

THE CHILLING EFFECT OF PROSECUTION OF DEFAMATION ON THE RIGHT TO FREEDOM OF EXPRESSION: AN URGENT CALL TO DECRIMINALIZE DEFAMATION

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1

INTRODUCTION

Since its Grand Chamber judgment in 2004 in the case of *Cumpănă and Mazăre v. Romania*, the European Court of Human Rights (ECtHR) made it clear that criminal prosecutions and criminal convictions for defamation in press articles or as part of public debate are problematic from the perspective of the right to freedom of expression and information as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). In 2007, the Parliamentary Assembly of the Council of Europe in its Resolution 1577 called on the member states to abolish prison sentences for defamation without delay, to guarantee that there is no misuse of criminal prosecutions for defamation, to define the concept of defamation more precisely in their legislation and to ensure that civil law provides effective protection of the dignity of persons affected by defamation.¹ The Recommendation CM/Rec(2016)4 of the Committee of Ministers of the Council of Europe on the protection of journalism and safety of journalists and other media actors again emphasized the detrimental impact of criminal prosecution on journalism and public debate in general. This Recommendation formulates under its principles in no. 34 that:

Legislation and how it is applied in practice can give rise to a chilling effect on freedom of expression and public debate. Interferences that take the form of criminal sanctions have a greater chilling effect than those constituting civil sanctions. Thus, the dominant position of State institutions requires the authorities to show restraint in resorting to criminal proceedings. A chilling effect on freedom of expression can arise not only from any sanction,

1. <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>. See also PACE's *Recommendation Towards decriminalisation of defamation* 1814 (2007), at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17587&lang=en>.

disproportionate or not, but also the fear of sanction, even in the event of an eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future.²

In its recent case law, the ECtHR clarified that criminal prosecution and conviction is an 'extreme sanction' that can only be justified as an interference with one's right to freedom of expression under Article 10 ECHR in cases where the comments have the potential to provoke violence posing a 'clear and present danger'. Criminal prosecution and conviction for offensive comments that cannot be considered as stirring up base emotions or embedded prejudices in an attempt to incite hatred or violence, but are merely to be qualified as insulting or defamatory, therefore amount to a violation of the right to freedom of expression.³

In what follows I focus on the European Court's approach of the chilling effect of criminal prosecution of defamation and insult. The case law of the ECtHR in particular demonstrates the often abusive character of criminal prosecutions and convictions for defamation or insult, as in many cases they amount to a violation of Article 10 ECHR. As part of the action that is to be taken against SLAPPs (*Strategic Lawsuits Against Public Participation*)⁴ it is time to stop these abusive prosecutions and abolish criminal defamation and insult laws.

2 CRIMINAL DEFAMATION AND ITS CHILLING EFFECT ON PUBLIC DEBATE IN A DEMOCRATIC SOCIETY

In his PhD dissertation on *Article 10 and the chilling effect*, Ronan Ó Fathaigh has meticulously analysed the application and the development of the concept of chilling effect in the ECtHR's case law in relation to the right to freedom of expression, including criminal defamation.⁵ This research shows that in order to protect freedom of expression from the chilling effect of criminal defamation proceedings, the ECtHR has elaborated a set of requirements, namely that governments must display restraint in resorting to criminal proceedings, that criminal proceedings to protect reputation are only proportionate in 'certain grave cases' – such as speech inciting violence – and that the imposition of prison

2. https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1.

3. ECtHR, *Moseyev v. Russia*, 1 March 2022, no. 78618/13, §§ 9-11.

4. See www.the-case.eu/ and https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13192-EU-action-against-abusive-litigation-SLAPP-targeting-journalists-and-rights-defenders_en.

