CASE NO. 13.015

INTER-AMERICAN COURT OF HUMAN RIGHTS

AMICUS CURIAE BRIEF

Presented on behalf of:

THE HIGH-LEVEL PANEL OF LEGAL EXPERTS ON MEDIA FREEDOM

In the case of

EMILIO PALACIO URRUTIA AND OTHERS

v.

THE REPUBLIC OF ECUADOR

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3 June 2021

TABLE OF CONTENTS

I. INTRODUCTION

1. The High-Level Panel of Legal Experts on Media Freedom ('**the Panel**') is an independent advisory body convened at the request of the governments of the United Kingdom and Canada, on behalf of the Media Freedom Coalition of 47 States. The Panel exists to provide advice and recommendations[1] to the Coalition and its partners, including international organisations, to protect and promote a free media and to reverse abuses or violations of media freedom.

2. The Panel is chaired by the Rt. Hon. Lord Neuberger of Abbotsbury, the President of the UK Supreme Court from 2012 to 2017 and a serving Non-Permanent Judge of the Hong Kong Court of Final Appeal. The Panel's Deputy Chair is barrister, Ms. Amal Clooney. The Panel members include a former Vice Chair of the UN Human Rights Committee, a former U.S. Independent Expert to the Venice Commission, a former Attorney General of Canada, a former UN Special Representative on Human Rights Defenders, and a former Vice President of the European Court of Human Rights.[2] Professor Dario Milo and barrister Can Yeginsu are members of the Panel and represent the body before this Court.

3. The present case gives rise to issues which fall squarely within the Panel's remit and expertise. It concerns the lawfulness of statutory provisions in Ecuador criminalising defamation, and the application of those provisions to individuals that have received custodial sentences and substantial fines for undertaking journalistic activity in the public interest – specifically, for reporting on alleged malfeasance by Rafael Correa, the former President of Ecuador. Mr. Correa has since been convicted of bribery in the Caso Sobornos 2012-2016.

4. The Panel is of the view that the present case holds considerable significance as an opportunity for this Court to address, once again, a fundamental question of principle: whether or not criminal defamation can properly co-exist with the protections for a free press under the American Convention system. The Panel presents this written brief as an *amicus curiae*, pursuant to Article 28 and 44 of the Rules of Procedure of this Court.

5. In this written brief, the Panel puts before this Court a body of international and comparative standards and jurisprudence that recognises the serious threat that the criminalisation of defamation poses to the right to freedom of expression and, specifically, to media freedom.

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[1] For instance, the Panel has published Advisory Reports directed to the Media Freedom Coalition of States: (i) *On the Use of Targeted Sanctions to Protect Journalists*, authored by Amal Clooney; (ii) *On Strengthening Consular Support to Journalists at Risk*, authored by Irwin Cotler; (iii) *On Providing Safe Refuge to Journalists at Risk*, authored by Can Yeginsu; and (iv) *On Promoting More Effective Investigations into Abuses against Journalists*, authored by Nadim Houry.

[2] The Panel's other members are: Ms. Catherine Anite of Uganda, Ms. Galina Arapova of Russia, Justice Manuel José Cepeda Espinosa of Colombia, Professor Sarah Cleveland of the United States, the Honourable Irwin Cotler, PC, OC, OQ, of Canada, Mr. Nadim Houry of Lebanon, Ms. Hina Jilani of Pakistan, Baroness Kennedy of The Shaws, Q.C. of the UK, Ms. Karuna Nundy of India, Professor Kyung-Sin Park of South Korea, and Baroness Françoise Tulkens of Belgium.

When it comes to journalistic activity, in particular, it is submitted that there can be no principled basis on which criminal sanctions can be held as a proportionate or justifiable response to media activity under the Convention. Nor should journalists, or anyone else for that matter, face the prospect of a custodial sentence for defamation. The Panel, therefore, invites this Court to use the opportunity of the present case to hold *as a matter of principle*:

5.1. That a custodial sentence can never be a lawful sanction for defamation.

5.2. That any criminal sanction for defamation constitutes an inappropriate interference with journalistic activity and will not meet the tests of necessity and proportionality required by the Convention.

6. The issues arising in the present case are far from academic. As this Court has itself recognised, criminal defamation laws represent the most severe of interferences with the right to freedom of expression and, in particular, the right to a free press. The very existence of such laws chills political speech and undermines the press's vital role of "public watchdog" in a democracy. Today, criminal defamation laws are a powerful tool in the hands of authoritarian leaders to stifle dissent, to muzzle an independent media, and to undermine the democratic order.

7. In the light of the jurisprudence cited in this brief, including the principled judgment of this Court in *Alvarez v. Venezuela*, and the increasing recognition that criminal defamation laws are incompatible with international standards on freedom of expression, the Panel urges this Court to recognise in express terms the two propositions advanced in this written brief, thereby bringing the Court's jurisprudence on Article 13 of the Convention in line with the consensus that has emerged among international human rights courts and mechanisms around the world.

II. BACKGROUND[3]

8. *El Universo* is one of the most well-established and widely circulated newspapers in Ecuador. On 6 February 2011, one of the newspaper's journalists, Mr. Emilio Palacio Urrutia, published an opinion column entitled *'No a las mentiras'*, claiming that then-President Correa had ordered troops to fire at will and *'without warning'* at a *'hospital full of civilians and innocent people'* during the 2010 uprisings in Ecuador.

