

IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

TULIO ALBERTO ÁLVAREZ

v.

VENEZUELA

WRITTEN COMMENTS OF MEDIA LEGAL DEFENCE INITIATIVE, PEN
INTERNATIONAL, PEN AMERICA, PEN MEXICO, PEN QUEBEC, MEDIA LAW
RESOURCE CENTER, FUNDACION PARA LA LIBERTAD DE PRENSA (FLIP), HUMAN
RIGHTS WATCH

pursuant to Article 28 and 44 of the Rules of Procedure of the Inter-American Court of
Human Rights

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January 2019

I. INTRODUCTION

1. Media Legal Defence Initiative, PEN International, PEN America, PEN Mexico, PEN Quebec, Media Law Resource Center, Fundación para la Libertad de Prensa (FLIP), and Human Rights Watch (the “amici curiae”) respectfully submit these written comments to assist the Inter-American Court of Human Rights (the “Court”) in its consideration of the case of *Tulio Alberto Álvarez v. Venezuela*.
2. The amici curiae are non-governmental organizations working in the field of freedom of expression. Many of the amici curiae have previously intervened in cases at regional courts, such as the Inter-American Court of Human Rights, the European Court of Human Rights, the African Court on Human and Peoples’ Rights and the ECOWAS Court of Justice and the East African Court of Human Rights, including on cases relating to criminal defamation. An overview of the mandates of the amici curiae is included as Annex 1.
3. These proceedings raise a fundamental question – whether the application of criminal defamation laws violates the right to freedom of expression under international human rights law. Freedom 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.¹ The media perform an important corrective function in society by exposing corruption and other wrongdoing.² They convey essential information to the public and promote debate on issues of public concern, functions which are vital to a healthy democracy.
4. Criminal defamation laws present one of the biggest threats to the media’s ability to express itself freely. Journalists in many states still face criminal charges, especially when reporting on public officials and institutions. The use of these laws has been described as “inimical to democracy because it strangles dissent and debate, punishing legitimate criticism of government officials and institutions. Too often, it serves no other purpose than to provide government and government officials with the power, through intimidation or post-publication sanctions, to discourage journalists, scholars, politicians and ordinary citizens from expressing critical views that might be deemed offensive, insulting or defamatory.”³
5. These laws have been identified as one of the biggest challenges to free speech by the freedom of expression rapporteurs for the United Nations (“UN”), Inter-American Commission on Human Rights (“Inter-American Commission”) and African Commission on Human and Peoples’ Rights

¹ United Nations (“UN”) Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (12 September 2011) (“General Comment No. 34”), par. 3.

² International Mechanisms for Promoting Freedom of Expression, *Joint Declaration by 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* (2002), available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87>.

³ See Organization for Security and Co-operation in Europe (“OSCE”), *Ending the Chilling Effect - Working to Repeal Criminal Libel and Insult Laws* (25 November 2004), available at: <https://www.osce.org/fom/13573?download=true>.

(“African Commission”), as well as the Organization for Security and Cooperation in Europe (“OSCE”).⁴ They often allow for the imposition of lengthy prison sentences and are open to abuse, including by politicians and other public figures.⁵ Having criminal defamation laws on the books in itself has a chilling effect on speech.

6. There is increasing recognition that criminal defamation laws are incompatible with international standards on freedom of expression. In its General Comment No. 34, the UN Human Rights Committee for instance calls on states to consider decriminalising defamation.⁶ Similarly, UNESCO,⁷ the Inter-American Commission,⁸ and the Council of Europe⁹ have also called for reform of criminal defamation laws. The OSCE Representative on Freedom of the Media also regularly urges countries to decriminalise defamation. In addition, a number of states have either decriminalised defamation or taken significant steps towards the decriminalisation of defamation (see Annex 2).¹⁰
7. This amicus brief is intended to assist the Court in its determination of the matters in issue between the parties. This Court has previously noted that criminal convictions in defamation cases are disproportionate and violate the right to freedom of expression.¹¹ However in the case of *Mémoli v Argentina* this Court stated that in principle “it does not find that a punishment in relation to the expression of information or opinions is contrary to the Convention”.¹² The Court continued that “[b]oth the civil and the criminal jurisdiction are legitimate, under certain circumstances, and insofar as they meet the requirements of necessity and proportionality, as a means for the

⁴ The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the Organization of American States (“OAS”) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (“ACHPR”) Special Rapporteur on Freedom of Expression and Access to Information, *Tenth Anniversary Joint Declaration: Ten Key Challenges To Freedom of Expression in the Next Decade* (2010), available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=784&IID=1>.

