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# **URGENT COMMENTS ON THE DRAFT CRIMINAL OFFENCES AGAINST HONOUR AND REPUTATION IN THE REPUBLIKA SRPSKA**

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## **BOSNIA AND HERZEGOVINA**

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Based on an unofficial English translation of the draft provisions provided by the OSCE Mission to Bosnia and Herzegovina.

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## EXECUTIVE SUMMARY

The right to freedom of expression is a human right crucial to the functioning of a democracy and is central to achieving other human rights and fundamental freedoms. The full enjoyment of this right is one of the foundations of a free, democratic, tolerant and pluralist society in which individuals and groups with different backgrounds and beliefs can voice their opinions, while bringing visibility to marginalized or underrepresented groups. Any restriction on freedom of expression must meet the strict test under international human rights law, namely that it must (1) be provided for by law; (2) serve to protect a legitimate interest recognized under international law; (3) be necessary in a democratic society; and (4) be non-discriminatory.

Bearing in mind the negative impact that defamation laws may have on the freedom of expression, international human rights bodies, including the OSCE Representative on Freedom of the Media, have called upon states to abolish any *criminal* defamation laws. State practices show that criminal defamation laws are often used against journalists, political opponents, human rights defenders and others who are critical of government officials and policies. Where *civil* defamation laws exist, they should be drafted with care, in order to ensure full compliance with international human rights standards. It is acknowledged that the right to protection of reputation is also a fundamental right which is protected under international law, and could be impacted by defamatory statements. At the same time, defamation laws could have a chilling effect on the exercise of the right to freedom of expression. Therefore, it is important that defamation laws when they exist are formulated in a way that excludes potential abuse by the public authorities, and at the same time conform to the principle of proportionality.

The draft amendments to the Criminal Code of the Republika Srpska, which are analyzed in the Urgent Comments, aim at protecting reputation and honour, particularly against defamation and insult (the “Draft Amendments”). In the Explanatory Note, the Government refers to the general provisions of the Constitution of the Republika Srpska and invokes international standards as a justification for enacting such new provisions. However, the Draft Amendments raise concern with regard to their compatibility with international obligations pertaining to the right to freedom of expression.

As a general remark, the terms used in the Draft Amendments are vague and broad, and therefore open for subjective interpretation and application. While the Draft Amendments provide for exceptions concerning a range of expressions falling under the public interest, made in good faith, as well as a truth defence, such exceptions are narrowly defined. In addition, the nature and severity of sanctions are of particular importance when assessing the proportionality of an interference with the right to freedom of expression. Criminal convictions, given their chilling effect, inherently endanger freedom of expression; even criminal fines are disproportionate interferences and therefore contribute to or amount to a violation of the right to freedom of expression. Respectively, civil defamation laws have a less chilling effect on freedom of expression than criminal defamation laws, but should still be drafted with great caution.

In light of the foregoing, ODIHR calls upon the authorities not to pursue the adoption of the provisions that aim at criminalizing “insults” and “defamation” in the Republika Srpska. The drafters could instead consider enhancing the existing non-criminal legislation, providing for alternative remedies and civil damages to be paid to the affected persons when the expression reaches a certain level of severity, while ensuring that the said provisions are also carefully crafted to exclude arbitrary application or abuse by the public authorities and fully comply with international human rights standards.

In any case, legislation should provide greater protection for speech about politics and other matters of public interest, including by requiring politicians and public officials to

tolerate a higher level of criticism than ordinary citizens. A higher threshold of tolerance should also be ensured for journalistic works covering matters of interest in the public debate. Appropriate defences should also be available to defendants in defamation cases involving statements on matters of public interest, irrespective of whether produced and/or disseminated by professional media operators. Anyone should also benefit from the defence of “reasonable publication” and not bear strict liability for inaccurate statements of fact that are published or disseminated when they have acted reasonably and in good faith.

Whatever the modalities of legislating on defamation, imprisonment should never be imposed in defamation/insult cases and civil fines or damages awards should be proportionate taking into account all of the circumstances and should not be so large as to exert a chilling effect on freedom of expression.

While ODIHR recommends not to pursue the adoption of these Draft Amendments, the analysis and recommendations offered in these Urgent Comments aim to inform the ongoing discussions on this matter.

***As part of its mandate to assist OSCE participating States in implementing their OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.***

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## **I. INTRODUCTION**

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1. On 29 March 2023, the Head of the OSCE Mission to Bosnia and Herzegovina sent to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) a request for a legal review of the draft amendments to the Criminal Code of the Republika Srpska (one of the two entities of Bosnia and Herzegovina).
2. On 13 April, ODIHR responded to this request, confirming the Office's readiness to prepare a legal review on the compliance of the draft amendments, with particular focus on the draft criminal offences against honour and reputation, with international human rights standards and OSCE human dimension commitments. In light of the subject-matter, ODIHR invited the OSCE Representative on Freedom of the Media to contribute to this legal review.
3. The above-mentioned draft amendments passed the first reading in the Parliament on 23 March 2023, followed by public consultations during a period of 60 days after which the second reading in the Parliament will take place. Given the short timeline to prepare this legal review before the second reading in the Parliament, ODIHR decided to prepare an urgent legal review, which does not provide a detailed analysis of all the provisions but primarily focuses on the analysis of the draft criminal law offences against honour and reputation, including defamation (hereinafter the "Draft Amendments"), and their compliance with international human rights standards and OSCE human dimension commitments.
4. These Urgent Comments were prepared in response to the above-mentioned request. ODIHR conducted this assessment within its general mandate to assist the OSCE participating States (hereinafter "pSs") in the implementation of their OSCE human dimension commitments.

## **II. SCOPE OF THE OPINION**

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5. The scope of these Urgent Comments covers only the proposed criminal law offences against honour and reputation, including defamation, submitted for review. Hence, this legal review does not constitute a full and comprehensive review of the other proposed criminal law offences that are part of the package of draft amendments that passed the first reading on 23 March 2023 nor of the existing criminal legislation.
6. The Urgent Comments raise key issues and provide indications of areas of concern. In the interest of conciseness, the Comments focus more on those provisions that require improvements rather than on the positive aspects of the Draft Amendments. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Urgent Comments also highlight, as appropriate, good practices from other OSCE pSs in this field.
7. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality* and commitments to mainstream gender into OSCE

activities, programmes and projects, the Urgent Comments integrate, as appropriate, a gender and diversity perspective.<sup>1</sup>

8. The Urgent Comments are based on an unofficial English translation of the Draft Amendments, which is attached to this document as an annex. Errors from translation may result. When available in another language, the English version of the Urgent Comments shall prevail in case of discrepancies.
9. In view of the above, ODIHR would like to stress that this review does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in the future.

### **III. LEGAL ANALYSIS AND RECOMMENDATIONS**

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#### **1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS**

10. The right to freedom of expression is a human right crucial to the functioning of a democracy and is central to achieving other human rights and fundamental freedoms. The full enjoyment of this right is one of the foundations of a free, democratic, tolerant and pluralist society in which individuals and groups with different backgrounds and beliefs can voice their opinions, while bringing visibility to marginalized or underrepresented groups. While underlying the importance of protecting the right to free expression, it should also be balanced with the protection of reputation and the prevention of harm.
11. Freedom of expression and opinion is enshrined in Article 19 of the Universal Declaration of Human Rights (hereinafter “UDHR”)<sup>2</sup> and is guaranteed by Article 19 of the United Nation (UN) International Covenant on Civil and Political Rights (hereinafter “ICCPR”). Article 19 of the ICCPR provides that “*everyone shall have the right to hold opinions without interference*” and that “*everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*”<sup>3</sup> The UN Human Rights Committee’s General Comment No. 34 on Article 19 of the ICCPR further elaborates that “[f]reedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights” and protects “*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.*”<sup>4</sup>
12. Restrictions on the right to freedom of expression must be compatible with the three-part test set out in Article 19(3) of the ICCPR, requiring any restriction to have a basis in the law of the country where it is imposed (test of legality), to be in pursuit of one of the aims listed exhaustively<sup>5</sup> (test of legitimacy) and to be the least intrusive measure possible among

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<sup>1</sup> See the [UN Convention on the Elimination of All Forms of Discrimination against Women](#), adopted by General Assembly resolution 34/180 on 18 December 1979; and the [OSCE Action Plan for the Promotion of Gender Equality](#), adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

<sup>2</sup> See the [Universal Declaration of Human Rights \(UDHR\)](#).

<sup>3</sup> See the [UN International Covenant on Civil and Political Rights](#) (ICCPR), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. Bosnia and Herzegovina became a State Party to the ICCPR by succession on 1 September 1993.

<sup>4</sup> See UN Human Rights Committee, [General comment No. 34](#) on Article 19 of the ICCPR, CCPR/C/GC/34, para. 11.