9. On 21 March 2011, President Correa lodged a complaint for the criminal offence of '*serious slanderous insult to authority'* against Mr. Urrutia, *El Universo* and three directors of the

[3] This background summary is relevant to the Article 13 arguments before this Court and has been drawn from the findings of fact in the Commission's Merits Report No. 29/19, OEA/Ser.L/V/II. Doc. 34, dated 19 March 2019: *see*, in particular: Section III, §§12-56. For the request for precautionary measures, see PM 406/11 - Emilio Palacio, Carlos Nicolás Pérez Lapentti, Carlos Pérez Barriga and César Pérez Barriga, Ecuador.

newspaper: Carlos Eduardo Pérez Barriga, César Enrique Pérez Barriga and Carlos Nicolás Pérez Lapentti (the three are brothers). The President sought the maximum custodial term of 3 years and total damages of not less than US $50 million as against the four individuals; he also sought damages of not less than US $30 million against the newspaper itself. The statutory basis for the criminal complaint of '*serious slanderous insults to authority*' was as follows:

9.1. Article 489 of the Criminal Code which provided as follows: '*insult is: slanderous, when it consists in the false imputation of a crime; and, not slanderous, when it consists in any other expression uttered in discredit, dishonor, or disparagement of another person, or in any action executed for the same purpose.*'

9.2. Article 490 of the Criminal Code which stated that '*non-slanderous insults are serious or minor: serious are: […] imputations that rationally deserve the classification of serious, given the state, dignity, and circumstances of the victim and the offender […].*'

9.3. Article 491 of the Criminal Code which provided that '*slanderous insult shall be punished with imprisonment from six months to two years and a fine of six to twenty-five dollars from the United States of North America, when the accusations have been made: […] by means of writings, printed or not, images or emblems fixed, distributed, or sold, offered for sale, or exposed to the eyes of the public […].*'

9.4. Finally, Article 493 of the Criminal Code which stated that '*it shall be punished with one to three years of imprisonment and a fine of six to twenty-five dollars from the United States of America, those that have addressed to the authority accusations that constitute slanderous insult. If the accusations made to the authority constitute non-slanderous but serious insults, the penalties shall be imprisonment from six months to two years and a fine of six to nineteen dollars of the United States of North America.*'

10. On 20 July 2011, the Fifteenth Supervisory Court of Guayas ('**the first instance court**') convicted the defendants, pursuant to Articles 489, 491, and 493 of the Criminal Code. It sentenced Mr. Urrutia and the three directors of *El Universo* to the maximum three years in prison, ordered them to pay damages of US $30 million to President Correa, ordered *El Universo* to pay an additional US $10 million in damages, and ordered all of the defendants to pay the costs of the trial.

11. On 22 September 2011, the first instance court's judgment was upheld on appeal by the Second Criminal Chamber of the Provincial Court of Justice of Guayas. The defendants appealed again to the National Court of Justice which, by judgments of 7 November 2011, 27 December 2011, and 17 February 2012, dismissed all appeals on a final basis – thereby all domestic remedies have been exhausted.

12. Meanwhile, on 24 October 2011, the defendants had filed a petition against Ecuador with the Commission, together with a request for precautionary measures. Following the decision of the National Court of Justice, the Commission granted the request for precautionary measures and requested that Ecuador *'immediately suspend the effects of the judgment … to ensure the right to freedom of expression'* of the defendants.

13. Initially, the Ecuadorian government stated that it would not comply with the Commission's request. But on 27 February 2012, President Correa announced that he would pardon the defendants, while stating that *'[t]here is forgiveness, but I do not forget'*. In March 2012, the Commission lifted the precautionary measures; it has since held the case to be admissible and on 19 March 2019 issued its report on the merits.

III. ARTICLE 13 OF THE CONVENTION AND THE JURISPRUDENCE OF THIS COURT: CRIMINAL SANCTION FOR DEFAMATION DISPROPORTIONATE, SAVE IN EXCEPTIONAL CIRCUMSTANCES, & NEVER JUSTIFIED IN REPORTING ON PUBLIC OFFICIALS

14. Article 13 of the Convention provides in relevant part as follows:

> *'1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.*
>
> *2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:*
>
> *a. respect for the rights or reputations of others; or*
>
> *b. the protection of national security, public order, or public health or morals.'*

15. This Court has, on several occasions, held that the imposition of criminal sanctions by member states against journalists for defamation violates Article 13, often relying on the following four core principles drawn from its jurisprudence.

16. First, this Court has regularly referred to the close relationship between democracy and freedom of expression, when establishing that:[4]

> *'Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a conditio*

[4] Advisory Opinion OC-5/85 of November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) Requested by the Government of Costa Rica, para. 70; see also *Herrera-Ulloa v. Costa Rica*, Judgment (IACtHR, 2 July 2004), Series C No. 107, para. 112.

> *sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.'*

17. The right to freedom of expression protects not only *'the expression of statements which are well seen by the public opinion and those which are deemed to be harmless'*, but also *'the expression of statements which shock, irritate or disturb public officials or any sector of society'*.[5] Any restriction on the right must therefore be '*necessary*', as required under Article 13(2), i.e. '*required by a compelling government interest*'. Where there are several ways of achieving this compelling interest, the least restrictive means must be selected, and such means must be proportionate and closely tailored to the government's objective.[6]

18. Secondly, in recognising the importance of freedom of expression, this Court has emphasised the essential role of a free press in realising the promise of this right, holding that *'it is essential that journalists who work in the media should enjoy the necessary protection and independence to exercise their functions to the fullest, because it is they who keep society informed, an indispensable requirement to enable society to enjoy full freedom and for public discourse to become stronger'*.[7]

19. Thirdly, this Court has held that '*it is logical and appropriate that statements concerning public officials'* should be given *'a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system*'.[8] Although the honour and reputation of public officials should be respected, a higher '*threshold of protection*' must apply to such statements, on the basis that *'public officials and other individuals who exercise functions of a public nature'* have '*laid themselves open voluntarily to a more intense public scrutiny*' and criticism than private persons.[9]

20. Fourthly, this Court has recognised that criminal sanctions – including custodial sentences, but also restrictions on movement,[10] fines, a criminal record and the stigmatising effect of a criminal

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[5] *Kimel v. Argentina* (IACtHR, 2 May 2008), Series C No. 177, para. 88.

[6] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, above n 4, para. 46; *Herrera-Ulloa v. Costa Rica* above n 4 para. 121.

[7] *Herrera-Ulloa v. Costa Rica* above n 4 para. 119.

[8] *Herrera-Ulloa v. Costa Rica* above n 4 para. 128. *See also, Granier et al. (Radio Caracas Television) v. Venezuela*, Judgment, (IACtHR, 22 June 2015) Series C No. 293, para. 140.

[9] *Herrera-Ulloa v. Costa Rica* above n 4 paras. 128 – 129.

