ARTICLE 19
GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

On

Georgian Criminal and Civil Defamation Provisions

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

ARTICLE 19 has been asked to comment on the criminal and civil defamation provisions, including provisions relating to the rights of reply and refutation, contained in the Georgian Criminal and Civil Codes. There are moves to reform these laws and a number of defamation provisions were contained in the draft Law of Georgia on Freedom of Press and Speech – drafted by the Liberty Institute, in cooperation with the Parliamentary Committee on Legal Issues, Legitimacy and Administrative Reform – which passed a first reading in 1999. Our comments are based on an unofficial English translation of the relevant provisions in the Criminal and Civil Codes.[1]

The civil defamation regime is contained in a series of quite short and general provisions in the Georgian Civil Code. In addition to containing a dangerously overbroad definition of "person", which would allow public bodies to sue in defamation, the principal difficulty with this regime is that it is not developed in sufficient detail to provide the safeguards necessary to protect freedom of expression. The solution, as we describe below, is to bolster the provisions so as to create these safeguards.

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

The (single) criminal defamation provision, by contrast, is rather more narrowly and specifically drawn. However, ARTICLE 19 is of the view that all criminal defamation provisions breach the right to freedom of expression and should, therefore, be repealed. In the case of the Georgian provision, it provides for penalties which are likely to be highly disproportionate to the harm caused, in violation of international proportionality requirements. If the recommendation to repeal this provision altogether is not accepted, at a minimum we recommend that this provision be amended so that it is clear that harsh criminal penalties may never be imposed for defamation.

In Section II, we briefly describe international standards of freedom of expression. In Sections III and IV, we analyse, respectively, the Georgian civil and criminal defamation regimes against these standards. Our analysis draws upon the jurisprudence of the United Nations Human Rights Committee as well as upon that of the European Court of Human Rights in the area of defamation. These standards, as well as comparative standards in this area, have been encapsulated in the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* (*Defining Defamation*),[2] to which we will frequently refer. These principles have attained significant international endorsement, including by the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.[3]

II. International Standards

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. Article 19 of the *Universal Declaration on Human Rights* (UDHR),[4] a United Nations General Assembly resolution, guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),[5] ratified by Georgia in 1994, elaborates on many rights included in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR.

Freedom of expression is also protected in the three regional human rights systems, including Article 10 of the *European Convention on Human Rights* (European

[2] London: ARTICLE 19, 2000.
[3] See their Joint Declaration of 30 November 2000. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument.
[4] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[5] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

Convention), which was ratified by Georgia in 1999,[6] Article 13 of the *American Convention on Human Rights*[7] and Article 9 of the *African Charter on Human and Peoples' Rights*.[8]

The guarantee of freedom of expression applies to all forms of expression, not only those which fit in with majority viewpoints and perspectives. The European Court of Human Rights has repeatedly stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[9]

International law permits limited restrictions on the right to freedom of expression in order to protect various interests, including reputation. The parameters of such restrictions are provided for in both Article 19 of the ICCPR and Article 10 of the European Convention. Article 10(2) of the latter states:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

Any restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by both the Human Rights Committee[10] and the European Court of Human Rights,[11] requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest (including, as noted, protecting the reputations of others), and (3) necessary to secure this interest. In particular, in order for a restriction to be deemed necessary, it must restrict freedom of expression as little as possible, it must be carefully designed to achieve the objective in question and it should not be arbitrary, unfair or based on irrational considerations. Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

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[6] Adopted 4 November 1950, in force 3 September 1953.
[7] Adopted 22 November 1969, in force 18 July 1978.
[8] Adopted 26 June 1981, in force 21 October 1986.
[9] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.
[10] For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.
[11] For example, in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.

III. Civil Defamation Regime

The Civil Code contains Georgia's civil defamation regime. The regime consists of two parts, one creating a civil action for damages for defamation and the other conferring rights of reply and retraction for defamatory statements. We treat the former, which finds expression in Article 18(6) of the Civil Code, in Section III.1 and the latter, which is contained in Articles 18(2)-(4) of the Civil Code, in Sections III.2 and III.3.

