Written Comments on the Case of *Katya Kasabova v. Bulgaria*

A Submission to the European Court of Human Rights from ARTICLE 19 and the Open Society Justice Initiative

December 2008

Application no. 22385/03
KATYA KASABOVA v. BULGARIA

WRITTEN COMMENTS OF
ARTICLE 19
THE OPEN SOCIETY JUSTICE INITIATIVE

Pursuant to leave granted on November 14, 2008 by the President of the Chamber, acting under Rule 44 § 2 of the Rules of Court, ARTICLE 19 and the Open Society Justice Initiative hereby submit written comments on the legal principles that should govern the resolution of the issues presented by this case.

Introduction

1. This case involves the conviction of a journalist for the criminal offence of defamation for writing an article discussing allegations of corruption and abuse of their duty by four provincial civil servants. Following publication of the article, the civil servants were disciplined by their employer and the public prosecutor opened a criminal investigation against them, which was still ongoing at the time of the final domestic judgment. The journalist had relied on a variety of sources when writing the article. The domestic courts presiding over the libel case found that the journalist applicant had failed to prove the truth of her allegations, and that in any event, only a prior criminal conviction against the civil servants would have been "capable of establishing the truth" of an offence such as bribe-taking for the purposes of a defamation case. As no such prior conviction existed, she had to be guilty of the offence. The domestic courts also found that the applicant did not carry out "a proper journalistic inquiry."[1] The journalist was ordered to pay a fine of BGN 2,800, non-pecuniary damages of BGN 4,000 and court costs. The applicant complains that her Convention rights to a fair trial and freedom of expression were violated.

2. This case raises important questions at the intersection of Articles 6 and 10 of the Convention, with the potential to affect the ability of the media and other social actors to contribute to a vibrant democratic debate. These comments address three issues: (A) the burden of proof in criminal defamation proceedings, both generally and (B) in relation to allegations of criminal conduct; and (C) the conditions under which defamation defendants should be absolved of liability on the grounds that they acted in good faith or with reasonable care in disseminating statements on matters of public interest.

A. Burden of Proof in Criminal Defamation Proceedings

3. The case law of this Court has yet to squarely address the question of whether it is compatible with the Convention to require a defendant in a criminal defamation proceeding to prove the veracity of any defamatory statements of fact, or other central elements of criminal liability. These questions implicate both the principle of presumption of innocence, established in Article 6 § 2 of the Convention, and the general protections for freedom of expression under Article 10.

1. Permissible Presumptions of Law or Fact in Criminal Proceedings

4. The right to be presumed innocent until proven guilty is a fundamental and broadly accepted tenet of international human rights law. Its application imposes on the prosecution the burden of proving all the critical facts and elements of a criminal charge and requires that any doubts as to the defendant's guilt should benefit the defendant.[2] The right is not, however, an absolute one. In particular, this Court has held that (rebuttable) presumptions of fact or law, which effectively shift

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[1] Judgment of the Burgas Regional Court, dated 17 January, 2003.
[2] See, among others, *Barbera, Messegue and Jabardo v. Spain*, Judgment of 6 December, 1988, para. 77.

the burden of proof to the accused, are not necessarily inconsistent with the Convention – as long as they are "confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."[3] Thus, in *Salabiaku v. France*, the Court reviewed the application of a statutory rule that a person caught in possession of undeclared customs goods was presumed to be liable of having illegally smuggled such goods. The Court held that that presumption did not violate Article 6 § 2 because it was rebuttable and had been moderated by domestic court decisions upholding the trial court's unfettered power of assessing evidence and by giving a broad meaning to *force majeure* [4]

5. The Canadian Supreme Court, which applies a test of permissible restrictions to constitutional rights similar to that employed by this Court, reviewed the question of statutory derogations from the presumption of innocence in the 1986 case of *R. v. Oakes*.[5] Striking down the statutory provision at stake, the Canadian Court found that a rule that requires an accused to disprove the existence of a presumed fact, which is "an important element of the offense" in question, violates the presumption of innocence. In the specific case, the Court found that there was "no rational connection" between the basic fact of possession of a narcotic substance and the presumed fact of possession for the purpose of trafficking.

