Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media

MEMORANDUM
On

Croatian Criminal Libel Provisions

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

ARTICLE 19, The Global Campaign for Free Expression, has been asked to comment on the libel provisions contained in the Croatian Criminal Code, as recently amended. Prior to these amendments, the Criminal Code provisions imposed serious and unwarranted restrictions on freedom of expression; the recent changes aggravate this already flawed regime by removing defences previously available to those charged with criminal defamation and by extending the scope of the offence to protect members of the judiciary.

ARTICLE 19 is of the view that criminal defamation provisions represent a breach of international law, in particular the guarantee of freedom of expression, and cannot be justified in a democracy. Defamation should, therefore, be decriminalized and addressed through civil laws of general application. At a minimum, imprisonment and other criminal sanctions should never be imposed for defamatory expression.

Croatia's criminal defamation regime, exacerbated by the recent amendments, is inconsistent with international legal standards regarding free expression and represents a setback in the development of democracy in Croatia.

II. International and Constitutional Obligations

II.1 The Guarantee of Freedom of Expression

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. In its very first session, in 1946, the UN General Assembly adopted Resolution 59(I) which states, 'Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.'[1] The UN Human Rights Committee has made clear the importance of freedom of expression in a democracy:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. … this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.[2]

[1] 14 December 1946.

[2] *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, para. 13.4.

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[3] a United Nations General Assembly resolution, guarantees the right to freedom of expression in the following terms:

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

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[4]

The *International Covenant on Civil and Political Rights* (ICCPR),[5] a treaty ratified by some 149 States as of July 2003, elaborates on many rights included in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. Croatia ratified the ICCPR in 1991. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR.

Freedom of expression is also protected in the three regional human rights systems, including Article 10 of the *European Convention on Human Rights* (ECHR),[6] Article 13 of the *American Convention on Human Rights*[7] and Article 9 of the *African Charter on Human and Peoples' Rights*.[8] Croatia ratified the ECHR in 1997 and thus is bound by its provisions Rights.

The guarantee of freedom of expression applies to all forms of expression, not only those which fit in with majority viewpoints and perspectives. The European Court of Human Rights has repeatedly stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[9]

II.2 Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of

[3] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[4] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit)
[5] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[6] Adopted 4 November 1950, in force 3 September 1953.
[7] Adopted 22 November 1969, in force 18 July 1978.
[8] Adopted 26 June 1981, in force 21 October 1986.
[9] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

Human Rights has consistently emphasised "the pre-eminent role of the press in a State governed by the rule of law."[10] It has further stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[11]

The Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[12] The media as a whole merit special protection under freedom of expression in part because of their role in making public,

> …information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.[13]

This has been recognised by constitutional courts in countries around the world. For example, the Supreme Court of Appeal of South Africa has recently held:

> [W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. The press and the rest of the media provide the means by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens—from the highest to the lowest ranks. Conversely, the press often becomes the voice of the people—their means to convey their concerns to their fellow citizens, to officialdomand to government.[14]

II.3 Restrictions on Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 10(2) of the ECHR lays down the benchmark, stating:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputations or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[15]

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[10] *Thorgeirson v. Iceland*, 25 June 1992, 14 EHRR 843, para. 63.
[11] *Castells v. Spain*, 24 April 1992, 14 EHRR 445, para. 43.
[12] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.
[13] *Ibid*., para. 63.
[14] *National Media Ltd and Others v. Bogoshi,* [1999] LRC 616, p. 628 (references omitted).
[15] See also Article 19(3) of the ICCPR.

This article envisages restrictions on freedom of expression but only where they meet a strict three-part test.[16] The jurisprudence of the European Court of Human Rights makes it clear that this test presents a high standard which any interference must overcome, because of the fundamental importance of freedom of expression in a democratic society. The Court has repeatedly stated:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[17]

First, the interference must be provided for by law. The European Court of Human Rights has stated that this requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[18] Second, the interference must pursue a legitimate aim. The lists of aims at Article 10(2) of the ECHR and Article 19(3) of the ICCPR are exclusive in the sense that no other aims are considered to be legitimate grounds for restricting freedom of expression. The listed aims include the protection of national security, prevention of disorder and the rights of others. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.[19]

Restrictions on freedom of expression that do not meet the stipulations of the three-part test are illegitimate under international law and, if implemented, represent a breach of Croatia's obligations under both the ECHR and the ICCPR.