5. R. Ó Fathaigh, *Article 10 and the chilling effect: a critical examination of how the European Court of Human Rights seeks to protect freedom of expression from the chilling effect*, PhD dissertation, Ghent University, 2019, <https://biblio.ugent.be/publication/8620369>.

sentences for a press offence will be compatible with Article 10 only in 'exceptional circumstances', such as hate speech or when other rights are seriously impaired.⁶

The European Court's approach finds its basis in the Grand Chamber judgment of 2004 in the case of *Cumpănă and Mazăre v. Romania*. The Grand Chamber found that the domestic authorities were entitled to consider it necessary to restrict the exercise of the applicants' right to freedom of expression and that the applicants' conviction for insult and defamation met a pressing social need. What remained to be determined was whether the interference at issue was proportionate to the legitimate aim pursued, in view of the sanctions imposed.⁷ In the instant case, besides being ordered to pay a sum for non-pecuniary damage to the plaintiff, the applicants were sentenced to seven months' immediate imprisonment and prohibited from exercising certain civil rights and from working as journalists for one year. The ECtHR stated that 'investigative journalists are liable to be inhibited from reporting on matters of general public interest – such as suspected irregularities in the award of public contracts to commercial entities – if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession'. The ECtHR found that the chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression was evident and had an impact on society as a whole. Although sentencing is in principle a matter for the national courts, the ECtHR considered the imposition of a prison sentence for a press offence compatible with journalists' freedom of expression as guaranteed by Article 10 ECHR only in exceptional

6. Notice that the ECtHR has left an opening for the member states to maintain defamation as a criminal offence: ECtHR, *Lindon, Otchakovsky-Laurens and July v. France*, 22 October 2007, nos. 21279/02 and 36448/02, § 59 ('in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued'). See also ECtHR, *Kaperzyński v. Poland*, 3 April 2012, no. 43206/07, § 69; ECtHR, *Kącki v. Poland*, 4 July 2017, no. 10947/11, § 57 and ECtHR, *Miljević v. Croatia*, 25 June 2020, no. 68317/13, § 57.

7. ECtHR, *Cumpănă and Mazăre v. Romania*, 17 December 2004, no. 33348/69, §§ 113-115.

circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.⁸

In subsequent cases the ECtHR confirmed this approach, finding violations of Article 10 ECHR because of prosecutions or convictions for criminal defamation or insult. In *Lyashko v. Ukraine* the ECtHR held that the applicant's conviction and sentence to two years' imprisonment and a prohibition on occupying posts in media management, imposed following a trial lasting several years, could have had a considerable chilling effect on the applicant's freedom of expression.⁹ In *Krasulya v. Russia* the ECtHR found that the applicant's criminal prosecution violated his right to freedom of expression, although the sentence was suspended. The ECtHR considered that the applicant was 'faced with the threat of imprisonment', and the sentence condition had a chilling effect on the applicant by restricting his journalistic freedom and reducing his ability to impart information and ideas on matters of public interest.¹⁰ The judgment in *Malisiewicz-Gqsior v. Poland* confirmed that defamation of a politician in the context of a political debate presents no justification for the imposition of a prison sentence, even when the sentence is not enforced.¹¹ In *Tønsbergs Blad and Haukom v. Norway* the ECtHR found that the prosecution and conviction for criminal defamation was disproportionate and substantiated this finding by stating that criminal fines and costs could have a chilling effect, not only on the individual applicant, but also on press freedom in the respondent State in general.¹² In its Grand Chamber judgment in the case of *Morice v. France*, the ECtHR unanimously held that criminal proceedings may have a chilling effect on the exercise of freedom of expression, and even relatively moderate fines do not suffice to negate the risk of a chilling effect on the exercise of freedom of expression. Because of the chilling effect of criminal defamation proceedings on freedom of expression there should be