III.1 Civil Defamation Action

Article 18(6) of the Civil Code states:

> The protection of the good referred to in this article [human values such as honour, dignity and privacy] shall be exercised regardless of the culpability of the wrongdoer. And if the violation has been caused by culpable action, a person may claim damages (compensation for harm). Damages may be claimed in the form of the profit that accrued to the wrongdoer. In the case of a culpable violation, the injured person may also claim compensation for non-property (moral) damage. Moral damages may be recovered independently from the recovery of property damages.

According to our sources, Article 18(6) should be read in conjunction with Article 18(2), which provides for a right of retraction for defamatory statements, unless the author can show the statements were true.

The term "culpable action" is not defined in the Civil Code, which leaves the door open for potentially overbroad judicial interpretation of this term. For example, courts might apply it to expressive acts performed out of mere negligence. We therefore recommend that this term be clearly and narrowly defined in the legislation.

Notwithstanding the above, our sources inform us that, in the criminal law context, the term "culpable action" denotes actions which are performed with the intent to cause the relevant harm. In the case of civil actions, the term "culpable action" also applies to contexts where the actor recognised, but was indifferent to, the fact that the harm was likely to result. In the case of civil defamation, therefore, we proceed on the assumption that a culpable action is a statement uttered or published with either intent to harm the reputation of a person or with knowledge of, but indifference to, the likelihood of such harm. It is less clear whether culpability in this context also requires knowledge of falsity, an element of the wrong. We discuss this issue at Section III.1.f below.

In contrast to the defamation laws in a number of other countries, Article 18(6) is quite short and is cast in highly general terms. The result is a regime that is short on necessary safeguards and which is accordingly subject to substantial abuse, particularly by public officials and government bodies. Weaknesses in the provision include that it:

a) employs a definition of "person" which is so broad as to permit the bringing of defamation actions by public bodies;
b) fails to differentiate between facts and opinions and, in particular, fails to protect expressions of opinion from defamation claims;
c) imposes a burden of proving the truth of a challenged statement on the defendant, even where the statement relates to a matter of public concern;

d) fails to exempt statements made in certain contexts, for example, in the course of legislative or judicial proceedings, from liability;
e) fails to exempt certain types of information carriers, such as Internet Service Providers, from liability;
f) fails to provide a "reasonable publication" defense;
g) fails to clearly limit the amount of monetary damages in civil defamation actions; and
h) fails to provide a limitations period for bringing civil defamation actions.

We discuss the relevant parts of Article 18(6), and the applicable international standards relating to each of these matters, in the following sections and make relevant recommendations for additions to and amendments of Article 18(6) on this basis.

III.1.a Overbroad Definition of "Person"

Article 18(6) applies generally to all "persons". Article 1509 of the Civil Code provides that the *State* is a legal person, while Article 24 provides that the State may participate in civil law actions just as any legal person may with respect to private actions. It follows that the State, as represented by governmental and other public bodies, is empowered by Article 18(6) to bring actions in defamation.

This extension of the right to bring defamation actions to the State is highly problematic. It is vitally important in a democracy that open criticism of government and public authorities be facilitated. It is equally important to recognise that public authorities have only limited reputations which are in any case public. Finally, public authorities possess ample means to defend themselves. For these reasons, ARTICLE 19 is of the view that defamation actions by government bodies should be prohibited altogether.[12] Indeed, superior courts in a number of countries have limited the ability of public authorities, including elected bodies, State-owned corporations and even political parties, to bring defamation actions.[13] Georgia should follow this lead.

Recommendation:

- Article 18(6) should expressly provide that public bodies of any kind, including bodies forming part of the legislative, executive or judicial branches of government, may not sue in defamation.

