" particularly where "other means" are available for responding to unjustified attacks and criticisms);[72]

- *Cumpana v Romania* (the imposition of a prison sentence for a press offence would be compatible with Article 10 of the Convention "only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as for example, in the case of hate speech or incitement to violence";[73]

- *Dalban v Romania* (criminal conviction and sentence amounted to a disproportionate interference with freedom of expression).[74]

c. National Laws

69. There is a growing trend around the world to decriminalize defamation. Indeed, at a national level there is an "increasing tendency to view criminal defamation as an

[68] *Bodrozic and Vujin v Serbia*, Eur Ct HR, App No 33348/96, Judgement of 24 June 2009 at 115.
[69] *Mahmudov v Azerbaijan*, Eur Ct HR, App No 35877/04, Judgment of 18 December 2008 at 50-52.
[70] *Krasulya v Russia*, Eur Ct HR, App No 12365/03, Judgment of 22 February 2007, (2008) 45 EHRR 40.
[71] *Dabrowski v Poland*, Eur Ct HR, App No 18235/02, Judgment of 19 December 2006.
[72] *Lyashko v Ukraine*, Eur Ct HR, App No 21040/02, Judgment of 10 August 2006.
[73] *Cumpana v Romania*, Eur Ct HR, App No 33348/96, Judgment of 17 December 2004, (2005) 41 EHRR 200 at 115-119.
[74] *Dalban v Romania*, Eur Ct HR, App No 28114/95, Judgment of 28 September 1999, (2001) 41 EHRR 39 at 51-52.

unjustifiable restriction on freedom of expression and to abolish it in favour of civil defamation."[75]

70. A number of states – including Argentina, Mexico, Georgia, Ghana, UK, Ireland, the Maldives, Sri Lanka and Togo – no longer have a criminal law on defamation because they have decriminalized it. After their transition to democracy, other states such as Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, Romania and Serbia decided not to sanction libel with imprisonment. There are also states that have decriminalized libel offences partially, such as Uganda, which has decriminalized seditious libel, or have removed imprisonment for criminal libel, such as the Central African Republic and Croatia. Furthermore, prominent political figures in other states, such as India[76] and France,[77] have appeared to endorse decriminalization of defamation.

71. Some of the most notable examples of these countries are indicated below.[78]

- *Argentina*: To comply with this Court's ruling in the *Kimel* case, in September 2009 President Kirchner sent a legislative proposal to Congress to decriminalize defamation, which was approved in November 2009.

- *Armenia*: On 18 May 2010, the National Assembly adopted amendments to the Armenian Criminal and Civil Codes decriminalizing libel and insult.[79]

- *Bermuda*: The Supreme Court of Bermuda declared on 12 August 2011 that Bermuda's criminal libel statute was unconstitutional because it criminalizes trivial and non-intentional libel, and lacks safeguards to prevent abuse.[80]

- *Bosnia and Herzogovina*: Criminal offences against honor and reputation were repealed on 1 November 2002. A new law, allowing for defamation to be dealt within the civil jurisdiction, has been enacted.

---

[75] ARTICLE 19, *Defamation ABC: A Simple Introduction to Concepts of Defamation Law* (November, 2006) at p 10.
[76] Minister of Information and Broadcasting, Ambika Soni, and Minister of Law and Justice, Moodbidri Veerappa Moily, publicly stated in early 2011 that the government is actively looking to decriminalize defamation. ARTICLE 19, "Ministers Move to Decriminalize Defamation", 21 February 2011 http://www.article19.org/data/files/pdfs/press/india-ministers-move-to-decriminalise-defamation.pdf
[77] In 2008, French president Nicholas Sarkozy called for legal reform to decriminalize defamation following a case in which a former newspaper editor was arrested, detained and strip-searched.
[78] See ARTICLE 19, Defamation Map indicating full or partial decriminalization http://www.article19.org/defamation/map.html
[79] Report by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe following his visit to Armenia from 18 to 21 January 2011, CommDH (2011)12, 9 May 2011.
[80] *Charles Roger Richardson v Lyndon D Raynor*, Supreme Court of Bermuda Judgment of 12 August 2011.

- *Bulgaria:* In Bulgaria, the penalty of imprisonment for defamation was abolished in 1999. Articles 146 (insult), 147 (criminal defamation) and 148 (public insult) of the Criminal Code prescribe a penalty of fine.