8. For some examples, see ECtHR, *Sürek and Özdemir v. Turkey*, 8 July 1999, nos. 23927/94 and 24277/94; ECtHR *Feridun Yazar a.o. v. Turkey*, 23 September 2004, no. 42713/98; ECtHR, *Féret v. Belgium*, 16 July 2009, no. 15615/07; ECtHR, *Dieudonné M'bala v. France*, 20 October 2015, no. 25239/13; ECtHR, *Fouad Belkacem v. Belgium*, 27 June 2017, no. 34367/14; ECtHR, *Hans Burkhard Nix v. Germany*, 5 April 2018, no. 35285/16, and ECtHR, *Kilin v. Russia*, 11 May 2021, no. 10271/12. The ECtHR has also clarified that there is a positive obligation for the members states to provide for and apply provisions in criminal law to protect the rights of individuals or groups against hate speech or incitement to violence: ECtHR, *Beizaras and Levickas v. Lithuania*, 24 January 2020, no. 41288/15; ECtHR, *Budinova and Chaprazov v. Bulgaria*, 16 February 2021, no. 12567/13; ECtHR, *Behar and Gutman v. Bulgaria*, 16 February 2021, no. 29335/13 and ECtHR, *Oganezova v. Armenia*, 17 May 2022, nos. 71367/12 and 72961/12. According to the ECtHR it may be justified to impose even serious criminal-law sanctions in cases of hate speech or incitement to violence. It has also held that where acts that constitute serious offences are directed against a person's physical or mental integrity, only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor (ECtHR, *Identoba a.o.*, 12 May 2015, no. 73235/12, § 86).

9. ECtHR, *Lyashko v. Ukraine*, 10 August 2006, no. 73235/12.

10. ECtHR, *Krasulya v. Russia*, 22 February 2007, no. 12365/03.

11. ECtHR, *Malisiewicz-Gqsior v. Poland*, 6 April 2006, no. 43797/98.

12. ECtHR, *Tønsbergs Blad AS and Haukom v. Norway*, 1 March 2007, no. 510/04.

‘restraint’ in resorting to criminal proceedings, and the ECtHR reiterated that only in ‘exceptional cases’ a restriction ‘even by way of a lenient criminal penalty’ can be accepted as necessary in a democratic society.¹³ The ECtHR found also more recently that the criminal prosecution and sanctions for comments with a defamatory or insulting character published on an online platform, without inciting to hatred of violence, amounted to a violation of Article 10 ECHR.¹⁴

In *Dickinson v. Turkey* the ECtHR rejected the Turkish government’s argument that because Dickinson’s final conviction for insult of the prime minister had been suspended and therefore had no legal consequences for him, there had been no ‘interference’ with his freedom of expression under Article 10 ECHR.¹⁵ Criminal proceedings ‘over a considerable length of time’ targeting expression on matters of public interest create a ‘chilling effect’ and ‘self-censorship’, and confers the ‘status of victim of interference’ with freedom of expression under Article 10 ECHR, even in the absence of a conviction or sanction. Consequently, the ECtHR found that there had been a chilling effect on Dickinson’s willingness to express his views on matters of public interest. The ECtHR found that Article 10 ECHR was violated.

In *Freitas Rangel v. Portugal* the ECtHR referred to ‘the deterrent effect of the criminal fine imposed’ which in combination with the order to pay a substantial amount of damages ‘may have a chilling effect on the exercise of freedom of expression of persons called upon to participate in discussions of matters of general public interest and concerning institutions’.¹⁶ In finding a violation of Article 10 ECHR in a case of political satire in *Patrício Monteiro Telo de Abreu v. Portugal* the ECtHR found the criminal prosecution and conviction of the applicant of a fine of EUR 1,800 combined with an order to pay damages, manifestly

13. ECtHR, *Morice v. France*, 23 April 2015, no. 29369/10. See also I. Høedt-Rasmussen and D. Voorhoof, ‘A great victory for the whole legal profession’, *Strasbourg Observers Blog*, 6 May 2015, <http://strasbourgobservers.com/2015/05/06/a-great-victory-for-the-overall-profession-of-lawyers/#more-2848>.

