ARTICLE 19
GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on

Albanian Defamation Law

by

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Global Campaign for Free Expression

London
September 2004

Commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe

I. Introduction

This Memorandum analyses Albanian civil and criminal defamation law, including provisions relating to the right of rebuttal, against international standards on freedom of expression. Our comments are based on an unofficial English translation of the relevant provisions in the Criminal and Civil Codes and the Law on Radio and Television provided by the Office of the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe.[1]

[1] ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

ARTICLE 19 has long been concerned over the use in Albania of criminal defamation law. The Criminal Code penalises not only defamatory expressions but also 'insults', a term which is left undefined, and it even offers heightened protection to public officials. The defamation provisions in the Albanian Civil Code are equally problematic in their vague wording and the failure to provide for adequate defences. A study published in 2002 found that, in practice, the criminal defamation provisions are in frequent use. The courts have been found to rule against defamation defendants very frequently, displaying an alarming lack of sensitivity to standards set under the European Convention on Human Rights. Satirical cartoons commenting on everyday matters are classified as 'insults', the courts fail to distinguish between statements of fact and opinion, and they presume bad faith in nearly every case concerning journalists. A recent case exemplifies some of the problems with the law. In May of 2004, a newspaper publisher was fined ALL 2 million (approximately USD 20,000, roughly 100 times the Albanian average monthly wage) in a defamation case initiated by the Prime Minister. The charges related to an opinion piece which alleged that the award of 5 months salary to the Prime Minister, the Chief of Cabinet and General Secretary of the Government for work on the privatisation of the Albanian Savings Bank amounted to corruption. The case is now at the appeals court.[2]

Against the background of cases such as these, the Albanian defamation laws act as a serious deterrent to independent and critical journalism. This Memorandum analyses the civil and criminal defamation law provisions in detail, providing recommendations for reform throughout. Our overarching recommendation is that the criminal law provisions relating to defamation must be abolished and replaced with appropriate civil law provisions. If, in the short term, decriminalisation is not possible, the Albanian Criminal Code should at least be amended to abolish the enhanced protection for public figures, to provide appropriate defences, to abolish the possibility of imprisonment and to provide a ceiling for monetary fines and damages. The Civil Code should be amended, among other things, to narrowly circumscribe the tort of defamation, to introduce appropriate defences and to provide guidance on remedies.

The detail of our analysis is contained in Section III of this Memorandum. Section II summarises the body of international law on freedom of expression and defamation that the analysis draws on, focusing on the jurisprudence of the European Court of Human Rights. The analysis additionally draws on a set of standards on freedom of expression and defamation articulated in the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* (*Defining Defamation*).[3] These principles, which draw on comparative constitutional law as well as European and UN human rights jurisprudence, have attained significant international endorsement, including that of the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.[4]

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[2] ARTICLE 19 wrote to the Albanian Prime Minister to protest this case. A copy of the letter can be found at http://www.article19.org/docimages/1775.doc.
[3] London: ARTICLE 19, July 2000.
[4] See their Joint Declaration of 30 November 2000. Available at:

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. Article 19 of the *Universal Declaration on Human Rights* (UDHR),[5] 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 *International Covenant on Civil and Political Rights* (ICCPR),[6] ratified by Albania on 4 October 1991 elaborates on many of the rights set out in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. 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, Article 10 of the *European Convention on Human Rights* (European Convention)[7], which was ratified by Albania on 2 October 1996, Article 13 of the *American Convention on Human Rights*[8] and Article 9 of the *African Charter on Human and Peoples' Rights*.[9]

Article 10(1) of the European Convention states, in part:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Through the Albanian Constitution, the rights guaranteed in international treaties which the country has ratified and published in the Gazette take precedence over any Albanian laws or practices that are incompatible with them.[10] The Albanian Constitution also guarantees the right to freedom of expression separately, in Article 10 (freedom of expression of religions in public life), Article 20 (freedom of expression of minorities) and Article 22 (freedom of expression and freedom of the press, radio and television).

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. The European Court of Human Rights has repeatedly stated:

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http://www.unhchr.ch/huricane/huricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument.

[5] UN General Assembly Resolution 217A(III), adopted 10 December 1948.

[6] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

[7] Adopted 4 November 1950, in force 3 September 1953.

[8] Adopted 22 November 1969, in force 18 July 1978.

[9] Adopted 26 June 1981, in force 21 October 1986.

[10] Articles 5 and 122 of the Albanian Constitution, adopted 21 October 1998, as translated by K. Imholz, K. Loloci (Member of the Technical Staff of the Constitutional Commission and ACCAPP: <http://pbosnia.kentlaw.edu/resources/legal/albania/constitution/>.

