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Dear Commissioner Hammarberg,

Council of Europe's visit to Azerbaijan – freedom of expression concerns and recommendations for legal reform

To assist in your review of the human rights situation in Azerbaijan, we would like to draw your attention to the frequent use of criminal defamation laws, hate speech laws, as well as other laws, against the media, to silence criticisms of public bodies and officials. We also make specific suggestions for legal reform that should urgently be undertaken.

Cases of media harassment

The following are a few of the recent instances of intimidation and harassment of the media that we are highly concerned about:

- There are currently seven journalists in prison in Azerbaijan many of whom have not been granted due process in the hearing of the allegations against them – giving the country one of the worst records in the region for the treatment of journalists.
- The editor of the newspaper *Sanat*, Samir Sadagatoglu, and the author of an article entitled “Europe and Us”, Rafiq Tagi (also referred to as Taghizad), were arrested in late 2006 for the view expressed in the article that Islam was an obstacle to Azerbaijan's economic and political development. They were held in pre-trial detention for four months, found guilty of incitement of national, racial and religious hatred under Article 283 of the Azerbaijani Criminal Code on 4 May 2007, and sentenced to, respectively, three and four years in prison.
- Eynulla Fatullayev, founder and senior editor of *Realny Azerbaijan* was prosecuted for an article allegedly posted by him on an Internet forum. The article criticised the Azerbaijani authorities and armed forces for failing to protect residents of the town of Khojaly during the siege of the town by Armenian forces in February 1992, at the time of the Karabakh conflict. He was charged with defamation under article 147 of the Criminal Code and on 20 April 2007 found guilty of offending refugees from Khojaly. He was sentenced to two and a half years in prison.
- The same day as Mr. Fatullayev was sentenced, his deputy, Uzeir Jafarov, was brutally attacked and taken to hospital with serious injuries. The attack



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came hours after Jafarov testified in a Baku court in favor of Eynulla Fatullayev.

- In July 2007, new charges of terrorism and incitement to racial and religious hatred (under Articles 214 and 283 of the Criminal Code) were brought against Eynulla Fatullayev. The basis for these charges, which carry sentences of up to eight and four years' imprisonment respectively, remain unclear.
- On 16 May 2007, journalists Rovshan Kebirli and Yashar Agazadeh of the Baku-based opposition newspaper *Muhalifet* were sentenced to two and half years in prison for defaming Jalal Aliyev, President Ilham Aliyev's uncle and an MP, under Articles 147 and 148 of the Criminal Code, for accusing Mr Aliyev of exploiting his family connections for his business activities.
- On 25 December 2006, four unidentified men severely beat Nijat Huseynov, a reporter for the Baku-based opposition daily Azadlyg. The journalist had covered alleged corruption among high-ranking government officials. He had reportedly received anonymous threats from callers who made reference to his work.

Legal reforms needed

These are all extremely concerning developments. We consider that, in particular, the reform of defamation and hate speech laws is urgently needed to provide some measure of protection from harassment for the Azeri media.

While international standards permit States to take measures through criminal law against hate speech, only such statements can legitimately be penalised which are intended to incite violence and where there is a direct and immediate link between the statement and the likelihood or occurrence of violence. In the above-mentioned cases the use of hate speech laws in Azerbaijan grossly failed to meet this standard.

You will also be aware that criminal defamation laws are highly problematic for the protection of the right to freedom of expression, particularly in transitional democracies. Such laws are easily abused and the threat of a prison sentence, large fines or even 'just' a suspended criminal conviction exerts a real chilling effect on expression.

In 2007, ARTICLE 19 worked with the OSCE Office in Baku to try to remedy this situation. ARTICLE 19 prepared a legal analysis on the most recent version (the 4th) of the **Draft Defamation Law**. ARTICLE 19 considers that the Draft Law is a progressive proposal which will remedy some of the existing problems and bring Azerbaijan's legal framework more closely in line with international standards and practice. Most importantly the Draft Law proposes to **decriminalise defamation** and provide a range of non-financial measures to remedy damage to reputation.

There is substantial scope, however, for the further improvement of the Draft Law. In our legal analysis,¹ we note the following four broad areas of concern:

¹ <http://www.article19.org/pdfs/analysis/azerbaijan-defamation-07.pdf>

Definition of Defamation

- Only false allegations which actually result in damage to an individual's reputation should be considered defamatory.

Accordingly, the definitions of 'defamation' and 'defamatory information' should be amended to reflect this.

Defences

- To ensure that Article 3.1.8 provides a true 'reasonable publication defence', only 'reasonable measures' need be taken to verify the accuracy of the information before dissemination. At present 'all possible means' is required, which is a highly onerous obligation.
- The 'reasonable publication defence' should also apply to all statements on matters of public concern, not just those in the mass media.
- The defences of 'conscientious interpretation' and 'public interest' in Article 11.3 should be clearly defined, rather than left to judicial discretion.

Damages

- Only the defamed person should be able to claim 'moral damages'. Furthermore, 'material damage' should be limited solely to actual pecuniary loss.

Publications on the Internet

- The limitation period for claims as a result of information disseminated on the internet should be clarified.
- The protection for ISPs in Article 9.1.7 should be extended to all intermediaries in a similar position.

We trust that this information will be useful to your fact-finding mission to assess the human rights situation in Azerbaijan. Do not hesitate to contact us if you require further information or clarification.

Yours truly,

Dr. Agnès Callamard
Executive Director