2. ECtHR Jurisprudence on Burden of Proof in Defamation and Libel Proceedings

6. Legal rules that place the burden of proof on the defendant in a libel case (whether criminal or civil) operate on the presumption that defamatory statements are false until proven true and/or that a person's moral character is deemed good until proven otherwise. A key question raised by the Kasabova case is under what conditions such presumptions would be compatible with Articles 6 § 2 and 10 of the Convention. Turning to that specific issue, this Court has held, in *McVicar v. UK* and later in *Steel and Morris v. UK*, that "it is not in principle incompatible with Article 10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements."[6] However, both cited cases arose out of civil defamation proceedings, and the applicants' challenges to the burden of proof requirements in the domestic trials relied exclusively on Article 10 of the Convention. Here, Article 6 § 2 is also engaged, which is only applicable to persons "charged with a criminal offence."

7. More recently, in the February 2008 case of *Rumyana Ivanova v. Bulgaria*, the Court was called to decide on the applicant's claim that the domestic criminal libel proceedings violated both the fundamental Article 6 § 2 principle "that the burden of proof lay on the prosecution" and the Article 10 protections for free expression.[7] Referring to *McVicar* and *Steel and Morris*, the Fifth Section chamber reiterated what it treated as the Court's established case law that it is not "contrary to the Convention to require the defendant to prove, to a reasonable standard, that her allegations were substantially true" (at para. 68). We respectfully find such conclusion to be problematic for several reasons. The *Rumyana Ivanova* Court appears to have applied the *McVicar* line of precedent without taking into account the different nature of the (criminal) libel proceedings in the Bulgarian case, and essentially failing to address the applicant's claims under Article 6 § 2.[8] In addition, the Court did not elaborate on what would constitute "a reasonable standard" of proof to be imposed on defendants in criminal libel cases, in what would essentially be a reversal of the presumption of

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[3] See *Salabiaku v. France*, Judgment of 7 October, 1988, para. 28; and *Phillips v. UK*, Judgment of 5 July, 2001, paras 40-47.

[4] Paras 28-29.

[5] [1986] 1 S.C.R. 103. Section 1 of the Canadian Charter of Rights and Freedoms requires any limitations on Charter rights to be reasonable, prescribed by law and "demonstrably justified in a free and democratic society."

[6] Judgment of 7 May, 2002, para. 87 (emphasis added); see also *Steel and Morris v. UK*, Judgment of 15 February, 2005, para. 93.

[7] Judgment of 14 February, 2008, para. 37.

[8] The Court noted that the proceedings against Rumyana Ivanova were instituted by a private individual, rather than a state authority, and that, "though they started as criminal, they ended with a mere administrative punishment." Para. 68. This notwithstanding, there was no question that the domestic proceedings were criminal in nature and could have well resulted in a verdict of criminal liability.

innocence. And finally, we respectfully submit, the *Rumyana Ivanova* Court failed to properly consider the severe chilling effects that such a reversal of presumption of innocence would surely have on freedom of expression and public debate in a democratic society.[9]

8. In sum, the Court has yet to spell out how the *Salabiaku* standard on permissible shifts of the burden of proof – namely, those confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence – ought to be applied and interpreted in the context of criminal defamation. The instant case presents the Court with an opportunity to revisit these questions in a more deliberate fashion.

3. Comparative Practice and Jurisprudence

9. A substantive or evidentiary rule that places the burden of proof on defendants in defamation proceedings, and especially in criminal cases, has a clear potential to cast a chilling shadow on free expression. Such dangers were eloquently described by Justice Brennan of the US Supreme Court in the landmark case of *New York Times v. Sullivan*, a civil defamation case:

> Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. … Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.'[10]

10. Courts and legislators in much of the democratic world have similarly moved away from a strict liability approach to criminal and civil libel, in recognition of the duty to not inhibit debate on matters of public interest. In *Thoma v. Luxembourg*, this Court underscored its concern to ensure that defamation standards not interfere with free expression in holding that

> punishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.[11]

The domestic courts in that case had found that the journalist defendant had failed to show "lack of malice" by virtue of not having "distanced" himself from the statements of his quoted sources.