II.3 The Croatian Constitution

Article 38 of the Constitution of the Republic of Croatia protects the right of freedom of expression in the following terms:

> Freedom of thought and expression of thought shall be guaranteed.
>
> Freedom of expression shall specifically include freedom of the press and other media of communication, freedom of speech and public expression, and free establishment of all institutions of public communication.
>
> Censorship shall be forbidden. Journalists shall have the right to freedom of reporting and access to information.
>
> The right to correction shall be guaranteed to anyone whose constitutionally determined rights have been violated by public communication.

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[16] See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).
[17] See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[18] *The Sunday Times v. United Kingdom*, note 16, para. 49.
[19] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

Article 16 of the Constitution permits the restriction of fundamental freedoms in the following terms:

> Freedoms and rights may only be restricted by law in order to protect freedoms and rights of others, public order, public morality and health.
>
> Every restriction of freedoms or rights shall be proportional to the nature of the necessity for restriction in each individual case.

It may be noted that the scope of restrictions permitted by the Constitution is largely consistent with international law inasmuch as the former requires restrictions to be by law and for a limited range of legitimate aims. The Constitution uses the phrase 'proportional to the nature of the necessity' rather than 'necessary' as a qualification on restrictions, but this probably amounts to more-or-less the same thing.

III. The Croatian Criminal Code Provisions

Articles 199 to 205 and Article 309 of the Croatian Criminal Code impose criminal sanctions for the separate offences of insult and defamation.

Specifically, Article 199 states that a person guilty of insult will be punished by a fine equivalent to 100 days of income or to imprisonment for a term not exceeding three months. Insult is not defined. Paragraph (2) of the same provision states that if the insult is made through the press, radio, television, in front of a number of persons or at a public gathering, or in any other way that results in the insult being accessible to a large number of persons, the fine will be the equivalent of 150 days of earnings, or imprisonment for up to six months. If the victim of the insult returns the insult, then both perpetrators may be found guilty (paragraph (3)).

Article 200 criminalizes defamation, stating at paragraph (1) that whoever disseminates a falsehood about another which can damage that person's honour or reputation, will be punished with a fine in an amount equivalent to a maximum of 150 days of earnings or imprisonment for up to six months. Defamation disseminated through the media (the same wording as Article 199, paragraph (2)) will be punished by a fine or imprisonment not exceeding one year; the amount of the fine is not specified.

Paragraph (3) of Article 200 provides that if the defendant proves the truth of his or her statement(s), or the existence of reasonable grounds for believing the statement(s) to be true (reasonable justification), then he or she will not be punished for defamation but rather for insult, as provided by Article 199.

Article 201 imposes a fine or imprisonment for disclosing details of a person's personal or family life that can damage that person's honour or reputation. If that information has been transmitted through the media, or otherwise, to a large group of people, then a mandatory prison sentence of six months to a year is imposed.

Article 202 was repealed on the basis that the offences it set out were already covered, that it had not been used in practice and that it was not compatible with a modern criminal code.

Article 203 provides some limited exceptions to the application of the previous provisions, although the recent amendments have reduced the scope of these. According to this article, there will be no finding of criminal liability for insult – as provided for in Articles 199 and 200(3) – or for the disclosure of damaging personal information as prohibited by Article 201, if:

> [the statements] are realized or made accessible to other persons in scientific or literary works, works of art or public information, in the discharge of official duty, political or other public or social activity, journalistic work, or in the defence of a right or in the protection of justifiable interests, if, from the manner of expression and other circumstances, it clearly follows that such conduct was not aimed at damaging the honour or reputation of another.

Prior to the recent amendments, this exception clause also applied to defamatory statements as defined by Articles 200(1) and (2) but the government, in official comments that follow the text of Article 203, states that such a situation is unacceptable:

> The exclusion of the unlawfulness allows an individual, in this case, journalists to defame other persons, i.e. to consciously state something that is not true. That kind of right cannot be justified even by Article 38 of the Constitution that guarantees freedom of expression…

The exception thus no longer applies to Article 200 offences.