III.1.b Protection for Expressions of Opinions

Article 18(6) does not exempt statements of opinion from defamation liability. There are two key problems with this. First, as described more fully in the next section, defendants may be required to prove the truth of an allegedly defamatory opinion in order to avoid liability which, in the case of statements of opinion, is simply impossible and hence a

[12] See *Defining Defamation*, note 2, Principle 3.
[13] See, for example, *Derbyshire County Council v. Times Newspapers Ltd.* [1993] 1 All ER 1011 (United Kingdom); *Rajgopal v. State of Tamil Nadu*, (1994) 6 Supreme Court Cases 632, p. 650 (India); *City of Chicago v. Tribune Co.*, 307 Ill 595 (1923), p. 601 (United States); *Die Spoorbond v. South African Railways* [1946] SA 999 (AD) (South Africa); *Posts and Telecommunications Corporation v. Modus Publications (Private) Ltd.*, (1997), Judgment No S.C. 199/97 (Zimbabwe).

breach of the right to freedom of expression. As the European Court of Human Rights has said: "The requirement to prove the truth of a value judgment … infringes freedom of opinion itself, which is a fundamental part of the right to [freedom of expression]."[14]

Second, the law fails to provide for greater protection of opinions, as mandated by international law. ARTICLE 19 is of the view that the expression of opinions should be absolutely protected.[15] This is based in part on the absolute protection that international law provides for the holding of opinions and in part on the serious abuse of defamation provisions criminalizing the expression of opinions around the world. It is also based on the fact that, as a matter of law, opinions are no longer penalised in defamation in some jurisdictions, while in others this is observed in practice. Regardless, it is recognised that statements of opinion deserve a greater degree of protection than (false) statements of fact. This is reflected, for example, in the high level of protection afforded by the European Court of Human Rights for such statements, even when expressed in extreme forms. Article 18(6) fails to respect these standards.

Recommendation:

- Article 18(6) should explicitly provide that statements of opinion are not actionable in defamation.

III.1.c Burden of Proof

As noted above, Article 18(6) appears to be governed by Article 18(2) so that a defendant in a civil defamation action will always prevail in the event that he or she proves that his or her allegedly defamatory statement is true. It would perhaps be preferable were explicit language to this effect inserted in Article 18(6). In any event, this is partly consistent with the ARTICLE 19 principles, which provide that no one should be liable for a statement which has been found to be true.[16]

However, these provisions expressly place the burden of proof in civil defamation cases on the person who has made the allegedly defamatory statement. Unless the person can prove that the statement was true, he or she will be liable. This is in violation of international and comparative standards which recognise, at least as regards expression on matters of public concern, that this may impose an unreasonably harsh burden on the media, who may have to protect confidential sources of information. As a result, courts have instead provided that, in cases involving matters of public concern, the plaintiff should bear the onus of proving the falsity of the challenged statement.[17]

Recommendation:

- Where an allegedly defamatory statement relates to a matter of public concern, the plaintiff should bear the burden of proving that the statement was false.

[14] *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 42.
[15] See *Defining Defamation*, note 2, Principle 10.
[16] See *Defining Defamation*, note 2, Principle 7(a).
[17] See *Defining Defamation*, note 2, Principle 7(b).

III.1.d Exemptions from Liability

It is recognised that certain kinds of statements should never attract liability for defamation. Generally speaking, this is where it is clearly in the public interest that people be able to speak freely without fear or concern that they may be liable for what they have said. This would apply, for example, to statements made in court, in the legislature and before various official bodies, as the European Court of Human Rights has made clear. Equally, fair and accurate reports of such statements, in newspapers and elsewhere, should be protected.[18]

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

> (a) Certain types of statements should never attract liability under defamation law. At a minimum, these should include:
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> i. any statement made in the course of proceedings at legislative bodies, including by elected members both in open debate and in committees, and by witnesses called upon to give evidence to legislative committees;
> ii. any statement made in the course of proceedings at local authorities, by members of those authorities;
> iii. any statement made in the course of any stage of judicial proceedings (including interlocutory and pre-trial processes) by anyone directly involved in that proceeding (including judges, parties, witnesses, counsel and members of the jury) as long as the statement is in some way connected to that proceeding;
> iv. any statement made before a body with a formal mandate to investigate or inquire into human rights abuses, including a truth commission;
> v. any document ordered to be published by a legislative body;
> vi. a fair and accurate report of the material described in points (i) – (v) above; and
> vii. a fair and accurate report of material where the official status of that material justifies the dissemination of that report, such as official documentation issued by a public inquiry, a foreign court or legislature or an international organisation.
>
> (b) Certain types of statements should be exempt from liability unless they can be shown to have been made with malice, in the sense of ill-will or spite. These should include statements made in the performance of a legal, moral or social duty or interest.