> 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.[11]

The Court has also made it clear that the right to freedom of expression protects offensive speech. It has become a fundamental tenet of its jurisprudence that the right to freedom of expression "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'."[12]

It has similarly emphasised that "[j]ournalistic freedom … covers possible recourse to a degree of exaggeration, or even provocation."[13] This means, for example, that the media are free to use hyperbole, satire or colourful imagery to convey a particular message.[14] The choice as to the form of expression is up to the media. For example, the Court has protected newspapers choosing to voice their criticism in the form of a satirical cartoon.[15] The context within which statements are made is relevant as well. For example, in the second *Oberschlick* case, the Court considered that calling a politician an idiot was a legitimate response to earlier, provocative statements by that same politician while in the *Lingens* case, the Court stressed that the circumstances in which the impugned statements had been made "must not be overlooked."[16]

The Court attaches particular value to political debate and debate on other matters of public importance. Any statements made in the conduct of such debate can be restricted only when this is absolutely necessary: "There is little scope … for restrictions on political speech or debates on questions of public interest."[17] The Court has rejected any distinction between political debate and other matters of public interest, stating that there is "no warrant" for such distinction.[18] The Court has also clarified that this enhanced protection applies even where the person who is attacked is not a 'public figure'; it is sufficient if the statement is made on a matter of public interest.[19] The flow of information on such matters is so important that, in a case involving newspaper articles making allegations against seal hunters, a matter of intense public debate at the time, the journalists' behaviour was deemed reasonable, and hence protected against liability, even though they did not seek the comments of the seal hunters to the allegations.[20]

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[11] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[12] *Ibid.* Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.
[13] *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.
[14] *See Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras 50-54.
[15] See, for example, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 63 and *Bergens Tidende and Others v. Norway*, 2 May 2000, Application No. 26131/95, para. 57.
[16] *Oberschlick v. Austria (No. 2)*, 1 July 1997, Application No. 20834/92, para. 34 and *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 43.
[17] See, for example, *Dichand and others v. Austria*, note 13, para. 38.
[18] *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 64.
[19] See, for example, *Bladet Tromsø and Stensaas v. Norway*, note 15.
[20] *Ibid.*

The guarantee of freedom of expression applies with particular force to the media. The Court has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law"[21] and has 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.[22]

In nearly every case before it concerning the media, the Court has stressed the "essential role [of the press] in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it 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'."[23] In the context of defamation cases, the Court has emphasised that the duty of the press goes beyond mere reporting of facts; its duty is to interpret facts and events in order to inform the public and contribute to the discussion of matters of public importance.[24]

II.2. Restrictions on the Right to Freedom of Expression

International law permits limited restrictions on the right to freedom of expression in order to protect various interests, including reputation. The parameters of such restrictions are provided for in Article 10(2) of the European Convention, which states:

> 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 reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

Any restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by both the Human Rights Committee[25] and the European Court of Human Rights,[26] requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest (including, as noted, protecting the reputations of others, relevant to the comments contained herein), and (3) necessary to secure this interest. In particular, in order for a restriction to be deemed necessary, it must restrict freedom of expression as little as possible, it must be carefully designed to

[21] *Thorgeirson v. Iceland*, note 18, para. 63.
[22] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
[23] See, for example, *Dichand and others v. Austria*, note 13, para. 40.
[24] *The Sunday Times v. The United Kingdom*, 26 April 1979, Application No. 6538/74, para. 65.
[25] For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.
[26] For example, in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.

achieve the objective in question and it should not be arbitrary, unfair or based on irrational considerations.[27] Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

The European Court of Human Rights has held that this represents a high standard which any interference must overcome:

> 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.[28]

III. Analysis of Albanian Defamation Law

This section analyses in detail the Albanian civil and criminal defamation law, as well as the law on the right of rebuttal, providing recommendations for reform. As stated in the introduction, we are very concerned about the criminal law provisions that have enabled public figures successfully to sue journalists for defamation over stories that raised clear issues of public interest. Our overarching recommendation, therefore, is that these provisions should be abolished. At a minimum, the criminal law provisions should be amended immediately to introduce key defences, procedural safeguards and limitations on fines and damages that may be awarded. It is also a matter of priority that the existing civil law provisions, which do not meet the standards required by the European Court of Human Rights, be replaced with appropriate civil law rules. We elaborate on these general recommendations in the following paragraphs.

III.1 Albania's Criminal Defamation Regime

The Albanian Criminal Code contains a series of provisions that criminalise "insult", "defamation" and "humiliation" of specific subjects. Separate provisions deal with defamation and insult, and there is enhanced protection for public officials, the president, foreign dignitaries and the flag, among others. From the point of view of protecting freedom of expression, these provisions are all highly problematic.

International law recognises that freedom of 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. 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 envisage are not proportionate to the harm done.