<sup>5</sup> i.e., (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

those effective enough to reach the designated objective (test of necessity and proportionality). Article 19(3) specifically refers to respect of the reputations of others as one of the legitimate aims. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific aim being pursued. Regarding defamation in particular, the UN Human Rights Committee further notes that “[d]efamation 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. [...] 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.”<sup>6</sup> These obligations are supplemented by a number of resolutions and recommendations from the UN. The UN General Assembly Resolution 76/173, on the Safety of Journalists and the Issue of Impunity, adopted in 2021, urges governments not to misuse defamation laws to censor and interfere with journalists’ work and, “where necessary, to revise and repeal such laws, in compliance with States’ obligations under international human rights law.”<sup>7</sup>

13. Article 17(2) of the ICCPR also provides that everyone has the right to the protection of the law from “unlawful attacks on [one’s] honour and reputation”. UN Human Rights Committee’s General Comment no. 16 on Article 17 of the ICCPR further provide that “[p]rovision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible”. At the same time, the UN Human Rights Committee also underlines that “the protection of privacy is necessarily relative” and may be restricted, especially in cases where knowledge about an individual’s private life is “essential in the interests of society”.<sup>8</sup> In addition, “legislation must specify in detail the precise circumstances in which such interferences may be permitted”.<sup>9</sup> In its decisions relating to damage to reputation, honour and dignity under Article 17 of the ICCPR, the UN Human Rights Committee has elaborated that full reparation in such cases should involve *inter alia* adequate compensation, including for lost earnings and damage to reputation and legal costs involved in litigation; appropriate measures of satisfaction with a view to restoring one’s reputation, honour, dignity and professional standing, and; taking steps to prevent similar violations from occurring in the future.<sup>10</sup>
14. At the Council of Europe level, freedom of expression and freedom of information are protected by Article 10 of the European Convention on Human Rights (hereinafter “ECHR”).<sup>11</sup> Freedom of expression and freedom of information are not absolute and therefore may be subject to certain formalities, restrictions, conditions and limitations.

<sup>6</sup> UN Human Rights Committee (CCPR), [General Comment no. 34 on Article 19: Freedoms of Opinion and Expression](#), 12 September 2011, para. 47.

<sup>7</sup> See the [UN General Assembly Resolution 76/173](#), on the Safety of Journalists and the Issue of Impunity (A/RES/76/173), 10 January 2022. See also [Disinformation and freedom of opinion and expression](#) (A/HRC/47/25), 9 July 2021 and [Reinforcing media freedom and the safety of journalists in the digital age – Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#) (A/HRC/50/29), 20 April 2022.

<sup>8</sup> See UN Human Rights Committee, [General Comment No. 16: Article 17 \(Right to Privacy\)](#), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, para. 7.

<sup>9</sup> *Ibid.* para. 8 (General Comments No. 16).

<sup>10</sup> See e.g., UN Human Rights Committee, [Khidimazar Allakulov v. Uzbekistan](#), Communication No. 2430/2014 (2017), para. 9.

<sup>11</sup> See [Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms](#) (ECHR), which entered into force on 3 September 1953. Bosnia and Herzegovina became a State Party to the ECHR on 12 July 2002.

Article 10(2) of the ECHR specifically provides that any interference must be provided by law, must pursue a legitimate aim included in such provision,<sup>12</sup> which mentions “*the protection of the reputation or rights of others*”, and must be necessary in a democratic society, meaning that it must be strictly needed and proportionate to adequately protect one of those aims. The European Court of Human Rights (hereinafter “ECtHR”) has underlined that Article 10 of the ECHR also protects expressions that “*offend, shock or disturb*” the State or any part of the population.<sup>13</sup> The ECtHR case-law serves as an important reference point for assessing the risks of human rights violations that are inherent in the national defamation laws. The ECtHR has also held that reputation is encompassed by Article 8 as being part of the right to respect for private life and that states have a positive obligation to achieve a fair balance of protection of reputation and freedom of expression.<sup>14</sup> Where freedom of expression comes into conflict with the right to respect for private life guaranteed by Article 8, the ECtHR has set forth criteria for the balancing exercise including: whether the expression contributed to a debate of general interest; the public status of the person subjected to the statement; the prior conduct of the person who is the subject of criticism; the truth defence (where the expression contains factual statements); the content, form and the consequences of the expression/publication; the severity of the sanctions.<sup>15</sup> The Council of Europe Committee of Ministers’ *Recommendation CM/Rec(2022)16 on combating hate speech*<sup>16</sup> and the Parliamentary Assembly of the Council of Europe (PACE) *Resolution 1577 (2007) “Towards decriminalisation of defamation”*<sup>17</sup> are also of particular relevance for the present Comments.

15. As a candidate country for accession to the European Union (EU),<sup>18</sup> Bosnia and Herzegovina should approximate relevant state legislation to the EU *acquis communautaire*. Hence, when drafting new legislation, it is important to take into consideration EU primary legislation and the EU Charter on Fundamental Rights, especially Article 11 on freedom of expression and information. Of note, “[g]uarantee [of] freedom of expression and of the media and the protection of journalists” is expressly mentioned among the fourteen priorities listed by the European Commission that should be fulfilled in view of opening EU accession negotiations with Bosnia and Herzegovina.<sup>19</sup> Regarding defamation laws specifically, the European Commission *Recommendation 2022/758* calls upon Member States to “*specifically review their legal*

<sup>12</sup> i.e., national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.

<sup>13</sup> See e.g., ECtHR, *Handyside v. United Kingdom*, no. 5493/72, 7 December 1976, para. 49, where the ECtHR held that Article 10 of the ECHR protects “*not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’*”.

<sup>14</sup> See European Court of Human Rights (ECtHR), *Radio France and Others v. France*, no. 53984/00, 30 March 2004, para. 31, which states that “*reputation [is] an element of the right to respect for private life*”; and *Pfeifer v. Austria*, no. 12556/03, 15 February 2008, para. 35, where the Court held that “*a person’s reputation [...] forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her private life*”.

<sup>15</sup> See e.g., ECtHR, *Jerusalem v. Austria*, no. 26958/95, 27 February 2001, para. 40; *Ruokanen and Others v. Finland*, no. 45130/06, 6 April 2010, para. 52; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, 22 October 2007, para. 59. See also Venice Commission, *Amicus Curiae Brief for the Constitutional Court of Georgia on the Question of the Defamation of the Deceased*, CDL-AD(2014)040, para. 23.

<sup>16</sup> Council of Europe Committee of Ministers, *Recommendation CM/Rec(2022)16 on combating hate speech*, adopted by the Committee of Ministers on 20 May 2022.

<sup>17</sup> See Parliamentary Assembly of the Council of Europe (PACE), *Resolution 1577 (2007) “Towards decriminalisation of defamation”*, which calls for state authorities to take the following actions, among others: abolish prison sentences for defamation; guaranteeing that there criminal prosecutions for defamation are not misused; defining the concept of defamation in more precisely in their legislation with enough precision so as to avoid arbitrary applications; making only incitement to violence, hate speech and promotion of negationism punishable by imprisonment; avoiding any increased protection for public figures; providing for appropriate legislative means for persons pursued for defamation to defend themselves, particularly the so-called “truth defences”; setting reasonable and proportionate maxima for awards for damages and interest in defamation cases; providing appropriate legal guarantees against disproportionate awards.

<sup>18</sup> See <[Bosnia and Herzegovina \(europa.eu\)](https://www.europa.eu)>.

<sup>19</sup> See European Commission, *Opinion (Avis) on the EU membership application of Bosnia and Herzegovina* (May 2019).



*frameworks applicable to defamation to ensure that existing concepts and definitions cannot be used by plaintiffs against journalists or human rights defenders in the context of manifestly unfounded or abusive court proceedings against public participation” and encourage Members States “to favour the use of administrative or civil law to deal with defamation cases”.*<sup>20</sup>

15. At the OSCE level, a number of commitments proclaim the right to everyone to freedom of expression. In particular, 1990 OSCE Copenhagen Documents states that “[t]his right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.”<sup>21</sup> The OSCE pSs also reaffirmed “the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinion” in the 1991 OSCE Moscow Document.<sup>22</sup> Moreover, in 1994, the OSCE pSs reaffirmed that “freedom of expression is a fundamental human right and a basic component of a democratic society” committing to “take as their guiding principle that they will safeguard this right” and emphasizing in this respect, that “independent and pluralistic media are essential to a free and open society and accountable systems of government”.<sup>23</sup> In the OSCE Ministerial Council Decision 3/2018 on the Safety of Journalists, the OSCE Ministerial Council called the OSCE pSs to “[e]nsure that defamation laws do not carry excessive sanctions or penalties that could undermine the safety of journalists and/or effectively censor journalists and interfere with their mission of informing the public and, where necessary, to revise and repeal such laws, in compliance with participating States’ obligations under international human rights law.”<sup>24</sup>
16. The OSCE Representative on Freedom of the Media (hereinafter “OSCE RFoM”) is also specifically mandated to observe relevant media developments in all OSCE pSs and to advocate and promote full compliance with OSCE principles and commitments regarding freedom of expression and free media. The OSCE RFoM together with the freedom of expression mandate-holders from the United Nations, the African Commission on Human and Peoples’ Rights and the Organization of American States (together jointly referred to as “the International Mandate-Holders on Freedom of Expression”), have adopted several Joint Declarations, which offer very practical guidance covering current universal challenges to freedom of expression, including with respect to defamation.<sup>25</sup> In this respect, bearing in mind the negative impact that defamation laws may have on the freedom of expression, the International Mandate-Holders on Freedom of Expression have called upon states to abolish criminal defamation laws.<sup>26</sup>

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<sup>20</sup> See [European Commission Recommendation 2022/758](#), 22 April 2022.

<sup>21</sup> See OSCE, [Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE](#) (Copenhagen, 5 June-29 July 1990).

<sup>22</sup> See OSCE, [Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE](#), (Moscow, 3 October 1991).

<sup>23</sup> See OSCE, [CSCE Budapest Document 1994, Towards a Genuine Partnership in a New Era](#) (Budapest, 21 December 1994), para 36.

