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URGENT OPINION ON THE DRAFT AMENDMENTS TO THE CRIMINAL CODE OF THE REPUBLIC OF CYPRUS

CYPRUS

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Based on an unofficial English translation of the draft amendments.

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EXECUTIVE SUMMARY

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

The Draft Amendments to the Criminal Code of Cyprus under review mainly address two distinct issues: the dissemination of false information or content, including the re-criminalization of defamation, and the distribution of indecent or obscene communications.

Bearing in mind the negative impact that *criminal* defamation laws may have on the freedom of expression, international human rights bodies, including the OSCE Representative on Freedom of the Media and ODIHR, have called upon states to abolish legislation providing for *criminal sanctions* for defamation. It is acknowledged that the right to protect once reputation, which could be impacted by defamatory statements, is guaranteed under international law. However, the mere existence of criminal sanctions for defamation can have a chilling effect, even if they are minor in pecuniary terms or applied rarely or not at all. Moreover, there is a risk that criminal defamation laws may be used against journalists, political opponents, human rights defenders and others who are critical of government officials and policies. Where *civil* defamation laws exist, they should be drafted with care, in order to ensure full compliance with international human rights standards and minimize risk of potential abuse by public authorities, and at the same time conform to the principle of proportionality.

Therefore, it is recommended to reconsider entirely Draft Article 99 F[ΣΤ]. The drafters could instead consider enhancing the existing regulatory framework providing for alternative non-criminal remedies and civil damages to be paid to the affected persons when the expression reaches a certain level of severity, while ensuring that the said provisions are also carefully crafted to exclude arbitrary application or abuse by public authorities and fully comply with international human rights standards.

With respect to the communication through public electronic communications network of “false content” (Draft Article 99 C[Γ]), it is acknowledged that the spread of information that aims to deceive, mislead or manipulate people, particularly on the Internet and via social networks, has reached new dimensions – in terms of impact, speed and volume. This may have serious consequences on the democratic order, including on election processes, unduly impact the exercise of human rights and fundamental freedoms and risk undermining public trust in institutions and democratic processes. These challenges may justify state’s proportionate responses. At the same time, in order not to constitute a disproportionate means to tackle the issue, the criminalization of the dissemination of knowingly “false information” may be envisaged only when it is intended to and actually presents a clear and concrete risk to cause or results in *serious* harm to others, public disorder or seriously endangers public safety. Inaccurate information is not always harmful, and only harm reaching a certain degree of seriousness may warrant some forms of state intervention and possibly, legislative regulation. In addition, state responses to such phenomena must themselves respect the right to freedom of opinion and expression. The notion of falsehood is generally vague and overbroad. In addition to not reaching the level of seriousness justifying criminalization, the *actus reus* (material

element) and the *mens rea* (mental element) of the proposed criminal offence as provided in Draft Article 99 C[Γ] are overbroad and vague and would generally not be compliant with the principle of legality. This is notwithstanding the existence of other legal provisions that may already target some forms of dissemination of false information in other specific circumstances, although some of these provisions may themselves suffer from similar deficiencies. Consequently, it is recommended **to reconsider the criminalization of the communication of "false information" as envisaged in Draft Article 99 C[Γ] entirely,** or at minimum more strictly circumscribe the material and mental elements of the offence or consider instead to seek to address the problem in a manner that will not impinge on freedom of expression and freedom of the media.

With respect to the criminalization of the communication through public electronic communications networks or publication of content that is grossly offensive and/or indecent and/or obscene and/or threatening in nature (Draft Articles 99 D[Δ] and G[Z]), it must be reiterated that the right to freedom of expression also protects "*deeply offensive*" speech or forms of expression. The mere inclusion of material that is sexually explicit or graphic does not automatically take the form of expression beyond the protection of Article 10 of the ECHR and Article 19 of the ICCPR. The criminalization of some forms of expression that may fall within the scope of the Draft Articles 99 D[Δ] and G[Z] may be appropriate and legitimate – for instance to target the most severe forms of abuse, such as child sexual abuse materials, cyber harassment including "cyberflashing", non-consensual pornography, and many others, that should be prohibited or criminalized according to international or regional instruments.

However, given the broad wording and the vagueness of the terms provided in Draft Articles 99 D[Δ] and G[Z], the proposed criminal provisions may also cover consensual sexualised messaging among adults, or satirical and artistic images, which are legitimate forms of expression that should in principle fall within the scope of protection of freedom of expression. Consequently, **Draft Articles 99 D[Δ] and G[Z], given their broad scope and vague wording should either be reconsidered entirely or, at minimum, much more strictly circumscribed,** with more precise definition of the material and mental elements of the criminal offences to reflect those provided in international and/or regional instruments, and the addition of exclusion or defence clauses, such as in case of consent of the person appearing on such image and of the addressee, or when involving journalistic, artistic, research, academic, educational, human rights or humanitarian work or other legitimate use.

Overall, each of the proposed new criminal offences present some serious shortcomings in terms of compliance with international human rights standards and OSCE human dimension commitments, especially with respect to the vague and overbroad terms used, which may potentially lead to arbitrary application or abuse by public authorities. While some of the proposed provisions envision certain exceptions concerning a range of expressions falling under the public interest, such exceptions are narrowly defined and do not apply to all of the proposed new criminal offences. In addition, the nature and severity of sanctions, particularly the imposition of prison sentences, are problematic, especially since they are currently contemplated for the mere communication of information or dissemination of false content that is not necessarily harmful or does not constitute severe forms of abuse as described above. It is recognized that the mere possibility of imposition of a criminal sanction, be it a mild fine, still risks having a chilling effect on the exercise of freedom expression.

In any case, legislation should aim to provide an enabling framework for the exercise of the right to freedom of expression and access to information, ensuring greater protection for speech about politics, public affairs and other matters of public interest, including by requiring politicians and public officials to tolerate a higher level of criticism than ordinary

citizens. A higher threshold of protection should also be ensured for journalistic work covering matters of interest in the public debate. Appropriate defences should also be available to defendants in defamation and other criminal cases involving expression on matters of public interest, irrespective of whether produced and/or disseminated by professional media operators, as well as when the communications were intended as part of education, scientific research, academic, artistic or journalistic work. Anyone should also benefit from the defence of "reasonable publication" and not bear strict liability for inaccurate statements of fact that are published or disseminated when they have acted reasonably and in good faith.

In light of the foregoing, **the adoption of the Draft Amendments, in their current form, should not be pursued as they contain considerable deficiencies that render them incompatible with international human rights standards and OSCE human dimension commitments. Especially, the Draft Article 99 F[ΣΤ] which would lead to the re-criminalization of defamation should be removed entirely.** ODIHR remains at the disposal of the authorities for further assistance in this matter, especially with respect to the identification of possible legislative or other alternatives to address genuine, concrete concerns that correspond to the legitimate aims provided by international human rights law.

While ODIHR recommends not to pursue the adoption of these Draft Amendments in their current version, the analysis and recommendations offered in this Urgent Opinion aim to inform the ongoing discussions on this matter, in light of international human rights standards and OSCE human dimension commitments.

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

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I. INTRODUCTION

1. On 24 July 2024, the Chair of the Committee on Human Rights and on Equal Opportunities for Men and Women of the House of Representatives of the Republic of Cyprus sent to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) a request for a legal review of the draft amendments to the Criminal Code of the Republic of Cyprus (hereinafter "Draft Amendments).

2. On 26 July 2024, ODIHR responded to this request, confirming the Office's readiness to prepare a legal review on the compliance of the draft amendments with international human rights standards and OSCE human dimension commitments. In light of the subject-matter, ODIHR invited the OSCE Representative on Freedom of the Media to peer review this legal opinion.

3. The above-mentioned Draft Amendments were initially set for parliamentary debate in September 2024. Given the short timeline to prepare this legal review before the plenary vote of the House of Representatives of the Republic of Cyprus, ODIHR decided to prepare an urgent legal review, which primarily focuses on the most concerning issues from a human rights perspective. The absence of comments on certain provisions of the Law should not be interpreted as an endorsement of these provisions.

4. This Urgent Opinion was prepared in response to the above-mentioned request. ODIHR conducted this assessment within its general mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.

II. SCOPE OF THE OPINION

5. The scope of this Urgent Opinion covers only the Draft Amendments, submitted for review. Hence, this legal analysis does not constitute a full and comprehensive assessment of the existing criminal legislation and other related legal provisions.

6. The Urgent Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, the Opinion focuses more on those provisions that require improvements rather than on the positive aspects of the Draft Amendments. The ensuing legal analysis is based on international and regional human rights standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Urgent Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.

7. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality* and commitments to mainstream gender into OSCE activities, programs and projects, the Urgent Opinion integrates, as appropriate, a gender and diversity perspective.[1]

8. The Urgent Opinion is based on an unofficial English translation of the Draft Amendments, which is attached to this document as an annex. Errors from translation

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

may result. When available in another language, the English version of the Urgent Opinion shall prevail in case of discrepancies.

9. In view of the above, ODIHR would like to stress that this review does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. Relevant International Human Rights Standards and OSCE Human Dimension Commitments

1.1. The Right to Freedom of Expression and Access to Information

10. The right to freedom of expression and access to information is a human right crucial to the functioning of a democracy and is also central to fulfilling other human rights and fundamental freedoms. The full enjoyment of this right is one of the foundations of a free, democratic, tolerant and pluralist society in which individuals and groups with different backgrounds and beliefs can voice their opinions, while bringing visibility to marginalized or underrepresented groups. The right to freedom of expression and access to information is also necessary for facilitating the effective participation of citizens in the conduct of public affairs and holding government accountable. While underlying the importance of protecting the right to free expression, it should also be balanced against other rights and legitimate public interests, including the protection of reputation and the prevention of harm.

11. The right to freedom of opinion and expression and access to information is enshrined in Article 19 of the Universal Declaration of Human Rights (UDHR)[2] and is guaranteed by Article 19 of the United Nation (UN) International Covenant on Civil and Political Rights (ICCPR),[3] Article 10 of the European Convention on Human Rights (ECHR)[4] and Article 11 of the EU Charter of Fundamental Rights.[5]

12. The jurisprudence of the UN Human Rights Committee (UN HRC) as well as its General Comment No. 34 on Article 19 of the ICCPR also offer authoritative interpretation of the nature and scope of the right to freedom of expression and access to information.[6] The European Court of Human Rights (ECtHR) case-law further serves as an important reference point, particularly for assessing the necessity and proportionality of restrictions to freedom of expression, including risks of human rights violations that could stem from national defamation laws. The ECtHR has made it clear that the Internet plays an important role in allowing the public access to news and the dissemination of information

2 See the Universal Declaration of Human Rights (UDHR).

3 See the UN International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Cyprus ratified the ICCPR on 2 April 1969. Article 19 of the ICCPR provides that "everyone shall have the right to hold opinions without interference" and that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

4 See Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which entered into force on 3 September 1953. The Republic of Cyprus ratified the ECHR on 6 October 1962.

5 Charter of Fundamental Rights of the European Union (EU), OJ C 326, 26 October 2012.

6 See UN Human Rights Committee, General comment No. 34 on Article 19 of the ICCPR, CCPR/C/GC/34, para. 11, where the UN Human Rights Committee further elaborates that "[f]reedom of expression *is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights*" and protects "*even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.*"

generally, and therefore constitutes an important platform for the exercise of the right to freedom of expression.[7]

13. At the OSCE level, a number of commitments proclaim the right of everyone to freedom of expression and to receive and impart information, as well as the right of the media to collect, report and disseminate information, news and opinion, underlining the essential role of independent and pluralistic media.[8] The OSCE Representative on Freedom of the Media (RFoM) is specifically mandated to observe relevant media developments in all OSCE participating States and to advocate and promote full compliance with OSCE principles and commitments regarding freedom of expression and free media. The OSCE RFoM together with the freedom of expression mandate-holders from the United Nations, the African Commission on Human and Peoples' Rights and the Organization of American States (together jointly referred to as "the International Mandate-Holders on Freedom of Expression"), have adopted a series of Joint Declarations, which offer very practical guidance covering current universal challenges to freedom of expression.[9] The *Joint Declaration on Media Freedom and Democracy* (2023), which calls upon states to abolish criminal defamation laws,[10] and the *Joint declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda* (2017)[11] are of particular relevance to this Urgent Opinion.

14. Any restriction on the right to freedom of expression must be compatible with the strict test set out in Article 19 (3) of the ICCPR and Article 10 (2) of the ECHR, requiring any restriction to be provided by law (requirement of legality), to be in pursuit of one of the legitimate aims listed exhaustively in the respective international instrument[12] (requirement of legitimacy) and to be necessary and proportionate (requirement of necessity and proportionality, which *inter alia* presupposes that any imposed restriction should represent the least intrusive measure possible among those effective enough to reach the designated objective). In addition, the restriction must be non-discriminatory (Articles 2 and 26 of the ICCPR and Article 14 of the ECHR and Protocol 12 to the ECHR[13]). Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific aim being pursued (Article 18 of the ECHR).

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7 See e.g., *Delfi AS v. Estonia* [GC], ECtHR, no. 64569/09, 16 June 2015; *Times Newspapers Ltd v. the United Kingdom*, ECtHR, nos. 3002/03 and 23676/03, 10 March 2009; *Cengiz v. Turkey*, ECtHR, nos 48226/10 and 14027/11, 1 December 2015, paras. 49 and 52.

8 See in particular OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen, 5 June-29 July 1990), which states that "*[t]his right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards."* The OSCE participating States also reaffirmed "*the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinion*" in OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, (Moscow, 3 October 1991). Moreover, in 1994, the OSCE participating States reaffirmed that "*freedom of expression is a fundamental human right and a basic component of a democratic society*" committing to "*take as their guiding principle that they will safeguard this right*" and emphasizing in this respect, that "*independent and pluralistic media are essential to a free and open society and accountable systems of government*"; see OSCE, CSCE Budapest Document 1994, Towards a Genuine Partnership in a New Era (Budapest, 21 December 1994), para. 36.

9 See <Joint declarations | OSCE>. See also, The Significance of the Joint Declarations on Freedom of Expression, Sejal Parmar, 37 Netherlands Quarterly of Human Rights, 2019, pp. 178 – 195.