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, but it clearly recognises that there are serious problems with criminal

[27] See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).
[28] See, for example, *Thorgeirson v. Iceland*, note 18, para. 63 (European Court of Human Rights).

defamation. It has frequently reiterated the following statement, originally made in a defamation case:

> [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.[29]

The position taken within the UN and OSCE systems has been far more categorical. The UN Human Rights Committee, the body with responsibility for overseeing implementation of the ICCPR, which Albania is a state party to, has repeatedly expressed concern about the possibility of custodial sanctions for defamation.[30] The UN Special Rapporteur on Freedom of Opinion and Expression, appointed by the UN Commission on Human Rights, has called on States to repeal all criminal defamation laws in favour of civil defamation laws.[31] 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".[32] Finally, in their joint Declarations of November 1999, November 2000 and again in December 2002, 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 – called on States to repeal their criminal defamation laws. The December 2002 Joint Declaration stated:

> 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.[33]

Based on the foregoing, our principal recommendation is that the defamation provisions in the Criminal Code be repealed altogether. If criminal defamation laws remain in force, however, they should be amended so as to minimise the potential for abuse or unwarranted restrictions on freedom of expression in practice. We elaborate on the minimum amendments necessary in the following paragraphs.

III.1.1 Definition of Insult and Defamation

The Criminal Code distinguishes between "insult", a term which is left undefined, and "defamation", defined in Article 120 as "[i]ntentionally spreading rumors, and any other knowingly false information, which affect the honor and dignity of the person". Both provide for a sentence of a fine or imprisonment, with longer terms or higher fines

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[29] *Castells v. Spain,* note 22, para 46.

[30] For example, in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), Cameroon, Mexico, Morocco, Norway and Romania (1999), Kyrgyzstan (2000), Azerbaijan, Guatemala and Croatia (2001), and Slovakia (2003).

[31] 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.

[32] See, for example, Resolution 2000/38, 20 April 2000, para. 3.

[33] Joint Declaration of 10 December 2002. Available at: http://www.cidh.oas.org/Relatoria/English/PressRel02/JointDeclaration.htm.

available "when [the insult or defamation] was committed publicly, or to the detriment of several people, or repeatedly".

ARTICLE 19 believes that defamation laws are legitimate only if their aim is to protect the reputations of individuals – or of entities with the right to sue and be sued – against injury, including by tending to lower the esteem in which they are held within the community, by exposing them to public ridicule or hatred, or by causing them to be shunned or avoided. Defamation laws should not protect people from language that is merely offensive or shocking. It is worth noting in this regard the European Court's maxim that the right to freedom of expression "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".[34]

Against this background, we are concerned, first, by the criminalisation of "insult". Although left undefined, we assume this to refer to statements of opinion which do not contain allegations of fact – as opposed to "defamation", which is specifically defined to refer to spreading "false information". The ARTICLE 19 Principles, consistent with the best international practice, rule out defamation restrictions on statements of opinion:

> No one should be liable under defamation law for the expression of an opinion.[35]

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 defamatory statements, devoid of any factual basis and specifically intended to cause harm to reputation.[36] Without such limitations, any rule prohibiting statements of opinion is almost certain to be abused by those seeking to avoid criticism. This concern appears to be particularly valid in the Albanian context. Commentators report that, in some cases, the courts have interpreted 'insult' to include "humiliating, immoral or ridiculing words, images and gestures", as well as satirical sketches.[37] Such a broad interpretation almost certainly goes beyond what may permissibly be restricted under Article 10 of the European Convention.[38]

Second, we are concerned about the inclusion in the definition of defamation of the very different concepts of 'honour' and 'dignity'. The concept of human dignity is extremely general in nature, serving as the philosophical foundation for all human rights rather than the basis for a specific legal provision.[39] As such, it is not capable of precise definition and fails the requirement, outlined in section II.2, that restrictions on freedom of

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[34] Note 12, above.
[35] Defining Defamation, note 3, Principle 10(a).
[36] See, for example, *Unabhängige Initiative Informationsvielfalt v. Austria*, 26 February 2002, Application No. 28525/95, para. 46 (European Court of Human Rights).
[37] I. Elezi, *Criminal Law, Special Part*, Vol. 1, Tirana: Luarasi Publishing House: 1995, pp. 119-120, quoted in *The Cost of Speech: Violations of Media Freedom in Albania*, Human Rights Watch: June 2002, p. 28.
[38] See, in this regard, the judgment of the Paris Tribunal de Grande Instance of 25 April 2001 indicating that the French 'insult' provisions are in breach of Article 10 of the European Convention. This judgment was referred to in the European Court of Human Rights' *Colombani* judgment, note 46, in which it was indicated that the French provisions are no longer applied.
[39] See, for example, the preamble of the Universal Declaration of Human Rights.

expression be set out in clear and unambiguous terms. The concept of honour would appear to refer as much to self-perception as to the esteem in which an individual is held by external persons. Given the impossibly subjective nature of honour thus understood, as well as the grounds for restrictions on freedom of expression in Article 10 of the European Convention, which refers only to rights and reputation, it seems an inappropriate basis for protecting reputations. Instead, we recommend that the clear and unambiguous term 'reputation' be used.