The official commentary goes on to state that the limited defence provided by Article 200(3) sufficiently protects those who have falsely been accused of defamation, provided they can prove that their statement(s) were true or that they possessed reasonable grounds for believing the statement(s) were true.

These provisions thus distinguish between statements of opinion and statements of fact. Regarding the former, the only defence is that found in Article 203 (that is, for scientific and literary statements and so on). Statements of fact will be treated as statements of opinion if the defendant proves they are true or that he or she made them with reasonable justification. Even in such cases, defendants may be found guilty unless the statement(s) come within the scope of the Article 203 defence.

Article 204(1) provides that criminal proceedings may be initiated by the victim. However, paragraph (2) provides that where the victim is the President of Croatia, the President of the Croatian Parliament, the Prime Minister, the President of the Constitutional Court or the President of the Supreme Court, proceedings will be initiated by the State prosecutor, following the receipt of written consent from the victim. Pursuant to paragraph (3), those same political victims may withdraw their consent for criminal prosecution at any time.

Finally, Article 309(2), added by the amendments, states:

> Who by grossly insulting or belittling/scorning obstructs the work of a judge, public prosecutor or notary public, shall be fined or punished with imprisonment up to three years.

Paragraph (2) states that whoever, during the course of proceedings before a court, but before a final decision has been reached, "repeatedly expounds his/her opinion" regarding how officials involved in the administration of justice should carry out their functions, or what kind of decision should be reached, will be imprisoned for up to one month. This provision is actually a form of contempt of court but it is analysed here due to its close relationship to defamation and its inclusion in an article that otherwise deals with defamation.

IV. Criminal Defamation

Consistent with international human rights law and practice, ARTICLE 19 is of the view that defamation should not be punished through the application of criminal laws but rather should be subject only to civil or administrative sanctions or dealt with through self-regulatory mechanisms.

International law recognizes that free expression may be limited to protect individual reputations, but defamation laws, like all restrictions, must be proportionate to the harm done and not go beyond what is necessary in the particular circumstances. In general, a particular measure will not be regarded as necessary where a less restrictive means could be employed to achieve the same end or where the sanction itself is so overwhelming that it cannot be regarded as a proportionate response to the harm done. Criminal defamation provisions breach the guarantee of freedom of expression both because less restrictive means, such as the civil law, are adequate to redress the harm and because the sanctions they impose are not proportionate to the harm done.

IV.1 Criminal Defamation under International Law

There is a strong and growing body of law in support of the principle that criminal defamation is itself a breach of the right to freedom of expression.

The European Court of Human Rights has never actually ruled out criminal defamation, and there are a small number of cases in which it has allowed criminal defamation convictions (see below, under sanctions), but it clearly recognises that there are serious problems with criminal defamation. It has frequently reiterated the following statement, including in defamation cases:

> [T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means

> are available for replying to the unjustified attacks and criticisms of its adversaries or the media.[20]

In *Castells v. Spain*, the Court stated that criminal measures should only be adopted where States act "in their capacity as guarantors of public order". In our view it is significant that in that case, which involved a conviction for defamation, the Court referred to the application of criminal measures only as a means of maintaining public order, and not as a means of protecting reputations. It is unfortunate, and in our view an anachronism, that defamation laws continue to be used for public order purposes; practically every country has adequate laws specifically tailored to protecting public order.

The position taken within the UN system has been far more categorical. The UN Human Rights Committee, the body with responsibility for overseeing implementation of the ICCPR, has repeatedly expressed concern, in the context of its consideration of regular country reports, about the possibility of custodial sanctions for defamation.[21] These standards are of direct relevance to Croatia, which is also a State Party to the ICCPR.

The UN Special Rapporteur on Freedom of Opinion and Expression has stated unconditionally that imprisonment is not a legitimate sanction for defamation. In his 1999 Report to the UN Commission on Human Rights, he stated:

> Sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied.[22]

In his Report in 2000, and again in 2001, the Special Rapporteur went even further, calling on States to repeal all criminal defamation laws in favour of civil defamation laws.[23] Every year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with "the abuse of legal provisions on criminal libel".[24]

The three special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – have met each year since 1999 and each year they issue a joint Declaration addressing various freedom of expression issues. In their joint Declarations of November 1999, and again in December 2002, they called on States to repeal their criminal defamation laws. The 2002 statement read:

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[20] *Castells v. Spain*, 23 April 1992, para 46.
[21] For example in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999).
[22] *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.
[23] See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64, 26 January 2001.
[24] See, for example, Resolution 2000/38, 20 April 2000, para. 3.

> Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.[25]

In October 2000, the Inter-American Commission on Human Rights adopted a Declaration of Principles on Freedom of Expression. Paragraph 10 of this Declaration states, among other things, "The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest."[26]

These standards are encapsulated in the July 2000 ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (the ARTICLE 19 Principles),[27] a set of principles on how to balance the right to freedom of expression and the need to protect reputations. These Principles were the product of a long process of study, analysis and consultation overseen by ARTICLE 19, and have been endorsed by all three special international mandates dealing with freedom of expression,[28] as well as a large number of other organisations and individuals.

Principle 4(a) states categorically:

> All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws. Steps should be taken, in those States which still have criminal defamation laws in place, to progressively implement this Principle.

It may be noted that countries around the world have taken steps to formally abolish criminal defamation laws – recent examples include Argentina, Sri Lanka and Ghana – while in many more countries these laws have effectively become obsolete, reflecting their undemocratic nature. In the UK, for example, there has been no public prosecution for criminal defamation since the 1970s and all recent private prosecutions have been blocked.

IV.2 Criminal Sanctions

A key problem with criminal defamation laws is that any breach may lead to a custodial sentence or another form of harsh sanction, such as a suspension of the right to practise journalism or a significant fine. Even if these laws are rarely applied, this mitigates the problem only slightly since the severe nature of these sanctions means they cast a long shadow. Suspended sentences, common in some countries, also exert a significant chilling effect as a subsequent breach within the prescribed period means that the sentence will be imposed.

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[25] Joint Declaration of 10 December 2002.
[26] Adopted at the 108th Regular Session, 19 October 2000.
[27] (London: July 2000).
[28] See their Joint Declaration of 30 November 2000.

International jurisprudence has consistently emphasized the overriding importance of the guarantee of freedom of expression, resulting in a narrow interpretation of the legitimate scope of restrictions and sanctions. The "chilling" effect which disproportionate sanctions, or even the threat of such sanctions, may have upon the free flow of information and ideas must be taken into account when assessing the legitimacy of restrictions.

The European Court of Human Rights has made it clear that disproportionate sanctions, even of a civil nature, violate Article 10 of the ECHR. In holding that a high civil defamation award represented a breach of the right to freedom of expression, the Court stated: "[U]nder the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered."[29]

The possibility of imprisonment for defamation is a very severe penalty and the European Court of Human Rights has never upheld a prison sentence for defamation. Indeed, it has specifically stated, in relation to criminal penalties for defamation, that such measures should only be adopted where they are:

> [i]ntended to react *appropriately and without excess* to defamatory accusations devoid of foundation or formulated in bad faith. [emphasis added][30]

Although the Court has upheld criminal defamation convictions, in these cases it has been at pains to point out that the sanctions were modest and hence met the requirement of proportionality. For example, in *Tammer v. Estonia*, the Court specifically noted "the limited amount of the fine imposed"[31] in upholding the conviction; the fine in that case was 10 times the daily minimum wage.

As noted above, the legitimacy of custodial sanctions for expression related matters, including for defamation, has repeatedly been called into question by UN bodies, including the Human Rights Committee.

In many parts of the world, custodial penalties for defamatory expression have fallen into disuse and are generally regarded as an anachronism. Indeed, civil defamation laws are the only means used to protect reputations in many countries and the experience in these countries shows that the criminal law is not necessary to provide effective protection to reputations.

The ARTICLE 19 Principles clearly call for the abolition of criminal defamation laws but, in recognition of the fact that many countries still have such laws in place, Principle 4 goes on to state:

> (b)(iv) prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never

[29] *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No.18139/91, para.49.
[30] *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para.46.
[31] 6 February 2001, para. 69. See also *Constantinescu v. Romania*, 21 March 2000.

> be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

The clear view of both international jurisprudence and of the international bodies that have considered the matter is that the imposition of custodial sanctions through criminal defamation laws is disproportionate and unnecessary to protect individual reputations, particularly when alternative measures – including apologies, corrections and the use of the right of reply – can effectively address any harm to reputation without exerting a chilling effect on freedom of expression.