11. In addition, this Court has held unduly burdensome requirements of evidence to violate Article 10. In considering the specific circumstances of a case where a journalist had relied on third party sources such as patients and hospital personnel for an article alleging police misconduct, the Court found that it was "an unreasonable, if not impossible task" for the journalist to be required to establish the truth of his statements in a trial for criminal defamation.[12]

12. The Inter-American Court of Human Rights has recently stated in very clear terms that in all criminal cases affecting the right to free expression, "[a]t all stages the burden of proof must fall on the party who brings the criminal proceedings."[13] Previously, in *Herrera Ulloa v. Costa Rica*, which arose out of a criminal and civil defamation case against a journalist who reported European media allegations of misconduct by a Costa Rican diplomat, the Court explained the dangers of reversing the burden of proof in such cases:

> [T]he [national] judge ruled that Mr. Herrera Ulloa's justification defence (*exceptio veritatis)* had to be disregarded as he had failed to prove that the facts that various

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[9] *Kyprianou v. Cyprus*, Grand Chamber Judgment of 15 December 2005, paragraph 175, found that Article 10 protects against the "chilling effect" of interferences with the future exercise of the right to freedom of expression.
[10] 376 U.S. 254 (1964), at 279.
[11] Judgment of 29 March, 2001, para. 62. See also *Jersild v. Denmark*, Judgment of 23 September, 1994, para. 35.
[12] *Thorgeirson v. Iceland*, Judgment of 25 June, 1992, para. 65.
[13] *Kimel v. Argentina,* Judgment of 2 May, 2008, para. 78.

> European newspapers attributed to [the diplomat] were true. …The effect of the standard of proof required in the judgment is to restrict freedom of expression in a manner incompatible with Article 13 of the American Convention, as it has a deterrent, chilling and inhibiting effect on all those who practice journalism. This, in turn, obstructs public debate on issues of interest to society.[14]

13. The national courts in *Herrera Ulloa* held the journalist liable for failing to prove the truth of allegations appearing in other respectable media, which he had accurately reported. As the *Thorgeirson* and *Thoma* cases before the ECHR show, however, a journalist often must rely on the information and opinions of various third-party sources. When it comes to the difficulty of proving the truth of every statement of fact in journalistic-style reporting, it makes little difference if that statement is an explicit third-party quote or a piece of information provided by an unnamed source. That distinction is largely artificial as far as the evidentiary burden and its chilling effects are concerned.

14. Multiple European jurisdictions have also abolished or modified rules that placed the burden of proof on the defendant in criminal defamation proceedings. Thus, the German Federal Constitutional Court was asked to rule, in the *Echternach* case, on the constitutionality of a judicial injunction which prohibited the description of a private foundation as a "nationalistic enterprise in democratic clothing." The German Court concluded that the ordinary courts had erred in requiring the author to provide strict proof of the factual basis of that statement: "The basic right to free expression is intended not merely to promote the search for truth but also to assure that every individual may freely say what he thinks, even when he does not or cannot provide an examinable basis for his conclusion."[15]

15. The Hungarian Constitutional Court reached a similar conclusion in a 1994 case in which it reviewed the constitutionality of a criminal code provision that granted public officials and state institutions special protection vis-à-vis defamatory allegations.[16] The statutory provision in question placed on the accused the burden of proving both the truth of the factual allegations and the fact that their dissemination was in the public interest. Recognizing that this provision "reversed the general rule" of presumption of innocence, the Hungarian Court concluded that,

> …allowing verification of the truth does not eliminate the unconstitutionality of the statutory definition. The provisions of criminal law are founded on the presumption of falseness. This would reasonably deter individuals from criticising the actors of public life, detaining them from communicating even true facts or facts believed to be true (*at para.III.4*)

16. English criminal libel laws have been very rarely enforced in recent decades. In a 1980 case, Lord Diplock questioned whether they are compatible with Article 10 of the Convention, including with respect to the burden of proof:

> No onus lies on the prosecution to show that the defamatory matter was of a kind that it is necessary in a democratic society to suppress…. On the contrary, … the publisher of the information must be convicted unless he himself can prove to the satisfaction of a jury that the publication of it was for the public benefit. This is to turn Article 10 of the Convention on its head.[17]

17. The laws and practices of Council of Europe member states, while not uniform, also provide ample support for the proposition that placing the burden of proving truth on criminal defamation defendants is not justifiable in a modern democracy. For example, Austria's 1981 Media Act relieves journalists of the obligation to prove truth if they are able to establish that they observed

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[14] Judgment of 2 July 2004, paras. 132-33.
[15] 42 BVerfGE 167 (1976), 170-71.
[16] Decision 36/1994 (VI.24.) AB. Available at http://www.mkab.hu/content/en/en3/36_1994.pdf.
[17] *Gleaves v. Deakin* [1980] AC 477, at 482-83.

proper journalistic care in publishing matters of significant public interest.[18] Under the Spanish Penal Code, the prosecutor bears the burden of proving the requisite intent (*animus iniurandi*) to establish the crime of "injuria."[19]

18. The newer European democracies, particularly sensitive to the importance of pluralistic debate, have also been moving in similar directions. In Croatia, plaintiffs (accusers) in criminal defamation cases bear the burden of proving that the defendant published the defamatory statements of fact with the sole intent of harming the plaintiff's reputation. Opinions and value judgments enjoy full protection, and public prosecutors play no role in defamation proceedings. [20] Georgia has done away with criminal defamation altogether and, even in civil proceedings, requires the plaintiff to prove that the defamatory allegations of fact were "essentially false."[21] According to the OSCE Representative on Freedom of the Media, another five Council of Europe member states – Bosnia and Herzegovina, Cyprus, Estonia, Moldova, and Ukraine – have decriminalized libel.[22]

B. Burden of Proof Issues in Cases Involving Allegations of Criminal Conduct

19. A subset of criminal defamation laws, falling in some countries under the heading of "calumnia" offenses, provides for stiffer sanctions and/or greater liability against the publication of allegations that another person engaged in criminal conduct. These become particularly problematic where, as in Bulgaria, laws and/or judicial practice not only require defendants to prove the veracity of their allegations, but also severely restrict the nature of the evidence that can be admitted to such effect. In the most extreme version, the only admissible evidence is a final court judgment that finds the plaintiff in the defamation case guilty of the alleged offence. This approach relies on a misguided interpretation of the presumption of innocence, considering it as applicable to everyone, rather than applicable only to the statements of public authorities during a criminal process that impute guilt prior to conviction.

20. This Court has already rejected this evidentiary standard. In *Flux v. Moldova (no. 6)*, for example, the Court, while finding that Article 10 had not been violated in that case, emphasized that "it [did] not accept the reasoning of the [Moldovan] first-instance court, namely that the allegations of serious misconduct levelled against the claimant should have first been proved in criminal proceedings."[23] In the words of Judge Bonello, who agreed with the majority on this point, this interpretation runs the risk of pushing the free media "into the business of respect[ing] eternal silence, waiting deferentially for a judgment of the criminal court" that might never materialize.[24]

21. Charges of criminal conduct are among the most damaging attacks on a person's reputation and, if made in bad faith, they should be sanctioned appropriately. However, placing an insurmountable evidentiary burden on the media and other watchdogs who monitor the conduct of public affairs ill-serves a democratic society. Though many breaches of duty by public officials – including corruption, traffic of influence, and abuse of public office – are criminally punishable, they remain

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[18] Article 29. See also "Examination of the alignment of the laws on defamation with the relevant case-law of the European Court of Human Rights, including the issue of decriminalisation of defamation," a survey prepared by the Council of Europe Secretariat for the Steering Committee for the Media and New Communication Services, March 2006, Doc. CDMC(2005)007, p. 36.

[19] Article 208. Injuria is defined as an act or expression that is damaging to a person's reputation or self-esteem.

[20] Criminal Code, art. 203, as amended in July 2004. See also Doc. CDMC(2005)007, note 18 above, p. 43.