[10] *Canese v. Paraguay* Judgement (IACtHR, 31 August 2004) Series C No 111, paras. 106 – 107.

record[11] – are '*the most restrictive and severest*' limitations on the right to freedom of expression and can only be justified in the most exceptional circumstances under Article 13(2).[12]

21. Applying these four principles, this Court has found that the imposition of criminal liability by members states for defamation violates, *inter alia*, the proportionality criterion under Article 13, including in the cases of *Herrera-Ulloa v. Costa Rica*,[13] *Canese v. Paraguay*,[14] and *Kimel v. Argentina*.[15] This Court will recall that:

21.1. In *Herrera-Ulloa v. Costa Rica*, Mauricio Herrera-Ulloa, a journalist, had been prosecuted and convicted for reproducing news reports that concerned a public official's conduct abroad. The legislative provisions under which the journalist had been prosecuted carried both criminal and civil penalties. The Costa Rican court had determined that Mr. Herrera Ulloa was unable to invoke the justification defence to defamation as he had failed to prove the veracity of the facts that had been reported. This Court found that Article 13 had been violated on the facts, noting that statements concerning public officials should be accorded a certain latitude in the broad debate on matters of public interest and that *'the effect of the standard of proof required in the judgment is to restrict freedom of expression in a manner incompatible with Article 13 of the American Convention, as it has a deterrent, chilling and inhibiting effect on all those who practice journalism. This, in turn, obstructs public debate on issues of interest to society.'*[16]

21.2. In *Canese v. Paraguay*, this Court similarly found a violation of Article 13 regarding the criminal conviction of Ricardo Canese, a presidential candidate who had made public statements questioning the suitability of his rival, citing his involvement in corrupt business activities. This Court reiterated the need for a greater tolerance of statements made on matters of public interest and statements made during public debate.[17] The criminal conviction, the restrictions placed on Mr. Canese's movement, and the criminal trial itself were found to be '*an unnecessary and excessive punishment for the statements that the alleged victim made in the context of the electoral campaign concerning another candidate to the presidency of the Republic on matters of public interest. They also limited the open debate on topics of public interest or concern and restricted Mr. Canese's*

[11] *Kimel v. Argentina* above n 5 para. 85.

[12] *Canese v. Paraguay* above n 10 para. 104. *See also, Kimel v. Argentina* above n 5 para. 76.

[13] Above n 4 paras. 130 – 132.

[14] Above n 10 para. 106.

[15] Above n 5 para. 94. See also, *Tristán Donoso v. Panamá* (Judgment, 27 January 2009) and *Usón Ramírez v. Venezuela* (Judgment of 20 November 2009) where criminal sanction was held to be a violation of Article 13.

[16] *Herrera-Ulloa v. Costa Rica* above n 4 para. 133.

[17] *Canese v. Paraguay* above n 10 para. 97.

exercise of freedom of thought and expression to emit his opinions for the remainder of the electoral campaign.'[18]

21.3. In *Kimel v. Argentina*, although recognising for the first time that criminal proceedings may, in exceptional circumstances, be a suitable means of protecting a person's honour and reputation, this Court found that Argentina had violated Article 13 where a journalist had been convicted for criminal libel (following a complaint brought by a judge) for statements in a book that had found fault with criminal investigations into a notorious murder of five Catholic priests. In its discussion of the proportionality criterion in that case, this Court stated:[19]

> '*The Court has held that Criminal Law is the most restrictive and harshest means to establish liability for an illegal conduct. The broad definition of the crime of defamation might be contrary to the principle of minimum, necessary, appropriate, and last resort or ultima ratio intervention of criminal law. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State.*'

It placed conditions on the use of criminal sanctions in defamation cases, stating that such sanctions should be '*carefully analysed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception*'.[20]

22. By its most recent judgment in the area of criminal defamation and Article 13, in the case of *Álvarez Ramos v. Venezuela*,[21] this Court has now adopted a clear rule: it is disproportionate, for the purposes of Article 13, to use the criminal law to punish those who criticise a public official's performance of his or her duties.

23. The petitioner in that case, Professor Ramos, was a lawyer and university professor who had been prosecuted and convicted for the defamatory contents of a column in a newspaper. The column had alleged that, on the watch of the head of the National Assembly, the national savings bank had been looted to cover other National Assembly expenses, to the detriment of public sector employees. Professor Ramos was sentenced to two years and three months of imprisonment.

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[18] *Id* para. 106.

[19] *Kimel v. Argentina* above n 5 para. 76.

[20] *Id*, para. 78.

[21] *Alvarez Ramos v. Venezuela* (IACtHR, 30 August 2019), Series C No. 380.

24. This Court, in finding a violation of Article 13 in that case, considered once again the importance of a free press in a democratic society, and in particular, the protections required for an independent press to be able fully to perform its essential functions. Where it came to reporting on matters of public interest, this Court was clear:[22]

> *'in the case of speech protected by the public interest, such as those relating to the conduct of public officials in the exercise of their functions, the punitive response of the state through criminal law is not conventionally appropriate to protect the honour of the official'.*

25. This is because *'the use of criminal law for broadcasting news of this nature would produce, directly or indirectly, an intimidation which, in the final analysis, would limit freedom of expression and prevent the submission to public scrutiny of conduct that infringes the legal order…'.*[23]

26. This, in turn, provided the Court the basis to hold that *'in cases…where there are complaints of public conduct by officials whose control is in the public interest, the exercise of an activity expressly protected by the American Convention…cannot be considered to fall within the scope of the criminal law conduct.'*[24] In other words, *'under the terms of the Convention, the publication of an article of public interest concerning a public official cannot be considered a criminal offense or a crime against honour'.*[25]

27. This Court's decision in *Álvarez Ramos* to hold that it can never be a legitimate use of the criminal law to punish those who criticise a public official's performance of duties brings this Court's jurisprudence in line with the settled position in international human rights law. It also constitutes a clear repudiation of the Court's prior judgment in *Mémoli v. Argentina.*[26]

IV. JURISPRUDENCE OF INTERNATIONAL COURTS AND UN BODIES ON DEFAMATION: CUSTODIAL SENTENCE NEVER A PROPORTIONATE MEASURE, CRIMINAL SANCTION NOT AN APPROPRIATE RESTRICTION TO JOURNALISTIC ACTIVITY

28. In *Álvarez Ramos* this Court stopped short of holding, *as a matter of principle*, that: (i) a custodial sentence can never be a lawful sanction for defamation; or (ii) any criminal sanction for

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[22] *Id* paras. 121, 126-127 (translated judgment).