It is clear that the Croatian criminal defamation provisions fail to respect these standards. They provide for imprisonment, in some cases up to three years and in some cases apparently subject to a minimum of six months, as well as very large fines of up to 150 daily incomes. These are totally excessive penalties which simply cannot be justified in a democracy.

Recommendations:
- All of the articles in the Criminal Code dealing with defamation or protection of reputation should be repealed and replaced, where necessary, with appropriate civil defamation laws.
- No one should be subject to criminal sanction, including imprisonment or harsh fines, for defamation.

V. The Croatian Criminal Code Provisions

V.1 Insult Laws

Articles 199 and 309(2) of the Croatian Criminal Code criminalize insult, which, although not defined, is assumed to refer to statements of opinion which do not contain allegations of fact. The only defence for such statements is contained in Article 203, described above, which relates to special circumstances in which such statements may be allowed.

The ARTICLE 19 Principles, consistent with the practice in many countries, rule out defamation restrictions on statements of opinion:

> No one should be liable under defamation law for the expression of an opinion.[32]

Even where liability may ensure for the expression of an opinion, it is recognised that this should be the case only for the most serious and defamatory statements, devoid of any factual basis and intended to cause harm to reputation. Without such limitations, any rule prohibiting statements of opinion is almost certain to be abused by those seeking to avoid criticism.

[32] Defining Defamation, note 27, Principle 10(a).

Recommendations:
- Articles 199 and 309(2) should be repealed.
- Alternatively, insult should be clearly and narrowly defined in these articles and defences should be provided for.

V.2 Defamation Provisions

For the purposes of this analysis, it is assumed that Article 201, dealing with matters relating to personal or family life, refers to factual matters and is thus similar in scope to Article 200.

Articles 200 and 201 criminalize defamation and should, as a result, be repealed. The ARTICLE 19 Principle recognise that many States do retain criminal defamation laws and, as a practical matter, call for the following standards to be respected immediately in relation to such laws:

> i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;
> ii. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or reckless as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;….[33]

Even if Articles 200 and 201 were civil law provisions, however, they would breach the guarantee of freedom of expression in serious ways. In particular, they lack the defences now recognised as necessary to ensure that defamation laws are not excessively onerous.

Neither of these articles has a proper defence of truth or of reasonable justification, in a patent contradiction of international law. Article 200(3) means that proof of truth or reasonable belief in truth simply enables the defendant to avail him- or herself of the limited Article 203 defence available for insult, not to absolve him or her from liability. The Article 203 defence is always available for Article 201, but there is no defence of truth or reasonable justification for this offence either.

It is well-established that one cannot protect a reputation that one does not deserve and, where the impugned statements are true, there is no legitimate reputation to protect. If truth is established, a defendant should be totally exonerated and not subject to further criminal charges. This is reflected in the ARTICLE 19 Principles, which state:

> In all cases, a finding that an impugned statement of fact is true shall absolve the defendant of any liability.[34]

The ARTICLE 19 Principles also address the question of onus of proof, often a crucial issue in defamation cases, providing: "In cases involving statements on matters of public

[33] Defining Defamation, note 27, Principle 4.
[34] Defining Defamation, note 27, Principle 7(a).

concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory."[35]

It is also well-established that defendants should benefit from a defence of reasonably justification so that even statements which are false will not attract liability where the circumstances otherwise justify publication. The European Court has recognised this in a number of cases, holding that even false statements should not attract liability. For example, in *Tromsø and Stensaas v. Norway*, the Court held that to punish certain false and defamatory statements breached the guarantee of freedom of expression. The Court placed great emphasis on the fact that the statements concerned a matter of great public interest which the plaintiff newspaper had covered overall in a balanced manner.[36] The same or a similar defence is recognised in democratic countries around the world.

The ARTICLE 19 Principles summarise this defence as follows:

> Even where a statement of fact on a matter of public concern has been shown to be false, defendants should benefit from a defence of reasonable publication. This defence is established if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. In determining whether dissemination was reasonable in the circumstances of a particular case, the Court shall take into account the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters.[37]

Recommendations:

- Articles 200 and 201 should be repealed.
- Until such time as they are repealed from the criminal law, the following amendments should be made immediately:
  - the plaintiff should bear the onus of proving, beyond all reasonable doubt, all the elements of the offence;
  - no one should be convicted unless it has been proved that the statements are false, that they were made with knowledge of such falsity or reckless disregard for the truth and that they were made with the intention of causing harm.
- Even if these articles are transformed into civil law provisions, both should provide for the total exoneration of the defendant if the truth, or reasonable belief therein is established.