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

11 See <Joint declaration on freedom of expression and "fake news", disinformation and propaganda (2017) | OSCE>.

12 i.e., Article 19 (3) of the ICCPR: *"(a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals*"; Article 10 (2) of the ECHR: "*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.*"

13 The Republic of Cyprus ratified the Protocol no. 12 on 30 April 2002 and it entered into force on 1 April 2005.

15. The requirement that any restriction be "provided by law" or "prescribed by law" not only requires that the restriction should have an explicit basis in domestic law, but also refers to the quality of the law in question.[14] Such law must be sufficiently clear and precise to enable an individual to assess whether or not his or her conduct would be in breach of the law and to foresee the likely consequences of any such breach, while not conferring unfettered discretion on those charged with its execution.[15] This also means that the law must be formulated in terms that provide a reasonable indication as to how these provisions will be interpreted and applied.[16]

16. The requirement of "necessity and proportionality" means that any restriction imposed on the right to freedom of expression, whether set out in law or applied in practice, must meet a "pressing social need",[17] be proportionate to the legitimate aim pursued and the reasons given by the authorities for such restriction must be relevant and sufficient.[18] The requirement to meet a "pressing social need" also means that a restriction must be considered imperative, rather than merely "reasonable" or "expedient".[19] The means used should be proportionate to the aim pursued, meaning that where a wide range of interventions may be suitable, the least restrictive or invasive measure must always be used.[20]

17. Article 20 of the ICCPR provides that speech must be "prohibited by law" where it amounts to "propaganda for war" or "advocacy of national, racial or religious hatred that constitutes incitement to discrimination or violence". Restrictions on expression falling within the scope of Article 20 must also comply with the strict tests of Article 19(3)[21] explained above. The Rabat Plan of Action[22] ("Rabat") provides authoritative guidance by providing a six-part test to assess whether a statement may meet the threshold of prohibited expression based on a case-by-case assessment. The six grounds for consideration are the 'socio-political context', 'position or status of the speaker', 'intent', 'content', 'extent of dissemination' and the 'likelihood and imminence of harm'.[23] Importantly, Article 20 of the ICCPR does not require the criminalisation of expression within its scope – simply that it is "prohibited by law" and the Rabat Plan of Action specifies that "criminal sanctions related to unlawful forms of expression should be seen as last resort measures to be applied only in strictly justifiable situations".[24] In essence, it means that States can choose whether to address the issue by means of civil, administrative or criminal law.

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14 Guidelines on Freedom of Peaceful Assembly, ODIHR-Council of Europe's European Commission for Democracy through Law (Venice Commission), 3rd ed., 2019, para. 98.

15 See UN Human Rights Committee, General comment No. 34 on Article 19 of the ICCPR, CCPR/C/GC/34, para. 25. See also ECtHR, *The Sunday Times v. the United Kingdom (No. 1),* no. 6538/74, paras. 48-49; and *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015, para. 131, where the Court underlined that: "*A norm could not be regarded as a "law" unless it was formulated with sufficient precision to enable the person concerned to regulate his or her conduct: he or she needed to be able – if need be with appropriate advice – to foresee, to a degree that was reasonable in the circumstances, the consequences that a given action could entail. However, the Court went on to state that these consequences did not need to be foreseeable with absolute certainty, as experience showed that to be unattainable.*"

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

17 "Necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable"; see ECtHR, *The Sunday Times v. the United Kingdom (No. 1),* no. 6538/74, para. 59.

18 See, for example, ECtHR, *Janowski v. Poland* [GC], no. 25716/94, 21 January 1999, paras. 31 and 35.

19 Guidelines on Freedom of Peaceful Assembly, para. 131.

20 See e.g., Perinçek v. Switzerland [GC], ECtHR, no. 27510/08, 15 October 2015, para. 273.

21 UN Human Rights Committee*, General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, para. 50.

22 UN General Assembly, Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, 11 January 2013

23 Ibid., para. 29.

24 Ibid., para. 34.

1.2. The Right to Respect for Private Life and Protection of Reputation

18. Article 17(2) of the ICCPR provides that everyone has the right to the protection of the law from "*unlawful attacks on [one's] honour and reputation*". The UN Human Rights Committee's General Comment No. 16 on Article 17 of the ICCPR further provides that "*[p]rovision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible*". At the same time, the UN Human Rights Committee also underlines that "*the protection of privacy is necessarily relative*" and may be restricted, especially in cases where knowledge about an individual's private life is "*essential in the interests of society*".[25] In addition, "*legislation must specify in detail the precise circumstances in which such interferences may be permitted*".[26] In its decisions related to damage to reputation, honour and dignity under Article 17 of the ICCPR, the UN Human Rights Committee has elaborated that full reparation in such cases should involve *inter alia* adequate compensation, including for lost earnings and damage to reputation and legal costs involved in litigation; appropriate measures of satisfaction with a view to restoring one's reputation, honour, dignity and professional standing; and taking steps to prevent similar violations from occurring in the future.[27]

19. At the Council of Europe level, Article 8 of the ECHR protects the right to respect for private and family life. The ECtHR has held that reputation is encompassed by Article 8 as being part of the right to respect for private life and that states have a positive obligation to achieve a fair balance of protection of reputation and freedom of expression.[28] Where freedom of expression comes into conflict with the right to respect for private life guaranteed by Article 8 and the protection of reputation, the ECtHR has set forth criteria for the balancing exercise including: whether the expression contributed to a debate of general interest; the public status of the person subjected to the statement; the prior conduct of the person who is the subject of criticism; the truth defence (where the expression contains factual statements); the content, form and the consequences of the expression/publication; and the severity of the sanctions.[29]

20. Importantly, it is generally accepted that since political and public figures are inevitably and knowingly subject to close scrutiny of their word and action by both journalists and the public, they must consequently display a higher level of tolerance towards criticism[30] and potential interferences with their right to privacy.

21. The Council of Europe Committee of Ministers' *Recommendation CM/Rec(2022)16 on combating hate speech*[31] and the Parliamentary Assembly of the Council of Europe

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25 See UN Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, para. 7.

26 *Ibid.* para. 8 (General Comment No. 16).

27 See e.g., UN Human Rights Committee, *Khidirnazar Allakulov v. Uzbekistan*, Communication No. 2430/2014 (2017), para. 9.

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

29 See e.g., *Jerusalem v. Austria*, ECtHR, no. 26958/95, 27 February 2001, para. 40; *Ruokanen and Others v. Finland*, ECtHR, no. 45130/06, 6 April 2010, para. 52; *Lindon, Otchakovsky-Laurens and July v. France* [GC], ECtHR, nos. 21279/02 and 36448/02, 22 October 2007, para. 59. See also Venice Commission, Amicus Curiae Brief for the Constitutional Court of Georgia on the Question of the Defamation of the Deceased, CDL-AD(2014)040, para. 23. See also Decriminalization of Defamation in the Context of Free Speech: a European Perspective, Andrey Rikhter, Media and Journalism Research Center, 14 February 2024.

30 See in the Council of Europe context, the Guide on Article 10 of the European Convention on Human Rights: Freedom of Expression, Registry of the European Court of Human Rights updated on 29 February 2024, p. 50.

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

(PACE) *Resolution 1577 (2007) "Towards decriminalisation of defamation"*[32] are also of particular relevance for the present Urgent Opinion.

2. National Context and Background

22. The Constitution of the Republic of Cyprus guarantees several fundamental rights and freedoms, including the right to freedom of speech and expression in any manner (Article 19 (1)). Article 19 (3) specifies that such right "*may be subject to such formalities, conditions, restrictions or penalties as may be prescribed by law and necessary only in the interests of the security of the Republic or constitutional order or public security or public policy or public health or public morals or to protect the reputation or rights of others or to prevent disclosure of information obtained confidentially or in order to preserve the authority and impartiality of the judiciary.*"

23. Article 50 of the Criminal Code of the Republic of Cyprus criminalizes as a misdemeanour, the publication in any form of "*false news or information which may undermine public order or public confidence in the State or its organs or cause fear or anxiety to the public or in any way prejudice the common peace and order*", which is subject to imprisonment not exceeding two years and/or a fine not exceeding 1,500 pounds.[33] The said provision specifies that the proof that the publication was made in good faith and was based on facts justifying such publication constitutes a defence. The Criminal Code also include the criminal offences of insulting the army (Article 50 D), provocation or incitement to violence (Article 51 A), defamation of foreign rulers (Article 68), public insult – subject to imprisonment of up to one month and/or a fine not exceeding 75 pounds (Article 99), incitement to violence or hatred based on sexual orientation or gender identity (Article 99 A), obstruction of a breastfeeding mother (Article 99 B), publications insulting religions (Article 142), insults to the memory of a deceased person (Article 202 A). While this goes beyond the scope of this Opinion, some of these existing provisions may be problematic if they result in the criminalization of certain speeches that are protected under international human rights law.

24. It is noted that the Law 84(I)/2003 repealed sections 194 to 202 of the Criminal Code of the Republic of Cyprus in 2003,[34] thereby de-criminalizing defamation. Currently, the Civil Offences Act, especially Articles 17 to 24, sets out the law of defamation, including truth and good faith defences.[35] Article 25 of the same Act also regulates "harmful falsehood", i.e., "*the malicious publication of a false statement, whether oral or otherwise, concerning - (a) The profession, trade, work, occupation or position of another; or (b) goods other than that, or (c) the title of ownership of another*".

25. The initial version of the Draft Amendments was submitted by the Ministry of Justice and Public Order to the House of Representatives in March 2021 and was discussed in several session of the Committee on Legal Affairs, Justice and Public Order, most

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

33 See The Criminal Code Act of the Republic of Cyprus (Cap. 154).

34 Articles 194 to 202 of the Criminal Code of Cyprus criminalized defamation. Under Article 194, defamation was defined as "*any person who, by print, writing, painting effigy, or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person , with intent to defame that other person, is guilty of the misdemeanour termed libel*". Article 196 provided that defamation could result in imprisonment for up to three years. See Criminal Code of the Republic of Cyprus, 1959 Edition.

35 See The Civil Offences Act of the Republic of Cyprus (Cap. 148).

recently on 3 July 2024. In a letter from the OSCE Permanent Delegation of the Republic of Cyprus to the OSCE, forwarding information from the Ministry of Justice and Public Order on the Bill, it was explained that the main reason for drafting the proposed Bill was to transfer the provisions of two offences initially included in the Regulation of Electronic Communications and Postal Services Act of 2004 (similar to Draft Articles 99 C and D) into the Criminal Code for reasons of coherence, which may be justifiable. At the same time, such offences still need to be compliant with the strict test for restrictions on freedom of expression as further analysed below in Sub-Sections 4.1 and 4.2. It is further explained that it was also decided to add two new additional criminal offences to the Bill, related to the publication or posting of false content and of grossly offensive and/or indecent and/or obscene and/or threatening nature.

26. The *rationale* invoked to introduce these new criminal offences as per the information provided to ODIHR was primarily to protect citizens and not to target journalists. During the discussions on the Bill, some suggestions to exclude "journalists" from the scope of these provisions were made, though noting the challenge linked to the lack of a national definition of a "journalist" in this respect. From an international law perspective, it is important to emphasize that the rights of journalists, and protection afforded by international human rights standards to journalists, should not be applicable only to journalists affiliated with mass media outlets, either through employment or other contractual relationship (or who are recognized by the editorial office as its freelance authors or correspondents in performing assignments of the editorial office). In this respect, such protection should also apply to other actors who engage in other forms of self-publishing as long as they perform "journalistic function" and disseminate information and ideas of public interest as it supports informed societies and democratic participation. Indeed, a variety of other entities or individuals carrying out "journalistic function" deserve protection, including non-governmental organizations, human rights defenders and other actors, who may be also assimilated to "public watchdogs" insofar as the protection afforded by the right to freedom of expression is concerned.[36] The UN Human Rights Committee makes clear that states' responsibilities to protect journalists and those who perform the function of journalism are not restricted to full-time professional journalists or to those to whom officials have granted recognition or favour, but also to other actors who engage in forms of self-publication in print, online, or elsewhere.[37] Similarly, at the CoE level, the term "journalist" is understood as any natural or legal person who is regularly or professionally engaged in collecting and disseminating information to the public via any means of mass communication.[38] This allows for a broader understanding of persons who engage in journalistic work for the purpose of protecting them against infringement of their freedom of opinion and expression as enshrined in Article 19 of the ICCPR and Article 10 of the ECHR (see also Sub-Section 7 below for additional comments regarding the legislative process)**.**

27. The Draft Amendments to the Criminal Code of the Republic of Cyprus propose to add four new criminal offences (Articles 99 C[Γ], 99 D[Δ], 99 F[ΣΤ] and 99 G[Z]) under the section dealing with offences against public peace, next to the criminal offence of public insult (Article 99), incitement to violence or hatred based on sexual orientation or gender identity (Article 99 A) and obstruction of a breastfeeding mother (Article 99 B). It seems that the logic behind this section is to prevent harm coming from insults, incitement of

36 See e.g., the Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000; and the European Court of Human Rights, *Magyar Helsinki Bizottság v. Hungary*, App. no. 18030/11, 8 November 2016, para. 166. See also e.g., ODIHR, Urgent Comments on the Draft Criminal Offences against Honour and Reputation in the Republika Srpska (11 May 2023), para. 55.

37 See the General Comment No. 34 on Article 19 of the ICCPR, UN Human Rights Committee, CCPR/C/GC/34, para. 44.

38 See e.g., the Recommendation No. R (2000) 7, CoE Committee of Ministers, 8 March 2000, under "definitions". See also, Recommendation CM/REC(2011)/7 on a new notion of media, CoE Committee of Ministers, 21 September 2011.

violence either against the population as a whole or against specific (protected) category(ies) of people. The proposed amendments expand the scope of provisions enshrined in this section of the Code and criminalize some new forms of behaviour.