[23] *Id* para. 122 (translated judgment).

[24] *Id* para. 123 (translated judgment).

[25] *Id*, para. 129 (translated judgment), emphasis added.

[26] *Mémoli v. Argentina*, Judgment (IACtHR, 22 August 2013), Series C No. 265. The judgment marked the first occasion on which this Court held as lawful the application of criminal penalties to public interest speech, based on a narrow definition of public interest speech. It has been described as a "regression" in the jurisprudence of this Court (caused by the pressure exerted by the Respondent government and Venezuela on the inter-American system) by Catalina Botero-Marino, Special Rapporteur for Freedom of Expression for the Commission from 2008 to 2014: *see*, 'The Role of the Inter-American Human Rights System in the Emergence and Development of Global Norms on Freedom of Expression', in *Regardless of Frontiers* (2021, Columbia University Press) pp.193-194. *See also*, IACtHR, *Fontevecchia and D'Amico v. Argentina* (Serie C no. 238), 29 November 2011, para. 59.

defamation is an impermissible restriction of journalistic activity, for the purposes of Article 13. The present case affords an opportunity for this Court to take this step, one that would, in the Panel's submission, give effect to a clear consensus that has emerged among the international and other regional human rights mechanisms.

(a) Article 19 ICCPR and the UN Human Rights Committee

29. The UN Human Rights Committee is clear, both in its General Comment 34 and its decisions on individual communications, that criminalisation of defamation is generally not an appropriate restriction, and a custodial sentence is never an appropriate restriction, on the right to freedom of expression as protected by Article 19 of the ICCPR. This is because restrictions on freedom of expression must be '*the least intrusive instrument amongst those which might achieve their protection function*'.[27]

30. In General Comment 34, the Committee encouraged parties to the ICCPR to *'consider the decriminalization of defamation'*. If not decriminalised, defamation laws must *'be crafted with care to ensure that they comply with paragraph 3 [of article 19], and that they do not serve, in practice, to stifle freedom of expression'*, warning that *'the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is <u>never</u> an appropriate penalty'*.[28]

31. In the light of this General Comment, the Human Rights Committee held in the case of *Adonis v. the Philippines* that the sanction of imprisonment for defamation was incompatible with Article 19(3) of the ICCPR.[29] Similarly in *Ribeiro v. Mexico*, after referring to the General Comment, the Committee held that '*[i]f defamation should never result in a penalty of deprivation of liberty being imposed on the grounds that it is not an appropriate penalty, then a fortiori no detention based on charges of defamation may ever be considered either necessary or proportionate.*'[30]

32. The application of criminal defamation laws to the media will not survive an Article 19 review. In *Marques de Morais v. Angola*, the Committee stressed the '*paramount importance*' of a free and uncensored press in a democratic society,[31] holding that there had been a violation of Article 19 of the ICCPR following the arrest, detention, and conviction of a journalist for defamation, noting:[32]

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[27] HRC, General Comment 34, CCPR/C/GC/34, 12 September 2011, para. 34.

[28] *Id* para. 47, emphasis added.

[29] *Adonis v. The Philippines* (HRC, 26 April 2012), CCPR/C/103/D/1815/2008, para. 7.10.

[30] *Ribeiro v. Mexico* (HRC, 17 July 2018), CCPR/C/123/D/2767/2016, para. 10.8.

[31] *Marques de Morais v. Angola* (HRC, 18 April 2005), CCPR/C/83/D/1128/2002, para. 6.8. *See also*, General Comment 25, para. 25. See also *Bodrozic v. Serbia and Montenegro* (HRC, 23 January 2006), CCPR/C/85/D/1180/2003, para. 7.2.

[32] Ibid.

> *'The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media, the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition.'*

33. The Committee has also made clear that, under Article 19, '*all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.*'[33] It has emphasised that '*in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.*'[34]

(b) The European Court of Human Rights

34. The European Court of Human Rights has repeatedly held that criminal sanctions for defamation violate Article 10 of the European Convention on Human Rights. The Strasbourg Court has never upheld a custodial sentence for defamation.

35. The European Court's jurisprudence on criminal defamation under Article 10 is underpinned by the very same four principles that have provided the basis for this Court's reasoning in criminal defamation cases decided under Article 13 of the American Convention. In particular:

36. First, a recognition of the fundamental importance of the right to freedom of expression. The ECtHR has recognised that the right extends to protect a broad array of speech, especially speech that concerns matters of public interest: *'there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest'*.[35] But Article 10 also protects statements that are (to a degree) exaggerated, provocative and immoderate,[36] those that *'offend, shock or disturb'*,[37] and even those not supported by objective evidence.[38] It protects, moreover, the expression of opinions.[39]

37. Secondly, the ECtHR has, much like this Court, emphasised that the press is entitled to strong protections under Article 10, given its key role in facilitating political discourse and in revealing

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[33] HRC, General Comment 34, CCPR/C/GC/34i, para. 38.

[34] *Id.*

[35] *Paraskevopoulos v. Greece* app no 64184/11 (ECtHR, 28 June 2018), para. 43.

[36] *Id* para. 41.

[37] *Oberschlick v. Austria* app no 20834/92 (ECtHR, 1 July 1997), para. 29 and *Lingens v. Austria* app no 9815/82 (ECtHR, 8 July 1986), para. 41.

[38] *Belpietro v. Italy* app no 43612/10 (ECtHR, 24 September 2013).