⁵ International Mechanisms for Promoting Freedom of Expression, *Joint Declaration by 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* (2002), available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87>.

⁶ General Comment No. 34, par. 47.

⁷ UNESCO, *Doha Declaration* (1-3 May 2009), available at: <http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/previous-celebrations/worldpressfreedomday200900/doha-declaration/>.

⁸ See http://www.oas.org/en/iachr/expression/jurisprudence/si_decisions_court.asp.

⁹ The Council of Europe Parliamentary Assembly (“PACE”), *Resolution 1577 (2007) Towards decriminalization of defamation*; and the *Response of the Committee of Ministers*, adopted at the 1029th meeting of the Ministers’ Deputies (11 June 2008).

¹⁰ Annex 2 provides a non-exhaustive list of states that have decriminalised defamation since 2010.

¹¹ See, Inter-American Court of Human Rights (“IACtHR”), *Herrera-Ulloa v. Costa Rica*, (2 July 2004) Series C, No. 107; IACtHR, *Ricardo Canese v. Paraguay* (31 August 2004) Serie C, No. 111; IACtHR, *Tristán Donoso v. Panama*, (27 January 2009) Serie C, No.193.

¹² IACtHR, *Kimel v. Argentina* (2 May 2008), Serie C, No.177, par. 78; IACtHR, *Fontevicchia and D’Amico v. Argentina* (29 November 2011), Serie C, No.238 par. 55; IACtHR, *Memoli v. Argentina* (2013) Serie C, No. 265 par. 126, 133 and 139.

subsequent imposition of liability for the expression of information or opinions that affect honor or reputation.”¹³

8. In the below, the amici curiae will set out international and regional standards and case law which provide guidance on the circumstances under which certain punishments, ranging from criminal sanctions to civil damages awards, are appropriate. As a position of principle, the amici curiae submit that the criminalisation of speech should be limited to instances of hate speech and incitement to violence and that criminal defamation laws should be abolished to prevent abuse of such laws, as for instance demonstrated by the case of Mr Álvarez. This is the amici curiae’s optimum position, set out under II.
9. We recognize that this Court has on occasion found that prison sentences were not contrary to the Convention. The amici curiae will respectfully submit under III that there is a consensus among international and regional human rights mechanisms that prison sentences, even suspended ones, are never an appropriate remedy in cases of defamation.
10. Under IV, this brief will argue that while civil law remedies are an appropriate avenue of relief in cases of defamation, states should be aware of their potential chilling effect on speech.

II. CRIMINAL SANCTIONS FOR SPEECH ARE ONLY PERMISSIBLE IN CASES OF HATE SPEECH OR INCITEMENT TO VIOLENCE

11. The amici curiae respectfully submit that this Court should have particular regard to the context of, and background to, criminal defamation cases that come before it. The case of Mr Alvarez demonstrates the extent to which criminal defamation laws can be used for purposes other than those for which they were ostensibly intended.
12. The case is a paradigm example of how the range of sanctions available under criminal defamation laws, apart from imprisonment, can be used to suppress free expression. Other sanctions that can be imposed through the application of criminal defamation laws include significant fines, suspension of the right to practice journalism, and disqualification from public office. The imposition of such sanctions can have an enormous impact on the lives of those prosecuted on charges of defamation. In addition, the use of criminal laws in the context of defamation opens the door for the state to take other far-reaching measures pending trial, such as imposing a travel ban and freezing assets. The stigmatizing effect and psychological impact of being subjected to a criminal investigation and a criminal trial, the latent risk of a fine, damage to one’s professional reputation, and a potential criminal record which will have implications for future employment also have an impact that should not be underestimated.

¹³ IACtHR, *Memoli v. Argentina* (2013) Serie C, No. 265 par. 126; IACtHR, *Fontevicchia and D’Amico v. Argentina* (29 November 2011), Serie C, No.238 par. 49.