28. The proposed new criminal offences target the communication *through public electronic communications network* of information or messages *known to be false* with the intent of causing annoyance and/or harassment and/or unnecessary alarm to another person (Draft Article 99 C[Γ]), the communication of information that is grossly offensive and/or indecent and/or obscene and/or threatening in nature (Draft Article 99 D[Δ]99 D[Δ]), the publication or posting of *false* information in any form ***with the intent of damaging or adversely affecting the reputation of another person or exposing another person to contempt or ridicule, or adversely affecting the rights of another person*** (Draft Article 99 F[ΣΤ]) and the publication or posting in any form of information that is grossly offensive and/or indecent and/or obscene and/or threatening in nature ***with the intent of damaging or adversely affecting the reputation of another person or exposing another person to contempt or ridicule, or adversely affecting the rights of another person*** (Draft Article 99 G[Z]). The two latter criminal offences also specifically refer to possible defences and may only be prosecuted by the Attorney General of the Republic or with his/her approval (Article 99 H). Finally, Draft Article 99 I[Θ] provides that the courts of the Republic of Cyprus shall have jurisdiction to try these new criminal offences when committed in a foreign country by any person and directed against a citizen of the Republic of Cyprus or a foreign national who, at the time of the commission of the offence, was or had been permanently residing in Cyprus.

29. The justification for the introduction of these new criminal offences has not been clearly elaborated and according to publicly available information, is not based on an in-depth regulatory impact assessment (see also Sub-Section 7 below).

3. General Considerations Regarding the Criminalization of Certain Forms of Expression and Content

30. At the outset, it must be reiterated that the right to freedom of expression protects all forms of ideas, information or opinions, including those that "*offend, shock or disturb*" the State or any part of the population, and even "*deeply offensive*" speech.[39] It is also important to reiterate that law cannot regulate or sanction the right to human thoughts or to hold opinions,[40] however dangerous or unfavourable they may be. It should also be underlined that international human rights law recognizes only a limited number of types of expression which states have an obligation to prohibit or render punishable (by law),[41]

39 See UN Human Rights Committee, General Comment no. 34 on Article 19: Freedoms of Opinion and Expression, 12 September 2011, paras. 11 and 38; *Handyside v. United Kingdom,* ECtHR, no. 5493/72, 7 December 1976, para. 49, where the ECtHR held that Article 10 of the ECHR protects "*not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'*"; and *Bodrožić v. Serbia,* ECtHR, no. 32550/05, 23 June 2009, paras. 46 and 56. See also International Mandate-Holders on Freedom of Expression, Joint declaration on freedom of expression and "fake news", disinformation and propaganda (2017), seventh paragraph of the Preamble; and UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 2015 Thematic Report, A/HRC/31/65, 22 February 2016, para. 38.

40 In accordance with the Roman law principle *cogitationis poenam nemo patitur* ("nobody endures punishment for thought", Justinian's Digest (48.19.18)), punishment cannot encroach into the private sphere of the individual, until such time as the thoughts have been brought, through conduct, into the external world. In addition, the UN Human Rights Committee stated that criminalizing the holding of an opinion is incompatible with Article 19 of the ICCPR, see. UN Human Rights Committee, General Comment no. 34 on Article 19: Freedoms of Opinion and Expression, 12 September 2011, para. 9.

41 These include: "*direct and public incitement to commit genocide*", which should be punishable as per Article III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide to which the Republic of Cyprus acceded on 29 March 1982; the "*propaganda for war*" and the "*advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*", which should be prohibited as per Article 20 (1) and (2) of the ICCPR (see also OSCE RFoM, Non-Paper on Propaganda and Freedom of the Media (2015), especially with reference to propaganda for war and hatred that leads to violence and discrimination);

providing that the legal provisions are strictly interpreted in accordance with international freedom of expression standards, especially when dealing with "incitement".[42]

31. Outside of these very limited and narrowly defined exceptions, states should as a default refrain from prohibiting or sanctioning expression through the criminal law system,[43] especially given the potential chilling effect that such criminalization may have on the exercise of the right to freedom of expression and to impart information, the work of journalists and the freedom of the media in general. Indeed, even if no prison sentence is imposed but a fine is paid by a person found guilty of a criminal offence, a criminal record can seriously impact a person's life in the long run. The lasting effects of a criminal conviction are very difficult to overturn. For instance, this may lead to a situation where a journalist might have their life severely affected, and their professional reputation irreparably damaged, even after a prolonged and exhaustive legal battle.

32. Significant fines may also in practice lead to a closure of a media outlet as such, which will be damaging for the sector as a whole and will also have a chilling effect for all other media striving to financially survive under the current economic realities. In its rulings, the ECtHR has emphasized that the nature and severity of a sanction imposed are factors to be carefully considered when assessing the proportionality of the interference.[44] The ECtHR, however, repeatedly stated that criminal sanctions are less likely to be found proportionate when civil and disciplinary remedies would have been available.[45] As also emphasized by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression *"[c]riminal law should be used only in very*

"*all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as [...] incitement to [acts of violence] against any race or group of persons of another colour or ethnic origin*", which should be an offence punishable by law according to Article 4 (a) of the ICERD; "*public provocation to commit acts of terrorism*", when committed unlawfully and intentionally which should be criminalized (see UN Security Council Resolution 1624 (2005)); "child sexual exploitation material" which shall be criminalized as per Articles 2 (c) and 3 (1) (c) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography", which the Republic of Cyprus ratified on 6 April 2006. International recommendations also call upon States to enact laws and measures, as appropriate, "*to clearly prohibit and criminalize online violence against women, in particular the non-consensual distribution of intimate images, online harassment and stalking*", including *"[t]he threat to disseminate non-consensual images or content*", which must be made illegal; see UN Special Rapporteur on violence against women, its causes and consequences, Report on online violence against women and girls from a human rights perspective (18 June 2018), A/HRC/38/47, paras. 100-101. General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI) recommends to make it a criminal offence to publicly incite to violence, hatred or discrimination, or to threaten an individual or group of persons, for reasons of race, colour, language, religion, nationality or national or ethnic origin where those acts are deliberate. See also Council of Europe Committee of Ministers, Recommendation CM/Rec(2022)16 on combating hate speech, adopted by the Committee of Ministers on 20 May 2022, para. 11.

42 Regarding the prohibition of incitement to discrimination, hostility or violence (Article 20 of the ICCPR and Article 4 of the ICERD), it is also subject to the strict conditions of Article 19 of the ICCPR, see UN Human Rights Committee (CCPR), General Comment no. 34 on Article 19: Freedoms of opinion and expression, 12 September 2011, para. 11 and CERD, General recommendation No. 35 (2013), paras. 19-20. Such forms of expression would only be prohibited and punishable by law when: (1) the expression is intended to incite imminent violence; and (2) it is likely to incite such violence; and (3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence; taking into account a number of factors to determine whether the expression is serious enough to warrant restrictive legal measures including the context, speaker (including the individual's or organization's standing), intent, content or form, extent of the speech, and likelihood of harm occurring (including imminence); see CERD, General recommendation No. 35 (2013), paras. 13-16; see also the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, in the Report of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred, United Nations General Assembly, 11 January 2013, Appendix, para. 29; and International Mandate-holders on Freedom of Expression, Joint Declaration on Freedom of Expression and Countering Violent Extremism (2016), para. 2(d).

43 See e.g., *Morice v. France* [GC], ECtHR, no. 29369/10, 23 April 2015, paras. 127 and 176See also e.g., See UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, *Joint Letter* OL BIH 1/2023, 10 March 2023.

44 For example, see *Ceylan v. Turkey*, ECtHR no. 23556/94; and *Skalka v. Poland*, ECtHR, no. 43425/98. In this respect, the ECtHR case-law indicates a few useful parameters to ascertain the extent to which penalties can be considered proportionate, including, (1) if the award for damages is proportionate to the injury to reputation or other personal harm suffered (see See *Tolstoy Miloslavsky v. the United Kingdom*, ECtHR, (1995) 20 EHRR 442, 13 Jul 1995, para. 49); (2) if the award for damages is proportionate to the size and economic capacity of the fined company or rather such as to threaten its economic foundations (see *Błaja News Sp. z o. o. v. Poland*, ECtHR,no. 59545/10, 26 November 2013, para. 71; see also *Timpul Info-Magazin and Anghel v. Moldova*, ECtHR,no. 42864/05, 27 November 2007, para. 39); 3) how the total sum payable compares to the minimum monthly salary in the country (see *Kasabova v. Bulgaria*, ECtHR,no. 22385/03, 19 April 2011, para. 71); and (4) if the legal framework at the national level provides for "*adequate and effective domestic safeguards, at first instance and on appeal, against disproportionate awards which assured a reasonable relationship of proportionality between the award and the injury to reputation*" (see ECtHR, *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, ECtHR, no. 55120/00, 16 June 2005, para. 113).

45 See *Raichinov v. Bulgaria*, ECtHR,no. 47579/99, 20 April 2006, para. 50; *Kanellopoulou v. Greece*, ECtHR, no. 28504/05, 11 October 2007, para. 38.

exceptional and most egregious circumstances of incitement to violence, hatred or discrimination. Criminal libel laws […] should be repealed."[46] On the proportionality of sanctions, the ECtHR also held that a disproportionate sanction, even of a civil nature, constitutes an unjustified interference with the right to freedom of expression.[47] With specific reference to lawsuits concerning insults, criminal sanctions *per se* would not appear proportionate to the aim pursued. To exemplify this principle, even a suspended fine of merely EUR 30 imposed on a French citizen for insulting the President of France was considered "*likely to have a chilling effect*", "*disproportionate to the aim pursued and hence unnecessary in a democratic society*"[48] simply due to its criminal nature. [49]

33. At the outset, the legal drafters should consider the application of civil or administrative legislation when the expression attains a sufficient level of severity to justify legitimate restrictions under international human rights standards, providing that such legislation is crafted with due care to comply with the tripartite test mentioned above.

34. Furthermore, the legitimacy of criminal law depends on it being used sparingly, *ultima ratio,* as reflected in international law and practice.[50] With respect to the right to freedom of expression, the ECtHR specifically noted that public authorities are required "*to display restraint in resorting to criminal proceedings*".[51] Other measures such as civil and disciplinary remedies should be pursued in the first instance. Regarding defamation specifically, bearing in mind the negative impact that defamation laws may have on the freedom of expression, international and regional bodies, including the OSCE Representative on Freedom of the Media, have long called upon states to abolish any *criminal* defamation laws.[52] While the ECtHR has considered that, in light of the margin of appreciation left to state authorities, laws criminalizing defamation cannot be considered, as a matter of principle, incompatible with the ECHR, it has nevertheless raised some concerns regarding the chilling effect of criminal sanctions and their disproportionate nature[53] (see further elaboration in Sub-Section 4.3 below). In addition,

46 See the report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan on disinformation and freedom of opinion and expression, 13 April 2021, A/HRC/47/2, para. 89.

47 See *Tolstoy Miloslavsky v. the United Kingdom*, ECtHR, no.18139/91, 13 July 1995, para. 49. In holding that a high civil defamation award represented a breach of the right to freedom of expression, the Court stated that *"[u]nder the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered."*

48 *Eon v. France*, ECtHR, no. 26118/10, 14 March 2013, paras. 61-62.

49 In this regard, the UN Human Rights Committee stated that laws on *lese majeste*, *desacato,* disrespect for authority, disrespects for flags and symbols, defamation against the head of state, protection for the honour of public officials, criticisms of institutions such as the army or the administration are not compliant with Article 19 of the ICCPR. See UN Human Rights Committee, General Comment no. 34 on Article 19: Freedoms of Opinion and Expression, 12 September 2011, para. 38

50 European Parliament, Resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI)), European Parliament, P7_TA(2012)0208, Point I, which states: "*whereas in view of its being able by its very nature to restrict certain human rights and fundamental freedoms of suspected, accused or convicted persons, in addition to the possible stigmatising effect of criminal investigations, and taking into account that excessive use of criminal legislation leads to a decline in efficiency, criminal law must be applied as a measure of last resort (ultima ratio) addressing clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures and which causes significant damage to society or individuals…"*, cited in ODIHR, Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework (2018), p. 39. See also *Beizaras and Levickas v. Lithuania*, ECtHR, no. 41288/15, 14 January 2020, para. 111, where the Court acknowledged that "*criminal sanctions, including against the individuals responsible for the most serious expressions of hatred, inciting others to violence, could be invoked only as an ultima ratio measure […] That being so, it has also held that where acts that constitute serious offences are directed against a person's physical or mental integrity, only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor (see Identoba and Others, cited above, § 86, and the case-law cited therein). The Court has likewise accepted that criminal-law measures were required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes*".

51 See e.g., *Morice v. France* [GC], ECtHR, no. 29369/10, 23 April 2015, paras. 127 and 176; *Cumpănă and Mazăre v. Romania* [GC], ECtHR, no. 33348/96, 17 December 2004.

52 See, in particular, UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur and the African Commission Special Rapporteur on Freedom of Expression and Access to Information (hereinafter "International Mandate-Holders on Freedom of Expression"), 2023 Joint Declaration Joint Declaration on Media Freedom and Democracy, which specifically provides that "*[c]riminal defamation and laws criminalising the criticism of State institutions and officials should be repealed*"; 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, para. 2(b)(ii); 2010 Joint Declaration on Ten Key Challenges facing Freedom of Expression in the Next Decade; Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, 15 December 2008. See also Human Rights Councils' Disinformation and freedom of opinion and expression, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, para. 89, which states: *"[c]riminal law should be used only in very exceptional and most egregious circumstances of incitement to violence, hatred or discrimination. Criminal libel laws […] should be repealed*."

53 See e.g., *Eon v. France*, ECtHR, no. 26118/10, 14 March 2013, paras. 61-62,

the ECtHR has considered that state authorities have exceeded their margin of appreciation if "*relevant and sufficient reasons*" have not been provided and/or "*disproportionate weight had been given to the reputation*" of an individual or entity.[54] It is also noted that several countries have moved towards de-criminalizing defamation, as was done in Cyprus back in 2003.[55]

35. With the proliferation of social media raising new challenges regarding the spread of "misinformation" and other "online harms", there seems to be a distinct increase of initiatives to tackle harmful activity and content online.[56] At the same time, unless criminalization is required by international human rights instruments, such phenomena should be addressed through non-criminal responses (see paras. 45 and 47 below).

36. Finally, it has been generally demonstrated that the criminalization of defamation and potentially other forms of expression, tends to lead to a chilling effect,[57] genuine media self-censorship[58] and the progressive shrinkage of democratic debate and of the circulation of general information,[59] which all undermines a free, democratic, tolerant and pluralist society and the exercise of human rights in general.