[21] Law on Freedom of Speech and Expression (2004), art. 13. Article 14 (Defamation against a public figure) provides: "A person shall incur civil liability for defamation of a public person if the claimant proves in court that the statement of the defendant contains essentially wrong facts related directly to the claimant, caused damage to the latter, and was made with prior knowledge of the falsity [of the statement], or the defendant acted with reckless disregard that caused the dissemination of the information containing essentially false facts." (Unofficial English translation.)

[22] OSCE press release, "Media Freedom Representative welcomes Irish government move to decriminalize libel," 19 March 2008, available at http://www.osce.org/item/30323.html?print=1.

[23] Judgment of 29 July 2008, para. 31.

[24] *Ibid.*, Dissenting Opinion of Judge Bonello, para. 7. Judge Bonello dissented from other aspects of the majority opinion.

among the most difficult offences to expose, investigate and punish. Excessive evidentiary challenges imposed on media libel defendants unnecessarily tie the hands, not just of journalists, but of the law enforcement authorities who make use of their investigations. Allegations of criminal conduct in a defamation context should be subject to the same substantive and evidentiary standards as all speech on matters of public interest. Exposing the misconduct of public servants in the discharge of their duties is a matter of high public importance. This goal should not be frustrated by imposing on journalists the rigorous standard of proof required for the prosecution to sustain a criminal conviction. At the end of the day, government officials and other public figures are in the best position to disprove – both in a court of law and before the court of public opinion – allegations of their own misconduct by virtue of their privileged, and sometimes exclusive, control over the key information at stake.

22. Some eight years ago, the international special mandates on freedom of expression issued a joint declaration that drew attention to the perils of criminal defamation generally, cautioning, in particular, that in all defamation cases the plaintiff "should bear the burden of proving the falsity of any statement of fact on matters of public concern."[25] The case law of this Court, while generally supportive of the fundamental role of the media and other independent watchdogs in preserving the integrity of public life, has yet to embrace, in unambiguous terms, the three mandates' position of principle on the burden of proof issue. Such a ruling should make clear that – at least in cases involving speech on matters of public concern – the falsity of factual allegations should be treated as a core element of the offence of criminal defamation, which must be proved by the prosecution to the criminal standard. This approach would be consistent with the presumption under Article 10 that all speech on matters of public interest – including allegations that may not be entirely accurate – is entitled to protection, absent a compelling showing to the contrary.

C. Non-Liability in Defamation Law When Acting with Reasonable Care

23. Democracy depends on the possibility of open public debate about matters of public concern, without which, it is a formality rather than a reality. This is the underpinning for the frequent references by this Court to the press as 'watchdog' of government.[26] As the Judicial Committee of the Privy Council so aptly put it:

> In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism.[27]

Vibrant public debate, in turn, depends on the ability of the media and others, as a practical matter, to engage in criticism, including harsh criticism, particularly of those in power. A strict liability approach to truth in the context of defamation claims, whereby liability attached to all false statements of fact, would seriously undermine open public debate on matters of public concern. The Judicial Committee specifically repudiated the idea that, in the context of such debate, the standard of truth was the appropriate one:

> [I]t was submitted that it was unobjectionable to penalise false statements made without taking due care to verify their accuracy.... [I]t would on any view be a grave impediment to the freedom of the press if those who print, or *a fortiori* those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based.[28]

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[25] Joint Declaration of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the Organization of American States Special Rapporteur on Freedom of Expression, London, 10 December 2000.
[26] See, for example, *Rumyana Ivanova v. Bulgaria*, note 7, para. 58.
[27] *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312 (PC), p. 318.
[28] *Ibid.*

24. National and international courts, including this Court, have instead recognized that statements on matters of public concern should be protected, even if they contain inaccuracies, where certain standards, which we refer to herein generically as a standard of 'reasonable care', are respected. In this regard, this Court has referred to the idea that the "safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism."[29]

