REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 397 OF 2016

IN THE MATTER OF THE CONTRAVENTION OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS PARTICULARLY ARTICLES 33, 34, 35 AND 50(2) (n) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 194 AS READ WITH SECTION 36 OF THE PENAL CODE

JACQUELINE OKUTA.....FIRST PETITIONER

JACKSON NJERU……..SECOND PETITIONER

V

ATTORNEY GENERAL ….....FIRST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....SECOND RESPONDENT

AND

ARTICLE 19 EAST AFRICA……..INTERESTED PARTY

INTERESTED PARTY'S SUBMISSIONS

May it please Your Lordship, we are making submissions on this matter as the Sole Interested Party under the following heads:-

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INTRODUCTION

1. My Lord, ***ARTICLE 19 - Global Campaign for Free Expression***, is an international NGO, headquarterd in London with regional and national offices in Brazil, Mexico, Bangladesh, Senegal and Kenya. ARTIGO 19 and ARTICULO 19 are regional offices of ARTICLE 19 in the Americas. ARTICLE 19, which takes its name from Article 19 of the Universal Declaration of Human Rights, works globally to protect and promote the right to freedom of expression, including the right to information.
2. ARTICLE 19 has an international reputation for its work in expounding the implications of the guarantee of freedom of expression in different thematic areas. ARTICLE 19 regularly intervenes as ***amicus*** curiae or interested party in international, regional and national courts, including this Court in ***Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another [2015] eKLR (PETITION NOS. 628 & 630 OF 2014***) regarding the controversial Security Laws (Amendment) Act of 2014 and recently in the ***Geoffrey Andare v Attorney General case (PETITION NO.149 of 2015)*** challenging Section 29 of the Kenya Information and Communications Act which creates the offence of abuse of a licenced telecommunications system.

Background

3. The key question raised by the Petition can be summarized as **whether the offence of criminal libel created under section 194 of the Penal Code is constitutional in an open and democratic society such as Kenya**. In other words, does the criminal defamation law under section 194 of the Penal Code unjustifiably violate freedom of expression by imposing a criminal sanction on the civil wrong of defamation?

4. The petitioners are Kenyan citizens who are concerned about the constitutional question raised and have been charged under the impugned law.

5. The Petition is filed against the Attorney General (**AG**) as the constitutional office created under Article 156 of the Constitution whose mandate includes representation of the government in civil suits; and the Director of Public Prosecutions (**DPP**), as the constitutional office established under Article 157 of the Constitution concerned with the institution and oversight of all criminal prosecutions in Kenya, as the First and Second Respondents respectively.

6. Article 19 (Interested Party) was enjoined to the petition as having a legitimate stake and identifiable interest in the Petition since it is a registered Non-Governmental Organization with interest in implementation, promotion and protection of freedom of expression, opinion and access to information.

7. The Petition was sparked by the arraignment of the First Petitioner in **Kwale Criminal Case No. 531 of 2016** and of the **Second Petitioner in Nairobi Milimani Criminal Case No 549 of 2016** respectively, with the offence of criminal libel under the impugned section 194, as read with section 36 of the Penal Code.

8. The particulars of the First Petitioners offence were that with intent to defame the complainants, she: **"...on diverse dates between the month of March 2014 and April 2014 at unknown time and place within the Republic of Kenya, by electronic means of Facebook account Buyer Beware – *Kenya unlawfully published defamatory words concerning the complainants that the persons pictured and named above are wanted for illegal possession and handling of property. Anyone with information regarding either of the three get in touch with Facebook page - 100,000 Likes for Justice to be Done for Jacky and her Kids".***

9. For his part, the Second Petitioner was accused of using the Facebook account Buyer Beware on 31st March, 2016 to unlawfully publish the following words with intent to defame one Cecil Miller to wit: "***Jackline Okuta v Cecil Miller (Baby Daddy) sad news coming my way after four years since being charged, numerous hearings, adjournments and seven judgment a member of this group Jackie Okuta alias Nyako Maber has been guilty of misuse of telecommunication device. She is currently at Langata Womens prison I am waiting for her lawyer and mother to call me and will brief the group… For the evil man has no future, the lamp of the wicked will be put out Proverbs 24:20."***

10. A second count alleged publication of the following words: **The guy was supposed to be our IEBC chair then he was found unfit for Parliament because he is a serial wife beater.**

11. My Lord, we submit that it is important to note that the publication attributed to the 2nd Petitioner about the 1st Petitioner and Cecil miller were factual, especially regarding their estranged relationship, the 2nd Petitioner being charged and the fact that in 2009, Cecil Miller was nominated to be chairperson of the now defunct Interim Independent Electoral Commission (IIEC).

12. My Lord, it is noteworthy that "Buyer Beware" is an online platform on the social media site on Facebook that is administered by the 2nd Petitioner. Buyer Beware is a platform that allows members to

publish information that expose consumer exploitation, corruption, injustices and corporate and commercial excesses (consumer protection).

13. Section 194 of the Penal Code states:

"194. Definition of libel

Any person who, by print, writing, painting or effigy, or by any means otherwise than solely gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, is guilty of the misdemeanour termed libel. "

14. In as much as section 194 bears no penalty, Section 36 of the Penal Code discloses a penalty of imprisonment for a term not exceeding 2 years or a fine, or both, where no specific punishment is otherwise prescribed for a misdemeanour in the Penal Code.

15. The Petitioners challenged the constitutional validity of section 194 by a petition dated 29th April, 2016 and filed on 2nd May, 2016 seeking:

(a) A declaration that section 194 of the Penal Code is unconstitutional and invalid;

(b) A declaration that the continued enforcement of Section 194 by the Second Respondent against the Petitioner is unconstitutional; and

(c) An order that each party bears its costs in this petition brought partly in the public interest and in view of the subject matter.

Relevant Constitutional Provisions

16. Article 2 (1) of the Constitution of Kenya provides that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

17. Article 2 (4) of the Constitution of Kenya provides that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

18. Article 2 (5) of the Constitution of Kenya provides that the general rules of international law shall form part of the law of Kenya.

19. Article 2 (6) of the Constitution of Kenya provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya.

20. Article 50 (2) (n) of the Constitution of Kenya, 2010, provides as follows:

"Every accused person has the right to a fair trial, which includes the right—(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—(i) an offence in Kenya; or (ii) a crime under international law."