4. Proposed New Criminal Offences

37. The Draft Articles under review mainly address the dissemination of "false" messages or content, the distribution of indecent or obscene communications, and the harm to the reputation of another person. These are fundamentally different issues and should be analysed separately, as the process of targeting or criminalizing each of them involves specific challenges.

38. The proposed new criminal offences are analysed from the perspective of their compliance with the strict tripartite test provided by the international human rights instruments (see paras. 14 to 16 above). In this respect, it must be underlined that the requirement of legality of restrictions to the right to freedom of expression is all the more important in the context of criminal legislation given the serious consequences attached to criminal liability. In accordance with international human rights standards, any criminal offence must comply with the principles of legal certainty, foreseeability and specificity of criminal law. The ECtHR has specifically emphasized that: "*criminal-law provisions ... must clearly and precisely define the scope of relevant offences, in order to avoid a situation where the State's discretion to prosecute for such offences becomes*

54 See *Almeida Arroja v Portugal*, ECtHR, no. 47238/19, 19 March 2024, para. 92.

55 See, e.g., in the region, Ireland, Malta, Romania. See Defamation and Insult Laws in the OSCE Region: A Comparative Study commissioned by the OSCE Representative on Freedom of the Media, Scott Griffen (Vienna: International Press Institute, 2017).

56 See e.g., in the United Kingdom, HM Government, 'Online Harms White Paper: Full Government Response to the Consultation' CP 354, (December 2020) 3, accessed 9 August 2024; the Online Safety Act 2023 (OSA 2023), Section 179, contains the offence of "false communications": *"(1)A person commits an offence if— (a) the person sends a message (defined in section 182(2)-(3), as sending, transmitting or publishing a communication by electronic means, or causing such to happen), (b) the message conveys information that the person knows to be false, (c) at the time of sending it, the person intended the message, or the information in it, to cause non-trivial psychological or physical harm to a likely audience, and (d) the person has no reasonable excuse for sending the message. (2) For the purposes of this offence an individual is a "likely audience" of a message if, at the time the message is sent, it is reasonably foreseeable that the individual— (a) would encounter the message, or (b) in the online context, would encounter a subsequent message forwarding or sharing the content of the message. (3) In a case where several or many individuals are a likely audience, it is not necessary for the purposes of subsection (1)(c) that the person intended to cause harm to any one of them in particular (or to all of them)",* though noting that the proposed offence has been criticized for both not covering some forms of fact manipulation as well as being very broad and not compatible with freedom of expression regime.

57 See the Council of Europe, Study on the Case on Freedom of Expression and Defamation, p. 24, where it is noted that a chilling effect may arise, in the words of the ECtHR, *where a person engages in "self-censorship", due to a fear of disproportionate sanctions or a fear of prosecution under overbroad laws; see Vajnai v. Hungary,* ECtHR, no. 33629/06, 8 July 2008, para. 54; *Cumpănă and Mazăre v. Romania [GC]*, ECtHR, no. 33348/96, 17 December 2004, para. 114; and *Altuğ Taner Akçam v. Turkey*, ECtHR, no. 27520/07, 25 October 2011, para. 68.

58 See e.g., *Kaperzyski v. Poland*, ECtHR, no. 43206/07, 3 April 2012.

59 See Parliamentary Assembly of the Council of Europe (PACE), Resolution 1577 (2007) Towards decriminalisation of defamation, para. 8.

too broad and potentially subject to abuse through selective enforcement."[60] Accordingly, criminal offences and the relevant penalties must be clearly and precisely defined by law, meaning that an individual, either by himself/herself or with the assistance of a legal counsel, should know from the wording of the relevant provision which acts and omissions will make him/her criminally liable and what penalty he or she will face as a consequence.[61] In particular, this means that the legislation in force at the time of the commission of the criminal offence shall clarify the scope and elements of the offence, including the particular act/conduct (material element or *actus reus*) and intent (mental element or *mens rea*) and specify the penalties applicable to that offence. As noted below, prohibited conduct of the individual, and whether there must be any harm caused or danger arising from it (the material elements), and with what knowledge or intent (the mental element) should be clear. Otherwise, any vaguely or broadly framed restrictive provisions open the possibility for misinterpretation and arbitrary application by public authorities, subsequently having a chilling effect on the exercise of fundamental rights, especially when used to silence journalists or human rights defenders. In that regard, to satisfy the requirement of legality, any term used in the Draft Amendments should be properly defined for the purpose of its application.

39. To comply with the requirement of proportionality, particular attention must be paid to the proposed penalties, which must be commensurate with the gravity of the crime committed, be appropriate and effective. One significant dimension of the fair and proportionate application of criminal penalties is that courts must take into account all circumstances of the individuals and the crime committed by them, in assessing appropriate and proportionate penalties.[62] For example, in connection with the right to freedom of expression, the ECtHR has explicitly stated that "*the nature and severity of the penalties must not be such as to dissuade the press from taking part in the discussion of matters of legitimate public concern*".[63]

4.1. Communication Through Public Electronic Communications Network of False Message (Draft Article 99 C[Γ])

40. Draft Article 99 C[Γ] criminalizes the making of a telephone communication or the sending of a message, *through public electronic communications network*, the content of which the sender knows to be false "*with the intent of causing annoyance and/or harassment and/or unnecessary alarm to another person*" or "*persistently us[ing] a public electronic communications network for [that] purpose*". As it is worded, the defendant must have sent either a single or multiple false communications through the Internet, or other public electronic communications network, or via telephone (*actus reus*). As to the mental element (*mens rea*), the provision refers to the defendant's knowledge that the content(s) of the communication(s) is(are) false and to the defendant's purpose of causing annoyance, harassment and/or unnecessary alarm to another person.

41. It must be acknowledged that the spread of information that aims to deceive, mislead or manipulate people, particularly on the Internet and via social networks, has reached new dimensions – in terms of impact, speed and volume. This may have serious consequences on the democratic order, including on election processes, unduly impact the exercise of human rights and fundamental freedoms and risk undermining public trust in institutions

60 See *Savva Terentyev v. Russia*, ECtHR, no. 10692/09, 28 August 2018, para. 85.
61 See e.g., *Rohlena v. the Czech Republic* [GC], ECtHR, no. 59552, 27 January 2015, paras. 78-79. See also General Comment No. 29 on States of Emergency (Article 4 of the ICCPR), UN Human Rights Committee, CCPR/C/21/Rev.1/Add. 11 (2001), para. 7.
62 See Eurojust Annual Report 2016, page 13.
63 See *Cumpana and Mazare v. Romania*, ECtHR, no. 33348/96, 17 December 2004.

and democratic processes.[64] These challenges may justify state's proportionate responses. At the same time, criminalizing the mere dissemination of "false information", especially when it is not intended to cause or does not present a clear and concrete risk to result in serious harm, public disorder or seriously endanger public safety, constitutes a disproportionate means to tackle the issue and should not be considered.[65]

42. As stated recently in the 2022 Report of the UN Secretary-General to the General Assembly on countering disinformation for the promotion and protection of human rights and fundamental freedoms, state responses to disinformation must themselves avoid infringing on rights, including the right to freedom of opinion and expression.[66] Indeed, as also stressed in this Report, not all inaccurate information is harmful, and only some harms – such as those that in fact implicate public health, electoral processes or national security – may warrant state intervention.[67] Also, while domestic laws addressing the propagation of falsehoods are permissible in relation to matters such as fraud, perjury, false advertising and defamation, the general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events is not permitted, as specified by the UN Human Rights Committee in its General Comment No. 34.[68]

43. Similarly, the International Mandate-Holders on Freedom of Expression stated with regard to the issue of "disinformation" and "fake news" that "*general prohibitions on the dissemination of information based on vague and ambiguous ideas, including "fake news" or "non-objective information" are incompatible with international standards for restrictions on freedom of expression [...]and should be abolished*".[69] At the same time, it is also necessary to address real threats caused by the organized and systemic dissemination of "disinformation" understood as all forms of knowingly false, inaccurate, or misleading information designed, presented and/or promoted with the intent to cause serious harm to a person, social group, organization or country.[70] This may however be done in a variety of means, not necessarily or not only through legislation. In any case, any regulation in this field should be as specific and precise as possible in order to address concrete threats/harms instead of producing overall chilling effect on public discourse due to the use of vague and overbroad definitions.

44. The ECtHR caselaw that has addressed the prohibition of spread of untrue information and their relationship with Article 10 of the ECHR shows that there are shortcomings regarding legislation, especially the underlying proceedings, that seeks to target false information in terms of compatibility with international human rights standards.[71] At the same time, the ECtHR has underlined that Article 10 of the ECHR did not guarantee unrestricted freedom of expression and that the guarantee afforded to journalists in

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64 See *Delfi AS v. Estonia*, ECtHR, no. 64569/09, 16 June 2015, para. 136; Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe, Türkiye - Urgent Joint Opinion of the on the draft amendments to the penal code regarding the provision on "false or misleading information", October 2022, paras. 56 and 88. See also Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report on Disinformation and freedom of opinion and expression, A/HRC/47/25, 13 April 2021, para. 2.

65 Countries which introduced laws on disinformation in the context of the Covid-19 pandemic have been highly criticised by international human rights organizations; see ODIHR, *Report on OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic* (17 July 2020), p. 114. See also Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe, Türkiye - Urgent Joint Opinion of the on the draft amendments to the penal code regarding the provision on "false or misleading information", October 2022, para. 5.

66 See Report on Countering disinformation for the promotion and protection of human rights and fundamental freedoms, United Nations, Secretary General, A/77/287, 12 August 2022, para. 10.

67 *Ibid,* para. 42.

68 UN Human Rights Committee (CCPR), General Comment no. 34 on Article 19: Freedoms of opinion and expression, 12 September 2011, para. 49.

69 See Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, International Mandate-Holders on Freedom of Expression, 3 March 2017, para. 2 (a).

70 See e.g., Information Disorder: Toward an interdisciplinary framework for research and policy making, Council of Europe report, DGI(2017)09, p. 20; see also the Report of the High Level Expert Group on Fake News and Online Disinformation of the European Commission (2018), p. 5.

71 See e.g., *Brzeziński v. Poland,* ECtHR, no 47542/07, 25 July 2019; *Kwiecień v. Poland,* ECtHR, no. 51744/99, 9 January 2007; and *Kita v. Poland, ECtHR,* no. 57659/00, 8 July 2008.

respect of reporting on matters of general interest and other persons who engage in public debate was subject to the condition that they acted in good faith so as to provide accurate and credible information in accordance with journalistic ethics.[72]

45. It is important to reiterate that no one should bear strict liability for inaccurate statements of fact that are published or disseminated when one has acted reasonably and in good faith when verifying the accuracy of information and disseminating such information.[73] In this respect, a graduated and differentiated approach towards the legal obligations applicable in terms of checking facts and the accuracy of information should be envisaged, depending on the type of media, legal person or individual disseminating or publishing the information and their level of professional capacity and outreach.[74] This is in addition to the adoption of self-regulatory rules on verifying accuracy of information that is published. Regarding the media in particular, while it is reasonable to expect from media and journalists to act responsibly and verify the accuracy of facts and to carry out adequate or sufficient research for that purpose with a view to provide "reliable and precise" information in accordance with the ethics of journalism,[75] imposing a general obligation for all media to only publish accurate/truthful information would be disproportionate and may be abused in practice.

46. At the same time, according to the jurisprudence of the ECtHR, states bear positive obligations under Article 10 of the ECHR. In particular, they should establish an effective mechanism for the protection of journalists in order to encourage a favourable environment for participation in public debate;[76] put in place an appropriate legislative and administrative framework to guarantee effective pluralism in such a sensitive sector as the audio-visual media;[77] ensure that individuals have a reasonable opportunity to exercise their right of reply (i.e., by submitting a response to a media outlet for publication) and an opportunity before the domestic courts to contest a refusal (by such a media outlet) to do so, among others.[78]

47. Certain states have adopted alternative means of countering disinformation by focusing on enhancing accountability and transparency of online platforms and Internet intermediaries, promoting robust public information campaigns and wide-ranging access to information, protecting free and independent media and dialogue with communities and building digital, media and information literacy.[79] Some states also require, through legislation, that audio-visual outlets using terrestrial broadcasting establish an independent committee tasked with assisting them to ensure the honesty of the

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72 See *Bielau v. Austria*, ECtHR, no. 20007/22, 27 August 2024, para. 35.

73 See e.g., Urgent Comments on the Draft Criminal Offences against Honour and Reputation in the Republika Srpska, ODIHR, 11 May 2023, para. 37. See also, as a matter of comparison, the judgments of the European Court of Human Rights underlining that "*the safeguard afforded by Article 10 [of the ECHR] to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism*", see *Axel Springer AG v. Germany* [GC], 7 February 2012, para. 93; *Bladet Tromsø and Stensaas v. Norway* [GC], ECtHR, 20 May 1999, para. 65; *Fressoz and Roire v. France* [GC], ECtHR, 21 January 1999, para. 54; *Stoll v. Switzerland* [GC], ECtHR, 10 December 2007, para. 103; *Sellami v. France*, ECtHR, 17 December 2020, paras. 52-54; for an indication by the European Court of Human Rights that the same principle must apply to others who engage in public debate, see *Steel and Morris v. the United Kingdom*, ECtHR,15 February 2005, para. 90.

74 See e.g., Recommendation CM/Rec(2011)7 of the Committee of Ministers to the member States of the Council of Europe on a new notion of media.

75 See e.g., as a comparison, European Court of Human Rights, *Pedersen and Baadsgaard v. Denmark* [GC], 17 December 2004, paras. 72 and 82; *Kasabova v. Bulgaria*, 19 April 2011, paras. 61 and 63-68; and *Sellami v. France*, 17 December 2020, paras. 52-54.

76 *Dink v Turkey*, ECtHR, App Nos 2668/07, 6102/08, 30079/08, 14 September 2010, para 137; *Khadija Ismayilova v Azerbaijan*, ECtHR, App Nos 65286/13 and 57270/14, 10 January 2019, para 158.