<sup>24</sup> See [OSCE Ministerial Council Decision No. 3 on the Safety of Journalists](#), 12 December 2018, para. 11.

<sup>25</sup> See [Joint declarations | OSCE](#).

<sup>26</sup> See, in particular, UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur and the African Commission Special Rapporteur on Freedom of Expression and Access to Information (hereinafter “International Mandate-Holders on Freedom of Expression”), [2023 Joint Declaration Joint Declaration on Media Freedom and Democracy](#), which specifically provides that “[c]riminal defamation and laws criminalising the criticism of State institutions and officials should be repealed”; [2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression](#), para. 2(b)(ii); [2010 Joint Declaration on Ten Key Challenges facing Freedom of Expression in the Next Decade; Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation](#), 15 December 2008.

## 2. NATIONAL CONTEXT AND BACKGROUND

17. The Constitution of Bosnia and Herzegovina outlines the distribution of powers between the federal government and the two entities that make up Bosnia and Herzegovina - the Federation of Bosnia and Herzegovina and the Republika Srpska.<sup>27</sup> With regard to human rights, the Constitution of Bosnia and Herzegovina guarantees several fundamental rights and freedoms, including freedom of expression, freedom of peaceful assembly and association, and the right to a fair trial. The Constitution of the Republika Srpska guarantees human rights and freedoms in general, and explicitly mentions that public expression of opinion shall be guaranteed (Article 25) and refers to media freedoms in Article 26.<sup>28</sup>
18. Defamation has been a civil matter in the Republika Srpska since 2001, when a Law on the Protection from Defamation was enacted.<sup>29</sup> In its preamble, the Law provides that it should be interpreted in a way to enable freedom of expression on the highest possible level. Article 7 of the Law also states that establishing responsibility and any awards of damages should be governed by the standards of Article 10 of the ECHR and the jurisprudence of the European Court of Human Rights.<sup>30</sup> The Federation of Bosnia and Herzegovina also adopted a similar Law on the Protection from Defamation in 2002,<sup>31</sup> and shortly after Brčko District also enacted a Law on the Protection from Defamation reflecting similar principles as the Republika Srpska legislation.<sup>32</sup> Although not identical, such civil defamation laws, which offer protection from defamation, reflect an overall harmonized approach throughout the entire territory of Bosnia and Herzegovina.
19. The Draft Amendments to the Criminal Code of the Republika Srpska, especially in Article 7, propose to add a new chapter titled “Criminal acts against honour and reputation”, which include insult, defamation, spreading statements about personal and family life and others. In its current wording, the Criminal Code of the Republika Srpska already criminalizes “violent behaviour” (Article 362), which prescribes penalties for harshly insulting and abusing another person. In contrast, insulting a person is considered as a misdemeanour in the Law on Public Order and Peace of the Republika Srpska, which provides that insult and behaviour on political, religious or national basis or other reckless behavior are punishable by a fine (Article 8).
20. The proposed Draft Amendments under review refer to the rights to respect reputation and honour. In the Explanatory Note, the Government of Republika Srpska refers to the general provisions of the Constitution of the Republika Srpska and invokes the international standards as a justification for enacting such new provisions. The lawmakers contend that the Draft Amendments comply with Article 13 of the Constitution of the Republika Srpska, which stipulates that human dignity, physical and spiritual integrity, human privacy, personal and family life are inviolable and as a consequence, that every person has the right to ask another person to respect and not disparage his/her personal dignity.<sup>33</sup> The Explanatory Note further argues that the criminal legislation of the neighbouring countries, and even the criminal legislation of the countries that are in the EU, prescribes offenses against honour and reputation.<sup>34</sup> In this respect, it is important to note that the Republic of Serbia has only insult as a criminal

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<sup>27</sup> See the [Constitution of Bosnia and Herzegovina of Bosnia and Herzegovina](#), 14 December 1995.

<sup>28</sup> See the [Constitution of the Republic of Srpska](#), 14 December 1995.

<sup>29</sup> Defamation was decriminalised in 2012.

<sup>30</sup> See , 1 August 2001. [Law on Protection Against Defamation of the Republika Srpska](#), 1 August 2001., 1 August 2001.

<sup>31</sup> See [Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina](#), 1 November 2002.

<sup>32</sup> See [Law on Protection Against Defamation of the District Brčko](#), 10 July 2003.

<sup>33</sup> See [Draft Law on Amendments to the Criminal Code of the Republic of Srpska](#), 3 March 2023.

<sup>34</sup> *Ibid.*

offence and that defamation was decriminalized in 2012. North Macedonia also abolished defamation and insult as criminal acts, when it enacted the Law on Civil Liability for Insult and Defamation in 2012.<sup>35</sup>

21. Finally, it is worth emphasizing that the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association have raised concerns regarding the Draft Amendments and called upon to withdraw them and more generally to refrain from criminalizing expression.<sup>36</sup> In addition, OSCE RFoM viewed the proposed amendments “*as a step backwards in an already fragile media freedom environment in the entity of the Republika Srpska where only a handful of free and independent outlets are operating today [...] [and reiterated that] “such moves go against international standards and best practices and will further erode the overall media freedom situation in the Republika Srpska.”*”<sup>37</sup> This legislative initiative should also be assessed taking into account the broader context and the recent defamation cases against journalists as a tool to discourage them from reporting about issues of public importance.<sup>38</sup>

### **3. ANALYSES OF THE DRAFT AMENDMENTS**

#### **3.1. Definitions of the Criminal Offences**

22. At the outset, it is noted that there are no definitions of “defamation” or “insult” as such in international instruments, nor is there a standard usage for the English-language terms (of “defamation,” “libel,” “slander,” or “insult”) across OSCE pSs.
23. The above-mentioned requirement of legality of restrictions to freedom of expression means that the law concerned must be precise, certain and foreseeable, and must be formulated in terms that provide a reasonable indication as to how these provisions will be interpreted and applied.<sup>39</sup> This is all the more important in the context of criminal legislation given the consequences attached to criminal liability. Accordingly, criminal offences and the relevant penalties must be clearly and precisely defined by law, meaning that an individual, either by himself/herself or with the assistance of a legal counsel, should know from the wording of the relevant provision which acts and omissions will make him/her criminally liable and what penalty he or she will face as a consequence.<sup>40</sup>
24. Any vaguely or broadly framed restrictive provisions open the possibility for misinterpretation and arbitrary application by public authorities, subsequently having a chilling effect on the exercise of fundamental rights, especially when used to silence journalists. A chilling effect may arise, in the words of the ECtHR, “*where a person engages in ‘self-censorship’, due to a fear of disproportionate sanctions or a fear of*

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<sup>35</sup> See OSCE RFoM, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (2017).

<sup>36</sup> See UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, *Joint Letter OL BIH 1/2023*, 10 March 2023.

<sup>37</sup> See OSCE RFoM, *Press Release*, 4 March 2023.

<sup>38</sup> See also *ODIHR Final Report on 2022 General Elections in Bosnia and Herzegovina*, which states that “[...] recent defamation cases against journalists as a tool to discourage them from reporting about issues of public importance.”

<sup>39</sup> See e.g., Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, para. 58. In addition, see ECtHR, *The Sunday Times v. the United Kingdom (No. 1)*, no. 6538/74, where the Court ruled that “*the law must be formulated with sufficient precision to enable the citizen to regulate his conduct,*” by being able to foresee what is reasonable and what type of consequences an action may cause.”

<sup>40</sup> See e.g., ECtHR, *Rohlena v. the Czech Republic* [GC], no. 59552, 27 January 2015, paras. 78-79. See also UN Human Rights Committee, *General Comment No. 29 on States of Emergency* (Article 4 of the ICCPR), CCPR/C/21/Rev.1/Add. 11 (2001), para. 7.

*prosecution under overbroad laws. This chilling effect works to the detriment of society as a whole.*"<sup>41</sup>

25. It must also be emphasized that the right to freedom of expression protects all forms of ideas, information or opinions, including those that “*offend, shock or disturb*” the State or any part of the population,<sup>42</sup> and even “*deeply offensive*” speech.<sup>43</sup> International human rights law recognizes a limited number of types of expression which States must prohibit or render punishable (by law), providing that the legal provisions are strictly interpreted in accordance with international freedom of expression standards, especially when dealing with “*incitement*”.<sup>44</sup> Outside of these very limited and narrowly defined exceptions, **states should as a default refrain from sanctioning expression through the criminal law system, including through criminalization of defamation.** This does not prevent the application of civil or administrative legislation when the expression attains a sufficient level of severity to be considered offensive or harmful and be legitimately restricted under international human rights standards, providing that the above three-part test is complied with, as could be the case, for instance, with civil defamation legislation.
26. Finally, it is also essential that the legislation clearly distinguishes value judgments, which are not susceptible of proof, from factual statements the existence of which can be demonstrated.<sup>45</sup> A requirement to prove the truth of a value judgment is thus impossible to fulfil and infringes freedom of opinion itself.<sup>46</sup> In this respect, the ECtHR has emphasized that, where the national legislation or courts make no distinction between value judgments and statements of fact, which amounts to requiring proof of the truth of a value judgment, this is an indiscriminate approach to the assessment of speech and *per se* incompatible with freedom of opinion.<sup>47</sup>

<sup>41</sup> See the Council of Europe, [Study](#) on the Case on Freedom of Expression and Defamation, p. 24.