21. Article 10 (1) (a), (b) & (c) of the Constitution provide that the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them; applies or interprets the Constitution or; enacts, applies or interprets any law. The National values include; the rule of law, equity, sharing, participation of the people, social justice, good governance, integrity and human rights.
22. Article 19 of the Constitution provides that the Bill of Rights is an integral part of the Kenya's democratic state and is the framework for social, economic and cultural policies. Article 19 of the Constitution further asserts that the rights and fundumental freedoms in the **Bill of Rights are subject only to the limitations contemplated in the Constitution**.
23. Article 23 confers the authority of this Court to uphold and enforce the Bill of Rights and further recognizes the jurisdiction of the High Court in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
24. Article 24 provides that a right or fundamental freedom may only be limited by law, taking into account the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others, the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose.
25. Article 27 (1) provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.
26. Article 33 (1) (a) provides that ***every person has the right to freedom of expression which includes the freedom to seek, receive impart information or ideas***.
27. Article 33 (2) comes in to state that:-

'*the right to freedom of expression does not extend to a) Propaganda for war; b) Incitement to violence; c) Hate speech; or d) Advocacy for hatred that (i) constitutes ethnic incitement, vilification of others or incitement to cause harm or (ii) based on any ground of discrimination as per Article 27.*'

28. Article 34(1) provides that:-

    Freedom and independence of electronic, print and all other types of media is guaranteed but does not extend to any expression specified under Article 33(2).

29. Article 34(2) (a) provides that the **state shall not exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or dissemination of information by any medium**.

30. Article 34(2) (b) provides that the state shall not penalize any person for any opinion or view or the content of any broadcast, publication or dissemination.

31. Article 165 (3) (a) and (b) provides that, the High Court shall have unlimited original jurisdiction in criminal and civil matters; and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

32. Article 94 (6) states that an Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

1st Respondents Case

33. The First Respondent opposed the Petition on some five points appearing on his Grounds of Opposition dated and filed on 31st October, 2016.

34. First, that the Petition was an abuse of the court process, misconceived and unfounded and otherwise an abuse of the court process.

35. Second, that the Petition and Petitioner portended that had unsettled other laws of procedure and administration of justice particularly section 193A of the Criminal Procedure Code, Cap 75.

36. Third, that the application and Petition were speculative because they speculate that the Petitioners who are the accused in Kwale Criminal Case No 531 of 2016 and Milimani Criminal Case No 549 of

2016 would be prosecuted.

37. Fourth that the Petitioner was a constitutional office holder with a definite constitutional mandate so that granting the orders sought in the Petition and application would be tantamount to the court at the court at the behest of the Petitioners interfering with the exercise of constitutional powers by the 1st Respondent.
38. Lastly, that the High Court had no capacity to adjudicate upon the defenses in the criminal cases referred herein in the manner proposed in the application and petition.

2nd Respondent's Case

39. The 2nd Respondents response was largely on similar grounds to the 1st Respondent:
40. First, that the Petition was an abuse of the court process, misconceived and unfounded and otherwise an abuse of the court process.
41. Second, that under Article 157(10) of the Constitution and section 6 of the Office of the Director of Public Prosecution Act, 2013 the DPP does not require the consent of any person or authority for the commencement of criminal proceedings and that in the exercise of his powers or functions the DPP could not be under the direction or control of any person or authority.
42. Third, that the Petitioner had to demonstrate that substantial injustice would otherwise result if the criminal proceedings proceeded; in which event, the DPP argued, Article 50 of the Constitution provides safeguards against any potential injustice.
43. Fourth, that the Petitioners had been charged with an offence known to law and the same was properly before the trial court. That the Petitioners had not complained that the evidence on record had not met the threshold required for a prosecutable case.
44. Fifth, the DPP averred that the Petition and Petitioner portended that the Constitution had unsettled other laws of procedure and administration of justice particularly section 193A of the Criminal Procedure Code, Cap 75.
45. Sixth, that the application and Petition were speculative because they speculate that the Petitioners who are the accused in Kwale Criminal Case No 531 of 2016 and Milimani Criminal Case No 549 of 2016 would be prosecuted.

46. Seventh, that the Petitioner had merely stated his rights, but had failed to demonstrate how each of his specific rights stated in his application had been or would be infringed, violated or threatened if the criminal process proceeded.
47. Eighth that the application was without merit, an abuse of process and should therefore be dismissed with costs to the Respondents.

Questions for Deliberation

48. My Lord, this Court is required to address the question of whether criminal defamation proceedings violate the right to freedom of expression under the Kenya Constitution (2010) which enshrines the right to freedom of expression including the right to seek, receive and imart information or ideas, while specifically prescribing for situations whereby these rights and all other rights in the bill of rights can be limited.
49. This Court is also required to address the question of whether criminal definition proceedings violate the right to freedom of expression and freedom including the right to seek, receive or impart information under Kenya's international law obligations by dint of Article 2 (5) and (6) of the Constitution.
50. My Lord, these questions involve considerations of important issues related to the scope and limits of the right to freedom of expression, particularly in the context of criminal defamation laws.

INTERESTED PARTY'S POSITION

51. It is your humble Interested Party's overriding argument that ***any*** **law** criminalising defamation is, in and of itself, a violation of freedom of expression. Not only are criminal defamation laws **outdated and unduly harsh**; they are also **unnecessary and disproportionate** measures to protect the reputation of others.
52. In our view, criminal defamation proceedings commenced, especially in response to a statement about a matter in the public interest or in the endeavor of highlighting injustices such as in this case, are a particularly serious attack on freedom of expression.