[39] *Paraskevopoulos v. Greece* above n 35 para. 32.

public and private wrongdoing.[40] As the ECtHR held in *Castells v. Spain*, a case in which the applicant had been criminally charged with insulting the Spanish government:

> *'[T]he pre-eminent role of the press in a State governed by the rule of law must not be forgotten. Although it must not overstep various bounds set, inter alia, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest ….*
>
> *Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.'*[41]

38. Thirdly, in a similar vein again to this Court, the ECtHR has repeatedly held that public officials must be willing to accept a greater degree of criticism than private persons. It held in *Oberschlick v. Austria*, where a journalist had been found guilty of insult:[42]

> *'As to the limits of acceptable criticism, they are wider with regard to a politician acting in his public capacity than in relation to a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.'*

39. And government officials must have thicker skins than even other politicians, as the ECtHR made clear in *Castells v. Spain*:[43]

> *'The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.'*

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[40] *Axel Springer AG v. Germany* [GC] app no. 39954/08 (ECtHR, 7 February 2012), para. 79.

[41] *Castells v. Spain* app no 11798/85 (ECtHR, 23 April 1992), para. 43. *See also, Cumpănă and Mazăre v. Romania* [GC] app no 33348/96 (ECtHR, 17 December 2004), para. 93.

[42] *Oberschlick v. Austria* above n 37, para. 29. *See also, Savenko (Limonov) v. Russia* app no 29088/08 (ECtHR, 26 November 2019), para. 25.

[43] *Castells v. Spain* above n **Error! Bookmark not defined.** para. 46.

40. Fourthly, the ECtHR accepts, almost axiomatically, that any criminal sanction for defamation is the '*most serious form of interference with the right to freedom of expression*'[44] and will be very difficult to justify,[45] especially where civil remedies are available.[46]

41. Applying these principles, the ECtHR has generally found the application of criminal defamation laws to be disproportionate under Article 10(2).[47] In *Paraskevopolous v. Greece*, the ECtHR held that '*while the use of criminal-law sanctions in defamation cases is not in itself disproportionate…the imposition of a prison sentence in defamation cases will be compatible with the freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence'*.[48]

42. The ECtHR also held in *Cumpănă and Mazăre v. Romania*, a case in which two journalists had been found criminally liable for insult and defamation, that '*a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest*' presents '*no justification whatsoever for the imposition of a prison sentence*'.[49] In *Ottan v. France*, the Court held that '*even when the penalty is the lightest possible, that fact cannot suffice in itself to justify the interference with the applicant's freedom of expression'*.[50]

43. Similarly, in *Sallusti v. Italy*, a case involving the conviction of a journalist for criminal defamation, the ECtHR found that there had been a violation of Article 10, as the Italian courts had gone beyond what was a "necessary" restriction on the applicant's freedom of expression. The ECtHR held that '*there was no justification for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect…'*.[51] Importantly, the conclusion that a criminal conviction for defamation had gone '*beyond*' what was a necessary restriction on the right to freedom of expression was not altered by the fact that the prison sentence had been suspended as '*the individual commutation of a prison sentence into a fine is a measure subject to the*

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[44] *Tête v. France* app no 59636/16 (ECtHR, 26 March 2020), para. 68. *See also, Balaskas v. Greece* app. no. 73087/17, (ECtHR, 5 November 2020), para. 61.

[45] As in *Lingens v. Austria* above n 37, *Castells v. Spain* above n 41, *Oberschlick v. Austria* above n 37, *Cumpănă and Mazăre v. Romania* above n 41, *Belpietro v. Italy* above n 38, *Kącki v. Poland* app no 10947/11 (ECtHR, 4 July 2017) and *Paraskevopoulos v. Greece* above n 35.

[46] *Paraskevopoulos v. Greece* above n 35 para. 42. See also *du Roy Malaurie v. France* app no 34000/96 (ECtHR, 3 October 2000), para. 36.

[47] *Lingens v. Austria* above n 37 para. 40.

[48] *Paraskevopoulos v. Greece* above n 35 para. 42. *See also, Cumpănă and Mazăre v. Romania* above n 41 para. 115, *Gavrilovici v. Moldova* app no 25464/05 (ECtHR, 15 December 2009), para. 60. See also *Sallusti v. Italy* app no 22350/13 (ECtHR, 7 March 2019) para. 59.

[49] *Cumpănă and Mazăre v Romania* above n 41 para. 116.

[50] *Ottan v. France* app no 41841/12 (ECtHR, 19 April 2018), para. 73.

[51] *Sallusti v. Italy* above n 48 para. 62.

discretionary power of the President of the Italian Republic. Furthermore, while such an act of clemency dispenses convicted persons from having to serve their sentence, it does not expunge their conviction…'.[52]

44. This approach has been taken in other cases where a sentence is suspended, the person convicted is pardoned, or indeed the person prosecuted is acquitted, because of the chilling effect that the mere threat of conviction creates, particularly for journalists. As the ECtHR held in *Cumpănă and Mazăre v. Romania:*

> *'Investigative journalists are liable to be inhibited from reporting on matters of general public interest – such as suspected irregularities in the award of public contracts to commercial entities – if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession.*
>
> *The chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident …. This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on the present applicants ….'*[53]

45. But even other criminal sanctions, falling short of a custodial sentence, have been considered by the ECtHR as violations of Article 10, including a criminal fine[54] or damages,[55] a criminal record,[56] a prohibition from working as a journalist, or having to give up certain civil rights as a consequence of having a criminal record.[57]

(c) The African Court on Human and Peoples' Rights

46. In *Lohé Issa Konaté v. Burkina Faso*,[58] the African Court on Human and Peoples' Rights held as unlawful the conviction of a journalist for criminal defamation for publishing two articles in which he had reported on a State Prosecutor's alleged links to criminal activity. The journalist had been sentenced to twelve months' imprisonment and ordered to pay a fine, damages and

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[52] *Ibid.*

[53] *Id* paras. 113 – 114.

[54] *Kącki v. Poland* above n 45**Error! Bookmark not defined.**. *See also*, D*ą*browski *v. Poland* app no 18235/02 (ECtHR, 19 December 2006), paras. 36 – 37.

[55] *Belpietro v. Italy* above**Error! Bookmark not defined.** n 38.

[56] *Kącki v. Poland* above n 45**Error! Bookmark not defined.** para. 57.