V.3 The ARTICLE 203 Exception

The Article 203 exception has been amended and its application narrowed. Defendants may escape prosecution for insult in certain enumerated circumstances where there was not intent to cause harm. Defamatory statements have been removed from the scope of

[35] Defining Defamation, note 27, Principle 7(b).
[36] 20 May 1999, Application No. 21980/93, para. 33. See also, *Dalban v. Romania*, 28 September 1999, Application No. 28114/95.
[37] Defining Defamation, note 27, Principle 9.

the exception. The government's official justification for this amendment, contained in the commentary, is problematic for several reasons.

First, the commentary states that as originally phrased, Article 203 would have permitted persons, and specifically journalists, to consciously lie. This is obviously not the case since the exception only applies if there is no intent to harm.

Second, the commentary ignores the existence of civil remedies in Croatian law that may be relied upon to redress the harm caused by defamatory statements.

Third, the commentary implies that that the exception required narrowing because of the potential for journalists to abuse their societal role by being legally "allowed" to make false allegations. This reasoning is inconsistent with international practice, which tends to accord greater protection to the media's freedom of expression, rather than less. It also fails to take into account the importance of freedom of expression, as recognised by international bodies (set out above).

Recommendation:

- The amendment made to Article 203 should be repealed and the exception contained therein should again apply to defamatory statements and specifically the offences enumerated in Article 200.

V.4 Protection for Public Officials

Article 204(2) provides for a form of special protection to certain senior public officials. Although it does not establish different standards, or higher penalties, in these cases, it calls for the State prosecutor to initiate criminal defamation proceedings in these cases, with their consent, which paragraph (3) states that they may then call off the prosecution at any time. The two paragraphs together allow these officials to control criticism through the threat of commencing or halting criminal proceedings.

It is well-established under international human rights law that public officials should not benefit from exceptional protection from defamation laws and that, instead, they should be required to tolerate a greater degree of criticism than ordinary citizens since they have willingly taken on a public role in a democratic context where their actions are subject to the scrutiny of the public.[38]

This rule also extends to the manner in which cases are prosecuted, as clearly established by the ARTICLE 19 Principles:

> Public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the

[38] See, for example, the European Court of Human Rights decisions in *Lingens*, note 19, and *Castells*, note 30, where these views have been promulgated.

party claiming to have been defamed, even if he or she is a senior public official. [emphasis added] [39]

The provisions may also bring the administration of justice into disrepute by undermining the independence of the State prosecutor.

Recommendation:
- Paragraphs (2) and (3) of Article 204 should be repealed.

Article 309(2) provides for the vague offence of obstructing the course of justice by grossly insulting justice officials. Article 10(2) of the ECHR recognizes the legitimacy of restrictions imposed on freedom of expression in order to maintain "the authority or impartiality of the judiciary". However, like all restrictions, any such measures must meet the standards of the three-part test. Experience in other countries where criticism of these officials is not specially sanctioned shows that it is extremely rare, if not unknown, for such criticism to actually impede the justice system. Furthermore, these individuals, like everyone, may take advantage of the defamation laws to protect their reputation.

Article 309(3) is even more problematical, providing for imprisonment for repeatedly expounding views as to how the administration of justice should operate. Such repeated expositions may lead to positive reform of the judicial system, and examples of this abound in democratic countries. The right to criticise the judicial system is a key mechanism of accountability for this important public function. At the very minimum, punishment should be conditional upon actual harm to the administration of justice.

Recommendation:
- Paragraphs (2) and (3) of Article 309 should be repealed.

VI. Alternative Measures to Address Defamatory Speech

This Memorandum argues strongly against the imposition of criminal measures for defamation. The position is based to some extent on the argument that civil defamation measures are adequate to deal with the problem of defamation and, since they represent a less intrusive restriction on freedom of expression, they must be preferred to criminal measures.