53. We direct your attention to the fact that currenty, Kenya is grappling with issues related to impunity and the rule of law. We further point out that Kenya has witnessed increased awareness and exposure of the abovementioned vices largely because of Kenyans freedom to discuss and deliverate on issues in online platforms such as Buyer Beware page which is domiciled in facebook.
54. We argue that the Court should hold that the criminal defamation proceedings against **the 1st and 2nd Petitioners** are in violation of the Constitution of Kenya; Article 9 of the African Charter of Human and Peoples Rights; and Article 19 of the International Convention on Civil and Political rights.
55. In support of this position, we will rely on the unique provisions on the Constitution of Kenya (2010) regarding limitation of fundamental rights; and the Constitution's express recognition of international norms, laws, treaties and conventions as Kenyan laws properly so called, by dint of Article 2 (5) and (6) of the constitution of Kenya, in particular Article 9 of the African Charter of Human and Peoples Rights; and Article 19 of the International Convention on Civil and Political Rights.
56. We shall also impress upon this Honourable court to be guided by decisions and statements of international and regional courts and authorities– including the **UN Human Rights Committee** and the **UN Special Rapporteur on Freedom of Opinion and Expression** – as well as evidence of a global trend towards decriminalization of defamation and progressive standards endorsed by civil society organisations and experts.

The Fundamental Importance of The Right to Freedom of Expression

57. The right to freedom of expression is protected by Article 33 of the Constituton of Kenya as well as a range of international and regional instruments around the world. It is guaranteed, most notably, by the **Universal Declaration of Human Rights** (Article 19), the **International Covenant on Civil and Political Rights** (ICCPR, Article 19), and the **African Charter on Human and Peoples Rights** (Article 9), as well as the **American Convention on Human Rights** (Article 13), the **European Convention on Human Rights** (Article 10).
58. Withn the Kenyan context, Article 33(1)(a) of the Constitution provides that **every person has the right to freedom of expression which includes the freedom to seek, receive impart information or ideas**.

59. My Lord, we posit that right of freedom of expression **is crucial for the full development of the human person and the realization of all other human rights**. Regional human rights courts have recognized it as an essential foundation of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. The rationale being that one cannot claim his own rights without knowing of the existence of such right, or knowing how to secure said rights.
60. Article 19 of the ICCPR (which Kenya is party to) protects the right to freedom of expression in broad terms. Under that provision, States parties are required to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers.
61. Although the right to freedom of expression has such importance, **it is not an absolute right and thus may be restricted in certain circumstances**. Article 19(3) of the ICCPR indicates that the limitations on of the right to freedom of expression are permitted to ensure, ***inter alia,*** **the respect the rights or reputations of others (Article 19(3)(a)) (as well as the protection of national security or of public order *(ordre public)* or of public health or morals** (Article 19(3)(b)).
62. It thus follows that when a State party imposes restrictions on the exercise of freedom of expression, the restriction should not put in jeopardy the right itself. In fact, the Human Rights Committee has indicated that the relationship between right and restriction and between norm and exception must not be reversed.
63. My Lord, the international human rights bodies have developed a detailed guidance on how the restrictions on the right can be applied and to meet so called "three part test" described below.
64. *First*, the restrictions must **be prescribed by law**: this means that a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly (see, Human Rights Committee, ***Leonardus J.M. de Groot v. The Netherlands, No. 578/1994, U.N. Doc. CCPR/C/54/D/578/1994 (1995).*** Ambiguous, vague or overly broad restrictions on freedom of expression are therefore impermissible.
65. *Second,* restrictions must **pursue a legitimate aim**, exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR as respect of the rights or reputations of others, protection of national security, public order, public health or morals.

66. *Third*, restrictions must **be necessary and proportionate** to secure the legitimate aim: Necessity requires that there must be **a pressing social need for the restriction**. The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest.
67. Proportionality requires that a restriction on expression is not over-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result. (see Human Rights Committee, ***Velichkin v. Belarus, Communication No. 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001 (2005)).***
68. Furthermore, it should be noted that the imprisonment of individuals, "for seeking, receiving or imparting information and ideas can rarely be justified as a proportionate measure to achieve one of the legitimate aims under article 19, paragraph 3 […]" (see Report of the UN Special Rapporteur on Freedom of Expression, A17/27, 17 May 2011 (May 2011 Report of Special Rapporteur), para 36).
69. Therefore, the need to protect the reputation of others may warrant restriction upon an individual's freedom of expression, if such a limitation is justified on the grounds that it is provided by law and is necessary and **must be the least intrusive measure to achieve the intended legitimate objective**.

Criminal Defamation Proceedings violate the right to Freedom of Expression

70. My Lord, Your humble Interested Party submits that laws criminalising defamation are **not necessary and provide disproportionate sanctions to protection of reputation**. Hence, they fail the test of necessity and proportionality. Criminal defamation is in fact an ancient offence whose origins lay in the need to maintain public order in an era where attacks on reputation might have resulted in breaches of the peace.
71. A key problem with criminal defamation laws is that a breach may lead to **a harsh sanction, such as a custodial sentence** or another form of harsh sanction, such as a suspension of the right to express oneself or a significant fine.
72. The prospect of imprisonment and actual imprisonment will exert a chilling effect to those who are minded to speak out about injustices or any other matter of public interest. The prospect/threat of

imprisonment will act as an inhibition or discouraggemetn of Kenyans legitimate exercise of free expression.

73. Kenya on the other hand is a robust constitutional democracy bound by the rule of law, democracy, participation of the people, huma dignity, equality, human rights, non discrinination and protection of the marginalized, good governance, integrity, transparency and accountabilty as per Article 10(2) of the Constitution which sets out Kenya's national values and principles of governance.
74. International and regional human rights authorities have frequently noted the harshness of criminal provisions on defamation. For example, the UN Special Rapporteur on Freedom of Opinion and Expression stated in 2008 that **the subjective character of many defamation laws, their overly broad scope and their application within criminal law have turned them into a powerful mechanisms to stifle investigative journalism and silent criticism**.
75. My Lord, we humbly submit that that laws criminalising defamation directly violate constitutional, international and regional human rights standards on the right to freedom of expression because they do not meet the criteria for permissible restrictions indicated in the above section. More specifically, criminal defamation laws are ***unnecessary*** **and** ***disproportionate*** responses to providing adequate protection for reputations.
76. In the Zimbabwean Case of ***Nevanji Madanhire and anor v Attorney-General*** *the Court* found criminal defamation laws unconstitutional, the Learned Judge commented as follows:-

"I take the view that the harmful and undesirable consequences of criminalising defamation, viz. the chilling possibilities of arrest, detention and two years imprisonment, are manifestly excessive in their effect. Moreover, there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons. In short, it is not necessary to criminalise defamatory statements. Consequently, I am satisfied that the offence is not reasonably justifiable in a democratic society within the contemplation of s 20(2) of the former Constitution. Accordingly, it is inconsistent with the freedom of expression guaranteed by s 20(1) of that Constitution."