[57] *Cumpănă and Mazăre v. Romania* above n **Error! Bookmark not defined.** para. 112.

[58] *Lohé Issa Konaté v. Burkina Faso* app no 004/2013 (ACtHPR, 5 December 2014).

costs of around US $12,500. His newspaper was banned from publication for six months.[59] The Court also found unlawful the statutory provisions on which his convictions had been secured.

47. The African Court made reference to several of the principles propounded by this Court and the ECtHR in criminal defamation cases, including:

47.1. That in the interest of free public debate, public officials must bear a greater degree of scrutiny than private persons;[60]

47.2. That criminal defamation can only be used *'as a last resort, when there is a serious threat to the enjoyment of other human rights'*;[61] and

47.3. That the exercise of freedom of expression should not attract custodial sentences, except in very exceptional circumstances involving incitements to crimes or hate speech.[62]

48. Applying these principles, the African Court held that Burkina Faso had violated the right to freedom of expression under Article 9 of the African Charter and Article 19 of the ICCPR, as well as the right to a free press under Article 66(2)(c) of the Revised ECOWAS Treaty on the basis that the State had *'failed to show how a penalty of imprisonment was a necessary limitation to freedom of expression in order to protect the rights and reputations of members of the judiciary'*.[63]

49. Burkina Faso was ordered to amend its domestic law to reflect the position that criminal penalties for defamation are not permissible under the African Charter. In particular, the State was ordered: (i) to repeal custodial sentences for acts of defamation; and (ii) to amend its legislation to ensure that sanctions for defamation meet the test of necessity and proportionality, in accordance with its obligations under the African Charter and other international instruments.[64] A similar order was recently made by the African Commission against Rwanda, ordering legislative amendment after a finding that the State's laws which criminalised insult and defamation (and imposed custodial sentences for both offences) were in violation of Article 9 of the African Charter.[65]

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[59] *Id* paras. 5 – 6.

[60] *Id* para. 155.

[61] *Id* para. 158.

[62] *Id* para. 165.

[63] *Id* para. 163.

[64] *Id* Order for relief, para. 8, p. 49 of judgment.

[65] *Agnes Uwimana-Nkusi & Saidati Mukakibibi v. Rwanda* decision on Comm 426-12 (African Commission, 16 April 2021).

(d) The ECOWAS Court

50. In *Federation of African Journalists v. The Gambia*,[66] four journalists who had been arrested, charged and convicted for sedition, false news and criminal defamation under Gambian law claimed before the ECOWAS Court that, amongst other things, these offences (by their existence and their application to them) infringed their right to freedom of expression under Article 66(2) of the Revised ECOWAS Treaty, as well as Article 9 of the African Charter and Article 19 of the ICCPR.

51. The ECOWAS Court recognised the following principles under international law:

51.1. the right to freedom of expression *'is not only the cornerstone of democracy, but indispensable to a thriving civil society'*;[67]

51.2. the crime of defamation is no longer necessary because of the availability of corresponding civil actions;[68] and

51.3. criminal defamation has a chilling effect on journalism.[69]

52. Applying these principles, the ECOWAS Court held that the criminal sanctions imposed on the applicants were *'disproportionate and not necessary in a democratic society where freedom of speech is a guaranteed right under the international provisions cited'*.[70] It also held that '*the existence of criminal defamation and insult or sedition laws are indeed inacceptable (sic) instances of gross violation of free speech and freedom of expression*'.[71] The Court ordered that the Gambia's legislation on sedition, false news, and criminal defamation be immediately *'reviewed and decriminalised to be in conformity with the international provisions on freedom of expression…'*.[72]

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[66] *Federation of African Journalists v. The Gambia* judgment no. ECW/CCJ/JUD/04/18 (ECOWAS Court, 13 February 2018).

[67] *Id* p. 32.

[68] *Id* pp. 36 – 37. The Court noted that the House of Lords in *Gleaves v. Deakin* [1980] A.C. 477 had recognised that the ancient need for criminal defamation had been superseded by the modern civil action for defamation. In that case, Lord Diplock explained that "*the reason for creating the offence was to provide the victim with the means of securing the punishment of his defamer by peaceful process of the law instead of resorting to personal violence to obtain revenge. But risk of providing breaches of the peace has ceased to be an essential element in the criminal offence of defamatory libel; and the civil action for damages for libel and on injunction provides protection for the reputation of the private citizen without the necessity for any interference by public authority with the alleged defamer's right to freedom of expression.*" The Court also cited the Zimbabwean case of *Madanhire v. Attorney General* CCZ 2/14 (see §66 below) which had held that criminal defamation was "*not reasonably justifiable in a democratic society*".

[69] *Id* p. 47.

[70] *Id.*

[71] *Id*, p. 40.

[72] *Id* p. 48.

(e) The East African Court of Justice

53. In the East African Court of Justice case of *Media Council of Tanzania v. Attorney General of Tanzania*,[73] the applicants (three NGOs) challenged the Tanzanian Media Services Act 120 of 2016 which, among other things, restricted certain types of news content, required the registration of journalists and introduced the offences of sedition, publication of a false statement, and criminal defamation.

54. The East African Court of Justice held that the new offence of criminal defamation violated article 6(d) of the Treaty for the Establishment of the East African Community, which provides that one of the fundamental principles of the Community is *'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'*, and article 7(2), which requires member states to *'abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights'*.

55. The Court held that Tanzania had failed to show the *need* for criminalising defamation – it had failed to demonstrate *'a direct and immediate connection between the specific threat , and the specific action taken'*.[74] Citing the decision of the ECOWAS Court in *Federation of African Journalists v. Gambia*,[75] and the African Court's decision in *Konaté*, the Court held that the law was not the least intrusive method to prevent defamation, and that it was likely to have a *'chilling effect that may unduly restrict the exercise of freedom of expression of journalists'*.[76] Tanzania was ordered to amend the Media Services Act so as to bring the statute into compliance with Treaty for the Establishment of the East African Community.[77]

VI. GROWING INTERNATIONAL CONSENSUS IN FAVOUR OF DE-CRIMINALISING DEFAMATION

56. The issues raised in the present case must also be placed in the context of the growing international consensus around the decriminalisation of defamation. As the decisions from the international human rights courts and mechanisms cited above have shown, imposing a custodial sentence on any individual for defamation will constitute a violation of international human rights law. But even in the very exceptional circumstances where criminal sanction may be lawfully applied – in instances of hate speech that incites violence – it is not appropriate to

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[73] *Media Council of Tanzania v. The Attorney General of the United Republic of Tanzania* reference no. 2/2017 (EACtJ, 28 March 2019).