25. When considering the appropriate standard for reasonable care in this context, it is submitted that this Court should look beyond the interests at play in the case at hand, and consider the wider 'chilling effect' that the restriction may entail. The chilling effect refers to the risk that a restriction will affect expression beyond the particular scope of the prohibition. The quotation in paragraph nine above from the US Supreme Court refers to such an effect in relation to the burden of proof. The South African Supreme Court of Appeal, in *National Media Ltd v. Bogoshi*, referred to the relevance of this effect in relation to sanctioning inaccurate statements, stressing that "nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error."[30]

1. Scope of the Rule

26. This Court recognized, in its very first defamation case, that the "limits of acceptable criticism" are wider in relation to politicians than private individuals.[31] In the case of *Thoma v. Luxembourg*, supra, this Court extended the same principle to civil servants, stating: "Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals."[32] And, as noted above, this Court has also taken into account the need for open debate about wider matters of public concern.[33]

27. In their 2000 Joint Declaration, referred to above, the international special mandates on freedom of expression reaffirmed the need for the scope of 'reasonable care' protection to be wide, noting that "defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens."[34] Many national defamation law systems also provide for greater protection for a wide category of statements on matters of public interest.

28. Not all statements about public officials necessarily contribute to debate about matters of public concern. However, statements about the activities of officials relating to their official conduct would normally meet this criterion, particularly where they relate to allegations of wrongdoing and/or the provision of public services.

2. Attributes of the Rule

29. Courts in different countries have applied different standards to the protection of statements on matters of public interest. In the United States, *New York Times Co. v. Sullivan*, noted above, decided by the U.S. Supreme Court, has set the enduring standards. In that case, the plaintiff, a police commissioner, alleged that an advertisement in the *New York Times*, accusing the police of excessive violence and containing some factual errors, damaged his reputation. The court ruled that "erroneous statement is inevitable in free debate"[35] and that, as a result, a public official could recover damages only if he or she could prove "the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard for whether it was false or not."[36] The fact that the plaintiff may have suffered "injury to official reputation" did not justify "repressing

[29] *Ivanova v. Bulgaria*, note 7, para. 61.
[30] 1998 (4) SA 1196, p. 1210.
[31] *Lingens v. Austria*, Judgment of 8 July 1986, para. 42.
[32] Note 11, para. 47.
[33] See note 29. See also *Bladet Tromsø and Stensaas v. Norway*, Judgment of 20 May 1999, para. 63.
[34] Note 25.
[35] Note 10, p. 271.
[36] *Ibid.*, pp. 279-80.

speech that would otherwise be free."[37] Although *Sullivan* is restricted in application to public officials, subsequent cases have extended it to candidates for public office[38] and public figures who do not hold official or government positions.[39]

30. A number of other jurisdictions have effectively adopted the 'Sullivan' standard. In *Rajagopal & Anor v. State of Tamil Nadu*, decided by the Indian Supreme Court, a key issue was whether public officials could prevent the publication of a biography, written by a prisoner but sought to be published by a weekly magazine, which they claimed defamed them. The Court discussed a number of leading authorities, including *Sullivan*, which it followed in substance, holding:

> In the case of public officials ... the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official established that the publications was made (by the defendant) with reckless disregard for truth.[40]

31. Similarly, in *Lange v. Atkinson*,[41] the New Zealand Court of Appeal held that the wider public had an interest in information concerning the functioning of government, so statements conveying such information, even if published generally, were protected by qualified privilege, which could only be defeated by malice.

32. This Court has focused on two considerations, namely whether the statements were made in good faith (which is a more stringent test than a requirement of absence of malice) and reasonably, or "in accordance with the ethics of journalism".[42] Rules along these lines, albeit with some differences, have been adopted, among others, in Germany,[43] the Netherlands,[44] Hungary,[45] the United Kingdom,[46] South Africa,[47] Australia,[48] France[49] and Spain.[50]

33. A number of factors are relevant to the question of whether a particular statement meets the appropriate standard. In *Reynolds*, Lord Nicholls set out ten factors to be taken into consideration: the seriousness of the allegation; the extent to which the information relates to a matter of public concern; the source of the information; steps taken to verify the information; the status of the information (including whether it had already been the subject of an investigation); the urgency of publication; whether comment was sought from the plaintiff; whether the information contained the