- *Central African Republic:* In 2004, an amendment was adopted to the 1998 Press Law which removed imprisonment as a penalty for defamation.

- *Cote D'Ivoire*: Imprisonment for defamation was abolished in 2004.

- *Croatia*: The Criminal Code was amended in June 2006 to remove imprisonment as a penalty for defamation.

- *El Salvador:* On 8 September 2011, the legislative assembly adopted a reform bill replacing the penalty of imprisonment for crimes against public image and privacy with monetary fines. Although the bill provides for journalists to be suspended for up to two years if they are found guilty of a crime against someone's honor, the president has suggested that this condition be removed.[81]

- *Georgia*: In 2004, the Georgian parliament repealed the criminal defamation laws and replaced them with a progressive law on the protection of freedom of speech and expression. This law explains the fundamental status of freedom of expression in society, provides clear principles when it may be restricted, the safeguards that must be in place to prevent abuses. It also protects the confidentiality of journalists' sources and whistle-blowers.[82]

- *Ghana*: On 27 July 2001, through the Criminal Code (Repeal of the Criminal and Seditious Laws (Amendment Bill) Act 2001, Ghana's parliament repealed provisions of the Criminal Code of 1960 dealing with criminal and seditious libel.

- *Ireland*: the Defamation Act 2009, which came into effect on 1 January 2010, decriminalized libel in Ireland. Section 35 of the legislation states the "common law offences of defamatory libel, seditious libel and obscene libel are abolished."

[81] Knight Center for Journalism in the Americas, "El Salvador's President supports bill decriminalizing libel but only with amendments", 3 October 2011 http://knightcenter.utexas.edu/blog/el-salvadors-president-supports-bill-decriminalizing-libel-only-amendments

[82] ARTICLE 19, Guide to Law of Georgia on Freedom of Speech Expression, April 2005 http://www.article19.org/data/files/pdfs/analysis/georgia-foe-guide-april-2005.pdf

- *Kyrgyzstan*: On 11 July 2011, President Roza Otunbayeva approved a law decriminalizing libel.[83]

- *Maldives*: The Maldives passed an amendment to the Penal Code abolishing five articles providing for criminal defamation on 23 November 2009.[84]

- *Mexico*: On 12 April 2007 the Mexican president, Felipe Calderón, signed a federal law decriminalizing defamation, libel and slander. The law repealed several provisions of the federal penal code relating to press offences so that defamation is now punishable by damages and corrections of erroneous material rather than imprisonment.

- *Montenegro*: On 22 June 2011, the parliament of Montenegro adopted laws decriminalizing defamation. The law entered into force on 9 July. It is interesting to note that the government had previously noted that decriminalization of libel was one of the European Union's recommendations as a means to improve media freedom.[85]

- *New Zealand*: The Defamation Act of 1992 repealed the crime of defamation. Although the government proposed adopting criminal provisions for defaming electoral candidates, the proposal was abandoned after strong opposition.

- *Romania*: The Romanian legislature repealed criminal defamation in September 2009.

- *Serbia*: On 19 July 2011, Serbia's State Secretary in the Ministry of Justice, Slobodan Homen, announced that defamation and libel will be removed from the country´s criminal code in autumn 2011. There were OSCE-facilitated consultations on the decriminalization of libel in Belgrade in October 2011.[86]

---

[83] "OSCE media freedom representative welcomes decriminalization of libel by Kyrgyzstan", 1 July 2011 http://www.osce.org/fom/81026

[84] The decriminalization of defamation was also one of the recommendations in a joint report by ARTICLE 19 and UNESCO which applies UNESCO's Media Development Indicators to the Maldives. ARTICLE 19 and UNESCO, "Assessment of Media Development in the Maldives" May 2009 http://www.article19.org/data/files/pdfs/press/maldives-assessment-of-media-development.pdf

[85] International Press Institute, "SEEMO Welcomes Decriminalisation of Libel in Montenegro", 13 July 2011 http://www.freemedia.at/home/singleview/article/seemo-welcomes-decriminalisation-of-defamation-in-montenegro.html

[86] OSCE, "OSCE Mission supports consultations on decriminalisation of libel in Serbia", 19 October 2011 http://www.osce.org/serbia/84155

- *Slovenia*: Slovenia's Criminal Code adopted in 2008 did not criminalize defamation generally; criminal liability extends to journalists, editors and publishers only.