14. ECtHR, *Moseyev v. Russia*, 1 March 2022, no. 78618/13.

15. ECtHR, *Dickinson v. Turkey*, 2 February 2021, no. 25200/11: the ECtHR found that the criminal proceedings against an artist’s satirical collage ‘insulting’ the Turkish Prime Minister violated his right to freedom of expression under Article 10 ECHR. The collage at issue criticized Erdoğan’s political support for the military occupation of Iraq, portraying the Prime Minister’s head glued to the body of a dog, which was held on a leash decorated with the colours of the American flag. The collage had the following phrase pinned on the dog’s torso: ‘We Will not be Bush’s Dog.’ Dickinson was placed in police custody and pre-trial detention for three days, and criminal proceedings were brought against him for insulting the Prime Minister, under Article 125 of the Turkish Criminal Code. Finally, no sanction was imposed. See also R. Ó Fathaigh and D. Voorhoof, ‘Yes, Prime Minister (bis): prosecution for satirical collage criticizing Turkish prime minister’s foreign policy violated artist’s freedom of expression’, *Strasbourg Observers Blog*, 19 March 2021, <https://strasbourgobservers.com/2021/03/19/yes-prime-minister-bis-prosecution-for-satirical-collage-criticising-turkish-prime-ministers-foreign-policy-violated-artists-freedom-of-expression/>.

16. ECtHR, *Freitas Rangel v. Portugal*, 11 January 2022, no. 78873/13, § 61. See also ECtHR, *Tête v. France*, 26 March 2020, no. 78873/13, § 68 and ECtHR, *Banaszczyk v. Poland*, 21 December 2021, no. 66299/10, §§ 81-82.

disproportionate, the more because the Portuguese Civil Code provided for a specific remedy for protecting the honour and reputation of persons.¹⁷

While the ECtHR does not categorically find all criminal measures as a response to defamation a violation of Article 10 ECHR,¹⁸ it found no justification for specific criminal law provisions protecting the honour or reputation of monarchs or other heads of state.¹⁹ To confer a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted, amounts to a special privilege that cannot be reconciled with modern practice and political conceptions.²⁰ The finding that specific criminal provisions protecting the reputation of monarchs or heads of state is in breach with Article 10 ECHR, is also reflected in a judgment of the Belgium Constitutional Court. In a judgment of 28 October 2021 the Constitutional Court found that criminalizing publicly expressed insults to the person of the (Belgian) King, as provided in Article 1 of the Act of 6 April 1847 is not compatible with Article 19 of the Belgian Constitution that guarantees the right to freedom of expression, read in conjunction with Article 10 ECHR.²¹ This ruling not only urges the Belgian legislator to abrogate the provision at issue of the Act of 6 April 1847, but might also have an impact on other European countries, such as the Netherlands, Denmark and Spain, that still have specific provisions protecting monarchs against insult or defamation.

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CRIMINAL DEFAMATION AND SLAPPS

The case law of the ECtHR leaves no doubt that a sentence of imprisonment for criminal defamation or insult situated in the context of public debate, because of the inherent chilling effect of such an interference, amounts to a disproportionate sanction and leads *as such* to the finding of a violation of Article 10 ECHR, insofar at least as the defamatory or insulting statements do not incite to violence and hatred. In other cases of prosecution and/or conviction for criminal defamation or insult, the finding of the disproportionate character of the interference with the right to freedom of expression depended on the concrete finding of the (risk of) chilling effect by the ECtHR. In evaluating the chilling effect (on the applicant, on others in similar circumstances or on society as a whole) the ECtHR also includes

17. ECtHR, *Patrício Monteiro Telo de Abreu v. Portugal*, 7 June 2022, no. 42713/15; § 46. See also ECtHR, *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, 3 April 2014, no. 37840/10, § 36.

18. See *supra* note 6, but see also ECtHR, *Morice v. France*, 23 April 2015, no. 29369/10, narrowing the margin of appreciation of the member states in such cases, and substantially limiting the possibilities for criminal prosecution for defamation.