13. It is the position of the amici curiae that for the reasons outlined above the use of the criminal law in defamation cases is arbitrary and excessive. In order to prevent abuse of such laws, for instance by prosecuting a journalist for exposing suspected wrongdoing by a public official, the amici curiae align themselves with numerous international bodies that have called on states to abolish criminal defamation. Further, it is submitted that when seeking to regulate speech states should use the least intrusive measures and the criminal law should only be used as a last resort, in highly exceptional circumstances.

a) Criminal sanctions for speech are an *ultimum remedium* only to be used in exceptional circumstances such as hate speech and incitement to violence

14. International human rights law clearly prescribes that states should use the least intrusive measure when interfering with the right to freedom of expression. The UN Human Rights Committee has for instance commented that restrictions of freedom to expression must not be “overbroad” and must be the “least intrusive instrument amongst those which might achieve their protective function”.¹⁴ It has further commented that restrictions “must be proportionate to the interest to be protected”.

15. This Court has recognised that “penal laws are the most restrictive and severest means of establishing liability for an unlawful conduct”.¹⁵ In the case of *Kimel v. Argentina*, although it left open the possibility of criminal sanctions, the Court emphasised that such sanctions could only be used in the narrowest circumstances possible in order to avoid abusive exercise of the punitive power of the state.¹⁶

“The broad definition of the crime of defamation might be contrary to the principle of minimum, necessary and 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.”

16. Outside of this Court, other international and regional courts have been critical of the criminalisation of speech. In *FAJ and others v The Gambia*, the Court of the Economic Community of West African States (“ECOWAS Court”)

¹⁴ General Comment 34, par. 34.

¹⁵ IACtHR, *Ricardo Canese v. Paraguay* (31 August 2004) Serie C, No. 111, par. 104.

¹⁶ IACtHR, *Kimel v. Argentina* (2 May 2008), Serie C, No.177, par. 76. In his concurring opinion, Judge Sergio García-Ramírez noted that the ongoing use of criminal defamation proceedings provided “cause for alarm”, stating that in such proceedings, “the harshest possible measures, which might be immoderate or excessive in general and in particular, are adopted and often turn out to be inefficient and counterproductive”, see the concurring opinion, par. 16. See also IACtHR, *Usón Ramírez v. Venezuela* (20 November 2009), Serie C, No. 207 par. 73.

considered the detention of a number of Gambian journalists, including on charges of criminal defamation. The ECOWAS Court held the criminal laws of the Gambia and the sanctions imposed on the journalists were “disproportionate” and “not necessary in a democratic society”. Further the Court, by reference to the African Charter on Human and Peoples’ Rights, directed that the Gambia’s laws on sedition, criminal libel, defamation and false news publication be “reviewed and decriminalised to be in conformity with international provisions on freedom of expression in consonance with the Defendants obligation under Article 1 of the Charter”.¹⁷

17. In *Castells v. Spain*, the European Court of Human Rights (“European Court”) encouraged states to use the least intrusive measure available: “[t]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.”¹⁸ Indeed, the European Court has frequently stated that criminal sanctions are disproportionate when civil remedies are available, and has accordingly stressed that complaining parties should seek “recourse to means of civil law which, in the Court’s view, are appropriate in cases of defamation.”¹⁹

“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” (...)

18. The European Court has likewise repeatedly held that “imposing criminal sanctions on someone who exercises the right to freedom of expression can be considered compatible with Article 10 [the free expression provision of the European Convention on Human Rights] ... only in exceptional circumstances, notably where other fundamental rights have been seriously impaired” [emphasis added].²⁰ The European Court has clarified that such “exceptional circumstances” which might warrant criminal sanctions constitute “cases of hate speech or incitement to violence.”²¹

¹⁷ ECOWAS, *Federation of African Journalists and Others v. the Gambia*, App. No. ECW/CCJ/APP/36/15 (2018) available at: <https://www.mediadefence.org/sites/default/files/blog/files/FAJ%20and%20Others%20v%20The%20Gambia%20Judgment.pdf>

¹⁸ ECtHR, *Castells v. Spain*, App. No. 11798 (23 April 1992), par. 46.