77. In support of the case against criminal defamation laws, we will also rely on the decisions and statements of international and regional courts and authorities, as well as the clear trend towards the decriminalization of defamation across states globally.

LANDMARK CASE ON FREEDOM OF EXPRESSION:

The African Court on Human and Peoples Rights decison in ***Lohé Issa Konaté v. The Republic of Burkina Faso***

78. On 5 December 2014, the African Court of Human and Peoples' Rights delivered a landmark ruling categorically stating that one should face prison for defamation in a case where Mr. Konaté was found guilty by the Ouagadougou High Court and sentenced to 1 year imprisonment, a fine of US $3000, and damages to be paid to the complainant.
79. In June 2013, an application was filed on behalf of Mr. Konaté before the African Court on Human and peoples' Right (ACHPR) alleging that the penalties imposed violate his freedom of expression rights as guaranteed by Article 9 of the African Charter on Human and Peoples' Rights ("Every individual shall have the right to express and disseminate his opinions within the law"), Article 19 of the International Covenant on Civil and Political Rights ("Everyone shall have the right to freedom of expression"), and Article 66(2)(c) of the Treaty of the Economic Community of West African States (ECOWAS) (states must ensure respect for the rights of journalists); all three of which Burkina Faso is a party to.d.
80. In carrying out its assessment in the case, the court looked at whether criminal penalties for defamation gave rise to an impermissible restriction of one's freedom of expression rights. To answer that question, the court looked to the requirements that domestic law limiting freedom of expression must meet in order to be allowed. This is a three question analysis. First, is the language of the domestic law clear enough that parties can easily conform to it? Second, does the restriction serve some legitimate purpose? Third, is the limitation in the law necessary to achieve that purpose?
81. As to the first two questions, the court found that the defamation laws in Burkina Faso, which allowed for criminal penalties, both met the requirements. First, the laws clearly delineated what the restrictions were and what penalties would be imposed. Second, the restrictions did serve a legitimate purpose. Freedom of expression can only be infringed if that restriction is based on an overarching public

interest. Here, the purpose of the defamation laws is to protect the honor and reputation of persons from being wrongly tarnished by others, which the court found to serve an adequate public interest.

82. The case really hinged on the third question: was the limitation imposed necessary to achieve the objective? The analysis of this question went to the whether or not the penalty imposed, **here criminal penalties**, was proportionate against the right to freedom of expression. In other words, penalties should only go **as far as strictly necessary** to achieve an objective, here the objective of the defamation laws was to protect the reputation of and individual.
83. The court also noted that criminal penalties for defamation may be **categorically inappropriate in a defamation scenario because civil recourse is more than sufficient to prevent defamatory works being published**. Because Burkina Faso's laws did call for criminal sanctions against those found guilty of defamation, the defamation laws themselves were not in accordance with the freedom of expression rights protected in the cited treaties and charters because they imposed a disproportionate penalty.
84. As such, court pronounced itself that the domestic court's sentence of Mr. Konate was improper under international law because it illegally violated his guaranteed freedom of expression rights under Article 19 of the ICCPR and Article 9 of the African Charter.
85. My Lord, we urge this court adopts the rationale of the African Court on Human and Peoples Rights which has set a good standard for the right to freedom of expression.

International and Regional Courts

86. International human rights authorities – specifically UN human rights bodies have called upon States to decriminalize defamation laws on numerous occasions.
87. The UN Special Rapporteur on Freedom of Opinion and Expression ("UN Special Rapporteur") – has condemned criminal defamation laws. The UN Special Rapporteur has long advocated the repeal of criminal defamation laws. For instance, in his 2001 report, the Special Rapporteur stated:-

"In the light of the cases received this year, the Special Rapporteur would like to reiterate the recommendations made in his previous report (E/CN.4/2000/63 para. 52) and to urge Governments to:

a. *Repeal criminal defamation laws in favour of civil laws;*

b. *Limit sanctions for defamation to ensure that they do not exert a chilling effect on freedom of opinion and expression and the right to information;*
c. *Prohibit government bodies and public authorities from bringing defamation suits with the explicit purpose of preventing criticism of the government or even of maintaining public order;*
d. *Ensure that defamation laws reflect the importance of open debate on matters of public interest and the principle that public figures are required to tolerate a greater degree of criticism than private citizens."*

88. The UN Special Rapporteur has emphasized that civic libel provides an adequate remedy when there has been an unjustified attack on one's reputation. In a Joint Declaration with the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media in 2002, the UN Special Rapporteur affirmed:-

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

89. The United Nations Commission on Human Rights has decried recourse to criminal defamation in order to stifle free speech as follows:

    "Detention as a sanction for the peaceful expression of opinion is one of the most reprehensible practices employed to silence people and accordingly constitutes a serious violation of human rights."

90. In similar vein, in **General Comment No. 34 (supra) at para. 47, the Human Rights Committee** stipulates the following guidelines on defamation laws vis-à-vis the application of Article 19 of the International Covenant on Civil and Political Rights:

    "Defamation laws must be crafted with care to ensure that they comply with paragraph 3 [the derogation clause in Article 19 of the Covenant], and that they do not serve, in practice, to stifle freedom of expression. …. Care should be taken by States Parties to avoid excessively punitive measures and penalties. …. States Parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."

91. The Committee endorsed and applied these strictures in a complaint by one **Alexander Adonis against the Government of the Philippines.** The complaint involved the imprisonment of a radio broadcaster for alleged defamation. In its decision in Communication No. 1815/2008, adopted on 26 October 2011 at its 103rd session, the Committee found as follows, at paras. 7.7 to 7.10:

"The Committee takes note of the author's allegation that his conviction for defamation under the Philippine Penal Code constitutes an illegitimate restriction of his right to freedom of expression because it does not conform to the standards set by article 19, paragraph 3, of the Covenant. The author maintains, in particular, that the criminal sanction of imprisonment established by the Philippine Revised Penal Code for libel is neither necessary nor reasonable …. Article 19, paragraph 3, lays down specific conditions and it is only subject to these conditions that restrictions may be imposed, i.e. the restrictions must be provided by law; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality …. In light of the above, the Committee considers that, in the present case the sanction of imprisonment imposed on the author was incompatible with article 19, paragraph 3, of the Covenant."