77 *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, ECtHR, no. 38433/09, 7 June 2012, para. 134. See also Recommendation CM/Rec (2007)2 of the Committee of Ministers of the Council of Europe on media pluralism and diversity of media content, 31 January 2007.

78 *Melnychuk v. Ukraine*, ECtHR, no. 28743/03, 5 July 2005, para. 2.

79 Report on Countering disinformation for the promotion and protection of human rights and fundamental freedoms, United Nations, Secretary General, A/77/287, 12 August 2022, see para. 24 and following for further information and state examples. See also Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, International Mandate-Holders on Freedom of Expression, 3 March 2017, para. 3. See also The Impact of The Information Disorder (Disinformation) On Elections, Venice Commission, 2018, para. 23.

information they disseminate.[80] The principle of honesty of information, distinct from a requirement of truthfulness or accuracy of *all* published information, necessitates, among others, that outlets verify the sources of information, present uncertain information in the conditional tense, and offer different perspectives when presenting contentious information.

48. The wording of the proposed new offence presents some important shortcomings. Firstly, it is unclear whether it targets only individual – i.e., person to person – communications, or also communications to a broader audience, for instance messaging on social media that may be viewed by others, or to the public. In addition, the Draft Article 99 C[Γ] (the same comment being relevant with respect to Article 99 F[ΣΤ]) refers to "false" content without clearly distinguishing knowingly inaccurate or misleading information from statements that may later prove to be false but reflect uncertainty, differences of opinion, different belief systems, or disagreements about facts.[81] **A definition that refers to knowingly spreading factually wrong information** would offer more legal certainty and predictability than a reference to vague notions such as "false content", which may potentially be subject to various interpretation.[82] Draft Article 99 C[Γ] also refers to the defendant's knowledge that the content is false. This means that the prosecutor will have to prove, beyond reasonable doubt, that the defendant knew, at the moment of sharing, that the information was false, which may prove challenging in practice.[83] To be compliant with international standards, the prosecutor should also prove that the intentional communication of factually wrong information presents real and concrete risk to cause or results in harm serious enough to justify criminal sanctions.

49. Another connected challenge to the quality of law is its wide scope. It seems that any false information, irrespective of how trivial that might be, but "causing annoyance" may fall within the definition of this criminal offence. Obvious exaggerations, satirical comments, intentionally wrong and fictional information, which does not intend to cause harm, could potentially be covered by this provision, whereas they in principle could fall within the scope of protection of Article 10 of the ECHR.[84]

50. It is also noted that other provisions of the Criminal Code prohibit the provision of false information in specific circumstances, for instance, Article 50 of the Criminal Code of the Republic of Cyprus, which criminalizes as a misdemeanour the publication in any form of "*false news or information which may undermine public order or public confidence in the State or its organs or cause fear or anxiety to the public or in any way prejudice the common peace and order*" or Article 312, which penalises submission of false reports of company officials etc. **As they are, the criminal provisions somewhat overlap or potentially duplicate one another, thereby leading to legal uncertainty.**

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80 See for example, Loi n° 2016-1524 du 14 novembre 2016 visant à renforcer la liberté, l'indépendance et le pluralisme des médias, Republic of France, 14 November 2016, Articles 6 and 11.

81 See e.g., A multi-dimensional approach to disinformation. Report of the independent. High level Group on fake news and online disinformation (2018), p. 20. See also Report on Disinformation and freedom of opinion and expression, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/47/25, 13 April 2021, paras. 54-55; Report on Disease pandemics and the freedom of opinion and expression, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/44/49, 23 April 2020, para. 42, noting that disinformation is an "*extraordinarily elusive concept to define in law*" and susceptible to providing executive authorities with "*excessive discretion to determine what is disinformation, what is a mistake, what is truth*"; see also Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, International Mandate-Holders on Freedom of Expression, 3 March 2017, para. 2 (a).

82 See e.g., Report on the Notions of Disinformation and Related Concepts (2020), European Regulators Group for Audiovisual Media Services, p. 17.

83 The *now repealed* s127(2) of the UK's Communications Act 2003 which criminalises the sending of a message "for the purpose of causing annoyance, inconvenience or needless anxiety to another" that "one knows to be false" required prosecutors to prove beyond all reasonable doubt the defendant's knowledge of falsity, and in practice, some UK offences pertaining to prosecutions arising out of the spread of false information have been infrequently prosecuted due to the evidentiary burden on the prosecution; see Law Commission, *Modernising Communications Offences: A Final Report* (HC 547, Law Com 399, 2021) [3.25], 81.

84 See e.g., *Eon v. France*, ECtHR, no. 26118/10, 14 March 2013, para. 60; and *Nikowitz and Verlagsgruppe News GmbH v. Austria*, ECtHR, no. 5266/03, 22 February 2007, para. 26; *Kuliś and Różycki v. Poland*, ECtHR, no. 27209/03, 6 October 2009, paras. 37-38; *Patrício Monteiro Telo de Abreu v. Portugal*, ECtHR, no. 42713/15, 7 June 2022, para. 40.

Importantly, while this goes beyond the scope of this Opinion, some of the existing provisions of the Criminal Code may be problematic if they lead to the criminalization of speeches that are protected under international human rights law. Several states do have certain specific provisions to address the harm caused by "false information" for instance in relation to consumer protection/false advertising, perjury or financial fraud, but more problematic is the use of criminal laws to punish the spread of loosely defined "false information" on issues of public interest.[85]

51. In addition, the provision fails to precisely and narrowly define what serious harm it seeks to prevent, and does not specifically require the establishment of a concrete and strong nexus between the act committed and the harm caused.[86] As noted above (para. 31), criminalization should be used *ultima ratio*, to target behaviours that may cause significant damage to society or individuals. In its *2018 Communication on Tackling Online Disinformation: a European Approach*, the European Commission refers to "public harm", comprising threats to democratic political and policy-making processes as well as public goods such as the protection of EU citizens' health, the environment or national security.[87] In any case, **the nature of the serious harm that the provision seeks to protect should be clarified and narrowly defined to avoid broad application of the new criminal offence. The proposed provision fails to mention specific intention (malicious or bad faith) to cause harm and should also be supplemented in this respect.**

52. Draft Article 99 C[Γ] refers to three purposes that may be sought by the defendant, i.e., causing annoyance, harassment and/or unnecessary alarm to another person. The purpose of causing annoyance is very vague, overly broad and, again, depends on the standard of proof that is selected for a particular criminal offence. While acknowledging that perfect precision is generally not attainable and that some vague and unclear definitions could be clarified through practical application and jurisprudence, the proposed provision appears to rely too heavily on administrative discretion, without offering sufficient guidance for their implementation.

53. Furthermore, the broad reference to "annoyance" caused to a person as a result of the communication of false information, does not necessarily require some psychological or physical harm, and hence seems **to fall short of the level of seriousness justifying the criminalization of a certain behaviour.** It is noted that Draft Article 99 F[ΣΤ] is broader because it does not limit the transmission to electronic means, thereby arguably restricting freedom of expression even further (see Sub-Section 4.3. below for additional comments on Draft Article 99 F[ΣΤ]). At a minimum, the provision should be circumscribed by requiring that the intentional communication of factually wrong information either results in serious harm or presents a clear and concrete risk of causing serious harm. Assessing the likelihood to cause serious harm, should involve a case-by-case evaluation based on grounds such as the "socio-political context", "position or status of the defendant", "intent", "content" and "means and extent of dissemination".

54. Finally, it is noted that contrary to Article 99 F[ΣΤ], the provision does not contain any defence, especially when the defendant had acted reasonably and in good faith, or when the communications were intended as part of education, scientific research, artistic or journalistic work, thereby excluding the imposition of criminal sanctions for a range of expressions falling under the public interest exception, when made in good faith.

85 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report on Disinformation and freedom of opinion and expression, A/HRC/47/25, 13 April 2021, para. 52.

86 See Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report on Disinformation and freedom of opinion and expression, A/HRC/47/25, 13 April 2021, paras. 54-55.

87 See Communication on Tackling online disinformation: a European Approach, European Commission, COM/2018/236 final, Sub-Section 2.1.

Additionally, public authorities must respect the right of journalists to disseminate information on questions of general interest, *including through recourse to a degree of exaggeration or provocation*, provided that they act in accordance with the principles of responsible journalism.[88]

55. In light of the foregoing, **it is recommended to reconsider the criminalization of the communication of "false messages" as envisaged in Draft Article 99 C[Γ] entirely, or at minimum, more strictly circumscribe its constitutive elements (*actus reus* and *mens rea*). In particular, a clearer and more precise definition of the *actus reus* should be provided, by referring instead of "false content" to factually wrong content or information. The *mens rea* should also be circumscribed, by referring to the act of knowingly communicating factually wrong content or information with the intention (malicious or bad faith) to cause serious harm, and presenting a clear and concrete risk to cause or having resulted in serious harm. If kept, this provision should also require the establishment of a concrete and strong nexus between the act committed and the harm caused. The nature of the serious harm that the provision seeks to protect should also be narrowly defined, as well as appropriate defences be introduced.**

4.2. Communication Through Public Electronic Communications Network of Content that is Grossly Offensive and/or Indecent and/or Obscene and/or Threatening in Nature (Draft Article 99 D[Δ])

56. Draft Article 99 D[Δ] provides for the criminalization of the communication *through a public electronic communications network*, of content that is grossly offensive and/or indecent and/or obscene and/or threatening in nature. The *actus reus* or reprehensible behaviour consists of the sending of a communication that is offensive, indecent, obscene or threatening through the Internet or via telephone. The criminal provision does not specify the *mens rea* or mental element. It appears that the defendant must intentionally send the image; however, it seems that the offensive, indecent, obscene or threatening nature of the communication will not be judged based on the defendant's awareness of these characteristics.

57. First, as noted with respect to Draft Article 99 C[Γ], it is unclear whether it targets only individual – i.e., person to person – communications, or also communications to a broader audience or to the public. Moreover, as underlined above, the right to freedom of expression also protects the expression of information that "*offend, shock or disturb*" the State or any part of the population, and even "*deeply offensive*" speech.[89] Hence, "grossly offensive" expression would *a priori* be protected by Article 10 of the ECHR, unless it reaches the threshold of constituting propaganda for war or incitement to discrimination, hostility or violence prohibited or other types of expression which states must prohibit or render punishable (by law) according to international instruments.[90] It may however be restricted in accordance with the strict test mentioned above. In this respect, the wording "grossly offensive" is in itself overbroad and vague, as well as

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88 See Venice Commission Opinion on Legislation of Defamation on Italy, para. 81.

89 See UN Human Rights Committee, General Comment no. 34 on Article 19: Freedoms of Opinion and Expression, 12 September 2011, paras. 11 and 38; and ECtHR, *Handyside v. United Kingdom,* no. 5493/72, 7 December 1976), para. 49; and *Bodrožić v. Serbia,* no. 32550/05, 23 June 2009, paras. 46 and 56. See also International Mandate-Holders on Freedom of Expression, Joint declaration on freedom of expression and "fake news", disinformation and propaganda (2017), seventh paragraph of the Preamble; and UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 2015 Thematic Report, A/HRC/31/65, 22 February 2016, para. 38.

90 See footnote 37.

inherently subjective, unless there is a clear and consistent interpretation of the term in the domestic jurisprudence.

58. The ECtHR's case law on artistic expression also notes that art may often have political connotations and may be designed to provoke or even disturb.[91] Thus the mere inclusion of material that is sexually explicit or graphic does not automatically take the form of expression beyond the protection of Article 10 of the ECHR,[92] and therefore cannot be blanketly restricted. While artistic expression is a defence for Article 99 G[Z], it is not with respect to Article 99 D[Δ].

59. Regarding the reference to "indecent" or "obscene" information, without further qualifications, it is unclear what is encompassed by such a wording, all the more since the understanding of what may be indecent or obscene may be subjective and also evolves over time in a given society and country context. In *Perrin v. The United Kingdom,* the ECtHR found inadmissible an application lodged challenging a conviction for publishing *seriously obscene* documents, when the material was published on a free preview page of the website that was accessible to anybody.[93] The punishment (thirty months' imprisonment with the possibility to claim release on licence after fifteen months) was deemed proportionate in this case noting that a fine would not have constituted sufficient punishment or deterrent.

60. Regarding the communication of information "threatening in nature", it is noted that Article 91 A of the Criminal Code already criminalizes the act of "*caus(ing) terror or alarm to another by threatening him/her with violence or other unlawful act or omission*", which is subject to imprisonment not exceeding three years. International human rights standards provide that expressions constituting a real threat, or genuinely perceived as such by the recipient, are not protected under the right to freedom of expression. In addition, the EU Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence requires the criminalization of some serious forms of threats constituting "cyber harassment" but such threats would need to involve the repeated or continuous engagement by means of information and communication technologies (ICT) in threatening conduct, which is "*likely to cause serious psychological harm to that person*" or "*engaging, together with other persons, by means of ICT, in publicly accessible threatening or insulting conduct directed at a person, where such conduct is likely to cause serious psychological harm to that person*".[94]

61. Communications that could be considered indecent, obscene or threatening by some, may be considered to be compliant with international human rights standards. It is therefore important that the law providing the basis for such criminalization is clear as to what falls within its ambit and what does not. General and vague prohibition would violate the requirement of legality that the ECtHR has established in its case law.

62. As it is, Draft Article 99 D[Δ] may potentially criminalize a wide range of expressions and/or communications. The criminalization of some of such forms of expression may be appropriate and legitimate – for instance to target the most severe forms of abuse such as child sexual abuse materials, cyber harassment including "cyberflashing",[95] non-consensual pornography, and many others. At the same time, given its vague and broad wording, the proposed criminal provision may be interpreted as potentially also covering

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91 See *Vereinigung Bildender Kunstler v. Austria,* ECtHR, no. 68354/01, 25 January 2007; *Mariya Alekhina and Others v. Russia*, ECtHR 38004/12, 17 July 2018.

92 See *Muller v. Switzerland*, ECtHR, no. 10737/84, 24 May 1988; and *Wingrove v. UK*, ECtHR, no. 17419/90, 25 November 1996.