¹⁹ ECtHR, *Raichinov v. Bulgaria*, App. No. 47579/99 (2006), par. 50. See also ECtHR, *Lehideux and Isorni v. France* (23 September 1998), Reports of Judgments and Decisions 1998 VII, p. 2886, par. 51 in fine and p. 2887, par. 57; and, mutatis mutandis, ECtHR, *Cumpăna and Mazăre v. Romania* [GC], App. No. 33348/96 (2004), par. 115, ECHR 2004 XI

²⁰ ECtHR, *Gavrilovici v. Moldova*, App. No. 25464/05 (2009), par. 60; see also ECtHR, *Cumpăna and Mazăre v. Romania* [GC], App. No. 33348/96 (2004), par. 115; ECtHR, *Mahmudov and Agazade v. Azerbaijan*, App. No. 38577/04 (2008), par. 50.

²¹ ECtHR, *Cumpăna and Mazăre v. Romania* [GC], App. No. 33348/96 (2004), par. 50; see also ECtHR, *Mahmudov and Agazade v. Azerbaijan*, App. No. 35877/04 (2004), par. 50.

19. In *Castells v. Spain*, the European Court also stated that criminal measures should only be adopted where states act “in their capacity as guarantors of public order” and where such measures are “[i]ntended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.”²² It is significant that in that case, which involved a criminal conviction for defamation, the European Court referred to the application of criminal measures only as a means of maintaining public order, and not as a means of protecting reputation, which is the purpose of the law on defamation.
20. The European Court has accordingly stressed that those alleging that they have been defamed should seek “recourse to means of civil law which, in the Court’s view, are appropriate in cases of defamation.”²³

b) There is strong international support for decriminalization of defamation

21. There are examples from across the world on the chilling effect criminal defamation laws have on speech, even where these laws are not used frequently, or journalists are not actually imprisoned.
22. For instance, the Parliamentary Assembly of the Council of Europe has noted that criminal defamation laws are open to abuse by the authorities and used to silence media criticism in a number of member states:²⁴

“the mere threat of prosecution for defamation may lead to a genuine media self-censorship and cause progressive shrinkage of democratic debate and of the circulation of general information. ... As a result, the whole of society suffers the consequences...”

23. Similarly, in its *Resolution on Repealing Criminal Defamation Laws in Africa*, the African Commission highlighted the chilling effect of having criminal defamation laws on the books, stating that it “impedes on the role of the media as a watchdog, preventing journalists and media practitioners to practice their profession without fear and in good faith”.²⁵
24. The OSCE Representative on Freedom of the Media has also highlighted that having criminal defamation on the books in one country might corrode fundamental rights in other countries:²⁶

²² *Ibid.*

²³ ECtHR, *Kubaszewski v. Poland*, App. No. 571/04 (2010), par. 45.

²⁴ PACE e.g. named Albania, Azerbaijan and the Russian Federation.

²⁵ African Commission on Human and Peoples’ Rights (“ACHPR”), *Resolution on Repealing Criminal Defamation Laws in Africa* (10 – 24 November 2010), available at: <http://www.achpr.org/sessions/48th/resolutions/169/>.

²⁶ OSCE Representative on Freedom of the Media, *Ending the Chilling Effect. Working to Repeal Criminal Libel and Insult Laws* (2004), available at: <https://www.osce.org/fom/13573?download=true>.

“The mere existence of these laws in the law codes of democratic countries is systematically misused by countries that are not democratic as an excuse for not reforming their libel laws.”

25. The amici curiae further submit that it is not even necessary to have criminal laws to address the exceptional circumstances in which criminal sanctions might be legitimately applied. Both hate speech and incitement to violence can be dealt with using specific laws that are precisely worded to only address these specific crimes. The experience of countries around the world where criminal defamation laws no longer exist or have fallen into disuse demonstrates clearly that civil defamation laws, along with a variety of self-regulatory and other non-criminal remedies, suffice to address harm to reputation.
26. Arising out of this, there is strong international support among international bodies for the decriminalisation of defamation, and for having civil defamation laws in their place.
27. In its General Comment No. 34, the UN Human Rights Committee has, for instance, called on all states to “consider the decriminalization of defamation (...)”.²⁷ Similarly, in a 2002 joint declaration, three special mandates for promoting freedom of expression — the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media — stated that:²⁸

“[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.”
28. Similarly, in its *Resolution on Repealing Criminal Defamation Laws in Africa*, the African Commission called on African states to repeal criminal defamation laws or insult laws.²⁹
29. The Parliamentary Assembly of the Council of Europe in its Recommendation 1814 (2007) called on the Committee of Ministers to urge all member states to review their defamation laws and, where necessary, make amendments in order to bring them into line with the case law of the European Court, with a view to removing any risk of abuse or unjustified prosecutions.³⁰

²⁷ General comment No. 34, par. 47.