The African Commission on Human and Peoples Rights (ACHPR)

92. In 2010, the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, identified criminal defamation laws as one of "Ten Key Challenges on freedom of expression" in a joint declaration. It stated:-

"Laws making it a crime to defame, insult, slander or libel someone or something, still in place in most countries (some 10 countries have fully decriminalized defamation), represent another traditional threat to freedom of expression. While all criminal defamation laws are problematical, we are particularly concerned about the following features of these laws:

a. *The failure of many laws to require the plaintiff to prove key elements of the offence such as falsity and malice;*
b. *Laws which penalize true statement, accurate reporting of the statements of official bodies, or statements of opinion;*
c. *The protection of the reputation of public bodies, of state symbols or flags, or the State itself;*
d. *failure to require public officials and figures to tolerate a greater degree of criticism than ordinary citizens.*
e. *The protection of beliefs, schools of thought, ideologies, religions, religious symbols or ideas;*
f. *The use of the notion of group defamation to penalize speech beyond the narrow scope of incitement to hatred;*
g. *Unduly harsh sanctions such as imprisonment, suspended sentences, loss of civil rights, including the right to practise journalism, and excessive fines"*

93. Article 9(1) of the ACPHR provides that every individual shall have the right to receive information. Sub-article 2 further provides that every individual shall have the right to express and disseminate his opinions within the law.

94. In its 48th Ordinary Session held in Banjul, The Gambia from 10-24 November, 2010. The African Commission on Human and Peoples' Rights pronounced itself that:-

"Expressing concern at the deteriorating press freedom in some parts of Africa, and in particular: restrictive legislations that censor the public's right to access information; direct attacks on journalists; their arrest and detention; physical assault and killings, due to statements or materials published against government officials;

Commending States Parties to the African Charter (States Parties) that do not have, or have completely repealed insult and criminal defamation laws;

Calls on States Parties to repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments also calls on States Parties to refrain from imposing general restrictions that are in violation of the right to freedom of expression; Urges journalists and media practitioners to respect the principles of ethical journalism and standards in gathering, reporting, and interpreting accurate information, so as to avoid restriction to freedom of expression, and to guide against risk of prosecution. Further Urges States Parties to implement the recommendations and appeals of the Special Rapporteur."

95. My Lord, the African Commission on Human and Peoples' Rights, in Resolution 169 adopted on 24 November 2010, condemed criminal defamation in the specific context of journalism and the media, by emphasising that:

"criminal defamation laws constitute a serious interference with freedom of expression and impedes on [sic] the role of the media as a watchdog, preventing journalists and media practitioners to practice [sic] their profession without fear and in good faith;"

96. Accordingly, the Commission called upon States Parties to the African Charter on Human and Peoples' Rights: **"to repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments."**

The Chilling Effect of Criminal Defamation on Freedom of Expression

97. My Lord, international jurisprudence has consistently emphasized the overriding importance of the guarantee of freedom of expression, resulting in a narrow interpretation of the legitimate scope of restrictions and sanctions. The "chilling" effect which disproportionate sanctions, or even the threat of such sanctions, may have upon the free flow of information and ideas must be taken into account when assessing the legitimacy of restrictions.
98. It cannot be denied that bloggers and online users such as Jackson Njeru, the Administrator of Buyer Beware play a vital role in disseminating information in every society, whether open or otherwise. Part and parcel of that role is to unearth corrupt or fraudulent activities, executive and corporate excesses, and other wrongdoings that impinge upon the rights and interests of ordinary citizens.
99. In light of the foregoing My Lord, we submit that, to maintain Section 194 and 195 of the Penal Code in Kenya's statute books has a real deleterious effect on free expression.
100. Generally, It is implausible that a blog or platform such as Buyer Beware could perform its investigative and informative functions that expoze injustices without defaming one person or another.
101. The overhanging effect of the offence of criminal defamation is to stifle and silence the free flow of information in the public domain. This, in turn, may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices.
102. The chilling effect of criminalising defamation is further enhanced by the maximum punishment of **two years imprisonment imposable for any contravention of Section 194 of the Penal Code. This penalty, in our view, is clearly excessive and patently disproportionate for the purpose of suppressing objectionable statements**. The accomplishment of that objective certainly cannot support imprisonment as a measure that is reasonably justifiable in a democratic society.

OTHER REGIONAL INSTRUMENTS

American Charter on Human Rights (ACHR)

103. The Inter-American legal framework provides one of the greatest regional protections for freedom of expression, including with respect to criminal defamation laws. The ACHR was designed to reduce to a minimum the restrictions on the free circulation of information, opinions and ideas as a

result of the impetus that the authors of the Convention attached to the need to express and receive any kind of information, thoughts, opinions and ideas.

104. Article 13(1) guarantees the right 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." Article 13(2) prohibits prior censorship, but provides that the right may be limited if it is "established by law" and "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"

105. The Inter-American Commission on Human Rights ("IACHR") in support of the Special Rapporteur on Freedom of Expression ("OAS Special Rapporteur") adopted a **"Declaration of Principles on Freedom of Expression". This included the following statement:**

10...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. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated or acted with gross negligence in efforts to determine the truth or falsity of such news.

11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as "desacato laws", restrict freedom of expression and the right to information.

106. In interpreting the "Declaration of Principles on Freedom of Expression", the OAS Special Rapporteur has observed that criminal sanctions for defamation exert a chilling effect:

The fear of criminal sanctions necessarily discourages people from voicing their opinions on issues of public concern particularly when the legislation fails to distinguish between facts and value judgments. Political criticism often involves value judgments.