Recommendation:

- Article 18(6) should provide for exemptions from liability in defamation for statements falling within the above-listed categories.

[18] See, for example, *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97 (members of the legislature should enjoy a high degree of protection for statements made in their official capacity); *Nikula v. Finland*, 21 March 2002, Application No. 31611/96 (statements made in the course of judicial proceedings should receive a high degree of protection); *Bladet Tromso and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93 (media and others should be free to report, accurately and in good faith, official findings or official statements).

III.1.e Exemption for Certain Information Carriers

Pursuant to Article 18(6), an Internet Service Provider (ISP) may risk liability as a culpable disseminator of statements, whenever it has been informed of a challenged to those statements. Given this potential for liability, most ISPs would simply remove statements from the Internet as soon as they have been challenged as defamatory, regardless of the legitimacy of the challenge. This represents a classic example of the chilling of expression, clearly in conflict with freedom of expression.

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

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

Recommendation:

- ISPs, and other entities and individuals who perform similar functions with respect to the Internet, should, unless they adopt the impugned statements, be shielded from defamation liability.

III.1.f Defence of Reasonable Publication

Article 18(6) provides for responsibility in damages for the dissemination of defamatory statements for all those who are 'culpable'. As noted above, the term "culpable" is not defined in the Civil Code. It may be taken to mean that the publication must have been disseminated with full knowledge of its falsity but it is likely that a broader interpretation could be adopted. Thus, individuals may be found to be liable whenever they are aware of the defamatory nature of their statements, even if they operated under the mistaken belief that these statements were true. Obviously, with such a broad standard, an immense amount of mass media publication could be the subject of Article 18(6) defamation actions.

A rule which assigned liability for *any* false statements, subject only to the condition that the disseminator knew they were harmful to reputation, is particularly unfair for the media, which are under a duty to satisfy the public's right to know where matters of public concern are involved and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information.

As a result, an increasing number of jurisdictions are recognising a 'reasonableness' defence – or an analogous defence based on the ideas of 'due diligence' or 'good faith' – due to the harsh nature of the traditional rule according to which defendants are liable whenever they disseminate false statements, or statements which they cannot prove to be true. This provides protection to those who have acted reasonably in publishing a statement on a matter of public concern, while allowing plaintiffs to sue only those persons who have

not acted reasonably. As the European Court of Human Rights has noted, for the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test.[19] This establishes a more appropriate balance between the right to freedom of expression and reputations.

Recommendation:

- Article 18(6) should provide for a defence of reasonable publication, along the lines suggested above.

III.1.g Sanctions

Unduly harsh sanctions *per se*, even for statements which it is agreed should attract liability in defamation, breach the guarantee of freedom of expression. As the European Court of Human Rights has stated, any sanction imposed for defamation must bear a "reasonable relationship of proportionality to the injury to reputation suffered".[20] To ensure that this standard is respected in practice, national defamation laws should include clear rules on the allocation of sanctions. In particular, non-monetary awards should be prioritised wherever possible and consideration should be taken of any potentially chilling effects particular monetary awards might have. A fixed ceiling for compensation for non-material harm to reputation should be set out in law, and the maximum should be awardable in only the most serious of cases.[21]

Article 18(6), in contrast, simply provides that compensation shall be available for 'non-property (moral) damage', thereby almost encouraging large claims and perhaps awards.[22]

Article 18(6) also provides for damages in the form of the "profit that accrued to the wrongdoer". According to our information, this is restricted to profit directly resulting from the defamatory statement. Obviously, any broader provision – perhaps permitting the recovery of any profit derived from the entire publication in which defamatory material appeared – would be excessive and, therefore, highly problematic from the point of view of freedom of expression. This should, however, be specified more clearly in Article 18(6).

Recommendations:

- Article 18(6) should specify that civil defamation awards must be strictly proportional to the harm actually suffered.
- Non-monetary remedies should be emphasised for civil defamation, to the exclusion of pecuniary awards wherever possible.