93 See *Perrin v. UK*, ECtHR, no. 5446/03, 18 October 2005.

94 See Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, Article 7.

95 i.e., the unsolicited sending of an image, video or other similar material depicting genitals to a person.

consensual sexualised messaging among adults, or satirical and artistic images, which are protected by the right to freedom of expression and cannot be blanketly restricted. The need for establishing criminal offences and the severity of criminal punishment should generally depend on the form and type of communications, the nature of harm such offences seek to prevent, as well as the context and conditions of their application.

63. It must be underlined that a number of international instruments require the criminalization of the dissemination or communication of certain forms of sexually exploitative content. Articles 2 (c) and 3 (1) (c) of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography"* require the criminalization of "*child sexual exploitation material*". Article 20 of the Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) requires the criminalization of intentional conduct, amounting to *"(a) producing child pornography; (b) offering or making available child pornography; (c) distributing or transmitting child pornography; (d) procuring child pornography for oneself or for another person; (e) possessing child pornography; and (f) knowingly obtaining access, through information and communication technologies, to child pornography."*[96] Arguably, the scope of Draft Article 99 D[Δ] is too limited and not specific enough to implement the treaty obligations as it is only triggered when obscene images are distributed, so production, making available or possession of child pornography would not fall within its definition. In this respect, it is also worth referring to the recommendations made to Cyprus with respect to the implementation of the Lanzarote Convention, including with respect to child self-generated sexual images and/or videos.[97]

64. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)[98] also requires the States Parties to protect victims of sexual harassment, which can include harassment online. In this respect, it requires States Parties to "*take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction*".[99] This and other forms of harassment and intimidation could be captured by the proposed legislation. At the same time, it is noted that sexual harassment is already criminalized by Law 114(I)/2021108 and is punished with up to two years imprisonment or a fine of up to €5,000. In any case, the criminal offence, as it is, should be more clearly defined and strictly circumscribe the material and mental elements of the criminal offence.

65. It is also noted that the recently adopted EU Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence,[100] to be transposed by 14 June 2027, also requires the criminalization of the communication of certain content online, including "*making accessible to the public, by means of [ICT], images, videos or similar material depicting sexually explicit activities or the intimate parts of a person, without that person's*

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96 Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), CETS No. 201, Article 20. The Lanzarote Convention was ratified by the Republic of Cyprus on 12 February 2015.

97 See Lanzarote Committee's Implementation Report on: "The protection of children against sexual exploitation and sexual abuse facilitated by information and communication technologies (ICTs): addressing the challenges raised by child self-generated sexual images and/or videos (CSGSIV)" – Factsheet Cyprus, 2 August 2023, calling upon Cyprus, among other, not to prosecute a child for sharing his/her sexual images and/or videos with another child when such sharing is voluntary, consensual and intended solely for their own private use.

98 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). The Republic of Cyprus ratified the Istanbul Convention on 10 November 2017 and it entered into force on 1 March 2018.

99 Istanbul Convention, Article 40.

100 See Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence.

consent, where such conduct is likely to cause serious harm to that person", "*producing, manipulating or altering and subsequently making accessible to the public, by means of ICT, images, videos or similar material making it appear as though a person is engaged in sexually explicit activities, without that person's consent, where such conduct is likely to cause serious harm to that person*" and "*threatening to engage in the [above-mentioned] conduct […] in order to coerce a person to do, acquiesce to or refrain from a certain act*." At the same time, contrary to Draft Article 99 D[Δ], the Directive specifies the mental element of the offence (perpetrator's intent) and underlines the lack of consent of the victim of the criminal offence, which tends to ensure a narrower and more strictly circumscribed definition of the offence and reduce the risk of arbitrary interpretation by the public authorities.

66. On the other hand, many other forms of expression could also fall within the scope of Draft Article 99 D[Δ]. For instance, provocative artistic expression would fall within its scope although such expression is protected under Article 10 of the ECHR. Arguably, if the provision is not limited to person to person communications, if such art is shared on the Internet, the author of such an artistic expression could be prosecuted under the proposed amendment. Draft Article 99 D[Δ] may also *a priori* cover satirical statements, whereas those are mentioned as a defence under Draft Article 99 G[Z], although not under Draft Article 99 F[ΣΤ]. More generally, contrary to Draft Articles 99 F[ΣΤ] and 99 G[Z], Draft Article 99 D[Δ] does not contain any exclusion or defence clauses, for instance with respect to journalistic, artistic, research, educational, human rights or humanitarian work or other legitimate grounds, which is problematic.

67. In addition, unless provided elsewhere in the Criminal Code, Draft Article 99 D[Δ] does not take into account the consent of the addressee to receive indecent communications, and of the person appearing on such communications, which is an important aspect in considering the degree of harm.[101] Hence, it seems that consensual sharing of personal sexualised images between two consenting adults would potentially and unnecessarily fall within the scope of this provision.

68. It is recommended that the legislator takes into consideration the issue of consent, especially if Article 99 D[Δ] would only deal with person to person private communications, but also in relation to the publication of the materials prohibited by Article 99 G[Z].

69. In light of the foregoing, **Draft Article 99 D[Δ], given its broad scope and vague wording, should be reconsidered or, at minimum, much more strictly circumscribed, with more precise definition of the material and mental elements of the criminal offence, while clarifying whether it intends to only target person to person communications and considering the addition of exclusion or defence clauses, such as in case of consent of the addressee.**

101 For instance, in Ireland, the Harmful Communications and Related Offences Act 2020 provides for two somewhat similar but much narrower offences: (1) the first offence deals with the distribution or publication, or threat to distribute or publish intimate images without consent, and with the intent to cause harm to the victim. It carries a maximum penalty of an unlimited fine and/or seven years' imprisonment; and (2) the second offence deals with the taking, distribution or publication of intimate images without consent even if there is no specific intent to cause harm to the victim. It carries a maximum penalty of €5,000 fine and/or 12 months' imprisonment; see <https://www.hotline.ie/what-to-report/iia/faq>.

4.3. Publication or Posting of False Content with the Intent of Damaging or Adversely Affecting the Reputation of Another Person or Exposing Him/Her to Contempt or Ridicule (Draft Article 99 F[ΣΤ])

70. Proposed Draft Article 99 F[ΣΤ] (1) provides that "*A person who publishes or posts in any manner or in any form, written text or illustrations or anything else, the contents of which are false, with the intent of damaging or adversely affecting the reputation of another person or exposing another person to contempt or ridicule, or adversely affecting the rights of another person, is guilty of a criminal offence and, upon conviction, shall be liable to a term of imprisonment not exceeding three (3) years, or a fine not exceeding ten thousand euros (€10.000), or both.*" Draft Article 99 F[ΣΤ] (2) provides a defence when the accused may prove that the publication was made in good faith and was based on facts justifying such publication.

71. Although Articles 99C and 99F are drafted differently, their *actus reus* seems to be quite similar. Essentially, the defendant must disseminate false information in some form. Article 99C is narrower, as it limits dissemination to messaging through public electronic communications network or via telephone, while Article 99F imposes no such limitation on the method of dissemination. Therefore, writing something false on a publicly accessible wall will not fall under Article 99 C[Γ] but would likely be covered by Article 99 F[ΣΤ].

72. The key difference between Draft Articles 99 C[Γ] and 99 F[ΣΤ] is the *mens rea* element, i.e., the purpose of dissemination of the information, namely the "*intent to injure or adversely affect the reputation of another person or to expose another person to contempt or ridicule, or adversely affect the rights of another person*".

73. Contrary to Draft Article 99 C[Γ] which refers to the person's knowledge that the content is false, it is not clear from the wording of Draft Article 99 F[ΣΤ] (1) whether the person must know that the material published was false. It is likely, given the defence provided of "good faith *and* based on facts" that the legislator intends that the person need not know that the information was false as the defence of "good faith" is linked to a factual basis. In essence, it is unclear whether the criminal defence of "honest mistake" falls under the proposed wording for the defence mentioned under Draft Article 99 F[ΣΤ] (2).

74. The reference to vague and inherently subjective notions such as "contempt" or "ridicule" is not clear enough to determine which kind of statements/acts may be covered. It must be reiterated that jokes, humorous or satirical statements are forms of expression protected under Article 10 of the ECHR, even though such expressions inherently encompass exaggeration and distortion of reality as they naturally aim to provoke and agitate.[102] In addition, it must be emphasized that someone who is active in the public domain must have a higher tolerance of criticism and the limits of acceptable criticism are wider with regard to politicians acting in their public capacity.[103] As also noted by the UN Human Rights Committee, the mere fact that the expression is considered to be insulting to a public figure is not sufficient to justify restriction or penalties.[104] The broad reference to the intent of "*adversely affecting the rights of another person*" is similarly broad and vague.

102 See e.g., *Eon v. France*, ECtHR, no. 26118/10, 14 March 2013, para. 60; and *Nikowitz and Verlagsgruppe News GmbH v. Austria*, ECtHR, no. 5266/03, 22 February 2007, para. 26.

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

104 See the UN Human Rights Committee General comment No. 34 to Article 19 of the ICCPR, CCPR/C/GC/34, para. 38.

75. Importantly**, Article 99 F[ΣΤ] in effect amounts to criminalizing defamatory statements published or posted in any manner.** Criminalization of defamation can have a chilling effect and unduly impact upon the exercise of the right to freedom of expression and, in particular, freedom of the press and the vital watchdog role it performs in a democracy.[105] This is particularly the case when criminal defamation proceedings are brought by state officials and other powerful actors.

76. It should be emphasized that several international human rights bodies call for the abolition of criminal defamation laws. In this respect, the UN Human Rights Committee notes that *"[d]efamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. […] All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. […] States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.*"[106] A number of resolutions and recommendations from the UN, including the UN General Assembly Resolution 76/173 on the Safety of Journalists and the Issue of Impunity, adopted in 2021, urge governments not to misuse defamation laws to censor and interfere with journalists' work and, *"where necessary, to revise and repeal such laws, in compliance with States' obligations under international human rights law."*[107]

77. The ECtHR has repeatedly noted that owing to the margin of appreciation, "*a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued*".[108] The Court has however underlined that "*the assessment of the proportionality of an interference with the rights protected thereby will in many cases depend on whether the authorities could have resorted to means other than a criminal penalty, such as civil and disciplinary remedies.*"[109] The ECtHR also underlined that "*an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life [and t]his requirement covers social reputation in general as well as professional reputation in particular*".[110]

78. The Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1577(2007) in favour of the decriminalization of defamation.[111] At the EU level, regarding defamation laws specifically, the European Commission *Recommendation 2022/758* calls upon Member States to "*specifically review their legal frameworks applicable to defamation to ensure that existing concepts and definitions cannot be used by plaintiffs against journalists or human rights defenders in the context of manifestly*

105 *Goodwin v. UK [GC],* ECtHR, no. 28957/95, 11 July 2002, para. 123; *Haldimann and Others v. Switzerland*, ECtHR, no. 21830/09, 24 February 2015 para 67; *De Carolis and France Télévisions v. France*, ECTHR, no. 29313/10, 21 February 2016 para. 63.

106 UN Human Rights Committee (CCPR), *General Comment no. 34 on Article 19: Freedoms of Opinion and Expression*, 12 September 2011, para. 47.

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

108 See *Radio France and Others v. France*, ECtHR, no. 53984/00, para. 40; and *Lindon, Otchakovsky-Laurens and July v. France* [GC], ECtHR, nos. 21279/02 and 36448/02, 22 October 2007, para. 59.

109 See *Raichinov v. Bulgaria*, ECtHR, no. 47579/99, 20 April 2006, para. 50.

110 See *Denisov v. Ukraine*, ECtHR, no. 76639/11, 25 September 2018, para. 112.

111 See Parliamentary Assembly of the Council of Europe (PACE), Resolution 1577 (2007) Towards decriminalisation of defamation, para. 13.

unfounded or abusive court proceedings against public participation" and encourage Members States "*to favour the use of administrative or civil law to deal with defamation cases*".[112] In the OSCE Ministerial Council Decision 3/2018 on the Safety of Journalists, the OSCE Ministerial Council called upon the OSCE participating States to *"[e]nsure that defamation laws do not carry excessive sanctions or penalties that could undermine the safety of journalists and/or effectively censor journalists and interfere with their mission of informing the public and, where necessary, to revise and repeal such laws, in compliance with participating States' obligations under international human rights law*."[113] The 2023 Joint Declaration on Media Freedom and Democracy of the International Mandate-Holders on Freedom of Expression specifically provides that "*[c]riminal defamation and laws criminalising the criticism of State institutions and officials should be repealed*".[114]

79. It has been generally demonstrated that the criminalization of defamation tends to lead to media self-censorship and causing progressive shrinkage of democratic debate and of the circulation of public interest information.[115]

80. Draft Article 99 F[ΣT] elicits three different, but connected levels of concern regarding the criminal nature of the sanctions.

81. First, **the mere existence of criminal sanctions for defamation can have a chilling effect, including when negligible in pecuniary terms or even not applied at all, due to the fact that they are normally registered in a person's criminal record**.[116]

82. Second, the contemplated penalties i.e., up to *three (3) years of imprisonment and/or a fine not exceeding ten thousand euros (€10,000),* raise concerns. Firstly, several international and regional human rights bodies have called upon states to abolish prison sentences for defamation,[117] considering them to be disproportionate. Significantly, the UN Human Rights Committee has asserted that *"the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty*".[118] The ECtHR has specifically emphasized that a prison sentence "*by its very nature, will inevitably have a chilling effect, and the fact that the applicants did not serve their prison sentence does not alter that conclusion*",[119] thereby implying that a penalty of imprisonment would be disproportionate in defamation cases. In *Fatullayev v Azerbaijan*, the ECtHR described the prison sentence of two years and six months imposed in a case of defamation as "grossly disproportionate" and instructed that the applicant be immediately released.[120] It is difficult therefore to see how the proposed maximum length of sentence of maximum three years proposed in the Draft Amendments would be compatible with Article 10 of the ECHR. It is likely be considered as constituting a disproportionate interference, even if not applied in practice. Hence,

112 See European Commission Recommendation 2022/758, 22 April 2022.

113 See OSCE Ministerial Council Decision No. 3 on the Safety of Journalists, 12 December 2018, para. 11.

114 See, in particular, UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur and the African Commission Special Rapporteur on Freedom of Expression and Access to Information (hereinafter "International Mandate-Holders on Freedom of Expression"), 2023 Joint Declaration Joint Declaration on Media Freedom and Democracy, which specifically provides that "*[c]riminal defamation and laws criminalising the criticism of State institutions and officials should be repealed*"; see also 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, para. 2(b)(ii); 2010 Joint Declaration on Ten Key Challenges facing Freedom of Expression in the Next Decade; Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, 15 December 2008. See also Human Rights Councils' Disinformation and freedom of opinion and expression, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, para. 89, which states: *"[c]riminal law should be used only in very exceptional and most egregious circumstances of incitement to violence, hatred or discrimination. Criminal libel laws [...] should be repealed*."