III.1.2 Enhanced Protection for Officials and Symbols

The Criminal Code contains special protections for a wide range of public officials and symbols, protecting officials including judges, the president and the national flag and emblem. Indeed, practically all public officials are given enhanced protection. The following matters are criminalised:

- "Insulting intentionally an official acting in the execution of a state duty or public service, because of his state activity or service" (Article 239);
- "Intentional defamation committed toward an official acting in the execution of a state duty or public service, because of his state activity or service" (Article 240);
- "Intentional defamation committed toward the President of the Republic" (Article 241);
- "Humiliation, made publicly or through publications or distribution of writings, of the Republic of Albania and [her] constitutional order, flag, emblem, anthem, martyrs of the nation or abolishing, damaging, destroying, making indistinct or unusable the flag or emblem of the Republic of Albania exposed by official institutions" (Article 268);
- "Insulting a judge or other members of trial panel, the prosecutor, the defense lawyer, the experts, or every arbitrator assigned to a case because of their activity" (Article 318);
- "Insulting prime ministers, cabinet members, parliamentarians of foreign states, diplomatic representatives, or [representatives] of recognized international bodies who are officially in the Republic of Albania" (Article 227); and
- insulting the flag, emblems or national anthem of foreign countries and international organisations (Article 229).

Provisions such as these all contravene Article 10 of the European Convention. The European Court of Human Rights has been very clear on the matter of public officials and defamation: they are required to tolerate more, not less, criticism, in part because of the public interest in open debate about public figures and institutions. In its very first defamation case, the Court emphasised:

> The limits of acceptable criticism are … wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.[40]

[40] *Lingens v. Austria*, note 16, para. 42.

The Court has affirmed this principle in several cases and it has become a fundamental tenet of its case law.[41] The principle is not limited to criticism of politicians acting in their public capacity. Matters relating to private or business interests can be equally relevant. For example, the "fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises."[42]

In statements on matters of public interest, the principle applies to public officials and to public servants as well as to politicians.[43] In the recent case of *Thoma v. Luxembourg*, the Court stated:

> Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals.[44]

We are additionally concerned that the Albanian courts are reported to apply a loose standard as to who is a 'public official', applying sections 239 and 240 of the Criminal Code in cases concerning public schoolteachers or medical personnel in the public health system.[45] This heightens the potential for abuse of these provisions.

The European Court has similarly given short shrift to provisions extending special protection to foreign dignitaries. In *Colombani and others v. France* it stated:

> [To] withdraw [Heads of State] from criticism only because of their function or stature, without taking into account the public interest in criticism … amounts to conferring an exorbitant privilege on foreign heads of State which cannot be reconciled with the political practice and designs of today. Whatever the obvious interest, for any State, to maintain friendly relations with the leaders of other States, this privilege exceeds what is necessary to achieve such a goal.[46]

The provision extending special protection to the judiciary also goes too far. While the European Court has acknowledged that "the work of the courts, which are the guarantors of justice and which have a fundamental role in a State governed by the rule of law, needs to enjoy public confidence [and] should therefore be protected against unfounded attacks",[47] the all-embracing protection afforded under Article 318 is disproportionate. As the Court made clear *Hrico v. Slovakia*,[48] provisions protecting the judiciary have to allow for criticism – including that which may be stridently worded – in the public interest.

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[41] See, for example, *Lopes Gomez da Silva v. Portugal*, 28 September 2000, Application No. 37698/97, para. 30; *Wabl v. Austria*, 21 March 2000, Application No. 24773/94, para. 42; and *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, para. 59.
[42] *Dichand and others v. Austria*, note 13, para. 51.
[43] See *Janowski v. Poland*, 21 January 1999, Application No. 25716/94, para. 33. See also *Thorgeir Thorgeirson v. Iceland*, note 18.
[44] *Thoma v. Luxembourg* , 29 March 2001, Application No. 38432/97, para. 47.
[45] Ismet Elezi, Criminal Law, note 37, pp. 54-57.
[46] *Colombani and others v. France*, 25 June 2002, Application No. 51279/99, para. 68.
[47] *Prager and Oberschlick v. Austria*, 26 April 1995, Application No. 15974/90, para. 34.
[48] 20 July 2004, Application No. 49418/99.

Finally, ARTICLE 19 believes that defamation laws should not be used to protect the 'reputation' of objects, such as State or religious symbols, flags or national insignia; nor can they be used to protect the 'reputation' of the State or nation, as such.[49] The only justification for a defamation law is its genuine purpose and demonstrable effect of protecting reputations of individuals against injury that lowers the esteem in which they are generally, exposes them to public ridicule or hatred, or causes them to be shunned or avoided.

Given this, ARTICLE 19 strongly recommends that, rather than according public officials extended protection, the standard for defamation in cases brought by public officials should be *stricter* than the standard for other individuals. Emblems such as the national flag or anthem do not merit any specific protection in defamation law.

III.1.3 Sanctions

The defamation and insult provisions in the Criminal Code all provide for sentences of imprisonment as well as fines. These are harsh sentences.

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 unduly harsh sanctions, even for statements found to be defamatory, breach the guarantee of freedom of expression. It has found that "the award of damages and the injunction clearly constitute an interference with the exercise [of the] right to freedom of expression";[50] and that any sanction imposed for defamation must bear a "reasonable relationship of proportionality to the injury to reputation suffered." [51] Disproportionately high fines, such as those imposed in the May 2004 case discussed in the Introduction, violate the right to freedom of expression.