- *Sri Lanka*: On 18 June 2002, the Sri Lankan government adopted a law repealing criminal defamation.

- *Togo*: Togo abolished criminal sanctions for defamation and insult on 24 August 2004 through amendments to the Press and Communications Act.

- *Ukraine*: The Criminal Code, which came into effect on 1 September 2001, did not contain any criminal defamation provisions.

- *United Kingdom*: The Coroners and Justice Act 2009, section 73 abolished the criminal offences of sedition and seditious libel, defamatory libel, and obscene libel in England, Wales and Northern Ireland.

- *United States of America:* There has never been a federal criminal defamation law at the federal level in the USA, where free speech is protected under the First Amendment.

3. Advocacy of Non-Governmental Organisations

72. Over the past decade, there have been growing calls from non-governmental organisations for the decriminalization of defamation.

73. ARTICLE 19 has called for the complete repeal of criminal defamation laws in *Defining Defamation: Principles on Freedom of Expression and the Protection of Reputation*.[87] Principle 4 of those principles states:

> (a) All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws. Steps should be taken, in those States which still have criminal defamation laws to progressively implement this principle.
>
> (b) As a practical matter, in recognition of the fact that in many States criminal defamation laws are the primary means of addressing unwarranted attacks on reputation, immediate steps should be

[87] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London, July, 2000).

taken to ensure that any criminal defamation laws still in force conform fully to the following conditions:

(i) no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;

(ii) the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;

(iii) public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to be defamed, even if he or she is a senior public official;

(iv) prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

74. These principles have been supported by a diversity of actors, including the UN Special Rapporteur. In his 2001 report to the UN Commission on Human Rights, the UN Special Rapporteur stated:

> 48. ... the Special Rapporteur would like to endorse the Principles on Freedom of Expression and Protection of Reputation that have been developed by ARTICLE 19, the Global Campaign for Free Expression.[88]

75. These *Principles* also propose the following definition of the "public interest" which broadly encompasses information about public officials and public figures which is important to matters of public concern.

> ... "matters of public concern" is defined expansively to include all matters of legitimate public interest. This includes, but is not limited to, all three branches of government – and, in particular, matters relating to public figures and public officials – politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic issues, the exercise of power, and art and culture. However, it does not, for example, include purely private matters in which the interest of members of the public, if any, is merely salacious or sensational.[89]

[88] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 13 February 2001, E/CN.4/2001/64.
[89] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* July 2000 (London) http://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf

76. The *Declaration of Table Mountain* adopted by the World Association of Newspapers and News Publishers calls on African states to further press freedom and uphold their African and international commitments by:[90]

> as a matter of urgency, abolishing "insult" and criminal defamation laws which in the first five months of 2007 has caused the harassment, arrest and/or imprisonment of 229 editors, reporters, broadcasters and online journalists in 27 African countries...

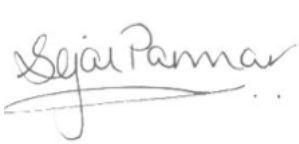
III. Conclusions

77. The Amici suggests that this Court should adopt a strong position in this case by holding that criminal defamation laws and proceedings, particularly when they are initiated in response to a matter in the public interest, violate the right to freedom of expression under Article 13 of the ACHR.

Dated: 8 November 2011

Respectfully submitted,

For ARTICLE 19, Global Campaign for Freedom of Expression



Dr Sejal Parmar	Paula Martins	Dario Ramirez
Senior Legal Officer	Director	Director
ARTICLE 19	ARTIGO Brasil	ARTICULO 19 Mexico

The person to contact about this amicus curiae brief is Sejal Parmar, Senior Legal Officer, ARTICLE 19 at +44 20 7324 2500 or email: sejal@article19.org.

[90] Declaration of Table Mountain Abolishing "Insult Laws" and Criminal Defamation in Africa and Setting A Free Press Higher on the Agenda, adopted by The World Association of Newspapers and News Publishers meeting at the 60th World Newspaper Congress and 14th World Editor Forum in Cape Town South Africa from 3-6 June 2007.