[74] *Id* para. 89.

[75] *FAJ v. Gambia* above n 65.

[76] *Media Council of Tanzania* above n 72 para. 91.

[77] Id, para. 118.

have criminal defamation laws to address those exceptional circumstances. Specific laws, precisely worded, can be passed to address those specific crimes.

57. For everything else, the experience of countries around the world in which criminal defamation laws no longer exist (or have not been used for decades) establishes clearly that civil sanctions for defamation are sufficient to address the specific harm to an individual's reputation. There is, therefore, now strong international support for the decriminalisation of defamation.

(a) The International Mechanisms

58. The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has declared that defamation laws should never apply *'penal sanctions, in particular imprisonment.'*[78]

59. On 30 November 2000, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression issued a joint declaration in which they recommended that UN member states consider *'the repeal of criminal defamation laws in favour of civil laws …, in accordance with relevant international standards.'*[79]

60. On 10 December 2002, the same bodies stated that *'[c]riminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws'*.[80]

61. The Parliamentary Assembly of the Council of Europe called on member states in 2007 to *'abolish prison sentences for defamation without delay'*, to *'remove from their defamation legislation any increased protection for public figures'*, and encouraged them to decriminalise defamation entirely.[81]

62. Similarly, in 2010 the African Commission on Human and Peoples' Rights resolved that *'criminal defamation laws constitute a serious interference with freedom of expression and impedes on the*

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[78] UN Special rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Sixth Rep. on Protection and Promotion of the Right to Freedom of Opinion and Expression, U.N. Doc. E/CN.4/1999/64 (29 January 1999), para. 28(h).

[79] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression *Joint Declaration: Current Challenges to Media Freedom*, 30 November 2000 at p 22. *See also*, OAS, Inter-American Declaration of Principles on Freedom of Expression, October 2000, Principle 10; OSCE Parliamentary Assembly, Warsaw Declaration, 9 July 1997, §140; OSCE Parliamentary Assembly, Bucharest Declaration, 10 July 2000, §80.

[80] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression *Joint Declaration: Freedom of Opinion and Expression*, 10 December 2002.

[81] Resolution 1577, Towards Decriminalization of Defamation, Eur. Parl. Doc. 1577 (4 October 2007), particularly para. 7.

role of the media as watchdog, preventing journalists and media practitioners to practice their profession without fear and in good faith' and called on state parties to repeal criminal-defamation laws.[82]

63. More recently, the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa, adopted in November 2019,[83] provides that '[states] *shall amend criminal laws on defamation and libel in favour of civil sanctions*' and *'[t]he imposition of custodial sentences for the offences of defamation and libel are a violation of the right to freedom of expression.'*

64. As this Court will be aware, in 2011 the Special Rapporteur of the Organization of American States recommended that OAS member states do the following:

> *'Promote the modification of laws on criminal defamation with the objective of eliminating the use of criminal proceedings to protect honor and reputation when information is disseminated about issues of public interest, about public officials, or about candidates for public office. Protecting the privacy or the honor and reputation of public officials or persons who have voluntarily become involved in issues of public interest, should be guaranteed only through civil law.'*[84]

(b) Comparative Law & Jurisprudence

65. A discernible trend towards the decriminalisation of defamation exists in domestic law. Some democracies have statutorily decriminalised defamation – New Zealand did so in 1993,[85] and Ghana in 2001,[86] with Argentina following suit in late 2009[87] and the United Kingdom in early 2010.[88] On decriminalisation, the UK's then-Justice Minister stated:

> *'Sedition and seditious and defamatory libel are arcane offences – from a bygone era when freedom of expression wasn't seen as the right it is today. Freedom of speech is now seen as the touchstone of democracy, and the ability of individuals to criticise the state is crucial to maintaining freedom.*

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[82] African Commission on Human and Peoples' Rights, Resolution on Repealing Criminal Defamation Laws in Africa, ACHPR/Res. 169 (XLVIII) 2010.

[83] African Commission on Human and Peoples' Rights, Declaration on Principles on Freedom of Expression and Access to Information in Africa (Adopted at the Commission's 65th Ordinary Session held from 21 October to 10 November 2019) principles 22.3 and 22.4.

[84] OAS Special Rapporteur, *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II (4 March 2011) Chapter V, para. 7(b).

[85] Defamation Act 105 1992, s 56(2). A limited proposal to reintroduce criminal defamation (but only in relation to parliamentary candidates one month before an election) was met with widespread opposition and was withdrawn (John Armstrong 'Government dumps criminal defamation in "spirit of Christmas"', *New Zealand Herald* (5 December 2001), available at https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=231538 and accessed on 1 June 2021).

[86] West African Journalists Association, 'Ghana: Criminal libel law repealed', 31 July 2001, available at https://ifex.org/criminal-libel-law-repealed/ and accessed on 1 June 2021.

[87] Law 26551 on November 18, 2009.

[88] Coroners and Justice Act 2009, s 73.