<sup>42</sup> See International Mandate-Holders on Freedom of Expression, [Joint declaration on freedom of expression and “fake news”, disinformation and propaganda](#) (2017), seventh paragraph of the Preamble. See also UN Special Rapporteur on counter-terrorism, [2015 Thematic Report](#), A/HRC/31/65, 22 February 2016, para. 38. See also e.g., ECtHR, [Handyside v. United Kingdom](#), no. 5493/72, 7 December 1976), para. 49; and [Bodrožić v. Serbia](#), no. 32550/05, 23 June 2009, paras. 46 and 56.

<sup>43</sup> UN Human Rights Committee (CCPR), [General Comment no. 34 on Article 19: Freedoms of Opinion and Expression](#), 12 September 2011, paras. 11 and 38.

<sup>44</sup> These include: “*direct and public incitement to commit genocide*”, which should be punishable as per Article III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide to which Bosnia and Herzegovina became a State Party by succession on 29 December 1992; the “*propaganda of war*” and the “*advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*”, which should be prohibited as per Article 20 (1) and (2) of the ICCPR (see also OSCE RFoM, [Non-Paper on Propaganda and Freedom of the Media](#) (2015), especially with reference to propaganda of war and hatred that leads to violence and discrimination); “*all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as [...] incitement to [acts of violence] against any race or group of persons of another colour or ethnic origin*”, which should be an offence punishable by law according to Article 4 (a) of the ICERD; *public provocation to commit acts of terrorism*”, when committed unlawfully and intentionally which should be criminalized (Article 5 of the [2005 CoE’s Convention on the Prevention of Terrorism](#), ratified by Bosnia and Herzegovina on 11 January 2008); “*child sexual exploitation material*” which shall be criminalized as per Articles 2 (c) and 3 (1) (c) of the [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#)”, which was ratified by Bosnia and Herzegovina on 4 September 2002. International recommendations also call upon States to enact laws and measures, as appropriate, “*to clearly prohibit and criminalize online violence against women, in particular the non-consensual distribution of intimate images, online harassment and stalking*”, including “[t]he threat to disseminate non-consensual images or content”, which must be made illegal; see UN Special Rapporteur on violence against women, its causes and consequences, [Report on online violence against women and girls from a human rights perspective](#) (18 June 2018), A/HRC/38/47, paras. 100-101. [General Policy Recommendation No. 7](#) of the European Commission against Racism and Intolerance (ECRI) recommends to 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. See also Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2022\)16 on combating hate speech](#), adopted by the Committee of Ministers on 20 May 2022, para. 11.

<sup>45</sup> See e.g., ECtHR, [Lingens v. Austria](#), no. 9815/82, 8 July 1986), para. 46; and [McVicar v. the United Kingdom](#), no. 46311/99, 7 May 2002, para. 83.

<sup>46</sup> See e.g., ECtHR, [Morice v. France](#) [GC], no. 29369/10, 23 April 2015, para. 126; and ECtHR, [Lingens v. Austria](#), no. 9815/82, 8 July 1986), para. 46.

<sup>47</sup> See e.g., ECtHR, [Gorelishvili v. Georgia](#), no. 12979/04, 5 June 2007, para. 38; and [Fedchenko v. Russia](#), no. 33333/04, 11 February 2010, para. 37.

### ***3.1.1. Provisions Pertaining to “Insult” (Draft Article 208a)***

27. At the outset, it is noted that an “insult” is already considered as a misdemeanour offense by the Law on Public Order. The fact that two sets of legal norms overlap may trigger legal uncertainty and confusion as to the applicable norms. In addition, should the sanction provided under the Law on Public Order be considered of a criminal nature, this risks also violating the principle of *non bis in idem*, whereby one person cannot be subjected to legal action twice for substantially the same facts.<sup>48</sup>
28. Draft Article 208a paragraph (1) provides that “[w]hoever insults another person shall be fined ranging from BAM 5,000 to BAM 20,000” (approx. 2,500 to 10,000 EUR).<sup>49</sup> If committed through the press, radio, television or other means of public information or at public gathering or in another way “as a result of which the insult became accessible to a larger number of persons”, the fine may range from 10,000 BAM up to 50,000 BAM (regarding the exclusion of criminal liability and defences provided by Article 208(d), see Sub-Section 3.2 below).
29. **The mere reference to “insult” without providing any description or definition of the meaning, nor indicating the constitutive elements of the criminal offence appears excessively broad and subjective and could be applied and interpreted in an arbitrary manner.** With this wording, any criticism, even satirical or of a minor could potentially be subjectively perceived as an insult. The reference to the accessibility “to a larger number of persons” is similarly vague as it would hardly allow an individual to clearly foresee in what circumstances a statement made in a not entirely private context could be penalised more severely. A preferable option would be to exclude the reference to “a larger number of persons” and limit the provision to the use of mass media. The provision also does not distinguish between value judgments and statements of fact (see para. 26 above).
30. In addition to the general exclusion clause/defences under Draft Article 208d, Draft Article 208a paragraph (3) provides an exemption of liability in case the perpetrator was “provoked by the indecent behaviour of the insulted party”. Again, the terminology “indecent behaviour” is vague and potentially subject to varying interpretation.
31. The ECtHR has acknowledged that derogatory and insulting expressions can cause “emotional disturbance” and affect a person’s “psychological well-being, dignity and moral integrity” and, therefore, can interfere with the right to respect for private life protected under Article 8 of the ECHR.<sup>50</sup> However, for insults to engage such a right, the Court expects the expression at stake to meet a certain threshold of severity.<sup>51</sup> In regard to the language used, the Court has recalled on multiple occasions that media operators should be allowed to use “a certain degree of exaggeration, provocation or harshness”.<sup>52</sup> While deciding on a case concerning a journalist sued for insulting and defaming local public officials, the ECtHR ruled that, in deciding on such cases, a balance must be struck between the competing rights to freedom of expression and of the media on the one hand, and the rights to honour and reputation on the other; therefore, in light of the fundamental role of the press in holding public officials accountable, media operators and especially

<sup>48</sup> See e.g., ECtHR, *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, 10 February 2009.

<sup>49</sup> As of 5 May 2023, EUR 1 equals BAM 1.96 (Bosnian Convertible Mark).

<sup>50</sup> See ECtHR, *F.O. v. Croatia*, no. 29555/13, 22 April 2021, para. 60.

<sup>51</sup> See ECtHR, *Denisov v. Ukraine*, no. 76639/11, 25 September 2018, para. 112, also quoting consolidated case-law such as *A. v. Norway*, paras. 63-64; *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, 21 September 2010, paras. 40 and 44; *Delfi AS v. Estonia*, no. 64569/09, 2015, para. 136; *Bédat v. Switzerland*, no. 56925/08, para. 72. As a matter of example, Section 1 of the United Kingdom’s Defamation Act 2013 reads as follows: ‘A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.’

<sup>52</sup> See ECtHR, *Kulis v. Poland*, no. 15601/02, 18 March 2008, para. 47.

investigative journalists should be, as long as they act in good faith and provide a sufficient factual basis for their assertions, adequately protected by the law and should not be unduly deterred from reporting on matters of general public interest by the fear of sanctions.<sup>53</sup> By contrast, the Court found that a gratuitous personal attack with pointlessly harmful comments which did not contribute to any debate of legitimate public interest and did not have any informational value whatsoever for society would not deserve protection under Article 10 of the ECHR.<sup>54</sup>

32. In addition, it must be emphasized that **someone who is active in the public domain must have a higher tolerance of criticism and the limits of acceptable criticism are wider with regard to politicians acting in their public capacity.**<sup>55</sup> As also noted by the UN Human Rights Committee, **the mere fact that the expression is considered to be insulting to a public figure is not sufficient to justify restriction or penalties.**<sup>56</sup>
33. Finally, in the case of insults, from the case-law of the ECtHR, it would appear that criminal sanctions *per se* would not be considered proportionate to the aim pursued due to their chilling effect on the exercise of freedom of expression as individuals are likely to self-censor themselves by fear of criminal prosecution or disproportionate sanctions,<sup>57</sup> especially when the underlying legislation is vaguely and broadly worded as is the case here (see also Sub-Section 3.3 *infra*).
34. In light of the foregoing, **the criminalization of “insult” should be re-considered entirely due to the disproportionate character of criminal sanctions and its potential chilling effect on freedom of expression, as well as the inherent difficulty of providing a definition compliant with the principles of legal certainty, foreseeability and specificity of criminal law.**

### ***3.1.2. Provisions Pertaining to Defamation (Draft Article 208b)***

35. Proposed Draft Article 208b defines “defamation” as “*whoever states or circulates something untrue concerning another person that may harm their honour or reputation, knowing that what they state or circulate is untrue.*” The fine for defamation ranges from BAM 8,000 to BAM 30,000 (approx. 4,000 to 15,000 EUR). Draft Article 208d provides for the exclusion of liability in certain circumstances (see Sub-Section 3.2. below).
36. At the outset, it should be reiterated that international human rights bodies call for the abolition of criminal defamation laws (see para. 16 above). While the ECtHR has considered that, in light of the margin of appreciation left to State authorities, laws criminalizing defamation cannot be considered, as a matter of principle, incompatible with the ECHR, it has nevertheless raised some concerns regarding the chilling effect of criminal sanctions and their disproportionate nature (see below Sub-Section 3.3).

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<sup>53</sup> See ECtHR, *Cumpănă and Mazăre v. Romania*, no. 33348/96, 17 December 2004, paras. 102-103 and 113; see also *Tănăsioaica v. Romania*, no. 3490/03, 19 June 2012.