19. Such provisions are often referred to as the *crimen laesio majestatis*.

20. ECtHR, *Colombani a.o. v. France*, 25 June 2002, no. 51279/99, § 68-69. See also ECtHR, *Otegi Mondragon v. Spain*, 15 March 2011, no. 2034/07, § 55-56 and ECtHR, *Stern Taulats and Roura Capellera v. Spain*, 13 March 2018, nos. 51168/15 and 51186/15, § 35.

21. Belgian Constitutional Court (Grondwettelijk Hof), 28 October 2021, nr. 157/2021.

other particular elements or characteristics of the case, such as the amount of the criminal fine, the combination with other measures (loss of certain civil rights, suspension to work as a journalist or media manager, additional civil damages...), the pre-trial arrest (eventually in combination with the long duration of the criminal proceedings), or other factors such as the availability of a provision in civil law guaranteeing an effective remedy in order to protect one's honour or reputation. The numerous findings of violations of Article 10 ECHR are a clear indication of the abuse that is often made at the domestic level of criminal law provisions on defamation or insult,²² also when the statements or publications are part of a debate on a matter of public interest.²³ The abusive application of provisions in criminal law on defamation or insult are a type of SLAPPs, *Strategic Lawsuits (or: Litigation) Against Public Participation*, most often targeting journalists, civil society organisations, environmental and human rights campaigners and academics. Journalists' organisations, media and civil society groups have launched a campaign against SLAPPs, and both the European Union²⁴ and the Council of Europe²⁵ have recently announced measures and action to combat the phenomenon. SLAPPs are considered as abusive lawsuits lodged against 'public watchdogs'²⁶ to prevent them from informing the public and reporting on matters of public interest. In a judgment of 15 March 2022, the ECtHR referred to 'the growing awareness of the risks that court proceedings instituted with a view to limiting public participation bring for democracy'.²⁷ It has been documented that there is an increase of prosecutions for criminal defamation in some European

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22. T. McGonagle, *Freedom of Expression and Defamation. A study of the case law of the European Court of Human Rights*, Council of Europe Publ., 2016, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ac95b>. See also the OSCE report *Defamation and insult laws in the OSCE-Region: a comparative study* (March 2017), <https://ipi.media/study-criminal-defamation-unduly-limits-media-freedom-2/> and www.osce.org/files/f/documents/b/8/303181.pdf.
 23. Notice however that SLAPPs can take very different forms, not only in matters of criminal defamation, but also very often as civil lawsuits for alleged libel or defamation, or on the basis of other legal grounds such as alleged breach of privacy or of protection of personal data, breach of intellectual property rights, and stalking or harassment. For a recent overview, see the SLAPP report published by Article 19, *SLAPPs against journalists across Europe* (March 2022), at www.article19.org/wp-content/uploads/2022/03/A19-SLAPPs-against-journalists-across-Europe-Regional-Report.pdf and the CASE-report, *Shutting out criticism. How SLAPPs threaten European democracy* (March 2022), at <https://static1.squarespace.com/static/5f2901e7c623033e2122f326/t/623897f6f5eb056c82fe2681/1647876093121/CASE+report+SLAPPs+Europe.pdf>.
 24. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13192-EU-action-against-abusive-litigation-SLAPP-targeting-journalists-and-rights-defenders_en.
 25. www.coe.int/en/web/freedom-expression/msi-slp. See also <https://anti-slapp-con.ecpmf.eu/> and www.ecpmf.eu/wp-content/uploads/2022/10/Anti-SLAPP-Declaration-20-October-2022.pdf.
 26. See ECtHR, *Magyar Helsinki Bizottság v. Hungary*, 8 November 2016, no. 18030/11, §§ 167-168.
 27. ECtHR, *OOO Memo v. Russia*, 15 March 2020, no. 2840/10, § 43.

countries, to the detriment of the right to freedom of expression and the participation in public debate on matters of public interest.²⁸

A pertinent reference to the abusive character of the application of provisions criminalizing defamation can be found in the 27 April 2022 Recommendation by the European Commission on SLAPPs:²⁹

5. Member States should ensure that their rules applicable to defamation do not have an unjustified impact on the freedom of expression, on the existence of an open, free and plural media environment, and on public participation.