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[19] See *Bladet Tromsø and Stensaas v. Norway*, note 18, para 65. See also *Defining Defamation*, note 2, Principle 9.

[20] *Tolstoy Miloslavsky v. United Kingdom,* 13 July 1995, Application No. 18139/91, para. 49.

[21] See *Defining Defamation*, note 2, Principle 15.

[22] While Article 413 of the Civil Code Monetary provides that compensation for non-property damages must be reasonable and fair, this standard is not explicitly adopted by Article 18(6) and, according to our sources, this absence raises the distinct possibility that, in practice, the Article 413 limits may not be observed in Article 18(6) actions.

- A fixed ceiling for non-material harm for defamation should be established, to be awarded in only the most serious of cases.
- It should be clarified that damages based on profit to the wrongdoer should cover only such profits as are directly based on the impugned statements.

III.1.hLimitations Period

Article 18(6) does not provide for a period within which a defamation action must be filed, and there is no other provision of the Civil Code that fills this gap. Consequently, there exists no limitation period for defamation actions.

Allowing cases to be initiated long after the statements on which they are based have been disseminated undermines the ability of those involved to present a proper defence. In all instances, unduly drawn-out cases exert a chilling effect on defendants' freedom of expression, as well as on the ability of plaintiffs to obtain adequate timely redress. *Defining Defamation* proposes a limitation period for defamation actions of one year, absent exceptional circumstances, an approach that has been adopted and/or recommended in a number of jurisdictions.[23]

Recommendation:

- Consideration should be given to provide for a shorter limitation period for filing a defamation action, outside of exceptional circumstances.

III.2 Right of Reply

Article 18(4) provides for a right of reply, in the following terms:

> A person whose honour and dignity has been defamed by information disseminated in the mass media shall be entitled to disseminate information in answer to the defamation through the same media of information.

The right of reply constitutes a highly disputed area of media law[24] and advocates of media freedom, including ARTICLE 19, generally suggest that such a right should be voluntary rather than prescribed by law. In the event that a legislative right is retained, certain conditions should apply that are absent from Article 18. These include that the reply:

- should only be in response to statements which breach a legal right of the person claiming the reply and should not be permitted to be used to comment on opinions that the reader or viewer doesn't like;

[23] See, for example, the Report of the Legal Advisory Group on Defamation in Ireland, published in March 2003. Available at: http://www.justice.ie/80256976002CB7A4/vWeb/fsWMAK4Q7JKY. See also *Defining Defamation*, note 2, Principle 5.

[24] In the United States, it is seen as unconstitutional on the grounds that it represents an interference with editorial independence. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In Europe, in contrast, the right of reply is the subject of a resolution of the Committee of Ministers of the Council of Europe. Resolution (74) 26 on the right of reply, adopted on 2 July 1974. See also the Advisory Opinion of the Inter American Court of Human Rights, *Enforceability of the Right to Reply or Correction*, 7 HRLJ 238 (1986). In many Western European democracies, the right of reply is provided for by law and these laws are effective to a varying extent.

- should receive similar prominence to the original article or broadcast;
- should be proportionate in length to the original article or broadcast;
- should be restricted to addressing the incorrect or misleading facts in the original text;
- should be able to be refused where it is itself illegal or contains abusive language; and
- should not be taken as an opportunity to introduce new issues or comment on other correct facts.

It is quite clear that Article 18(4) fails to conform to these standards in important ways. It is not restricted to statements of fact and there are no conditions placed on the reply, for example regarding length or the substance of the reply.

More seriously, in light of the Civil Code's very broad definition of "person", this provision is open to abuse. Public bodies, totally inappropriately, are entitled, and no doubt would take advantage of the opportunity, to demand a reply whenever they consider themselves to have been defamed by a mass medium publication, with all of the problems this entails, as outlined above, even when, as would normally be the case, the statements in question relate to a matter of public interest. As for defamation generally, pursuant to international law public bodies do not have such a right, and they should not be accorded one in Georgia.

In its present form, this right should also be denied to public officials, at least with respect to statements relating to their performance of their public functions. Officials may abuse this right to demand replies whenever their activities are the subject of critical comment by the mass media. The potentially resulting costs for the media could be enormous. Again, many of the problems with defamation law generally, as outlined above, apply here. For example, the allegedly injured person need not prove that the information published is untrue and reasonable publication is not a ground for refusing to publish a reply.