²⁸ International Mechanisms for Promoting Freedom of Expression, *Joint Declaration by 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* (2002), available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87>.

²⁹ ACHPR, *Resolution 169: Resolution on Repealing Criminal Defamation Laws in Africa* (48th Ordinary Session from 10 – 24 November 2010), available at: <http://www.achpr.org/sessions/48th/resolutions/169/>.

³⁰ PACE, referring to its *Resolution 1577 (2007)* entitled “*Towards decriminalisation of defamation*”, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>.

30. Furthermore, the OSCE Representative on Freedom of the Media is a strong advocate of decriminalisation of defamation and regularly calls on OSCE participating States to repeal all criminal defamation laws,³¹ while praising states that decriminalise defamation.³²
31. Decriminalisation is particularly important where laws still provide for criminal sanctions for defamation of public officials or public figures. Shielding public officials and public figures from criticism by giving them special protection through such laws has no place in a democratic society, and such laws should be repealed. It is worth noting that these laws run counter to the well-established international law principle that public officials should have a higher degree of tolerance to criticism than other members of society.³³
32. In a joint declaration in 2000, three special mandates for promoting freedom of expression—the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media— stated that “laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures, such as desacato laws, should be repealed”.³⁴ The failure to require public officials and figures to tolerate a greater degree of criticism than ordinary citizens was again raised as a particularly problematic element of criminal defamation laws by the three special mandates as well as the African Commission Special Rapporteur in 2010.³⁵
33. In particular with regard to public officials, public figures and others who have voluntarily entered the public arena who take offence at something that has been said or written about them, the Inter-American Commission has stated that only civil remedies are appropriate:

³¹ See, for instance, OSCE, *OSCE media freedom representative calls for decriminalization of defamation in Greece after journalist sentenced to 26 months on libel charges* (8 April 2015) available at: <https://www.osce.org/fom/150391>

³² See, for instance, OSCE, *OSCE media freedom representative welcomes Ireland's decriminalization of defamation, calls for crime of 'blasphemy' to be abolished* (12 January 2010) available at: <https://www.osce.org/fom/51819>; OSCE, *OSCE representative welcomes decriminalization of defamation in Malta, urges dismissal of civil defamation lawsuits against Caruana Galizia's heirs* (15 May 2018) available at: <https://www.osce.org/representative-on-freedom-of-media/381355>.

³³ OSCE Representative on Freedom of the Media, *Ending the Chilling Effect. Working to Repeal Criminal Libel and Insult Laws* (2004), available at: <https://www.osce.org/fom/13573?download=true>.

³⁴ International Mechanisms for Promoting Freedom of Expression, *Joint Declaration by 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* (2000), available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=142&lID=1>.

³⁵ International Mechanisms for Promoting Freedom of Expression, *Ten Key Challenges to Freedom of Expression in the Next Decade* (2010), available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=784&lID=1>

“The protection of a person’s reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.”

34. The African Commission in its *Declaration of Principles on Freedom of Expression in Africa* highlighted that states should at the very least ensure that no one shall be found liable for opinions or statements regarding public figures which were reasonable to make in the circumstances, while public figures shall be required to tolerate a greater degree of criticism.³⁶

35. In its 1997 Warsaw Declaration, the OSCE stated that laws which provide criminal penalties for the defamation of public figures, or which penalize the defamation of the state, state organs, or public officials as such, chill free speech and undermine democracy and should be repealed where they exist.³⁷ Highlighting the potential for abuse of such laws, the OSCE stated in its 2000 Bucharest Declaration that:³⁸

“(…) laws which provide criminal penalties for the defamation of public figures, or which penalise the defamation of the State, State organs, or public officials as such, are used to target journalists investigating corruption;”

36. The OSCE subsequently called on states that had not already done so to repeal laws which provide criminal penalties for the defamation of public figures, or which penalise the defamation of the state, state organs or public officials as such.³⁹

III. PRISON SENTENCES ARE NEVER A PROPORTIONATE REMEDY FOR DEFAMATION

37. It is the principled position of the amici curiae that criminal defamation laws are contrary to international legal standards on freedom of expression. In this section the amici curiae make the related submission that prison sentences, including the imposition of suspended prison sentences, in cases of defamation represent a paradigm example of a disproportionate interference with freedom of expression and fail to comply with the well-established

³⁶ African Commission, *Declaration of Principles on Freedom of Expression in Africa* (2002), available at: <http://www.achpr.org/sessions/32nd/resolutions/62/>

³⁷ OSCE Parliamentary Assembly, *Warsaw Declaration* (2004), available at: <https://www.osce.org/pa/37930?download=true>.