6. Member States should ensure that their rules applicable to defamation are sufficiently clear, including their concepts, to reduce the risk that they are misused or abused.

7. Member States should also ensure that penalties against defamation are not excessive and disproportionate. Member States should take utmost account of the Council of Europe's guidelines and recommendations addressing the legal framework for defamation, and in particular criminal law. In this context, Member States are encouraged to remove prison sentences for defamation from their legal framework. Member States are encouraged to favour the use of administrative or civil law to deal with defamation cases, provided that such provisions have a less punitive effect than those of criminal law.

This part of the EC Recommendation is in line with the growing international demand to abolish prison sentences for insult and defamation (apart from hate speech), to reduce the possibilities of abusive prosecution for criminal defamation, and – more generally – to decriminalize defamation.³⁰ Already in 2007, the Parliamentary Assembly of the Council of Europe, referring to its Resolution 1577 (2007) entitled 'Towards decriminalisation of defamation', called on the Committee of Ministers to urge all member states to review their defamation laws and, where necessary, make amendments in order to bring them in line with the case law of

28. See the reports by Article 19 and CASE, referred to in note 23. See also D. Voorhoof, 'Anti-SLAPP: Professor goes free after vexatious and frivolous suit', *Informs Blog – The International Forum for Responsible Media Blog*, 4 January 2022, <https://inform.org/2022/01/04/anti-slapp-professor-goes-free-after-vexatious-and-frivolous-suit-dirk-voorhoof/#more-51042> and D. Voorhoof, 'Belgian news site acquitted for stalking and breach of privacy in SLAPP-case', *Leuven Public Law Blog*, 22 June 2022, www.leuvenpubliclaw.com/news-site-acquitted-for-stalking-and-breach-of-privacy-in-belgian-slapp-case/.

29. European Commission, *Recommendation of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('strategic litigation against public participation')*, https://ec.europa.eu/info/sites/default/files/1_1_188781_recc_slapp_en_1.pdf. This Recommendation was published in the *Official Journal of the EU* on 17 May 2022, together with a proposal for an anti-SLAPP Directive: see https://ec.europa.eu/commission/presscorner/detail/eng/ip_22_2652 and <https://eulawanalysis.blogspot.com/2022/04/daphnes-law-european-commission.html>.

30. UNHRC, General comment No. 34, *Article 19: Freedoms of opinion and expression*, 12 September 2011, www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf and OSCE Office of the Representative on Freedom of the Media, *Special report on legal harassment and abuse of the judicial system against the media*, 23 November 2021, www.osce.org/files/f/documents/c/f/505075_0.pdf.

the European Court of Human Rights, with a view to removing any risk of abuse or unjustified prosecutions.³¹

Both the case law of the ECtHR and several recent reports give evidence of the fact that the actions taken at the domestic level in Europe have certainly not sufficiently responded to the repeated calls from both the Council of Europe and the EU to decriminalize defamation or at least substantially narrow its application, in line with the case law of the ECtHR. As part of the action that is needed against SLAPPs there is an obvious urge to implement the EC Recommendation of 27 April 2022 and to decriminalize defamation and insult and prevent abusive criminal prosecutions. Nearly 20 years after the European Court's Grand Chamber judgment in *Cumpănă and Mazăre v. Romania*, 15 years after the PACE Recommendation and Resolution to decriminalize defamation and more than 7 years after the Court's Grand Chamber judgment in *Morice v. France* it is now the 'momentum' to take action as part of the urgently needed anti-SLAPP measures.

31. PACE, *Recommendation Towards decriminalisation of defamation* 1814 (2007), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17587&lang=en>. See also *Recommendation CM/Rec(2016)4 of the Committee of Ministers of the Council of Europe on the protection of journalism and safety of journalists and other media actors* (principles 34-36), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1.

PART II

CRIME, CRIMINOLOGY AND CRIMINAL JUSTICE