This argument is sound, and ARTICLE 19 firmly believes it is correct. Its validity has been demonstrated in the many countries which do not have criminal defamation measures. At the same time, a number of other measures may be put in place which mitigate the impact of defamatory speech.

However, neither criminal nor civil law provisions on defamation are truly effective in addressing the problem. Both are time-consuming, meaning that the harm to reputation

[39] Defining Defamation, note 27, Principle 4(b)(iii).

may well have run its effective course by the time the problem is remedied. Neither lead to remedies which really run to the heart of the matter. Criminal conviction leads to fines and possibly imprisonment, neither of which really restore the reputation of the person who has been defamed, or even provide him or her with any direct benefit. Successful civil cases do at least lead to damage awards for the plaintiff, but again fail to actually restore the reputation. A further problem with civil defamation is that it is costly, so that ordinary individuals who may have been defamed rarely take the issue up.

There are other remedies which accord more closely with the goal of defamation laws, as described in the ARTICLE 19 Principles:

> The overriding goal of providing a remedy for defamatory statements should be to redress the harm done to the reputation of the plaintiff, not to punish those responsible for the dissemination of the statement.[40]

The most effective remedies are those which can lead, quickly and for little cost, to the publication of a retraction, apology, correction or reply. These measures, if applied rapidly, effectively negate the original statement, and thus largely eradicate the harm done.

One mechanism which may lead to such measures is an internal complaints system run by the media outlet concerned. Major outlets in many countries do run such systems on a voluntary basis. The BBC, for example, has a developed complaints system, along with a code of conduct against which such complaints may be measured. To try to require media outlets to set up internal complaints systems by law is probably impossible at a practical level, is of little benefit and is certainly contrary to the guarantee of freedom of expression, and this practice is unknown.

A second mechanism is a formal, media-wide complaints body. Such a body should develop and publish a code of conduct or standards and then receive and adjudicate complaints against such a code. There are a number of legitimate models for such bodies, ranging from truly voluntary bodies to statutory ones. The UK Press Complaints Commission is an example of the former, while the Danish Press Council is an example of the latter.

Voluntary bodies have a number of advantages over statutory ones, including the fact that, since they are run by the profession itself, they have more credibility and moral suasion, so that their decisions are more likely to have wide impact. A judgement by one's peers that one is in breach of professional standards may be far more persuasive than a similar judgement by a statutory body. Furthermore, in our view, the guarantee of freedom of expression at least requires that the authorities give the media an opportunity to develop a self-regulatory complaints system before attempting to impose one.

Statutory complaints bodies may be legitimate as long as they meet certain criteria. Perhaps the most important of these is that they should be adequately protected against

[40] Defining Defamation, note 27, Principle 13(b).

political or commercial interference. If the law fails adequately to guarantee their independence, they will be under constant threat of being undermined by interference. Their powers should also be appropriately tailored to their role, which is not to substitute civil defamation laws but to provide for an alternative, rapid, low-cost, relatively informal mechanism to address media excesses. They should not have quasi-judicial powers; most importantly, they should not be able to impose onerous sanctions, being instead limited in this regard to requiring the media to publish an apology or correction, as the case may be.

A third mechanism, common in Europe, is a right of reply. In many Western European democracies, the right of reply is provided by law and these laws are effective to a varying extent. The purpose of a right of reply is to provide an individual with an opportunity to correct inaccurate facts which interfere with his or her right to privacy or reputation. In most countries that recognise a right of reply, the offended party may seek a court order if the media outlet refuses to publish the reply.[41] Advocates of media freedom, including ARTICLE 19, generally suggest that a right of reply should be voluntary rather than prescribed by law. In any case, certain conditions should apply:

- the reply should only be in response to incorrect facts, not to comment on opinions that the reader or viewer doesn't like;
- it should receive similar prominence to the original article or broadcast;
- it should be proportionate in length to the original article or broadcast; and
- it should be restricted to addressing the incorrect or misleading facts in the original text. It should not be taken as an opportunity to introduce new issues or comment on other correct facts.

One of more of these mechanisms will provide an important complement to the defamation laws in place. Obviously, a range of other factors, including the overall level of professionalism of journalists, are also important to address fully the problem of defamation.

[41] This is the case in France, Germany, Norway and Spain.