³⁸ OSCE Parliamentary Assembly, *Bucharest Declaration* (2000), available at: <http://www.osce.org/node/37761>.

³⁹ OSCE Parliamentary Assembly, *Bucharest Declaration* (2000), available at: <https://www.osce.org/pa/37758?download=true>. See also the Paris Declaration (2001), available at: <http://www.osce.org/pa/37658> which calls for the elimination of all defamation and insult laws which aim specifically to shield public officials from criticism, believing that such laws severely inhibit free expression and open public debate, and contravene commitments to freedom of expression contained in OSCE and other international agreements;

principle that where speech is restricted, only the least intrusive measures should be used.

38. The UN Human Rights Committee has repeatedly condemned imprisonment as a punishment for defamation and has made it clear that imprisonment for defamation is not necessary or proportionate under Article 19 of the ICCPR. In its *General Comment 34*, the UN Human Rights Committee stated with respect to defamation laws that “imprisonment is never an appropriate penalty.”⁴⁰ In the case of *Adonis v the Philippines*, the UN Human Rights Committee further held that the sanction of imprisonment for defamation was incompatible with Article 19(3) of the ICCPR.⁴¹
39. The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has outlined several “minimum” principles for defamation laws to comply with the requirements of the ICCPR. These principles include that defamation laws should never apply “penal sanctions, in particular imprisonment.”⁴² The UN Special Rapporteur further found that imprisonment is “inconsistent with the principle of proportionality and therefore an undue restriction of press freedom”.⁴³
40. The jurisprudence of this Court demonstrates that the coercive power of the state should not be exercised so as to allow for imprisonment in cases of alleged defamation. In a series of cases, involving Paraguay and Argentina, this Court has rejected the sanction of imprisonment as punishment for speech related crimes on the grounds that it is a disproportionate and unnecessary remedy for injury to reputation and violates the right to freedom of expression.⁴⁴ In *Ricardo Canese v Paraguay*, this Court found that sentencing to a term of imprisonment, in addition to the criminal proceeding and the restriction on leaving the country, was unnecessary and excessive.⁴⁵
41. Similarly, in *Kimel v Argentina*, this Court found that a prison term and payment of a sizeable monetary fine for the offence of false imputation of a publicly actionable crime violated Mr Kimel’s right to freedom of expression.⁴⁶
42. Consistent with this approach, in the case of *Lohé Issa Konaté v Burkina Faso*, the African Court on Human and Peoples’ Rights (“African Court”) considered the situation of a newspaper editor charged with, inter alia,

⁴⁰ *General Comment No. 34*, par. 47 [emphasis added]. See also UN Human Rights Committee, *Concluding Observations on Italy*, 24 April 2006 CCPR/C/ITA/CO/5 par. 19.

⁴¹ UN Human Rights Committee, *Communication No. 1815/2008, Adonis v The Philippines*, Views adopted by the Committee at its 103rd session (17 October–4 November 2011), par. 7.10.

⁴² 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.4/199/64 (Jan. 29, 1999), available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.1999.64.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.1999.64.En?OpenDocument).

⁴³ IACtHR, *Tristán Donoso v. Panamá*, (27 January 2009). Serie C No.193

⁴⁴ IACtHR, *Ricardo Canese v. Paraguay* (31 August 2004), Serie C, No. 111, par. 106 and 108; IACtHR, *Kimel v. Argentina* (2 May 2008), Serie C, No.177, par. 80.

⁴⁵ IACtHR, *Ricardo Canese v. Paraguay* (31 August 2004), Serie C, No. 111, par. 106.