115 Resolution 1577 (2007) Towards decriminalisation of defamation, PACE, para. 8.

116 See *Reznik v. Russia*, ECtHR, no. 4977/05, 4 April 2013, para. 50;, *Mariapori v. Finland*, ECtHR, no. 37751/07, 6 July 2010, para. 69;, *Scharsach and News Verlagsgesellschaft mbH v. Austria*, ECtHR, no. 39394/98, 13 November 2003, para. 32; *De Carolis and France Télévisions v. France*, ECtHR, no. 29313/10, 21 February 2016 para. 63.

117 Resolution 1577 (2007) Towards decriminalisation of defamation, PACE, para. 13.

118 See UN Human Rights Committee General comment No. 34 to Article 19 of the ICCPR, CCPR/C/GC/34, para. 38.

119 *Cumpana and Mazare v. Romania*, ECtHR, no. 33348/96, 17 December 2004, para. 116.

120 *Fatullayev v. Azerbaijan,* ECtHR, no. 40984/07, 4October 2010, para. 129..

imprisonment sentences for defamation should be reconsidered entirely. Secondly, the proposed fine of up to €10,000, corresponding to approximately four times the average monthly earnings of employees in Cyprus,[121] could appear severe and excessive in certain cases.[122] .

83. Third, criminal sanctions, especially when a defamatory statement is made in the context of a public debate, are likely to be found incompatible with the Convention unless "exceptional circumstances" occur. The ECtHR ruled that such circumstances would normally occur when other fundamental rights are at stake, as in the case of hate speech or incitement to violence defined in accordance with international human rights standards.[123] Therefore, it is understood that the protection of the right to private life enshrined in Article 8 of the ECHR alone could not justify imposing detention penalties for cases of defamation or insult. Generally, civil defamation and damages serve better the interests of an affected person as they aim at restoring the plaintiff to the position that they would have been should the defamation had not occurred, whereas criminal fines are normally intended to serve the interests of a state, which are generally minimal in defamation cases that target an individual's reputation.

84. In this respect, it is noted that defamation was de-criminalized in 2003 when the Law 84(I)/2003 repealed sections 194 to 202 of the Criminal Code of the Republic of Cyprus. This means that two sets of legal norms will overlap (Law 84(I)/2003 and the proposed Article 99 F[ΣΤ] of the Criminal Code), which may trigger legal uncertainty and confusion.

85. In light of the foregoing, **it is recommended to reconsider entirely the re-criminalization of defamation contemplated in Article 99 F[ΣΤ] of the Criminal Code. The legal drafters should instead consider enhancing the existing civil defamation legislation, providing for alternative remedies and civil damages to be paid to the affected persons, while ensuring that the said civil defamation provisions are also carefully crafted to minimize potential arbitrary application or abuse by the public authorities and fully comply with international human rights standards. Civil defamation laws normally have less of a chilling effect on freedom of expression than criminal laws, provided that the law is formulated with sufficient clarity, in a way that minimises potential abuse by the authorities and includes some form of protection or safeguards against abusive lawsuits, especially against journalists and other media workers.**[124]

86. Apart from that, civil defamation should not be applicable for the dissemination of statements made by others, unless they constitute incitement to hatred, discrimination or violence defined in accordance with international human rights standards, or any direct threats to physical integrity.[125] In addition, the provision should clearly distinguish value judgments, which are not susceptible of proof, from factual statements the existence of

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121 See <Labour Cost and Earnings (cystat.gov.cy)>.

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

123 See *Ruokanen and Others v. Finland*, ECtHR, no. 45130/06, 6 April 2010, para. 50; ECtHR, *Cumpana and Mazare v. Romania*, ECtHR, no. 33348/96, 17 December 2004 para 115*;* *Balaskas v. Greece*, ECtHR no 73087/17, 5 November 2020, para 61; *Fatullayev v. Azerbaijan*, ECtHR, no 40984/07, 22 April 2010, paras. 129 and 177.

124 See e.g., OSCE RFoM, Special Report on Legal Harassment and Abuse of the Judicial System against the Media (2021), especially recommendation 11.

125 See *Jersild v. Denmark*, ECtHR, no. 15890/89, 23 September 1994, para. 35, where the Court stated that *"[t]he punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."* See also *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, ECtHR, no. 22947/13, 2 February 2016, para. 64.

which can be demonstrated.[126] A requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself.[127] In this respect, the ECtHR has emphasized that, where the national legislation or courts make no distinction between value judgments and statements of fact, which amounts to requiring proof of the truth of a value judgment, this is an indiscriminate approach to the assessment of speech and is *per se* incompatible with freedom of opinion.[128]

87. **Defamation provisions should also include appropriate defences, including truth defence.**[129] In addition, statements or allegations which are made in the public interest, even if they prove to be inaccurate, should not be punishable provided that they were made without knowledge of their inaccuracy, without intention to cause harm, and the relevant underlying facts or information were checked with proper diligence.[130] Especially, the ECtHR has emphasized that journalists should not bear responsibility for statements made by others and disseminated through interviews.[131]

4.4. Publication or Posting of Grossly Offensive and/or Indecent and/or Obscene and/or Threatening in Nature Content, With the Intent of Damaging or Adversely Affecting the Reputation of Another Person or Exposing to Contempt or Ridicule, or Adversely Affecting the Rights of Another Person (Draft Article 99 G[Z])

88. Draft Article 99 G[Z] criminalizes the publication or posting in any form of information that is grossly offensive and/or indecent and/or obscene and/or threatening in nature with the intent of damaging or adversely affecting the reputation of another person or exposing another person to contempt or ridicule, or adversely affecting the rights of another person. This criminal offence is similar in terms of *actus reus* to Draft Article 99 D[Δ], although the scope of Draft Article 99 D[Δ] is limited to dissemination *through public electronic communications network* while Draft Article 99 G[Z] does not contain such limitations.

89. The same comments as those made with respect to the *actus reus* of Draft Article 99 D[Δ] are similarly applicable with respect to Draft Article 99 G[Z]. Without providing further description or definition of the meaning suggesting the seriousness of the material act, the criminal offence would appear excessively broad and subjective and could be applied and interpreted in an arbitrary manner. It is noted that Draft Article 99 G[Z] (2) provides a defence in case of artistic or satirical expression, which is welcome. At the same time, without further qualification, insulting statement could potentially be subjectively perceived as falling within the scope of the offence. The ECtHR has acknowledged that derogatory and insulting expressions can cause "*emotional disturbance*" and affect a person's "*psychological well-being, dignity and moral integrity*" and, therefore, can interfere with the right to respect for private life protected under Article 8 of the ECHR.[132] However, for insults to engage such a right, the Court expects the expression at stake to

126 See e.g., *Lingens v. Austria*, ECtHR, no. 9815/82, 8 July 1986), para. 46; and *McVicar v. the United Kingdom*, ECtHR, no. 46311/99, 7 May 2002, para. 83.

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

128 See e.g. *Gorelishvili v. Georgia*, ECtHR, no. 12979/04, 5 June 2007, para. 38; and *Fedchenko v. Russia*, ECtHR, no. 33333/04, 11 February 2010, para. 37.

129 *Morice v. France* [GC], ECtHR, no. 29369/10, 23 April 2015, para. 155.

130 Resolution 1577 (2007) Towards decriminalisation of defamation, PACE, para. 7. See also: *Kasabaova v Bulgaria*, ECtHR, no. 22385/03, 19 April 2011, paras. 59-62; *Radio France and others v France*, ECtHR, no. 53984/00, 30 March 2004, para. 24.

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

132 See *F.O. v. Croatia*, ECtHR, no. 29555/13, 22 April 2021, para. 60.

meet a certain threshold of severity.[133] To assess the severity of an expression and which type of liability should be incurred, the ECtHR has taken into account the following factors: the content of the expression; the political and social context at the time of the expression; the intent of the speaker; the speaker's role and status in society; how the expression is disseminated or amplified; the capacity of the expression to lead to harmful consequences, including the imminence of such consequences; the nature and size of the audience, and the characteristics of the targeted group.[134]

90. In regard to the language used, the ECtHR has recalled on multiple occasions that media operators should be allowed to use "*a certain degree of exaggeration, provocation or harshness*".[135] While deciding on a case concerning a journalist sued for insulting and defaming local public officials, the ECtHR ruled that, in deciding on such cases, a balance must be struck between the competing rights to freedom of expression of the media on the one hand, and the right to honor and reputation on the other. Therefore, in light of the fundamental role of the press in holding public officials accountable, media operators and especially investigative journalists should be, as long as they act in good faith and provide a sufficient factual basis for their assertions, adequately protected by the law and should not be unduly deterred from reporting on matters of general public interest by the fear of sanctions.[136] By contrast, the ECtHR found that a gratuitous personal attack with pointlessly harmful comments which did not contribute to any debate of legitimate public interest and did not have any informational value whatsoever for society would not deserve protection under Article 10 of the ECHR.[137] As noted in paras. 20 and 72 above, someone who is active in the public domain must have a higher tolerance of criticism and the mere fact that the expression is considered to be insulting to a public figure is not sufficient to justify restriction or penalties.[138]

91. The key difference with Draft Article 99 D[Δ] rests in the *mens rea*. Under Draft Article 99 G[Z], the said information must be disseminated with a specific purpose i.e., "*the intention of damaging or adversely affecting the reputation of another person, exposing another person to contempt or ridicule, or adversely affecting the rights of another person*". This purpose is defined very broadly, meaning that the circulation of any grossly offensive, or indecent or obscene or threatening information about a real, identifiable person could fall under this article.

92. Another important difference between Draft Article 99 D[Δ] and Draft Article 99 G[Z] is that the latter provides defence of reasonable justification, whereby the court should take into account, *inter alia*, whether the publication in question was made in the context of discussion or criticism of a matter of public interest or whether the publication was made in the context of satire or artistic expression. It is welcome that such a defence is provided since the humorous and satirical genre, as protected by Article 10 of the ECHR, allows for a wider degree of exaggeration and even provocation, as long as the public is

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

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

135 See *Kulis v. Poland*, ECtHR, no. 15601/02, 18 March 2008, para. 47.

136 See *Cumpănă and Mazăre v. Romania [GC]*, ECtHR, no. 33348/96, 17 December 2004, paras. 102-103 and 113; see also *Tănăsoaica v. Romania*, ECtHR, no. 3490/03, 19 June 2012.

137 See, *Katamadze v. Georgia*, ECtHR no. 69857/01, 14 February 2006.

138 See International Mandate-Holders on Freedom of Expression, 2023 Joint Declaration on Media Freedom and Democracy, which specifically provides that: "Politicians and public officials should demonstrate high levels of tolerance towards critical j*ournalistic reporting bearing in mind that critical scrutiny of those in positions of power is a legitimate function of the media in democracy."* See also e.g., ECtHR, *Karman v. Russia*, no. 29372/02, 14 December 2006, para. 36; and ECtHR, *Jerusalem v. Austria*, no. 26958/95, 27 February 2001; *Lingens v Austria*, ECtHR, no. 9815/82, 8 July 1986 para 42. See also the UN Human Rights Committee General comment No. 34 to Article 19 of the ICCPR, CCPR/C/GC/34, para. 38.

not misled about facts.[139] Similarly, when artistic expression is involved, the ECtHR also noted that art may often have political connotations and may be designed to provoke or even disturb.[140] Thus, the mere inclusion of material that is sexually explicit or graphic does not automatically take the form of expression beyond the protection of Article 10 of the ECHR. Nevertheless, such expression may be restricted in accordance with the strict test provided by international law, although noting that the state has a wider margin of appreciation in this sphere than with respect to political expression or matters of public interest.[141]

93. At the same time, the defence appears rather narrowly framed, as it fails to refer to other legitimate forms of expression using such content, for instance for educational, academic or journalistic work. Owing to the importance of academic freedom and journalist work in the jurisprudence of the ECHR, the defences should make express reference to this.[142] Moreover, public authorities must respect the right of journalists to disseminate information on questions of public interest, *including through recourse to a degree of exaggeration or provocation*, which may involve some forms of satire that could be considered grossly offensive, provided that they act in accordance with the principles of responsible journalism.[143]

94. Finally, as underlined above, while there may be legitimate grounds to impose certain restrictions on the right to freedom of expression, criminal sanctions *per se* are likely to be considered disproportionate to the aim pursued. Application of criminal law may also have a chilling effect on the exercise of freedom of expression as individuals tend to self-censor themselves for fear of criminal prosecution or disproportionate sanctions,[144] especially when the underlying legislation is vaguely and broadly worded as is the case here.

95. In light of the foregoing, **Draft Article 99 G[Z], given its broad scope and vague wording should either be reconsidered entirely or, at minimum, much more strictly circumscribed, with more precise definition of the material and mental elements of the criminal offence, while considering removing the possibility to impose a prison sentence and considering broadening the scope of possible defences**.

4.5. Gender Considerations

96. It is critical to recognize that the use of defamation lawsuits or threat thereof, or other criminal offences targeting some forms of expression, may discourage or prevent women who are the victims of harassment, hate and violence from publicly sharing their experiences of harassment, violence and discrimination. This creates an additional barrier

139 Declaration on freedom of political debate in the media, Council of Europe, Committee of Ministers, 12 February 2004, Principle V on freedom of satire.

140 See *Vereinigung Bildender Kunstler v. Austria,* ECtHR, no. 68354/01, 25 January 2007, paras. 33-38.

141 See *Muller v. Switzerland*, ECtHR, no. 10737/84, 24 May 1988, para. 36; *Wingrove v. UK*, ECtHR, no. 17419/90, 25 November 1996, paras. 58-64, noting the little scope under Article 10 (2) of the ECHR for restrictions on political speech or on debate of questions of public interest but that "*a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion*".