107. The OAS Special Rapporteur's report on " 'Desacato' Laws and Criminal Defamation" also states:

17. In its previous reports the Office of the Special Rapporteur has mentioned its concern over the use of laws on criminal defamation, including slander and libel, for the same purpose as desacato laws. Generally speaking, these defamation classifications refer to the false imputation of criminal offences or of expressions that damage the honor of the person. In the Hemisphere, practice has shown that many

public officials resort to the use of such norms as a mechanism to deter criticism. As the Office of the Special Rapporteur has said in previous reports, "the possibility of abuse of such laws by public officials to silence critical opinions is as great with this type of law as with desacato laws…

20. The intention here is not to deny that persons in public office have honor, but that its possible injury is outweighed by another right – in this case freedom of expression to which society gives precedence. At all events, attacks on the honor and reputation of persons can be protected by means of civil sanctions, provided they are proportional and take actual malice into consideration

Inter-American Court of Human Rights

108. This Court has strongly protected the right to freedom of expression in the context of criminal laws on defamation. The Court's general attitude has been **"that penal laws are the most restrictive and severest means of establishing liability for an unlawful conduct."** In more stark terms, Judge Sergio García-Ramírez has stated that the frequent use of criminal defamation proceedings was **"cause for alarm"**. 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."**

109. In a series of cases this Court has found that criminal sanctions and criminal proceedings constitute an **unjustified violation of freedom of expression**, *including* in cases where the **defamed party was a public official, such as in this Petition**. Members of the Court have been extremely critical of the impact of criminal defamation laws on the exercise of freedom of expression. The Court has consistently held that criminal defamation suits and the sanctions resulting from a conviction for criminal defamation are unnecessary and disproportionate, and are therefore an illegal restriction on freedom of expression particularly when the statement concerns a person engaged in public activities.

110. In ***Kimel v Argentina***, the Court emphasised 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.

111. According to the Court, statements on matters of public interest, particularly those that hold a public institution accountable, deserve special protection because they are essential to enabling democracy. The Court has indicated that a greater margin of tolerance should be shown towards statements and opinions on matters of the public interest on numerous occasions. In **Canese v Paraguay**, the IACtHR reiterated the need for greater tolerance and latitude towards statements and opinions concerning public officials stating:

Democratic control exercised by society through public opinion encourages the transparency of State activities and promotes the accountability of public officials in public administration for which thereshould be a reduced margin for any restriction on political debates or debates on matters of public interest.

112. The different threshold is because the activities of these figures are a matter of public interest and debate which is crucial in a democracy. The Court stated in ***Canese v Paraguay*** that:

in the terms of Article 13(2) of the Convention, a certain latitude in the broad debate on matters of public interest ... is essential for the functioning of a truly democratic system. The same principle applies to opinions and statements of public interest made with regard to an individual who stands as candidate for the presidency of the Republic, thereby voluntarily laying himself open to public scrutiny, and to matters of public interest about which society has a legitimate interest to keep itself informed and to know what influences the functioning of the State, affects general interests or rights, or entails important consequences.

113. In ***Herrera Ulloa***, the Court held that the application of a criminal conviction for the defamation of a public official was in violation of freedom of expression. It held that a "different threshold of protection" should be applied in such cases. It stated:

Those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticised, because their activities go beyond the private sphere and belong to the realm of public debate.

114. In ***Canese v Paraguay***, the Court found not only that the criminal conviction was unjustified, but also that the criminal proceedings were an unjustified restriction on Mr Canese's right to freedom

of expression. They constituted "unnecessary and excessive punishment" and limited **"the open debate on topics of public interest or concern"**. It was observed that:

there was no imperative social interest that justified the punitive measure, because the freedom of thought and expression of the alleged victim was restricted disproportionately, without taking into consideration that his statements referred to matters of public interest

115. In ***Kimel***, the Court actually ordered the state to amend its criminal defamation laws. Although it left open the possibility of criminal sanctions, the Court emphasised that such sanctions could only be used in the narrowest circumstances possible:

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…

116. The Court emphasised the importance of confining the application of criminal laws to "serious" infringements of another fundamental right and of ensuring proportionality "to the seriousness of the damage caused". Although not entirely ruling out any criminal sanction entirely, it made clear that this was only be used exceptionally. The possibility of criminal sanctions should be "carefully analysed" considering:

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.

117. In ***Donoso v Panama***, the Court found that Panama had violated the right to freedom of expression in imposing a criminal sanction. The Court stated that **"greater protection"** must be awarded to speech that relates to public officials, because of the public interest in their activities. Whilst the Court did not reject criminal sanctions altogether, it noted that the imposition of day fines unnecessary:

It is important to note that the Court and IACHR have also held that a violation of the right to freedom of expression that results from enforcement of a law that is incompatible with the ACHR commences as soon as criminal proceedings are instituted and not simply when the penalty is imposed. As the Commission has indicated, the mere fact of criminally prosecuting someone for legitimately exercising his right to freedom of expression constitutes a violation of that right.

118. In ***Donoso v Panama***, the Commission agreed to hear the case even before the domestic criminal proceedings were finalised on the grounds that the arbitrary prosecution in itself violated the victim's right tofreedom of thought and expression. The Court subsequently found in favor of the individual in the case. In the case of ***Kimel***, the Court held that the **"effects of the criminal proceedings in themselves, [...] show that the subsequent liability imposed on Mr Kimel was serious"**

119. The jurisprudence of the Court thus demonstrates that the coercive power of the state may not be exercised so as to negatively affect the freedom of expression by using criminal laws to silence those who exercise their right to express themselves critically, or to lodge complaints of alleged human rights violations.

120. My Lord, we strongly submit that it is extreme and disproportionate to use criminal laws to protect the honor of public servants from the complaints made against them for serious human rights violations, especially as this could thwart or inhibit the critical and necessary work of human rights defenders when they scrutinise persons who hold public office.

The European Convention on Human Rights (ECHR)

121. The bodies of the Council of Europe have urged member states to abolish prison sentences for defamation altogether and to consider decriminalizing defamation completely.