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[37] *Ibid.*, p. 272.
[38] *Monitor Patriot Co. v. Roy*, 401 US 265 (1971).
[39] *Curtis Publishing Co. v. Butts*, 388 US 130 (1967).
[40] [1994] 6 SCC 632 (SC), p. 650.
[41] [2000] 1 NZLR 257.
[42] See, among others, *Bladet Tromsø and Stensaas v. Norway*, note 32, para. 65.
[43] See, for example, 54 FCC 208 (1980) (*Heinrich Böll* case) and 85 FCC 1 (1994) (*Auschwitz-Luege* case). See also Jan Hegemann and Slade R. Metcalf in Charles J. Glasser, Jr. and Matthew Winkler, *International Libel and Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters, and Lawyers* (2006: Bloomberg Press, New York.
[44] See 6 March 1985, *Nederlandse Jurisprudentie* 1985, 437 (*Herrenberg/Het Parool* case), noted in Dommering, E., "Unlawful publications under Dutch and European law - defamation, libel and advertising" (1992) 13 *Tolley's Journal of Media Law and Practice* 262, p. 264.
[45] See Decision 36/1994. (VI.24) AB, Constitutional Court.
[46] *Reynolds v. Times Newspapers Ltd and others*, [1999] 4 All ER 609 and *Jameel and another v. Wall Street Journal Europe SPRL*, [2006] UKHL 44 (both House of Lords).
[47] *National Media Ltd v. Bogoshi*, 1998 (4) SA 1196, South African Supreme Court of Appeal.
[48] *Theophanous v. The Herald and Weekly Times*, 182 CLR 104, 140 (1994) and *Lange v. Australian Broadcasting Corp.*, 189 CLR 520, 571 (1997).
[49] See, for example, TGI Paris 17th Chamber, 2 November 1995, Légipresse 1996-I, p. 2; Paris Court of Appeal 9 April 1999, Légipresse 1999-I, p. 99; Paris Court of Appeal 20 September 2001, Légipresse 2001-I, p. 1; TGI Paris 1st Chamber, 7 February 1996, Légipresse 1996-I-67; TGI Paris 29 January 1997, Légipresse 1991-I, p.113; TGI Paris 17th Chamber, 17 October 2001, Legipresse 2001 I, p. 147; and Cass. Crim. 11 February 2003, Légipresse n°201 May 2003-III, p. 71
[50] Decision of the Tribunal Constitucional 6/1988 and Decision of the Tribunal Constitucional 240/1992.

gist of the plaintiff's side of the story; the tone of the information; and the circumstances of the publication, including timing.[51] In *Jameel*, both Lord Bingham and Lord Craig made it clear that these were factors to be considered together in context, not individual 'hurdles' to be passed before publication might be appropriate.[52]

34. A different, but somewhat overlapping, set of considerations are taken into account in France, where four main issues are considered: 1) whether the plaintiff conducted a serious investigation (sources used, with official reports being considered among the most reliable, and an effort to get comment from the plaintiff); 2) objectivity and tone (whether the reader could be mislead as to the sources relied upon, the seriousness of the allegations, use of conditional statements and question marks); 3) the degree of public interest in the subject matter; and 4) the absence of personal animosity.[53]

35. Several of these factors go to the issue of the quality of the information relied upon to underpin the allegations made. In several cases, this Court has held that journalists are entitled to rely upon official reports. Thus, in *Bladet Tromsø and Stensaas*, this Court held that the applicant was entitled to rely on official statements without independently checking the facts.[54] The Court went even further in *Dalban v. Romania*, where it held that the journalist applicant was entitled to rely on information contained in police investigation files, even though the public prosecutor had decided not to charge the plaintiff. The Court concluded that "there was no proof that the description of the events … was totally untrue and was designed to fuel a defamation campaign."[55] Although the cases considered by this Court have involved direct reliance on an official report, the same principle – namely of reliance on official reports – should apply to cases where official reports have been used indirectly to bolster other sources of information that may be available.