142 See *Sorguç v. Turkey*, ECtHR, no. 17089/03, 23 September 2009, para. 35; *Kula v. Turkey,* ECtHR, no. 20233/06, 19 June 2018, para 38..

143 See Venice Commission Opinion on Legislation of Defamation on Italy, para. 81.

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

to accessing justice and creates a chilling effect for future victims.[145] In a Report on online violence against women and girls, the UN Special Rapporteur on Violence against Women noted that "*Women who speak out about their abuse online are frequently and increasingly threatened with legal proceedings, such as for defamation, which aims to prevent them from reporting their situation*."[146] The Report cautioned that the use of defamation lawsuits "*may form part of a pattern of domestic violence and abuse*."[147] Similarly, a recent UN report on the promotion and protection of the right to freedom of opinion and expression notes that the perverse use of defamation lawsuits against the #MeToo campaign is "*weaponizing the justice system to silence women […] while also undermining free speech*."[148]

97. International Mandate-Holders on Freedom of Expression, including the OSCE Representative on Freedom of the Media, in their 2022 Joint Declaration specifically noted: "*When women speak out about sexual and gender-based violence, States should ensure that such speech enjoys special protection, as the restriction of such speech can hinder the eradication of violence against women*" and recommended that *"States should decriminalise all defamation and insult actions, and enact comprehensive legislation to discourage vexatious or frivolous defamation cases and strategic lawsuits against public participation (SLAPPs) that are intended to intimidate and silence women and drive them out of public participation*".[149] In this respect, it must be noted that the recent Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (SLAPPs) is to be transposed by May 2026.[150]

98. Therefore, it is an additional argument to abolish criminal defamation legislation and this calls for even more caution when crafting defamation legislation to discourage vexatious or frivolous defamation claims.

5. Extra-Territorial Criminal Jurisdiction of Courts for the New Criminal Offences

99. Draft Article 99 I[Θ] provides that the courts of the Republic shall have jurisdiction to try these new criminal offences when committed in a foreign country by any person and directed against a citizen of the Republic of Cyprus or a foreign national who, at the time of the commission of the offence, was or had been permanently residing in Cyprus. This means that any individual in the world could allegedly be prosecuted for the new offences contemplated in the Draft Amendments committed against a citizen or permanent resident in Cyprus, even if they may not even have had knowledge of the nationality or permanent resident status of the alleged victim. In essence, this provision could enable individuals exposed to scrutiny to request Cyprus citizenship and/or residency with a view to potentially sue journalists or individuals based in a foreign country for defamation.

100. Under customary international law, there are several generally accepted bases on which a state may assert criminal jurisdiction, including, primarily, territoriality (where conduct

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

146 See Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, 18 June–6 July 2018, para. 31

147 Ibid.

148 See UN Report on Promotion and protection of the right to freedom of opinion and expression, A/76/258, 30 July 2021.

149 International Mandate-Holders on Freedom of Expression, Joint Declaration on Freedom of Expression and Gender Justice (May 2022), para. 3(d).

150 Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings.

either takes place within a nation's borders (subjective territoriality) or the effects of the conduct are felt within the nation's borders (objective territoriality)), nationality (where a state's citizen or corporation is either a victim (passive nationality) or a perpetrator (active nationality)), protective basis (for the punishment of offences against a state's sovereignty or its security) and universality (in the defense of enumerated "internationally protected legal interests" e.g. genocide, war crimes and crimes against humanity).[151]

101. Draft Article 99 I[Θ] reflects the passive nationality principle to assert criminal jurisdiction for acts committed abroad by non-nationals against citizens of Cyprus or permanent residents in Cyprus. It is noted that this principle is extremely controversial and was not included in the Draft Convention on Jurisdiction with respect to Crime.[152] As a matter of practice, the nationality of the victim is generally not recognized as a ground of jurisdiction by most countries.[153] At the same time, examples of state practice indicate that this principle may be slowly, increasingly accepted although primarily where the conduct constitutes a serious crime such as terrorism, hijacking and hostage taking.

102. The proposed Draft Article 99 I[Θ] may theoretically be linked to the protective basis of criminal jurisdiction, which allows states to prohibit and prosecute certain crimes committed wholly outside their territories by persons who are not their nationals, but such a basis would generally apply to grave offences against the security, integrity, sovereignty or government functions of that state.

103. According to customary international law, the territoriality basis generally serves as the basic ground for asserting jurisdiction. Exceptionally, however, national laws may be given extraterritorial application on the basis of the above principles. Several international human rights instruments require state parties to establish extraterritorial jurisdiction over certain serious offences. For example, the Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse requires state parties to criminalize, and establish extraterritorial jurisdiction for, among others, producing, transmitting, distributing and obtaining access to child pornography. [154] Similarly, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence require state parties to criminalize and establish extraterritorial jurisdiction for acts of sexual violence or harassment, female genital mutilation or forced marriage.[155]

104. At the same time, the use of the passive personality basis or protective basis with respect to relatively "mild" offences would be hardly justifiable and may raise issues, including possible retaliation/reciprocal actions of other states. If states seek to expand the sorts of crimes for which extra-territorial criminal jurisdiction may be provided, this runs the risk of creating a vaguely defined set of extremely broad powers to criminalize acts committed abroad by non-nationals and may also increase legal uncertainty for individuals.

105. More generally, such an approach would be considered to run against good practice of jurisdictional self-restraint and can easily either prove ineffective (as the means to effectively exercise jurisdiction may be lacking in practice to prosecute the said offences) or push individuals, journalists, domestic and international media outlets to comply with

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151 See Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters, Council of Europe, 15 May 1972, para. 11.

152 See Draft Convention on Jurisdiction with Respect to Crime (AJIL).

153 European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 073), Council of Europe, ratified by the Republic of Cyprus on 19 December 2001 and which entered into force on 20 March 2002; see Explanatory Report to the Convention, para. 11.

154 Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse, arts. 20 and 25.

155 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, arts. 36, 37, 38, 40 and 44.

the most restrictive set of national rules (the so-called race to the bottom effect), to the detriment of the freedom to impart and receive information. In the OSCE Charter for European Security (Istanbul, 1999), OSCE participating States reaffirmed "*the importance of (...) the free flow of information as well as the public's access to information [and] commit ourselves to take all necessary steps to ensure the basic conditions for (...) unimpeded transborder and intra-State flow of information*".[156] The CoE recommends that, in principle, states should *"only exercise jurisdiction over foreign materials that are not illegal under international law in limited circumstances, notably when there is a clear and close nexus between the materials or the disseminator and the state taking action."*[157]

106. Furthermore, the OSCE Charter for European Security (Istanbul, 1999), OSCE participating States committed "*to take all necessary steps to ensure the basic conditions for (...) unimpeded transborder and intra-State flow of information*".[158] The risk of criminalization of legitimate forms of expression communicated from abroad may create a system of censorship and endanger the very essence of the freedom to impart information.[159]

IN LIGHT OF THE FOREGOING, IT IS THUS RECOMMENDED TO RECONSIDER DRAFT ARTICLE 99 I[Θ] OF THE CRIMINAL CODE, OR, AT MINIMUM TO REVISE IT IN A WAY THAT IT ENCOMPASSES ONLY FORMS OF SPEECH FOR WHICH INTERNATIONAL HUMAN RIGHTS INSTRUMENTS REQUIRE CRIMINALIZATION AND EXTRATERRITORIAL JURISDICTION.

6. LEGISLATIVE PROCESS

107. OSCE participating States have committed to ensure that legislation will be "*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*" (1990 Copenhagen Document, para. 5.8).[160] Moreover, key commitments specify that *"[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (1991 Moscow Document, para. 18.1).[161] The ODIHR Guidelines on Democratic Lawmaking for Better Laws (2024) underline that "*all interested parties and stakeholders should have the opportunity to access the lawmaking process, be informed about it and be able meaningfully to participate and contribute*".[162] The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input and may be a useful source of good practice.[163]

108. As such, public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted. Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation.[164] To guarantee effective participation, consultation mechanisms should

156 See OSCE, Istanbul Document 1999 (Charter for European Security: III. Our Common Response), para. 26.
157 See the rule of law on the Internet and in the wider digital world', Issue paper published by the Council of Europe Commissioner for Human Rights, 2014, page 11.
158 See OSCE, Istanbul Document 1999 (Charter for European Security: III. Our Common Response), para. 26.
159 See e.g., UNESCO, Freedom of expression and public order: training manual (2015), p. 21, which states that the right to freedom of expression includes "*the right to import newspapers from other countries or to use the Internet to access content from around the world [...] limited restrictions may be imposed on the right, but these must meet the standards of international law*".
160 See 1990 OSCE Copenhagen Document.
161 See 1991 OSCE Moscow Document.
162 See Guidelines on Democratic Lawmaking for Better Laws, OSCE/ODIHR, 16 January 2024, Principle 7.
163 See Rule of Law Checklist, Venice Commission, CDL-AD(2016)007, Part II.A.5.
164 According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking

allow for input at an early stage *and throughout the process*,[165] meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). In the written information communicated to ODIHR, it is indicated that the Committee on Legal Affairs, Justice and Public Order held several meetings to discuss the Draft Amendments and that some consultations took place since 2021, in which some associations representing journalists and the media participated. Most recently, on 1 August 2024, a meeting took place at the Ministry of Justice and Public Order with the Legal Service of the Republic, the Cyprus Bar Association, the Union of Cypriot Journalists, the Publishers' Association, the Committee of Media Ethics and the Institute for Mass Media to discuss the Draft Amendments. Given the concerns raised in terms of respect for the right to freedom of expression, it was decided to establish a group of legal experts and the Parliamentary Committee was asked to postpone the discussions of the Bill for a reasonable time. This is welcome providing that this offers an opportunity for more in-depth discussions on the compliance of the draft amendments with international human rights standards with all relevant stakeholders, including representatives of various media and journalist associations, as well as civil society and public at large.

109. Based on information made available to ODIHR, the main justification for the introduction of these new criminal offences is the protection of citizens against the communication or publication of allegedly harmful content. It is not clear whether a proper in-depth regulatory impact assessment, including an evaluation of the potential impact of the criminal offences on the exercise of human rights and fundamental freedoms, has been carried out.

110. In light of the above, **the public authorities are encouraged to ensure that the Draft Amendments are subjected to transparent, inclusive drafting process, which involves effective and inclusive consultations, including with the academia, civil society and media organizations and journalist associations, offering equal opportunities for women and men to participate. Such consultations should take place in a timely manner, at all stages of the law-making process, including before the Parliament**. **An in-depth regulatory impact assessment should be carried out, including an evaluation of the compliance with international human rights standards.**

[END OF TEXT]

into account, inter alia, the nature, complexity and size of the proposed draft act and supporting data/information. See e.g., ODIHR, Opinion on the Draft Law of Ukraine "On Public Consultations" (1 September 2016), paras. 40-41.

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

ANNEX:

BILL ENTITLED
"ACT AMENDING THE CRIMINAL CODE ACT"

The House of Representatives shall vote as follows:

1. This Act shall be referred to as the Criminal Code (Amendment) Act, 2024 and shall be read together with the Criminal Code Act (hereinafter referred to as "the Basic Act").

2. The Basic Act is amended by inserting, immediately after Article 99B thereof, the following new Articles 99 C[Γ], 99 D[Δ], 99 E, 99 F[ΣΤ], 99 G[Z], 99 H and 99 I[Θ]:

99 C[Γ]. A person who, through a public electronic communications network, with the intent of causing annoyance and/or harassment and/or unnecessary alarm to another person, either makes a telephone communication or sends a message, the content of which the person knows to be false, or persistently uses a public electronic communications network for the above purpose, is guilty of a criminal offence and, upon conviction, shall be liable to a term of imprisonment not exceeding two (2) years, or a fine not exceeding five thousand euros (€5000), or both.

99 D[Δ]. A person who, through a public electronic communications network, makes a telephone communication or sends a message, the content of which is grossly offensive and/or indecent and/or obscene and/or threatening in nature, is guilty of a criminal offence and, in the event of conviction, is liable to a term of imprisonment not exceeding two (2) years, or to a fine not exceeding five thousand euros (€5000), or to both penalties.

99E. For the purposes of Articles 99C and 99D, the term "public electronic communications network" has the meaning given to that term in the Electronic Communications Regulation Act of 2022.

99 F[ΣΤ].(1) A person who publishes or posts in any manner or in any form, written text or illustrations or anything else, the contents of which are false, with the intent of damaging or adversely affecting the reputation of another person or exposing another person to contempt or ridicule, or adversely affecting the rights of another person, is guilty of a criminal offence and, upon conviction, shall be liable to a term of imprisonment not exceeding three (3) years, or a fine not exceeding ten thousand euros (€10.000), or both.
(2) It is a defence for the accused to prove that the publication was made in good faith and was based on facts justifying such publication.

99 G[Z].(1) A person who publishes or posts in any manner or in any form, written text or illustrations or anything else, the content of which is grossly offensive and/or indecent and/or obscene and/or threatening in nature, with the intent of damaging or adversely affecting the reputation of another person or exposing another person to contempt or ridicule, or adversely affecting the rights of another person, is guilty of a criminal offence and, upon conviction, shall be liable to a term of imprisonment not exceeding three (3) years, or a fine not exceeding ten thousand euros (€10.000), or both.
(2) It is a defence of the accused that the publication was made with reasonable excuse:

It is understood that the court in deciding whether there was a reasonable justification for the publication shall take into account, inter alia, whether the publication in question was made in the context of discussion or criticism of a matter of public interest or whether the publication was made in the context of satire or artistic expression.

99 H. Criminal prosecution for an offence under Articles 99F and 99G shall be brought only by the Attorney General of the Republic or with his/her approval.

99 I[Θ]. Notwithstanding the provisions of Articles 5 and 6 of this Act, the courts of the Republic shall have jurisdiction to try the offences provided for in Articles 99C, 99D, 99F and 99G, when committed in a foreign country by any person and directed against a citizen of the Republic or a foreign national who, at the time of the commission of the offence, was or had been permanently resident in the Republic."