Parliamentary Assembly Resolution 1577 of 4 October 2007, "Resolution towards decriminalization of defamation" calls on states to:-

- *17.1. abolish prison sentences for defamation without delay;*
- *17.2. guarantee that there is no misuse of criminal prosecutions for defamation and safeguard the independence of prosecutors in these cases;*
- *17.3. define the concept of defamation more precisely in their legislation so as to avoid an arbitrary application of the law and to ensure that civil law provides effective protection of the dignity of persons affected by defamation;*
- *17.4. in accordance with General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI), make it a criminal offence to publicly incite to violence, hatred or discrimination, or to threaten an individual or group of persons, for reasons of race, colour, language, religion, nationality or national or ethnic origin where those acts are deliberate;*

- *17.5. make only incitement to violence, hate speech and promotion of negationism punishable by imprisonment;*
- *17.6. remove from their defamation legislation any increased protection for public figures, in accordance with the Court's case law, and in particular calls on:-*
- *17.6.1. Turkey to amend Article 125.3 of its Criminal Code accordingly;*
- *17.6.2. France to revise its law of 29 July 1881 in the light of the Court's case law;*
- *17.7. ensure that under their legislation persons pursued for defamation have appropriate means of defending themselves, in particular means based on establishing the truth of their assertions and on the general interest, and calls in particular on France to amend or repeal Article 35 of its law of 29 July, 1881 which provides for unjustified exceptions preventing the defendant from establishing the truth of the alleged defamation;*
- *17.8. set reasonable and proportionate maxima for awards for damages and interest in defamation cases so that the viability of a defendant media organ is not placed at risk;*
- *17.9. provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury;*
- *17.10. bring their laws into line with the case law of the Court as regards the protection of journalists' sources.*

122. Parliamentary Assembly recommendation 1814 of 4 October 2007 calls 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 European Court of Human Rights, with a view to removing any risk of abuse or unjustified prosecutions"**.

123. Previously, the Committee of Ministers in its **"Declaration on Freedom of Political Debate"** of 12 February 2004 stated that defamation or insult published by the media should **not lead to imprisonment** "unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech".

124. Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe has made several statements in support of the decriminalization of defamation. Most notably, he recently stated at a hearing on "The state of media freedom in Europe" at the Council of Europe's Committee on Culture, Science and Education on 12 September 2011:

Defamation is still criminalised in several parts of Europe. Laws are in place which make it a criminal offence to say or publish true or false facts or opinions that offend a person or undermine his or her reputation. Journalists can be put in prison for what they have reported.

This happened for instance in Azerbaijan, where Eynulla Fatullayev (among others) had been convicted of defamation and sentenced to imprisonment. The European Court found later on that this was contrary to the European Convention of Human Rights.

The European Court of Human Rights underlined that "the imposition of a prison sentence for a press offence will not be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention except for exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence".

Offences against "honour and dignity" should be decriminalised and dealt with in civil law courts in a proportionate manner. Prison sentences should no longer be enforced in cases of defamation

125. He recommended further steps to decriminalize defamation throughout Europe.

European Court Of Human Rights (ECtHR)

126. Although the European Court on Human Rights (ECtHR) has not ruled that to have the criminal offence of defamation is itself a violation of Article 10 of the ECHR on freedom of expression, it has however subjected the imposition of criminal liability for defamation and any sanction on freedom of expression to very close scrutiny.

127. In ***Lingens v Austria***, the ECtHR rejected an argument that criminal libel proceedings did not "strictly speaking prevent [the convicted journalist] from expressing himself" observing that the penalty imposed:

Amounted to a kind of censure which would be likely to discourage him from making criticisms of this kind again in the future ... In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog..

128. In ***Raichinov v Bulgaria***, the ECtHR placed "particular reliance" on the fact that the applicant was subject not to a "civil or disciplinary sanction, but instead to a criminal one". It stated:

It is true that the possibility of recurring to criminal proceedings in order to protect a person's reputation or pursue another legitimate aim under paragraph 2 of Article 10 cannot be seen as automatically contravening that provision, as in certain grave cases – for instance in the case of speech inciting to violence – that may prove to be a proportionate response. However, the assessmentof 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.

129. The ECtHR found that criminal proceedings and the applicant's conviction were "disproportionate" to the incident at issue. It observed that:

In this connection, the Court reiterates that the dominant position which those in power occupy makes it necessary for them to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified criticisms of their adversaries ... The applicant's resulting sentence – a fine and a public reprimand – while being in the lower range of the possible penalties, was still a sentence under criminal law, registered in the applicant's criminal record..

130. The ECtHR noted that the victim of the insult was **a high-ranking public official, such as in this petition,** the **"bounds of acceptable criticism" geared toward him were wider than in relation to a private individual** (although they were not "limitless").

131. The ECtHR accepted that he "needed to enjoy confidence in conditions free of undue perturbation when on duty" but the Need to ensure that civil servants enjoy public confidence in such conditions can justify an interference with the freedom of expression only where there is a real threat in this respect.

132. My Lord, in the circumstances the ECtHR found that there were **"no sufficient reasons"** for the interference with the right to freedom of expression and the restriction "failed to answer any pressing social need and could not be considered necessary in a democratic society."

133. The jurisprudence of the ECtHR suggests that the Strasbourg court will apply an especially high level scrutiny of any restriction or penalty imposed through criminal sanction for defamation, particularly where a **public figure/public official complains** that they have been defamed. Persons involved in activities that fall within the domain of public interest should have a greater tolerance and

openness to criticism. This reflects the principle of the ECtHR that a public official who "lays himself open to close scrutiny of his every word and deed" must show a "greater degree of tolerance".

134. The ECtHR has highlighted the problematic nature of criminal defamation laws and their application in many cases including:

i. ***Fatullayev v Azerbaijan*** (criminal penalties for defamation were found not to be justified);

ii. ***Marchenko v Ukraine*** (criminal penalty was found to be excessive)

iii. ***Gavrilovici v Moldova*** (criminal sanctions on a person exercising his freedom of expression could be considered compatible with Article 10 "only in exceptional circumstances, notably where other fundamental rights have been seriously impaired");

iv. ***Bodrozic and Vujin v Serbia*** (where the ECtHR stated "recourse to criminal prosecution against journalists for purported insults raising issues of public debate should be considered proportionate only in very exceptional circumstances involving most serious attack on an individual's rights");

v. ***Mahmudov v Azerbaijan***(a prison sentence would be proportionate "only in exceptional circumstances, if other fundamental rights have been seriously impaired, as for example in cases of hate speech or incitement to violence);

vi. ***Krasulya v Russia***(the threat of imprisonment and suspended sentence **imposed a chilling effect on applicant, restricting his journalistic freedom** and reducing his ability to impart ideas and information in the public interest);

vii. ***Dabrowski v Poland***(the imposition of a criminal penalty, even if it is "light", leads to a criminal record and has serious implications);

viii. ***Cumpana v Romania***(the imposition of a prison sentence for a press offence would be compatible with 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";

ix. ***Dalban v Romania***(criminal conviction and sentence amounted to a disproportionate interference with freedom of expression)….