The possibility of imprisonment for defamation is particularly concerning; imprisonment should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.[52] The European Court of Human Rights has never upheld an actual prison sentence for defamation. 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

[49] See *Defining Defamation*, Principle 2.
[50] *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 35.
[51] *Ibid*., para. 49.
[52] See *Defining Defamation*, note 3, Principle 4.

fine imposed"[53] in upholding the conviction; the fine in that case was 10 times the daily minimum wage.

Finally, under Article 43 of the Criminal Code, courts have the power to order publication of the court sentence if "the disclosure of the content of the sentence interests juridical and physical persons". The courts may order publication of the sentence not only in the offending publication but in other newspapers or on TV as well. We do not believe that such a general power is appropriate. While in some countries it is within the power of a court to order that a newspaper publish the summary of a finding against it,[54] an order of publication of a full sentence will in most cases constitute a disproportionate interference with editorial independence. To provide, as Article 43 does, that other newspapers and broadcasters may also be required to publish the sentence will not be a justified interference with editorial independence in any case. If the object is to inform the public, this is better achieved through respect for freedom of expression. If the ruling is sufficiently newsworthy, a free media will likely report on it. If not, little is achieved by forcing the media to carry a story no one will read.

III.1.4 Limitation Period

Under Article 66 of the Albanian Criminal Code, defamation actions may be instituted until two years after the defamation was published or, in the case of defamation against the President, until five years after the defamation was published. Allowing cases to be initiated this long after the statements on which they are based have been disseminated undermines the ability of those involved to present a proper defence. In all instances, unduly drawn-out cases exert a chilling effect on defendants' freedom of expression, as well as on the ability of plaintiffs to obtain adequate and timely redress. *Defining Defamation* proposes a limitation period for defamation actions of one year, absent exceptional circumstances, an approach that has been adopted and/or recommended in a number of jurisdictions, albeit in the civil law context.[55]

III.1.5 Non-liability

In our view, the breadth of liability for criminal defamation in Albania is seriously problematical for two reasons. First, plaintiffs are presented with far too low a threshold for establishing guilt. Second, defendants do not have adequate defences available to them.

ARTICLE 19 is of the view that criminal defamation laws always breach the right to freedom of expression. At a minimum, however, they should comply with certain basic criminal standards. These are set out in *Defining Defamation* as follows:

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[53] 6 February 2001, Application No. 41205/98, para. 69.

[54] This is the case, for example, in France: see P. Carter-Ruck and H. Starte, *Carter-Ruck on Libel and Slander*, (Butterworths: London, 1997), p. 363. Malta has a similar provision in its Press Act (Section 20).

[55] See, for example, the Report of the Legal Advisory Group on Defamation in Ireland, published in March 2003. Available at: http://www.justice.ie/80256976002CB7A4/vWeb/fsWMAK4Q7JKY. See also *Defining Defamation*, note 3, Principle 5.

(b) As a practical matter, in recognition of the fact that in many States criminal defamation laws are the primary means of addressing unwarranted attacks on reputation, immediate steps should be taken to ensure that any criminal defamation laws still in force conform fully to the following conditions:

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

ii. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed….[56]

The Albanian law does include a requirement of intent, although it is not clear what specific intention is intended, namely an intention to defame or simply an intention to distribute the statements. In any case, this does not meet the standards set out above, which require both intention to defame, knowledge, real or constructive, of falsity and proof of actual falsity. Furthermore, proof, as in all criminal cases, should be beyond all reasonable doubt.

If criminal defamation is retained as an offence, the defendant should be able to avail him- or herself of a number of defences. In line with our main contention that defamation should be civil in nature, we outline these below, in Section III.2.2, which discusses defences in the civil law context. Suffice it to point out for now that none of these defences exist for criminal defamation.

Recommendations:

- All criminal insult and defamation provisions should be abolished. At a minimum, and as a short term measure, the criminal provisions must be amended along the following lines:
  - There should be no enhanced protection for public officials, judges, foreign officials or State emblems.
  - The offence of insult should be abolished and criminal defamation restricted to cases involving false facts which cause harm to reputation.
  - Sanctions should be strictly proportionate to any harm caused. In particular, imprisonment should never be available as a sanction for defamation.
  - Newspapers and broadcasters should not be required to publish defamation judgments in cases in which they were not a party; publications found guilty of defamation should not be required to publish the full judgment against them although they may, in some cases, be required to publish a brief summary of that judgment.
  - Defamation actions should not be initiated more than one year after the impugned publication.
  - The party bringing a criminal defamation case should be required to prove all of the elements of the offence, as described above, beyond all reasonable doubt.

[56] Note 3, Principle 4(b).

- Appropriate defences should be introduced, as detailed in the section discussing civil defamation, below.