> *The existence of these obsolete offences in this country had been used by other countries as justification for the retention of similar laws which have been actively used to suppress political dissent and restrict press freedom.'*[89]

66. Other countries have decriminalised defamation through their courts. In *Madhanhire v. Attorney-General*,[90] the Constitutional Court of Zimbabwe struck down section 96 of the Zimbabwean Criminal Law Code, which criminalised a serious form of defamation and which imposed a maximum prison sentence of two years or a fine. The Constitutional Court held that it *'certainly cannot be gainsaid that the offence of criminal defamation operates to encumber and restrict … freedom of expression'*,[91] and that the restriction was not justifiable because —

66.1. being investigated, the danger of arrest, the *'rigours and ordeal of a criminal trial'* and the resulting *'sizeable bill of costs'* can only have a *'stifling or chilling effect … on the right to speak and the right to know'*;[92]

66.2. newspapers *'play a vital role in disseminating information in every society'* (including to *'unearth corrupt or fraudulent activities, executive and corporate excesses, and other wrongdoings that impinge upon the rights and interests of ordinary citizens'*) and that it is thus *'inconceivable that a newspaper could perform its investigative and informative functions without defaming one person or another'*;[93]

66.3. the severity of the restriction was exacerbated by the *'excessive and patently disproportionate'* maximum penalty of two years' imprisonment;[94] and

66.4. a robust alternative remedy – a civil defamation claim – was available.[95]

67. Similarly in Kenya, in the case of *Okuta v. Attorney-General*, the High Court held an offence of criminal defamation to be unconstitutional, finding that *'[t]he chilling effect of criminalizing defamation is further exacerbated by the maximum punishment of two years imprisonment imposable… [which is] clearly excessive and patently disproportionate*' for the purpose of protecting personal reputation. In addition, the court noted the availability of a civil remedy.[96]

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[89] 'Criminal libel and sedition offences abolished', *Press Gazette* (13 January 2010).

[90] *Madhanhire v. Attorney-General* judgment no. CCZ 2/14 (Constitutional Court of Zimbabwe, 12 June 2014).

[91] *Id* p. 8.

[92] *Id* p. 10.

[93] *Id* pp. 10 – 11.

[94] *Id* p. 11.

[95] *Id* p. 12.

[96] *Okuta v. Attorney General* [2017] eKLR (Petition No. 397 of 2016) p. 11.

68. The United States of America has moved towards decriminalising defamation through a combination of state-level legislative reform and judicial decisions. Legislatures in at least 22 US states and territories, as well as the District of Columbia, have repealed their criminal-defamation statutes.[97] Courts in other states and territories have struck down criminal-defamation statutes for being unconstitutional.[98] Two judgments of the US Supreme Court have contributed to the state-level move towards decriminalisation.

68.1. The first is the well-known *New York Times Co. v Sullivan*,[99] in which the Supreme Court held that the First Amendment to the US Constitution[100] prohibits an award of damages for defamation of a public official through criticism of his or her official conduct, unless the official can prove that the statement was made with *'actual malice'* – in other words, knowledge of its falsity or reckless disregard for whether it was false.[101] The actual-malice standard was required by the First Amendment because of the US's *'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials'*.[102]

68.2. The second US Supreme Court case is that of *Garrison v. State of Louisiana*,[103] which made clear that the actual-malice standard applies to criminal prosecutions for defamation arising from statements about public figures or matters of public concern.

69. The effect of *New York Times v. Sullivan* and *Garrison*, taken together, is that states cannot criminalise defamation about public figures or matters of public concern unless it is an element of the crime that the statement was made with *'actual malice'* – something that is difficult for a prosecutor to prove beyond a reasonable doubt.

70. Even in countries where criminal defamation laws remain on the statute books, there are moves to limit the scope of the offence. In India, defamation can be an offence under sections 499 and

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[97] MLRC Bulletin (Media Law Resource Center), *Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the US. After Sullivan and Garrison*, March 2003, at 12. The jurisdictions are Alaska, Arizona, Arkansas, California, Connecticut, the District of Columbia, Hawaii, Illinois, Indiana, Iowa, Maine, Missouri, Nebraska, New Jersey, New York, Ohio, Oregon, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas and Wyoming.

[98] *See*, for example, *Parmelee v. O'Neel* 145 Wash. App. 223, 228 (Wash. Ct. App. 2008); *Williamson v. State*, 249 Ga. 851, 295 S.E.2d 305, 306 (Ga. 1982).

[99] *New York Times Co. v. Sullivan* 376 U.S. 254 (1964).

[100] The First Amendment provides as follows (emphasis added): *'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'*

[101] *New York Times v. Sullivan* at 279 - 280.

[102] *Id* at 270.

[103] *Garrison v. State of Louisiana*, 379 U.S. 64 (1964).

500 of the Indian Penal Code. In 2016, the Indian Supreme Court dismissed a constitutional challenge to the two sections,[104] but on 5 May 2020, the Madras High Court[105] —

70.1. extended the *New York Times v. Sullivan* standard of *'actual malice'* to criminal-defamation cases which involve a matter of public concern (it had previously only applied to civil defamation suits in India);[106] and

70.2. held that a court could quash a prosecution for criminal defamation before the trial begins if a summary examination of the state's case does not disclose the elements of criminal defamation (including actual malice, if applicable).[107]

VII. CONCLUSION

71. Freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress. A free press is an indissociable part of this broader freedom and plays a vital role in imparting information and ideas of public interest – it is the public's watchdog and, therefore, critical to the proper functioning of democratic societies.

72. Criminal defamation laws represent the most severe of interferences with the right to freedom of expression and, in particular, the right to a free press. The very existence of such laws chills political speech and undermines the press's vital public watchdog role in a democracy. Today, criminal defamation laws are a powerful tool in the hands of authoritarian leaders to stifle dissent, to muzzle an independent media, and to undermine the democratic order.

73. In the light of the jurisprudence cited in this brief, including the principled judgement of this Court in *Alvarez v. Venezuela*, and the increasing recognition that criminal defamation laws are incompatible with international standards on freedom of expression, the Panel urges this Court to hold that: (i) a custodial sentence can never be a lawful sanction for defamation; and (ii) any criminal sanction for defamation constitutes an inappropriate interference with journalistic activity, and will not meet the tests of necessity and proportionality required by Article 13 of the Convention.

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[104] *Swamy v. Union of India* writ petition (criminal) no. 184/2014 (Supreme Court of India, 13 May 2016).

[105] In *Grievances Redressal Officer, Economic Times Internet Ltd v. VV Minerals Pvt. Ltd* Crl OP(MD) No.9067 of 2016 and Crl MP(MD)Nos. 4493 & 4494 of 2016 (Madras High Court, 5 May 2020).

[106] *Id* paras. 14 – 15.

[107] *Id* paras. 20 – 21.