⁴⁶ IACtHR, *Kimel v. Argentina* (2 May 2008), Serie C, No.177, par. 80.

criminal defamation based on two articles in which he reported on a State Prosecutor's alleged ties to criminal activity. The journalist was convicted on all charges and sentenced to a year in prison. Analysing the relevant provisions of Burkina Faso's criminal defamation laws, the African Court declared that Burkina Faso had violated Article 9 of the African Charter, Article 19 of the ICCPR and Article 66(2) of the Revised ECOWAS Treaty due to the existence in its national laws of custodial sentences for defamation. Finding that Burkina Faso "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," the African Court broadly ruled that, apart from very exceptional circumstances involving incitement to crimes or hate speech, "violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences."⁴⁷ Burkina Faso was ordered to amend its laws accordingly.⁴⁸

43. The European Court has never upheld a prison sentence for defamation. It is well established that the European Court considers prison sentences for speech generally disproportionate, unless applied in highly exceptional circumstances such as hate speech or incitement to violence:⁴⁹

"[t]he imposition of a prison sentence for a press offence will be compatible with journalists' 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."

44. The European Court has held 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".⁵⁰ It is not relevant whether the applicants actually served their prison sentence, as "by its very nature, [such a sentence] will inevitably have a chilling effect".

45. At this point the amici curiae consider it appropriate to address this Court's findings in the case of *Mémoli v Argentina*. With regard to the suspended prison sentences of one and five months respectively given to Carlos and Pablo Mémoli, this Court observed that "Carlos Mémoli was sentenced to the minimum term of imprisonment established by domestic law, while Pablo Mémoli was sentenced to less than half the permitted term of imprisonment (...)". This Court went on to observe that "the punishments imposed on Messrs. Mémoli were not excessive or manifestly disproportionate in a way that affected their right to freedom of expression."

⁴⁷ African Court on Human and Peoples' Rights ("ACtHPR"), *Lohé Issa Konaté v Burkina Faso*, App. No. 004/2013 (5 December 2014).

⁴⁸ *Ibid.*

⁴⁹ See, for instance, ECtHR, *Cumpănă and Mazăre v. Romania* [GC], App. No. 33348/96 (2004), par. 115.

⁵⁰ *Ibid.*, par. 116.

46. The amici curiae respectfully submit that suspended prison sentences are highly troubling as well as they will continue to hang over the head of those who have been convicted and are therefore one of the most effective ways of ensuring individuals self-censor. This can have an enormous negative impact on public discourse. The European Court has recognized the chilling effect of a suspended prison sentence. In the case of *Belpietro v Italy*, in which the director of the daily newspaper “Il Giornale” was given a suspended sentence of four months’ imprisonment, the European Court held that imposition of a prison sentence, even suspended, may have a significant chilling effect.⁵¹
47. The Parliamentary Assembly of the Council of Europe goes further than the European Court, taking the view that “prison sentences for defamation should be abolished without further delay. In particular it exhorts states whose laws still provide for prison sentences – although prison sentences are not actually imposed – to abolish them without delay so as not to give any excuse, however unjustified, to those countries which continue to impose them, thus provoking a corrosion of fundamental freedoms.”⁵²

IV. STATES SHOULD BE MINDFUL OF THE CHILLING EFFECT ON THE MEDIA OF CIVIL DEFAMATION LAWS

48. The amici curiae submit that, even where criminal defamation laws have been abolished, civil defamation laws may not be appropriate in circumstances where they allow for excessive awards and lengthy and costly procedures. Excessive damages awards can have a severe chilling effect on speech. Large fines or damages awards may for instance lead to closure of a media outlet or take away the livelihood of a freelance journalist, leading to self-censorship as the financial risk of writing about people in positions of power becomes too high. Disproportionate and excessive damages will therefore also constitute a violation of the right to freedom of expression.⁵³
49. In some instances, plaintiffs acting in bad faith may institute civil defamation proceedings not to vindicate their reputation, but to create a chilling effect on the right to freedom of expression.⁵⁴ This practice, often referred to by the acronym SLAPP (Strategic Lawsuits Against Public Participation), has emerged in countries across the world, including the US, Australia, India and France.⁵⁵
50. In order to create a truly enabling environment for free speech in line with their obligations under international human rights law, states should

⁵¹ ECtHR, *Belpietro v. Italy*, App. No. 43612/10 (24 September 2013), par. 61.

⁵² PACE, *Resolution 1577 (2007) Towards decriminalization of defamation*; and the *Response of the Committee of Ministers*, adopted at the 1029th meeting of the Ministers’ Deputies (11 June 2008).