<sup>54</sup> See ECtHR, *Katamadze v. Georgia*, no. 69857/01, 14 February 2006.

<sup>55</sup> See International Mandate-Holders on Freedom of Expression”, *2023 Joint Declaration on Media Freedom and Democracy*, which specifically provides that: “*Politicians and public officials should demonstrate high levels of tolerance towards critical journalistic reporting bearing in mind that critical scrutiny of those in positions of power is a legitimate function of the media in democracy.*” See also e.g., ECtHR, *Karman v. Russia*, no. 29372/02, 14 December 2006, para. 36; and ECtHR, *Jerusalem v. Austria*, no. 26958/95, 27 February 2001.

<sup>56</sup> See the UN Human Rights Committee *General comment No. 34* to Article 19 of the ICCPR, CCPR/C/GC/34, para. 38.

<sup>57</sup> See the Council of Europe, *Study* on the Case on Freedom of Expression and Defamation, p. 24. See e.g., *Eon v. France*, no. 26118/10, 14 March 2013, paras. 61-62, where the Court considered that even a suspended fine of merely 30 Euros imposed on a French citizen for insulting the President of France (a sum which the remitting court contended it had been imposed “as a matter of principle”) was considered “likely to have a chilling effect” simply due to its criminal nature, and was held “disproportionate to the aim pursued and hence unnecessary in a democratic society”. See also See the UN Human Rights Committee *General comment No. 34* to Article 19 of the ICCPR, CCPR/C/GC/34, para. 47.

37. The wording in Draft Article 208b - “whoever states or circulates” - is also questionable. The distinction between stating and circulating a statement is in itself sufficiently self-evident; the current wording should be interpreted as to suggest that a defense of so-called innocent or reasonable publication would be applicable in such cases, meaning that **those who have acted reasonably and in good faith should not bear strict liability for inaccurate statements of fact that are published or disseminated.**<sup>58</sup> Especially, the ECtHR has noted that journalists should not bear responsibility for statements made by others and disseminated through interviews.<sup>59</sup> **To ensure that a defense of innocent or reasonable publication is indeed applicable, this should be made explicit in the Draft Amendments.**
38. In addition, proposed Draft Article 208b elicits three different, but connected levels of concern regarding the criminal nature of the sanctions. Firstly, **the mere existence of criminal sanctions for defamation can have a chilling effect, including when negligible in pecuniary terms or even not applied at all, due to the fact that they are normally registered in a person’s criminal record.**<sup>60</sup> Secondly, even in those cases when the ECtHR has accepted **monetary penalties as being proportionate, the level of such penalties was moderate.**<sup>61</sup> Lastly, criminal sanctions, especially when a defamatory statement is made in the context of a public debate, are considered in principle incompatible with the Convention unless “exceptional circumstances” occur. The ECtHR ruled that such circumstances would normally occur when other fundamental rights are at stake, as in the case of hate speech or incitement to violence<sup>62</sup> (see para. 43 below regarding the strict definition of such terms). Therefore, it is understood that the protection of the right to private life from Article 8 of the ECHR alone could not justify imposing detention penalties for cases of defamation or insult. Generally, civil defamation and damages actually serve better the interests of an affected person as they aim at restoring the plaintiff to the position that they would have been should the defamation had not occurred, whereas criminal fines are normally intended to serve the interests of a state (which are normally minimal in such cases).
39. **In light of the above, it is recommended not to pursue the adoption of the provisions that aim at criminalizing “defamation”. The legal drafters should instead consider enhancing the existing civil defamation legislation, providing for alternative remedies and civil damages to be paid to the affected persons, while ensuring that the said civil defamation provisions are also carefully crafted to exclude arbitrary application or abuse by the public authorities and fully comply with international human rights standards. Civil defamation laws as a rule have less of a chilling effect on freedom of expression than criminal laws, provided that the law is formulated in a way that excludes abuse by the authorities and includes some form of protection or safeguards against abusive lawsuits, especially against journalists and other media workers.**<sup>63</sup>

<sup>58</sup> See e.g., ECtHR, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, 20 May 1999, para. 65.

<sup>59</sup> See ECtHR, *Jersild v. Denmark*, no. 15890/89, 23 September 1994, para. 35, where the Court stated that “[t]he punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.”

<sup>60</sup> See ECtHR, *Reznik v. Russia*, no. 4977/05, 4 April 2013, para. 50. ECtHR, *Mariapori v. Finland*, no. 37751/07, 6 July 2010, para. 69; ECtHR, *Scharsach and News Verlagsgesellschaft mbH v. Austria*, no. 39394/98, 13 November 2003, para. 32.

<sup>61</sup> See for example, ECtHR, *Radio France and Others v. France*, no. 53984/00, 30 March 2004, para. 40. On a similar note, in *Rumyana Ivanova v. Bulgaria*, no. 36207/03, 14 February 2008, the ECtHR noted that “after convicting the applicant, the Sofia District Court waived her criminal liability and imposed an administrative punishment, opted for the minimum fine possible”, which all the more contributed to the Court’s finding of the sanction as proportionate, para. 69. Other examples of penalties that the ECtHR accepted as proportionate include a requirement to publish “an appropriate qualification to an article”, see ECtHR, *Times Newspapers Ltd v. the United Kingdom*, nos. 3002/03 and 23676/03 10 March 2009, para. 47.

<sup>62</sup> See ECtHR, *Ruokanen and Others v. Finland*, no. 45130/06, 6 April 2010, para. 50

<sup>63</sup> See e.g., OSCE RFoM, *Special Report on Legal Harassment and Abuse of the Judicial System against the Media* (2021), especially recommendation 11.

40. Draft Article 208b further provides for additional forms of aggravated defamation when the offence is committed through the press, radio, television or through social networks, at a public meeting or in another way, as a result of which it became “available to a large number of persons” (paragraph 2), and when it led or could lead to serious consequences for the injured party (paragraph 3). The comments made above regarding the reference to “a large number of persons” is also applicable here and in light of its vagueness, such a wording should therefore be removed. Read together with paragraph 1, paragraphs 2-3 would suggest that Article 208b paragraph (1) may *a contrario* criminalize defamatory statements being revealed to a small number of people or not triggering serious consequences. It must be reiterated that the ECtHR requires that “*an attack on a person’s reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life [and t]his requirement covers social reputation in general as well as professional reputation in particular*”.<sup>64</sup> **In light of this, paragraph 3 should be removed and the scope of Article 208b clarified so as to only apply to those expressions with serious enough consequences on personality rights.**

### *3.1.3. Exposing a Person or Group to “Scorn or Despise” (Draft Article 208g)*

41. Proposed Draft Article 208g criminalizes an act where an individual “*exposes publicly a person or group because of belonging to a particular race, skin color, religion, nationality or because of ethnic origin, sexual orientation or gender identity to a scorn or despise.*”
42. Article 20 (2) of the ICCPR prohibits “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Consequently, advocacy of national, racial or religious hatred pursuant to Article 20 of the ICCPR should be banned only if it constitutes incitement to discrimination, hostility or violence. The Council of Europe Committee of Ministers’ *Recommendation CM/Rec(2022)16 on combating hate speech* also elaborates on the types of expressions of hate speech that are subject to criminal liability.<sup>65</sup>
43. As recommended by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, “[t]o prevent any abusive use of hate speech laws, [...] only serious and extreme instances of incitement to hatred [should] be prohibited as criminal offences”.<sup>66</sup> The severity threshold to amount to incitement is quite high, as emphasized in the [Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence](#), which lists six factors to determine whether the expression is serious enough to warrant restrictive legal measures. These six factors are: context, speaker (including the individual’s or organization’s standing), intent, content or form, extent of the speech, and likelihood of harm occurring (including imminence).<sup>67</sup> At the Council of Europe level, a similar approach is followed to assess the severity of an expression and which type of liability should be incurred, taking into account the following factors: the content of the expression; the political and social context at the

<sup>64</sup> See ECtHR, *Denisov v. Ukraine*, no. 76639/11, 25 September 2018, para. 112.

<sup>65</sup> Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2022\)16 on combating hate speech](#), adopted by the Committee of Ministers on 20 May 2022, para. 11.

<sup>66</sup> See UN Special Rapporteur on Freedom of Opinion and Expression, [2012 Report](#), A/67/357, 7 September 2012, paras. 79-80.