III.2 Civil Defamation Provisions

Albania's Civil Code is sparse on defamation, containing just two brief articles that are directly relevant: Article 617, on 'libelous and inaccurate publications', and Article 625, on 'liability concerning non-property damage'. Article 618, in addition, provides for employer liability for faults committed by employees.

Article 617 provides for a right of correction for the publication of inaccurate, incomplete or 'fraudulent' information, discussed below in the section on Right of Reply and Correction. Article 625 states:

> The person who suffers damage, other than property damage, has the right to claim compensation if:
>
> a) he has suffered injury to his health or harm to his honor;
>
> b) the memory of a dead person is desecrated, and the spouse he lived with until the day of his death, or his relatives up through the second scale, seek compensation, except when the injury has been done when the dead person was alive and he was given the right of compensation for the desecration done.
>
> The right foreseen in the above-mentioned paragraph is not hereditary.

These provisions do not constitute an even remotely adequate civil defamation regime. They do not adequately define defamation, fail to provide proper defences, do not provide exemptions for certain forms of expression and fail to provide guidance on damages. In the following paragraphs, we elaborate on these concerns.

III.2.1 Defining Defamation

Article 625 provides that a person may claim compensation if damage is suffered through "harm to his honour". It does not further delineate the tort of defamation.

ARTICLE 19 does not consider that this is an appropriate provision to protect reputation. First, it opens the door for compensation claims for true statements that damage honour - for example, an allegation made against a government minister of abuse of State funds, proven to be true. This is not a proper use of defamation law. Principle 2 of *Defining Defamation*, states that "defamation laws cannot be justified if their purpose or effect is to protect individuals against harm to a reputation which they do not have or do not merit … In particular, defamation laws cannot be justified if their purpose or effect is to prevent legitimate criticism of officials or the exposure of official wrongdoing or corruption."[57]

Second, as briefly touched upon in section III.1 in relation to the criminal insult provisions, defamation laws need to distinguish between statements of fact and statements of opinion. It is internationally recognised that statements of opinion deserve a high degree of protection. For example, in *Feldek v. Slovakia*, the European Court of Human Rights disagreed that the use by the applicant of the phrase "fascist past" should

[57] Note 3.

be understood as stating the fact that a person had participated in activities propagating particular fascist ideals. It explained that the term was a wide one, capable of encompassing different notions as to its content and significance. One of them could be that a person participated as a member in a fascist organisation; on this basis, the value-judgment that that person had a 'fascist past' could fairly be made.[58]

Third, Article 625(b) enables an individual to sue on behalf of a deceased relative's memory. We do not believe this is appropriate. The harm from an unwarranted attack on someone's reputation is direct and personal in nature. Unlike property, it is not an interest that can be inherited; any interest surviving relatives may have in the reputation of a deceased person is fundamentally different from that of a living person in their own reputation. Furthermore, a right to sue in defamation for the reputation of deceased persons could easily be abused and might prevent free and open debate about historical events.

Finally, as noted above in section III.1, the term honour is capable of unduly broad interpretation as including the esteem in which someone holds themselves. A preferable term, consistent with international instruments, would be 'reputation'.

Recommendations:

- The tort of defamation needs to be narrowly defined to include only statements which cause harm to reputation through the publication of a false statement of fact.
- There should be no right to sue on behalf of deceased persons.

III.2.2 Defamation Defences

Article 625 fails to provide for adequate defences to a claim of defamation. Indeed, it is not clear what defences it does provide for. A number of defences have been recognised as necessary to ensure that defamation laws are consistent with the guarantee of freedom of expression.

Reasonable Publication

Defendants should benefit from a defence of reasonably justification so that even statements which are false do not attract liability where the circumstances otherwise justify publication. A rule of strict liability for all false statements is particularly unfair for the media, who are under a duty to satisfy the public's right to know where matters of public concern are involved and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. The nature of the news media is such that stories have to be published when they are topical, particularly when they concern matters of public interest. In a case in which ARTICLE 19 intervened, the European Court held:

[58] 12 July 2001, Application No. 29032/95.

> [N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[59]

A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably in publishing a statement on a matter of public concern. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test. This has been confirmed by the Court, which has stated that the press should be allowed to publish stories that are in the public interest subject to the provison that "they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism."[60]

Applying these principles in the case of *Tromsø and Stensaas v. Norway*, the European Court of Human Rights placed great emphasis on the fact that the statements made in that case concerned a matter of great public interest which the plaintiff newspaper had covered overall in a balanced manner.[61] This follows the line taken by constitutional courts of various countries which have recognised the principle that, where the press have acted in accordance with professional guidelines, they should benefit from a defence of reasonable publication.[62]

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.[63]

Burden of Proof

The ARTICLE 19 Principles address the question of burden of proof, often a crucial issue in defamation cases, providing: "In cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory."[64] This re-states the general principle developed by constitutional courts, including the US Supreme Court, that placing the burden of proof on the defendant will have a significant chilling effect on the right to freedom of expression. In delivering the judgment of that court in the seminal case of *New York Times v. Sullivan*, Brennan J commented:

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[59] *The Sunday Times v. the United Kingdom (No. 2)*, 24 October 1991, Application No. 13166/87, para. 51.
[60] *Bladet Tromsø and Stensaas v. Norway*, note 15, para 65.
[61] *Ibid*.
[62] See, for example, *Reynolds v. Times Newspapers Ltd and others*, [1999] 4 All ER 609, p. 625 (House of Lords); *National Media Ltd and Others v. Bogoshi*, [1999] LRC 616, p. 631 (Supreme Court of Appeal of South Africa).
[63] Defining Defamation, note 3, Principle 9.
[64] Defining Defamation, note 3, Principle 7(b).

> Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defence as an adequate safeguard have recognised the difficulties of adducing legal proof that the alleged libel was true in all its factual particulars. ... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'.[65]

The European Court has agreed that, particularly where a journalist is reporting from reliable sources in accordance with professional standards, it will be unfair to require them to prove the truth of their statements.[66] This is particularly so where the publication concerns a matter of public concern. However, the Court has required that when they make serious allegations, journalists should make a real effort to verify their truth, in accordance with general professional standards.[67]

Protected Statements

Internationally, it is recognised that certain kinds of statements should never attract liability for defamation. Generally speaking, this is where it is clearly in the public interest that people be able to speak freely without fear or concern that they may be liable for what they have said. This would apply, for example, to statements made in court, in the legislature and before various official bodies, as the European Court of Human Rights has made clear.[68] Equally, fair and accurate reports of such statements, in newspapers and elsewhere, should be protected.[69]

Principle 11 of *Defining Defamation* details the types of statements that should attract such protection as follows:

> (a) Certain types of statements should never attract liability under defamation law. At a minimum, these should include:
>
> i. any statement made in the course of proceedings at legislative bodies, including by elected members both in open debate and in committees, and by witnesses called upon to give evidence to legislative committees;
> ii. any statement made in the course of proceedings at local authorities, by members of those authorities;
> iii. any statement made in the course of any stage of judicial proceedings (including interlocutory and pre-trial processes) by anyone directly involved in that proceeding (including judges, parties, witnesses, counsel and

[65] *New York Times Co. v. Sullivan*, 376 US 254 (1964), p. 279.
[66] See, for example, *Colombani v. France*, note 46, para. 65.
[67] *McVicar v. the United Kingdom*, 7 May 2002, 46311/99, paras. 84-86 and *Bladet Tromsø and Stensaas v. Norway*, note 15, para 66.
[68] See, for example, *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97 (members of the legislature should enjoy a high degree of protection for statements made in their official capacity) and *Nikula v. Finland*, 21 March 2002, Application No. 31611/96 (statements made in the course of judicial proceedings should receive a high degree of protection). We note that such protection is extended under Article 47 of the Law on Public and Private Radio and Television in the Republic of Albania.
[69] See, for example, *Bladet Tromso and Stensaas v. Norway*, note 15 (media and others should be free to report, accurately and in good faith, official findings or official statements).

members of the jury) as long as the statement is in some way connected to that proceeding;

iv. any statement made before a body with a formal mandate to investigate or inquire into human rights abuses, including a truth commission;

v. any document ordered to be published by a legislative body;

vi. a fair and accurate report of the material described in points (i) – (v) above; and

vii. a fair and accurate report of material where the official status of that material justifies the dissemination of that report, such as official documentation issued by a public inquiry, a foreign court or legislature or an international organisation.

(b) Certain types of statements should be exempt from liability unless they can be shown to have been made with malice, in the sense of ill-will or spite. These should include statements made in the performance of a legal, moral or social duty or interest.[70]

Exemptions from Liability

Finally, there should be exemptions for certain types of information carriers. Under the current regime, it is not inconceivable that an Internet Service Provider (ISP) could attract liability by unwittingly providing access to insulting or defamatory information published through the Internet. This would not be appropriate because ISPs cannot be regarded as the 'authors' of such information. Additionally, there is an important risk of 'censorship by proxy': given their potential liability, many ISPs will simply remove statements from the Internet as soon as they have been challenged as defamatory, regardless of the legitimacy of the challenge.

As a result, it has been recognised that special protection in defamation law is necessary in relationship to the Internet. This is reflected in Principle 12(b) of *Defining Defamation*, which states, in relevant part:

> Bodies whose sole function in relation to a particular statement is limited to providing technical access to the Internet, to transporting data across the Internet or to storing all or part of a website shall not be subject to any liability in relation to that statement unless, in the circumstances, they can be said to have adopted the relevant statement.[71]

Recommendations:

- Defamation defendants should benefit from a defence of reasonable publication, as outlined above.
- In cases involving statements on matters of public concern, the plaintiff should bear the onus of proving the statements are false, rather than the defendant being required to prove they are true.
- Certain statements, as outlined above, should be protected against liability because of the overall public interest in their being made or disseminated.
- Bodies whose function to provide technical access to the Internet (ISPs) should not attract liability for information to which they provide access, unless they can be said to have adopted the statement as their own.