Recommendations:
- The right of reply should be elaborated in more detail and restricted in scope in accordance with the principles set out above. In particular, the right should be restricted to cases where a legal right of the claimant has been infringed.
- Public bodies should not benefit from the right to reply.
- At a minimum, conditions should be placed on the availability of this right to public officials, at least in relation to statements regarding their performance of their public duties. Such conditions should include a requirement that they prove the statements are false and the right of the media to refuse publication of the reply where they acted reasonably in publishing the original statement.

III.3 Right of Retraction

Article 18 contains two provisions relating to retraction. Article 18(2) provides:

> A person is entitled to demand in court the retraction of information that defames his honour, dignity, privacy, personal inviolability or business reputation unless the person who has disseminated such information can prove that it corresponds to the true state of affairs. The same rule applies to the incomplete dissemination of facts, if such dissemination defames the honour, dignity or business reputation of a person.

Article 18(3) expands on this, stating:

> If information defaming the honour, dignity, business reputation or private life of a person has been disseminated in the mass media, then it must be retracted in the same media. If such information is contained in a document issued by an organization, then this document must be corrected and the concerned parties must be informed of the correction.

There are a number of serious problems with these provisions. In the first place, we must emphasise the by-now familiar point that both public officials and public entities would appear to be empowered to demand retractions whenever allegedly false and defamatory information is published that in any way concerns or relates to them, with potentially disastrous results for the mass media.

Second, these provisions impose an inappropriate burden of proof, as does Article 18(6). As noted above, where a statement relates to a matter of public concern, the burden should fall on the person allegedly defamed to prove the falsity of the challenged statement. As the provision now stands, it is subject to serious abuse by persons, public or private, who simply want to put obstacles in the way of the legitimate publication activities of the mass media and other organisations and individuals insofar as they are discussing matters of public concern. All that such persons need do is to allege they have been defamed. At that point, the mass medium or other organisation or individual is obligated to mount a defence by showing that the challenged statement is true. This may result in a situation where the mass media and others are wary of publishing information of clear public importance unless they are in a position to prove, by the exacting standards of courts, the truth of the information. Even if they do succeed, they may risk incurring considerable court costs. Alternately, the mass media may print retractions whenever they receive demands to do so (regardless of whether the demands have merit), for fear that if they do not, they will find themselves with the monetary and time burdens of defending their refusal in court.

Third, Article 18(2) does not define the term “incomplete dissemination of facts”. This term could be interpreted very broadly to include, for example, wrong conclusions that people might draw from an article which was itself factually correct. To the extent that it covers incomplete dissemination of correct *facts*, it is, in our view, inappropriate. One cannot require a mass medium or any other publisher to retract a statement that is true, regardless of its effect on the reputation of others. In any case, this problem is surely adequately dealt with by the right of reply, discussed above.

Fourth, the right applies, apparently, to any publication by any organisation whatsoever, no matter how small, and no matter how incidental the reference to the complainant. Publications by small organisations with limited budgets should not be subject to a

requirement of retraction. The threat of continuous demands for retractions would, in a great many cases, discourage such organisations from commenting in any way on matters of public interest relating to the government.

Recommendations:

- These articles should be restricted in scope to statements of fact in the mass media which the claimant can prove are false.

IV. Criminal Defamation

IV.1 The Nature of Criminal Defamation

Article 148 of the Georgian Criminal Code provides:

> Defamation that contains acquisition in crime is punishable with fine or from 100-200 hours of public works or up to 1 year of correctional works.

We understand the term "defamation that contains acquisition in crime" to denote statements asserting that a person has committed a crime, as defined in the Criminal Code. According to our information, the following conditions also apply to this offence:

1. Only the victim is permitted to bring a criminal defamation action and the State prosecutor becomes involved only if the victim demands it.
2. The burden of proof is on the complainant, who must prove guilt beyond a reasonable doubt.
3. The defamatory statement must have been made with the intent to cause harm to the victim, or with complete or reckless disregard for the consequences of the statement.