<sup>67</sup> See the [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#), in the Report of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred”, United Nations General Assembly, 11 January 2013, Appendix, para. 29. This six-part threshold test has been endorsed by various independent experts and human rights monitoring bodies, e.g., in the [Report of the United Nations Special Rapporteur on Freedom of Religion or Belief \(Tackling manifestations of collective religious hatred\)](#), United Nations General Assembly, UN Doc. A/HRC/25/58, 26 December 2013, para. Application 58; and in Committee on the Elimination of Racial Discrimination, [General Recommendation 35: Combating Racist Hate Speech](#), UN Doc. CERD/C/GC/35, 12-30 August 2013, para. 15.



time of the expression; the intent of the speaker; the speaker's role and status in society; how the expression is disseminated or amplified; the capacity of the expression to lead to harmful consequences, including the imminence of such consequences; the nature and size of the audience, and the characteristics of the targeted group.<sup>68</sup>

44. As underlined by the ECtHR, “*it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.*”<sup>69</sup> [General Policy Recommendation No. 7](#) of the European Commission against Racism and Intolerance (hereinafter “ECRI”) recommends to 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.<sup>70</sup>
45. Draft Article 208g appears to cover instances going beyond serious and extreme instances of incitement to violence, hatred or discrimination defined in accordance with international human rights standards. Indeed, it does not clearly define the constitutive elements of the criminal offence, and, in particular, which kind of statements/acts “scorn” and “despise” may entail. **These terms are inherently difficult to define in compliance with the principle of legal certainty.** In this respect, such provision should only be applied in cases where an expression is capable of attaining a significantly harmful impact rather than being insignificant. In addition, the obligation to prohibit incitement to discrimination, hostility or violence provided in Article 20(2) of the ICCPR is already covered by the existing Article 359 of the Criminal Code of the Republika Srpska, which criminalizes publicly inciting violence and hatred on a variety of grounds. Therefore, the proposed provision would appear to duplicate the existing Article 359 of the Criminal Code of Republika Srpska and therefore appears unnecessary. Hence, **it is recommended to remove this provision altogether.**

### ***3.1.4. Insult and Defamation of a Deceased Person (Draft Article 208d)***

46. Draft Article 208d(2) allows family members (“*a spouse or a person who lived with the deceased in a permanent extramarital union, relatives in the direct line, adopter, adoptee, brother or sister*”) to take legal action on behalf of a deceased person for cases involving insult, defamation, or disclosure of personal and family circumstances. In respect to the specific issue of defamation of deceased persons, the jurisprudence of the ECtHR has been significantly restrictive, defining the right to respect of private and family life protected under Article 8 of the ECHR as a non-transferable right.<sup>71</sup> Only in specific and limited circumstances, such as when “*the reputation of a deceased member of a person's family may [...] affect that person's private life and identity*”, the Court has

<sup>68</sup> See e.g., Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2022\)16 on combating hate speech](#), adopted by the Committee of Ministers on 20 May 2022, Appendix, para. 4; see also paragraph 11, which elaborates the types of expressions of hate speech that are subject to criminal liability.

<sup>69</sup> See ECtHR, [Erbakan v. Turkey](#), no. 59405/00, 6 July 2006, para. 56.

<sup>70</sup> See [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), 51, U.N. Doc. A/67/357 (7 September 2012), para. 52. In addition, the German Criminal Code provides a short list of groups (including national, racial, religious and ethnic groups) and adds an open clause (other ‘segments of the population’) so as to extend future applications of this provision to any minority not explicitly mentioned in the original wording: see Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I, 3322 (last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I, 3214). The Finnish Criminal Code protects ‘race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or a comparable basis’: see Criminal Code (39/1889, amendments up to 766/2015 included). The Romanian Criminal Code prohibits incitement to hatred or discrimination ‘against a category of individuals’ - Law #286 of 17 July 2009 of the Criminal Code, Article 369.

<sup>71</sup> See European Court of Human Rights, [Dzhugashvili v. Russia](#), App. no. 41123/10, 9 December 2014, paras. 22-24, where the Court dismissed the applicant's request to protect his grandfather's reputation (former Soviet leader Joseph Stalin) from negative coverage in a newspaper article.

accepted that Article 8 might be engaged.<sup>72</sup> In another case, the Court accepted that a State law, which allowed to pass the right to bring an action for damages onto a person's heirs where the damage to reputation had occurred while that person was still alive, was neither unreasonable or arbitrary, in light of the short lapse of time between the death and the legal suit (only a few days) and the fact that the heirs themselves would likely still experience a feeling of grief at the time of their action.<sup>73</sup>

47. In light of the foregoing, **as for cases of insult and defamation of a living person, the criminalization of such expressions should be reconsidered altogether.** If nevertheless retained, it would be important to clearly circumscribe the scope of the legal action on behalf of a deceased person to avoid a chilling effect that may increase self-censorship within the media or academic community out of fear of legal consequences. In particular, in light of the ECtHR case-law, **two necessary conditions should be fulfilled: a) that the publication harming the subject's right to private life happened while the person was still alive, and a very short span of time between the harm and the lawsuit has passed; and b) the family members are directly affected by the publication. If retained at all, Draft Article 208d(2) should be amended to limit the possibility of heirs taking legal action on behalf of a deceased person in those specific circumstances only.**

### ***3.1.5. Exposing the Court, Judges, Public Prosecutors or Lawyers to Ridicule (Draft Article 340)***

48. Draft Article 340 on Damage to the Reputation of Court foresees the imprisonment of up to one year for “[w]hoever, in the proceedings before the court, exposes the court, judge, public prosecutor or lawyer to ridicule, or whoever commits the act in a written submission to the court.” In the event these acts were committed “in a particularly inappropriate manner” or “led or could have led to more serious adverse consequences for the injured party”, the sentence may be up to two years of imprisonment.
49. It would be hard to justify, especially in the absence of clearly defined definitions and clear indication of the constitutive elements of the criminal offence, that any “ridicule” may lead to imprisonment. The aggravating circumstance of having committed the act “in a particularly inappropriate manner” is vague and subject to subjective and potentially arbitrary application. The ECtHR has recognised that judges form part of a fundamental institution of the State and may thus be subject to wider limits of acceptable criticism than ordinary citizens.<sup>74</sup> It may however be necessary to protect the judiciary against gravely damaging attacks that are essentially unfounded.<sup>75</sup> The Court similarly considered that a prosecutor, who is a “party” to the proceedings, has to “tolerate very considerable criticism by ... defence counsel”.<sup>76</sup> Generally, state authorities and institutions could not in principle be defamed. At the same time, lawyers may choose to use very caustic, sarcastic or virulent remarks for the purpose of defending their clients. The proposed new criminal offence could potentially have a chilling effect on lawyers and potentially also impact client's right to a fair trial.
50. The ECtHR generally assesses remarks in their general context, in particular to ascertain whether they can be regarded as misleading or as a gratuitous personal attack and to

<sup>72</sup> See European Court of Human Rights, *Putistin v. Ukraine*, App. no. 16882/03, 21 November 2013, para. 33.

<sup>73</sup> See European Court of Human Rights, *Éditions Plon v. France*, App. no. 58148/00, 18 May 2004, paras. 34 and 47. See also Venice Commission, *Amicus Curiae Brief for the Constitutional Court of Georgia on the Question of the Defamation of the Deceased*, CDL-AD(2014)040.

<sup>74</sup> See e.g., ECtHR, *Morice v. France* [GC], no. 29369/10, 23 April 2015, para. 131.

<sup>75</sup> See e.g., ECtHR, *Prager and Oberschlick v. Austria*, no. 15974/90, 26 April 1995.

<sup>76</sup> See e.g., ECtHR, *Morice v. France* [GC], no. 29369/10, 23 April 2015, para. 137.

ensure that the expressions used had a sufficiently close connection with the facts of the case.<sup>77</sup> In the Court's view, where an individual's sole intent is to insult a court or the judges on its bench, an appropriate punishment could be imposed but prison sentence for mere statement exposing the court, judges or prosecutors to "ridicule", which is very subjective, would likely be considered a disproportionate sanction.<sup>78</sup> Moreover, in principle, the purpose of the offence of contempt of court is to ensure the smooth operation of the justice system, and not to protect the judges and prosecutors as individuals or victims of the contemplated acts. **It is therefore recommended that this provision be removed to provide instead for administrative, disciplinary or civil sanctions, which appear to be more appropriate to the purpose of contempt of court and also more proportionate.**

### ***3.1.6. Gender Considerations***

51. It is critical to recognize that the use of defamation lawsuits or threat thereof may discourage or prevent women who are the victims of harassment, hate and violence from publicly sharing their experiences of harassment, violence and discrimination. This creates an additional barrier to accessing justice and creates a chilling effect for future victims.<sup>79</sup> In a Report on online violence against women and girls, the UN Special Rapporteur on Violence against Women noted that "*Women who speak out about their abuse online are frequently and increasingly threatened with legal proceedings, such as for defamation, which aims to prevent them from reporting their situation.*"<sup>80</sup> The Report cautioned the use of defamation lawsuits "*may form part of a pattern of domestic violence and abuse.*"<sup>81</sup> Similarly, a recent UN report on the promotion and protection of the right to freedom of opinion and expression notes that the perverse use of defamation lawsuits in the #MeToo era is "*weaponizing the justice system to silence women [...] while also undermining free speech.*"<sup>82</sup>
52. International Mandate-Holders on Freedom of Expression, including the OSCE Representative on Freedom of the Media, in their 2022 Joint Declaration specifically noted: "*When women speak out about sexual and gender-based violence, States should ensure that such speech enjoys special protection, as the restriction of such speech can hinder the eradication of violence against women*" and recommended that "*States should decriminalise all defamation and insult actions, and enact comprehensive legislation to discourage vexatious or frivolous defamation cases and strategic lawsuits against public participation (SLAPPs) that are intended to intimidate and silence women and drive them out of public participation*".<sup>83</sup>
53. Therefore, this is an additional argument to abolish criminal defamation legislation and calls for even more caution when crafting defamation legislation to discourage vexatious or frivolous defamation cases.

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<sup>77</sup> See e.g., ECtHR, *Morice v. France* [GC], no. 29369/10, 23 April 2015, para. 139.

<sup>78</sup> See e.g., ECtHR, *Skałka v. Poland*, no. 43425/98, 27 May 2003, paras. 39-42.