⁵³ See for instance ECtHR, *Tolstoy Miloslavsky v. the United Kingdom*, App. No. 18139/91 (13 July 1997); ECtHR, *Independent Newspapers (Ireland) Limited v. Ireland*, App. No. 28199/15 (15 June 2017).

⁵⁴ ARTICLE 19, *Revised Defining Defamation Principles: Background Paper* (2016), available at: <https://www.article19.org/data/files/medialibrary/38362/Defamation-Principles-Background-paper.pdf>.

⁵⁵ *Ibid.*

therefore be mindful of the chilling effect of civil defamation laws as well. The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has outlined several “minimum” principles for defamation laws to comply with the requirements of the ICCPR. These principles include that defamation laws “should not be so stringent as to have a chilling effect on freedom of expression”.⁵⁶

51. In a 2000 joint declaration, three special mandates for promoting freedom of expression—the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media— stated that:

“civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritize the use of a range of nonpecuniary remedies.”⁵⁷

52. In the case of *Tristan Donoso*, this Court recognized the chilling effect of damages awards as well:

The Court further emphasized “the fear of a civil penalty, considering the claim by the former Attorney General for a very steep civil reparation, may be, in any case, equally or more intimidating and inhibiting for the exercise of freedom of expression than a criminal punishment, since it has the potential to attain the personal and family life of an individual who accuses a public official, with the evident and very negative result of self-censorship both in the affected party and in other potential critics of the actions taken by a public official.” [par. 129]

53. Similarly, the African Commission states in its *Declaration of Principles on Freedom of Expression in Africa* that sanctions provided for by defamation laws shall never be so severe as to inhibit the right to freedom of expression.⁵⁸

⁵⁶ 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 (Jan. 29, 1999), available at: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.1999.64.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.1999.64.En?OpenDocument).

⁵⁷ International Mechanisms for Promoting Freedom of Expression, *Joint Declaration by 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* (2000), available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=142&IID=1>.

⁵⁸ ACHPR, *Declaration of Principles on Freedom of Expression in Africa*, <http://www.achpr.org/sessions/32nd/resolutions/62/>

54. The European Court has considered the issue of excessive damages in civil defamation claims in a number of cases. In *Tolstoy Miloslavsky v. the United Kingdom*, the Court first held that “under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury suffered.” The Court went on further to state that the United Kingdom had violated Article 10 of the European Convention because of both the “size of the award” and “the lack of adequate and effective safeguards [in UK law] at the relevant time against a disproportionately large award.” Similarly, the Court again considered the issue of proportionality in respect of damages awarded in the case of *Independent Newspapers (Ireland) Limited v. Ireland* in 2017. The Court held that an excessive damages award in a defamation claim violated the newspaper’s right to freedom of expression. It also noted that the trial judges should have given sufficient guidance to juries when they are determining the damages to award in defamation proceedings.
55. The OSCE has also called on states to ensure that their civil defamation laws are made less harsh: “In our experience, we have seen that high fines can exert a chilling effect on journalists just as great as prison sentences. If we are to create an environment that allows the media to exercise their corrective function and encourages critical thinking, many provisions in civil codes will also need to be made less harsh. In this case, we could say a “de-harshening” is needed.”⁵⁹

V. CONCLUSION

56. Free expression plays a vital role in the democratic process. Without a free flow of information and ideas, the public cannot formulate opinions about their government, and on matters of public interest. The media plays a particularly important role, providing the public with information and acting as a watchdog, exposing corruption and inspiring political debate. In many countries, criminal defamation law represent one of the most serious threats to the open discussion which underpins democracy.⁶⁰
57. It is the position of the amici curiae that all criminal defamation laws are contrary to the guarantee of freedom of expression. In our respectful submission, criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws. However, in recognition of the reality that many countries do have criminal defamation laws, the amici curiae submit that, having regard to international human rights standards on freedom of expression, prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other

⁵⁹ Organization for Security and Co-operation in Europe (“OSCE”), *Ending the Chilling Effect - Working to Repeal Criminal Libel and Insult Laws* (25 November 2004), available at: <https://www.osce.org/fom/13573?download=true>.

⁶⁰ See par. 5 above.

profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws.

A handwritten signature in black ink, appearing to read 'Alinda Vermeer', with a long horizontal flourish extending to the right.

Alinda Vermeer
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