Finally, according to our sources, the following apply with respect to the sanctions provided for in Article 148:

1. Public work is work deemed to be socially useful, typically by local self-governmental bodies. Usually, the person assigned the work must devote approximately four hours to it per day. Thus, for example, a person sentenced to perform 100 hours of public work will have to work 25 days to satisfy the obligation. In the event that a person refuses to do the work, or persistently avoids it, he or she may be imprisoned, at the rate of one day for every eight hours of work which remains undone.
2. Correctional work amounts to a tax on the convicted person's wages. The person continues to work at his or her workplace and 5-20% of his or her salary is deducted and paid to the State. In the event that the person refuses to work at his or her workplace, imprisonment may be substituted in the proportion of one day of incarceration for every three days of correctional work owed.

IV.2 Inappropriateness of Criminal Defamation Statute

Consistent with international human rights law and practice, ARTICLE 19 is of the view that defamation should not be punished through the application of criminal laws but

rather should be subject only to civil or administrative sanctions or dealt with through self-regulatory mechanisms.

There is a strong and growing body of law in support of the principle that criminal defamation is itself a breach of the right to freedom of expression. For example, the UN Human Rights Committee, the body with responsibility for overseeing implementation of the ICCPR, has repeatedly expressed concern, in the context of its consideration of regular country reports, about the possibility of criminal sanctions for defamation.[25]

Similarly, the UN Special Rapporteur on Freedom of Opinion and Expression, in his Report in 2000, and again in 2001, called on States to repeal all criminal defamation laws in favour of civil defamation laws.[26] Every year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with "abuse of legal provisions on defamation and criminal libel".[27]

In a similar vein, the three special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – have met each year since 1999 and each year they have issued a joint Declaration addressing various freedom of expression issues. In their joint Declarations of November 1999, November 2000 and again in December 2002, they called on States to repeal their criminal defamation laws. The 2002 statement read:

> 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.[28]

The principal concern expressed by these bodies, as well as by various national courts, with respect to criminal defamation is the chilling effect of criminal penalties, which are disproportionate to any harm incurred. While these authorities have generally expressed their concerns on the basis of available custodial penalties, this concern is particularly apposite in the context of Article 148.

IV.3 Application of this Principle to Article 148

Article 148 is, in terms of scope of application, relatively narrowly drawn, subjecting to criminal liability only false allegations of criminal activity with an intent to cause harm to reputation. Nevertheless, the penalties provided for in Article 148 for the peaceful expression of views, albeit harmful ones, are excessive. A person will be obliged to spend between 25 and 50 days, four hours per day, doing public work, during which time it may

[25] For example in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999).
[26] See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64, 26 January 2001.
[27] See, for example, Resolution 2003/42, 23 April 2003, para. 3(a).
[28] Joint Declaration of 10 December 2002. Available at: http://www.cidh.oas.org/Relatoria/English/PressRel02/JointDeclaration.htm.

well be that he or she is unable to continue with his or her regular employment, or may lose as much as 20% of his or her salary for a full year. Moreover, the article leaves it up to the discretion of the court to determine the specific penalty, given the range of penalties available. This is particularly problematic given that the State prosecution may be involved in some but not all criminal defamation cases. Cases in which the prosecution is involved may be treated differently in terms of sanctions. Finally, Article 148 may ultimately lead to imprisonment for expressive activities, in the event that someone convicted of criminal defamation refuses to comply with his or her public or correctional work obligations.

The possibility of involvement of the State prosecutor is also problematical. Although international standards are not clear on this, in many countries those wishing to pursue a criminal defamation route cannot, at least in practice, obtain assistance from the State prosecutors. Principle 4(b)(iii) of *Defining Defamation* reflects this principle, stating:

> public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official.

Recommendations:

- Defamation should be removed altogether from the Criminal Code.
- In the event that Article 148 is retained, the following amendments should be introduced:
  - there should be no possibility of imprisonment or other harsh criminal sanctions for defamation;
  - strict proportionality should be required between the harm done and any penalty imposed;
  - clear guidelines should be set out regarding penalties; and
  - there should be no possibility for the State Prosecutor to be involved in cases.