<sup>79</sup> See the [UN Convention on the Elimination of All Forms of Discrimination against Women](#), adopted by General Assembly resolution 34/180 on 18 December 1979; and the [General recommendation No. 35, 2017, on gender-based violence against women, updating general recommendation No. 19](#), 1992.

<sup>80</sup> See [Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective](#), 18 June–6 July 2018, para. 31

<sup>81</sup> *Ibid.*

<sup>82</sup> See UN Report on [Promotion and protection of the right to freedom of opinion and expression](#), A/76/258, 30 July 2021.

<sup>83</sup> International Mandate-Holders on Freedom of Expression, [Joint Declaration on Freedom of Expression and Gender Justice](#) (May 2022), para. 3(d).

### **3.2. Exclusion of Criminal Liability for Criminal Offenses Against Honour and Reputation**

54. Draft Article 208d provides that any of the conducts described under Articles 208a, 208b and 208v shall not constitute criminal offense if featured in “*scientific, professional, literary or artistic work, in the performance of a duty prescribed by law, journalistic profession, political or other public or social activity or defense of a right, if from the way of expression or it arises from other circumstances that it was not done with the intention of disparagement, or if the person proves the veracity of [her/his] statement, or that [s/he] had a well-founded reason to believe in the veracity of what [s/he] stated or circulated.*” Overall, it is unclear from the text whether the different parts of the Article should apply cumulatively or it is enough only for one of the elements to be present; this provision also lacks legal clarity and certainty.
54. Draft Article 208d includes some defences or exceptions, that would *a priori* exclude criminal liability when the statements were intended as part of education, scientific research, artistic or journalistic work, thereby excluding the imposition of criminal sanctions for a range of expressions falling under the public interest exception, made in good faith. However, the defendant will need to prove in addition that the statement was not intended to disparage a person. There is no criterion to establish such intent. In practice, **the absence of such intent may be difficult to establish and may again depend on subjective interpretation or assessment by public authorities.** This provision also seems to shift the burden of proof of a criminal intent from the prosecution to the defendant’s side, which is not compliant with international standards. The provision may also not necessarily allow for a tolerance for journalistic works covering matters of public interest. Public authorities must respect the right of journalists to disseminate information on questions of general interest, *including through recourse to a degree of exaggeration or provocation*, provided that they act in accordance with responsible journalism.<sup>84</sup> **It is therefore recommended to remove the reference to the absence of intent to disparage from the provision.** It is commendable however that this provision provides for a truth defence. However, this defence is applicable also in the case of insults, which are generally value judgments, which are not susceptible of proof.<sup>85</sup>
55. In addition, with the current wording of this provision it is not entirely clear who would be protected by this provision. The ECtHR has stressed on numerous occasions that “*the function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organizations, whose activities are an essential element of informed public debate.*”<sup>86</sup> Consequently, a variety of other entities beyond journalists and the media carrying out “journalistic function” should deserve similar protection under this provision, including non-governmental organizations and human rights defenders. In addition, the ECtHR further noted that “*given the important role played by the Internet in enhancing the public’s access to news and facilitating the dissemination of information, the function of bloggers and popular users of the social media may be also assimilated to that of ‘public watchdogs’ insofar as the protection afforded by Article 10 is concerned.*” **It is therefore recommended to amend Article 208d to exclude from criminal liability all information that is in the**

<sup>84</sup> See Venice Commission *Opinion* on Legislation of Defamation on Italy, para. 81.

<sup>85</sup> See e.g., ECtHR, *Lingens v. Austria*, no. 9815/82, 8 July 1986), para. 46; and *McVicar v. the United Kingdom*, no. 46311/99, 7 May 2002, para. 83. See also ECtHR, *Gorelishvili v. Georgia*, no. 12979/04, 5 June 2007, para. 38; and *Fedchenko v. Russia*, no. 33333/04, 11 February 2010, para. 37.

<sup>86</sup> See European Court of Human Rights, *Magyar Helsinki Bizottság v. Hungary*, App. no. 18030/11, 8 November 2016, para. 166.

**public interest, irrespective of whether produced and/or disseminated by professional media operators.**

### **3.3. Disproportionality of Sanctions**

56. As they stand at present, the severity of the sanctions provided for by the Draft Amendments envisaged for offences against honour and reputation, are a source of particular concern. Generally, the excessive or unpredictable levels of damages in civil cases and, even more so, criminal penalties have been considered to potentially have a chilling effect on freedom of the media and freedom of expression in general.
57. The sanctions vary from BAM 5,000 to BAM 50,000 (approx. EUR 2,500 to 25,500) for the criminal offence of “Insult” and from BAM 8,000 to BAM 100,000 for “Defamation” (approx. EUR 4,000 to 51,000). Considering the average monthly salary,<sup>87</sup> such fines appear too severe to be proportionate. This is notwithstanding the potentially chilling effect they may trigger and the potential impact of a criminal record on the individual concerned (which cannot be expunged). It must be noted that current Article 46 of the Criminal Code envisages an imprisonment in the event “*the purpose of punishment cannot be achieved with a fine, or the fine cannot be enforced.*” Consequently, since the application of Article 46 of the Criminal Code is not excluded for the contemplated offences of “Insult” and “Defamation”, this means that imprisonment could potentially also be imposed for such criminal offences. In this respect, the ECtHR has found on several occasions that the imposition of a prison sentence in a defamation cases amounts to a violation of Article 10 of the ECHR regardless of whether or not the finding of criminal liability itself could be justified.<sup>88</sup> **Article 46 of the Criminal Code should therefore not be applicable for offences against honour and reputation.** In addition, Draft Article 340 also considers the imposition of prison sentences in case of exposing courts, judges, prosecutors to “ridicule”, which, as mentioned above, would likely be considered to be disproportionate.
58. Even if a fine is paid by a person found guilty of insult or defamation, a criminal record can seriously impact a person’s life in the long run. The lasting effects of a criminal conviction are very difficult to overturn, leading to a situation where a journalist might have their life severely affected, and their professional reputation irreparably damaged, even after a prolonged and exhaustive legal battle. Huge fines may also in practice lead to a closure of a media outlet as such, which will be damaging for the sector as a whole and will also have a chilling effect for all other media striving to financially survive under the current economic realities.
59. In its rulings, the Court has emphasized that the nature and severity of a sanction imposed are factors to be carefully considered when assessing the proportionality of the interference.<sup>89</sup> In this respect, the case-law indicates a few useful parameters to ascertain the extent to which penalties can be considered not disproportionate, including, (1) if the award for damages is proportionate to the injury to reputation suffered;<sup>90</sup> (2) if the award for damages is proportionate to the size and economic capacity of the fined company or rather such as to threaten its economic foundations;<sup>91</sup> (3) how the total sum payable

<sup>87</sup> For example, the average net salary paid in February 2023 in the Republika Srpska was approximately EUR 600 according to the official institute for statistics, but the real average net salary was estimated to approximately EUR 400.

<sup>88</sup> See e.g., ECtHR, *Belpietro v. Italy*, no. 43612/10 (2013), *Mika v. Greece*, no. 10347/10 (2013), *Mariapori v. Finland*, no. 37751/07 (2013).

<sup>89</sup> For example, see ECtHR judgments in *Ceylan v. Turkey*, no. 23556/94; and *Skalka v. Poland*, no. 43425/98.

<sup>90</sup> See ECtHR, *Tolstoy Miloslavsky v. the United Kingdom*, (1995) 20 EHRR 442, 13 Jul 1995, para. 49.

<sup>91</sup> ECtHR, *Blaja News Sp. z o. o. v. Poland*, no. 59545/10, 26 November 2013, para. 71; see also *Timput Info-Magazin and Anghel v. Moldova*, no. 42864/05, 27 November 2007, para. 39.

compares to the minimum monthly salary in the country,<sup>92</sup> and (4) if the legal framework at the national level provides for “adequate and effective domestic safeguards, at first instance and on appeal, against disproportionate awards which assured a reasonable relationship of proportionality between the award and the injury to reputation.”<sup>93</sup> The ECtHR, however, repeatedly stated that criminal sanctions are less likely to be found proportionate when civil and disciplinary remedies would have been available.<sup>94</sup> As also emphasized by the UN Human Rights Committee “[c]riminal law should be used only in very exceptional and most egregious circumstances of incitement to violence, hatred or discrimination. Criminal libel laws [...] should be repealed.”<sup>95</sup>

60. On the proportionality of sanctions, the ECtHR also held that a disproportionate sanction, even of a civil nature, constitutes an unjustified interference with the right to freedom of expression. In holding that a high civil defamation award represented a breach of the right to freedom of expression, the Court stated that “[u]nder the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.”<sup>96</sup>
61. It needs to be noted, however, that with specific reference to the case of insult, rather than defamation, criminal fines are even more unlikely to prove proportional irrespective of their quantification. In this regard, the ECtHR has not expressly found criminal provisions concerning insult and defamation, in principle, incompatible with the Convention. However, the Court opined that when specifically applied to lawsuits concerning insults, criminal sanctions *per se* do not appear proportionate to the aim pursued. To exemplify this principle, even a suspended fine of merely EUR 30 imposed on a French citizen for insulting the President of France was considered “likely to have a chilling effect” simply due to its criminal nature, “disproportionate to the aim pursued and hence unnecessary in a democratic society.”<sup>97</sup>

### 3.4. Conclusion

62. In light of the foregoing, **ODIHR calls upon the authorities not to pursue the adoption of the provisions that aim at criminalizing “insults” and “defamation” in the Republika Srpska. The drafters could instead consider enhancing the existing non-criminal legislation, providing for alternative remedies and civil damages to be paid to the affected persons, while ensuring that the said provisions are also carefully crafted to exclude arbitrary application or abuse by the public authorities and fully comply with international human rights standards.**
63. In any case, **legislation should provide greater protection for speech about politics and other matters of public interest, including by requiring politicians and public officials to tolerate a higher level of criticism than ordinary citizens. A higher threshold of tolerance should be ensured for journalistic works covering matters of interest in the public debate. Appropriate defences should also be available to defendants in defamation cases involving statements on matters of public interest, irrespective of whether produced and/or disseminated by professional media operators. Anyone should also benefit from the defence of “reasonable publication”**

<sup>92</sup> See ECtHR, [Kasabova v. Bulgaria](#), no. 22385/03, 19 April 2011, para. 71.