[70] Note 3.
[71] *Ibid.*

III.2.3 Exemptions and Limitations

As noted above, *Defining Defamation* proposes a limitation period for defamation actions of one year, absent exceptional circumstances (see section III.1.4). Such a limitation is not provided for in the Albanian Civil Code. Article 113 states that a lawsuit to reinstate or protect a personal non-property right, which includes reputation, can be instituted at any time. Article 115 defines certain exceptions to this general rule, not including defamation. We recommend that consideration be given to providing for a limitation period of one year for filing a defamation action, outside of exceptional circumstances. This provision could be placed either in Article 115, specifying its application to a defamation action, or in Article 625 itself.

Recommendation:

- Defamation actions should not be able to be initiated more than one year after the impugned statements were published.

III.2.4 Damages

Article 625 states that a person who suffers non-property damage has the right to claim "compensation", but fails to set limits on the amount of damages that may be awarded.

The right to freedom of expression demands that the purpose of a remedy for defamatory statements is, in all but the very most exceptional cases, limited to redressing the immediate harm done to the reputation of the individual(s) who has been defamed, and that the role of remedies is not to punish the speaker.[72] As the European Court of Human Rights has stated, there must exist a reasonable proportionality between the harm done and the compensation awarded.[73]

It is a general principle of law that plaintiffs in civil cases have a duty to mitigate damage. In the area of defamation law, this implies that the plaintiff should take advantage of any available mechanisms which might redress or mitigate the harm caused to his or her reputation, such as those available through the right of reply and correction mechanisms discussed below. This means that courts should prioritise the use of available non-pecuniary remedies to redress any harm to reputation caused by defamatory statements.

Pecuniary compensation for defamation should never be disproportionate and should be awarded only where non-pecuniary remedies are insufficient. To ensure that any sanction for defamation is proportional to the injury to reputation suffered, national defamation laws should include clear rules on the allocation of pecuniary remedies. Pecuniary awards to compensate actual financial loss or material harm should be awarded only where that loss or harm is specifically established

The level of compensation which may be awarded for non-material harm to reputation – that is, harm which cannot be quantified in monetary terms – should be subject to a fixed

[72] See *Defining Defamation*, note 3, Principle 14.
[73] *Tolstory Miloslavski v. the United Kingdom*, note 50.

ceiling. This maximum should be applied only in the most serious cases. Pecuniary awards which go beyond compensating for harm to reputation should be highly exceptional measures, to be applied only where the plaintiff has proven that the defendant acted with knowledge of the falsity of the statement and with the specific intention of causing harm to the plaintiff.[74]

Recommendations:

- The Civil Code should prioritise non-financial remedies.
- The Civil Code should set rules and provide guidance on the level of damages which may be awarded, in accordance with the above.

III.2.5 Right of Reply and Correction

Albanian law provides for a general right of correction in Article 617 of the Civil Code and a right of 'rebuttal' – limited to the broadcast media – in Article 47 of the Law on Public and Private Radio and Television.

In many western European democracies, the right of 'rebuttal' or 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. However, given that a right of reply constitutes an interference with editorial freedom,[75] 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 statements which are false or misleading and which breach a legal right of the claimant; it should not be permitted to be used to comment on opinions that the reader or viewer doesn't like.
- The reply should receive similar prominence to the original article or broadcast.
- The reply should be proportionate in length to the original article or broadcast.
- The reply should be restricted to addressing the incorrect or misleading facts in the original text and not be taken as an opportunity to introduce new issues or comment on correct facts.
- The media should not be required to carry a reply which is abusive or illegal.

In light of these conditions, the schemes provided under the Civil Code and the Law on Public and Private Radio and Television present several difficulties.

First, both procedures are statutory. This is heavy-handed from the media's point of view, but in the case of the Civil Code, which requires a court order to be obtained, also presents a high-threshold procedure for a claimant. For both reasons, we recommend that a self-regulatory right of reply or correction scheme be explored.

[74] See *Defining Defamation*, note 3, Principle 15.
[75] See *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).

Second, in relation to the Civil Code, we note that this provides that a court can require publication of a correction "when it is certified that a person is liable towards another person, because he has published incorrect, incomplete and fraudulent data … in the way that it would consider it appropriate." This grants the court considerable latitude in determining how the correction must be published, and in what form. It would be preferable if the legislation gave guidance on these matters.

Third, Article 47 of the Law on Public and Private Radio and Television provides a right of 'rebuttal' in relation to 'false information'. This suggests that the viewer or listener will be granted airspace to argue their case, which would present a far more invasive procedure than the simple right of correction suggested under Article 617 of the Civil Code. The Law, like the Civil Code, also fails to impose limitations on the format of the 'rebuttal', other than a general provision that it should not be "much longer" than the allegedly false statement reacted to.

Recommendations:

- The right of rebuttal in the Law on Radio and Television and the right to correction in the Civil Code should be reformed along the lines indicated above.