GLOBAL TRENDS

135. My Lord, there is a growing trend around the world to decriminalize defamation. Indeed, at a national level there is an **"increasing tendency to view criminal defamation as anunjustifiable restriction on freedom of expression and to abolish it in favour of civil defamation."**

136. A number of states – including Argentina, Mexico, Georgia, Ghana, UK, Ireland, the Maldives, Sri Lanka and Togo – no longer have a criminal law on defamation because they have decriminalized it. After their transition to democracy, other states such as Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, Romania and Serbia decided not to sanction libel with imprisonment. There are also states that have decriminalized libel offences partially, such as Uganda, which has decriminalized seditious libel, or have removed imprisonment for criminal libel, such as the Central African Republic and Croatia. Furthermore, prominent political figures in other states, such as Indiaand France,have appeared to endorse decriminalization of defamation.

137. Some of the most notable examples of these countries are indicated below:-

I. Argentina: To comply with this Court's ruling in the Kimel case, in September 2009. President Kirchner sent a legislative proposal to Congress to decriminalize defamation, which was approved in November 2009.

II. Armenia: On 18 May 2010, the National Assembly adopted amendments to the Armenian Criminal and Civil Codes decriminalizing libel and insult.

III. Bermuda: The Supreme Court of Bermuda declared on 12 August 2011 that Bermuda's criminal libel statute was unconstitutional because it criminalizes trivial and non-intentional libel, and lacks safeguards to prevent abuse.

IV. Bosnia and Herzogovina: Criminal offences against honor and reputation were repealed on 1 November 2002. A new law, allowing for defamation to be dealt within

V. the civil jurisdiction, has been enacted.

VI. *Bulgaria:* In Bulgaria, the penalty of imprisonment for defamation was abolished in

VII. 1999. Articles 146 (insult), 147 (criminal defamation) and 148 (public insult) of the Criminal Code prescribe a penalty of fine.

VIII. *Central African Republic:* In 2004, an amendment was adopted to the 1998 Press Law which removed imprisonment as a penalty for defamation.

IX. *Cote D'Ivoire*: Imprisonment for defamation was abolished in 2004.

X. *Croatia*: The Criminal Code was amended in June 2006 to remove imprisonment as a penalty for defamation.

XI. *El Salvador:* On 8 September 2011, the legislative assembly adopted a reform bill replacing the penalty of imprisonment for crimes against public image and privacy with monetary fines. Although the bill provides for journalists to be suspended for up to two years if they are found guilty of a crime against someone's honor, the president has suggested that this condition be removed.

XII. *Georgia*: In 2004, the Georgian parliament repealed the criminal defamation laws and replaced them with a progressive law on the protection of freedom of speech and expression. This law explains the fundamental status of freedom of expression in society, provides clear principles when it may be restricted, the safeguards that must be in place to prevent abuses. It also protects the confidentiality of journalists' sources and whistle-blowers.

XIII. *Ghana*: On 27 July 2001, through the Criminal Code (Repeal of the Criminal and Seditious Laws (Amendment Bill) Act 2001, Ghana's parliament repealed provisions of the Criminal Code of 1960 dealing with criminal and seditious libel.

XIV. *Ireland*: the Defamation Act 2009, which came into effect on 1 January 2010, decriminalized libel in Ireland. Section 35 of the legislation states the "common law offences of defamatory libel, seditious libel and obscene libel are abolished."

XV. Kyrgyzstan: ~~On 11 July 2011~~, President Roza Otunbayeva approved a law decriminalizing libel.

XVI. Maldives: The Maldives passed an amendment to the Penal Code abolishing five articles providing for criminal defamation on 23 November 2009.

XVII. Mexico: On 12 April 2007 the Mexican president, Felipe Calderón, signed a federal law decriminalizing defamation, libel and slander. The law repealed several provisions of the federal penal code relating to press offences so that defamation is now punishable by damages and corrections of erroneous material rather than imprisonment.

XVIII. Montenegro: On 22 June 2011, the parliament of Montenegro adopted laws decriminalizing defamation. The law entered into force on 9 July. It is interesting to note that the government had previously noted that decriminalization of libel was one of the European Union's recommendations as a means to improve media freedom.

XIX. New Zealand: The Defamation Act of 1992 repealed the crime of defamation. Although the government proposed adopting criminal provisions for defaming electoral candidates, the proposal was abandoned after strong opposition.

XX. Romania: The Romanian legislature repealed criminal defamation in September2009.

XXI. *Serbia*: On 19 July 2011, Serbia's State Secretary in the Ministry of Justice, Slobodan Homen, announced that defamation and libel will be removed from the country´s criminal code in autumn 2011. There were OSCE-facilitated consultations on the decriminalization of libel in Belgrade in October 2011.

XXII. Slovenia: Slovenia's Criminal Code adopted in 2008 did not criminalize defamation generally; criminal liability extends to journalists, editors and publishers only.

XXIII. Sri Lanka: On 18 June 2002, the Sri Lankan government adopted a law repealing criminal defamation.

XXIV. Togo: Togo abolished criminal sanctions for defamation and insult on 24 August 2004 through amendments to the Press and Communications Act.

XXV. Ukraine: The Criminal Code, which came into effect on 1 September 2001, did not contain any criminal defamation provisions.

XXVI. United Kingdom: The Coroners and Justice Act 2009, section 73 abolished the criminal offences of sedition and seditious libel, defamatory libel, and obscene libel in England, Wales and Northern Ireland.

XXVII. United States of America: There has never been a federal criminal defamation law at the federal level in the USA, where free speech is protected under the First Amendment.

CONCLUSION

138. My Lord, we have shown that it is a global consensus that criminal defamaton laws violate the constitution, the ICCPR, and the ACHPR by unjustifiably limiting the fundamental freedom of

expression including the right to seek, receive or impart information and that the application of criminal libel has a chilling effect on freedom of expression.

139. My Lord, your humble sole interested party therefore now prays for the several orders in the petition herein and invites the court to reject the 1st and 2nd Respondents position.

140. My Lord, we shall be most obliged.

DATED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2016

Litigation Counsel

Demas Kiprono

FOR: ARTICLE I9 – EASTERN AFRICA

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