<sup>93</sup> See ECtHR, [Independent News and Media and Independent Newspapers Ireland Limited v. Ireland](#), no. 55120/00, 16 June 2005, para. 113.

<sup>94</sup> See ECtHR, [Raichinov v. Bulgaria](#), no. 47579/99, 20 April 2006, para. 50; [Kanellopoulou v. Greece](#), no. 28504/05, 11 October 2007, para. 38.

<sup>95</sup> See Human Rights Councils’ [Disinformation and freedom of opinion and expression](#), Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, para. 89.

<sup>96</sup> See ECtHR, [Tolstoy Miloslavsky v. the United Kingdom](#), 13 July 1995, no.18139/91, para.49

<sup>97</sup> European Court of Human Rights, [Eon v. France](#), App. no. 26118/10, 14 March 2013, paras. 61-62.

**and not bear strict liability for inaccurate statements of fact that are published or disseminated when they have acted reasonably and in good faith.**

64. **Whatever the modalities of legislating on defamation, imprisonment should never be imposed in defamation/insult cases and civil fines or damages awards should be proportionate taking into account all of the circumstances and should not be so large as to exert a chilling effect on freedom of expression.**

#### **4. LAW-MAKING PROCESS**

65. OSCE pSs have committed to ensure that legislation will be “*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*” (1990 Copenhagen Document, para. 5.8).<sup>98</sup> Moreover, key commitments specify that “[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (1991 Moscow Document, para. 18.1).<sup>99</sup> The Venice Commission’s Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.<sup>100</sup>
66. As such, public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted. Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation.<sup>101</sup> To guarantee effective participation, consultation mechanisms should allow for input at an early stage *and throughout the process*,<sup>102</sup> meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings).
67. The Explanatory Note indicates that the drafting authority considered the draft amendments to be of interest to the public and accordingly published them on the website (www.vladars.net), with a deadline of seven days for submission of comments and suggestions. It is further indicated that there were no comments or suggestions on the proposed text. The deadline of seven days would *prima facie* appear rather short and generally not in line with recommendations issued by international or regional bodies and good practices within the OSCE area where public consultations generally last from a minimum of 15 days to two or three months.<sup>103</sup> There should also be some effort made by the public authorities to reach out to the public and make it aware that the amendments have been prepared and are open for comments other than just putting them on the website. The Draft Amendments passed the first reading in the Parliament on 23 March 2023, and are followed by public consultations during a period of 60 days after which the second reading in the Parliament will take place. It remains to be seen to what extent such public consultations are inclusive and meaningful.
68. **In light of the above, the public authorities are encouraged to ensure that the Draft Amendments are subjected to transparent, inclusive process and involve effective**

<sup>98</sup> See [1990 OSCE Copenhagen Document](#).

<sup>99</sup> See [1991 OSCE Moscow Document](#).

<sup>100</sup> See Venice Commission, [Rule of Law Checklist](#), Part II.A.5.

<sup>101</sup> According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, *inter alia*, the nature, complexity and size of the proposed draft act and supporting data/information. See e.g., ODIHR, [Opinion on the Draft Law of Ukraine “On Public Consultations”](#) (1 September 2016), paras. 40-41.

<sup>102</sup> See ODIHR, [Assessment of the Legislative Process in Georgia](#) (30 January 2015), [paras 33-34](#). See also ODIHR, [Guidelines on the Protection of Human Rights Defenders](#) (2014), Section II, Sub-Section G on the Right to Participate in Public Affairs.

<sup>103</sup> See e.g., ODIHR, [Opinion on the Draft Law of Ukraine “On Public Consultations”](#) (2016), paras. 40-41.

**and inclusive consultations, including with the academia, civil society and media organizations, offering equal opportunities for women and men to participate. Such consultations should take place in a timely manner, at all stages of the law-making process.**

*[END OF TEXT]*



**ANNEX:**

Draft

**THE LAW  
ON AMENDMENTS TO THE CRIMINAL CODE OF REPUBLIKA SRPSKA**

(...)

**Article 7**

After Article 208, a new Chapter XVIIa Criminal Offences Against Honor and Reputation, names of Articles and new Articles 208a, 208b, 2 shall be added, which read:

**"CHAPTER XVIIa  
CRIMINAL OFFENSES AGAINST HONOR AND REPUTATION**

**Insult**

**Article 208a**

- (1) Whoever insults another person shall be fined from KM 5,000 to KM 20,000.
- (2) If the act referred to in paragraph 1 of this Article had been committed through the press, radio, television or other means of public information or at a public gathering or in another way, as a result of which the insult became accessible to a larger number of persons, it shall be punished by a fine from KM 10,000 to KM 50,000.
- (3) If the perpetrator was provoked by the indecent behavior of the insulted party or if the injured party accepted his apology before the court for the committed act, the court may release him from sentence.
- (4) If the insulted party reciprocated the insult, the court may release both or only one of the perpetrators from sentence.

**Defamation**

**Article 208b**

- (1) Whoever states or circulates something untrue concerning another person that may harm his honor or reputation, knowing that what he states or circulates is untrue, shall be fined from KM 8,000 to KM 30,000.
- (2) If the act referred to in paragraph 1 of this Article had been committed through the press, radio, television or through social networks, at a public meeting or in another way, due to which it became available to a large number of persons, it shall be punished by a fine from KM 15,000 to KM 80,000.
- (3) If what is stated or circulated has led or could lead to serious consequences for the injured party, the perpetrator shall be fined from KM 20,000 to KM 100,000.

## Disclosure of personal and family circumstances

### Article 208v

(1) Whoever discloses or circulates anything from the personal or family life of a person that may harm his honor or reputation, shall be fined from KM 10,000 to KM 40,000.

(2) If the act referred to in paragraph 1 of this Article had been committed through the press, radio, television or through social networks or at a public meeting or in another way, due to which it became available to a larger number of persons, the perpetrator shall be fined from KM 20,000 to KM 100,000.

(3) If what is disclosed or circulated has led or could lead to serious consequences for the injured party, the perpetrator shall be fined from KM 25,000 to KM 120,000.

(4) The veracity or falsity of the matter disclosed or circulated from the personal or family life of a person cannot be proven, except in the cases referred to in Article 208d of this Code.

## Public exposure to ridicule because of belonging to a particular race, religion or nationality

### Article 208g

Whoever exposes publicly a person or group because of belonging to a particular race, skin color, religion, nationality or because of ethnic origin, sexual orientation or gender identity to a scorn or despise, shall be fined from KM 20,000 to KM 100,000.

## Exclusion of Illegality of the Criminal Offenses against Honor and Reputation

### Article 208d

What has been described under Articles 208a to 208v of this Code shall not constitute criminal offense, if it is an offensive expression or statement of something untrue in a scientific, professional, literary or artistic work, in the performance of a duty prescribed by law, journalistic profession, political or other public or social activity or defense of a right, if from the way of expression or it arises from other circumstances that it was not done with the intention of disparagement, or if the person proves the veracity of his statement, or that he had a well-founded reason to believe in the veracity of what he stated or circulated.

## Prosecution for crimes against honor and reputation

### Article 208đ

(1) Prosecution for acts referred to in articles 208a to 208v of this Code shall be instituted upon motion.

(2) If the acts referred to in Articles 208a to 208v of this Code were committed against a deceased person, prosecution shall be instituted at the proposal of a spouse or a person who lived with the deceased in a permanent extramarital union, relatives in the direct line, adopter, adoptee, brother or sister of the deceased person.

## Public publication of the judgment for criminal offenses against honor and reputation

### Article 208e

(1) The judgment declaring the perpetrator guilty of a criminal offense against honor and reputation committed through the press, radio, television, computer system or network or other means of public information or communication, shall be published in whole or in part at the expense of the perpetrator.

(2) In the judgment, the court shall determine the manner of its publication, whereby, whenever possible, it shall determine that it shall be in the same means of public information or communication in which the criminal offense was committed."

(...)

### Article 10

Article 340 is amended to read:

"(1) Whoever, in the proceedings before the court, exposes the court, judge, public prosecutor or lawyer to ridicule, or whoever commits the act in a written submission to the court, shall be punished by a fine or a prison sentence of up to one year.

(2) If the act referred to in paragraph 1 of this Article was committed in a particularly inappropriate manner or the offensive expression was of such significance that it led or could have led to more serious adverse consequences for the injured party, the perpetrator shall be punished with a fine or imprisonment of up to two years."

### Article 11

This law enters into force on the eighth day from the day of its publication in the "Official Gazette of the Republic of Srpska".

Number:

Date:

PRESIDENT OF THE NATIONAL ASSEMBLY

Nenad Stevandić