36. This Court has also adverted to the question of whether the target of the allegations (normally the plaintiff in the national case) was given an opportunity to comment before the statements were made public. Thus, in *Pedersen and Baadsgaard*, this Court placed some reliance, in coming to the conclusion that the applicants had failed to meet the required standard of journalistic care, on the fact that the plaintiffs had not had an opportunity to respond to the allegations.[56] Similarly, in *Flux (no.6)*, this Court noted that the applicant had made no attempt to contact the school principal who had been the target of the allegations.[57] Conversely, in *Selisto v. Finland*, the Court found a violation of Article 10 relying, in part, on the fact that the applicant had granted the defamation plaintiff an opportunity to comment on the relevant articles following their publication.[58]

37. Closely related is the extent to which it is possible to verify allegations concerning matters of public concern. If the standards imposed are too stringent, this will prevent important information from reaching the public. This suggests that the extent to which authors may be required to verify the truth of their statements will depend on the possibility, or ease, of such verification. This Court sanctioned this approach in *Ivanova*, where it contrasted the ease of verification of the facts in that case, where "that task was not unreasonable or impossible", with the situation in *Thorgeir Thorgeirson v. Iceland*, where the possibility of verification was, in the view of this Court, "an unreasonable, if not impossible task."[59] It may be noted that in the first case, the information was a piece of technical data, whereas in the second it was a wider allegation of wrongdoing, something which, almost by definition, it will be very difficult for a journalist to prove (see, in this regard, the comments in paragraph 21 above). In *Pedersen and Baadsgaard*, this Court also took into account

[51] Note 46 at page 205.
[52] Note 46 at para. 33.
[53] Note 49.
[54] Note 33, para. 65. See also *Colombani and others v. France*, Judgment of 25 September 2002, para. 65.
[55] Judgment of 28 September 1999, paras 49-50.
[56] Judgment of 17 December 2004, para. 90.
[57] Note 23, para. 29.
[58] Judgment of 16 November 2004, para. 66. The Court found that it was not established that the applicant had offered such an opportunity prior to publication. *Ibid*.
[59] *Ivanova*, note 7, para. 63, and *Thorgeirson*, note 12, para. 65.

the 'regrettable' failure of the journalist applicant to verify an important technical fact, even though this could easily have been done.[60]

38. It has often been noted that news is a perishable commodity and urgency of publication is one of the factors noted in the *Reynolds* case. From the lens of protecting the flow of public information, urgency arises when late provision of information will undermine the underlying public interest objective of circulating it. Urgency of publication clearly has a bearing on the extent to which fact verification can be expected to take place. In other words, greater urgency reduces the burden on the speaker to verify the truth of his or her statements.

39. In their Joint Declaration of 2000, the international special mandates on freedom of expression stated that "it should be a defence, in relation to a statement on a matter of public concern, to show that publication was reasonable in all the circumstances".[61] They did not define reasonableness but it may be assumed that it envisaged an approach which, while not encouraging irresponsible journalism, would protect a free flow of information on matters of concern to the public. In assessing the appropriate balance between protecting the free flow of information and reputations, it is perhaps well to bear in mind the following statement, made some 75 years ago by US Supreme Court Chief Justice Hughes:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits.[62]

Conclusion

40. We submit that, consistent with the main principles of its Article 10 case law, the Court should treat falsity of factual allegations as a core element of the offence of criminal defamation, which must be proved by the prosecution to the criminal standard. This approach would be consistent with the presumption under Article 10 that all speech on matters of public interest – including allegations that may not be entirely accurate – is entitled to protection, absent a compelling showing to the contrary. No arbitrary limits should be placed on the ability of defendants to produce evidence that the other party engaged in criminal conduct. In addition, this case presents the Court with an opportunity to further elaborate its jurisprudence on the contours of the "reasonable publication" defence – especially in the context of press allegations of serious official misconduct. The Court should confirm its rejection of a strict liability approach to either truth or due diligence in such cases. It remains essential, in particular, to preserve the ability of the media to rely on the defence of responsible journalism. This ought to include a right to rely, directly or indirectly, on official reports and investigations.

Respectfully submitted, on December 10, 2008,

For ARTICLE 19

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[60] Note 56, para. 83.
[61] Note 25.
[62] *Near v. Minnesota*, 283 US 697 (1931), pp. 718.