Inter-American Court of Human Rights
Case No. 12.367 "La Nación"

B E T W E E N:

MAURICIO HERERA ULLOA

and

FERNÁN VARGAS ROHRMOSER

versus

REPUBLIC OF COSTA RICA

WRITTEN COMMENTS SUBMITTED BY ARTICLE 19, GLOBAL CAMPAIGN FOR FREE EXPRESSION

DEFAMATION LAW AS A RESTRICTION ON FREEDOM OF EXPRESSION

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Inter-American Court of Human Rights
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WRITTEN COMMENTS SUBMITTED BY ARTICLE 19, GLOBAL CAMPAIGN FOR FREE EXPRESSION:

DEFAMATION LAW AS A RESTRICTION ON FREEDOM OF EXPRESSION

Summary of Argument

[1] On 24 January 2001, the Supreme Court of Justice of Costa Rica upheld Mauricio Herera Ulloa's criminal conviction for defamation of Costa Rican honorary diplomat Felix Przedborski Chawa, for articles published about the latter in *La Nación* newspaper, a leading daily in Costa Rica. The articles contained, among other things, allegations that Mr. Przedborski had engaged in various illegal activities, largely based on reports in respected foreign newspapers. Upon conviction, Mr. Herrera Ulloa was sentenced to a fine of 300,000 colones (120 times the minimum wage) and his name was ordered to be entered into the Judicial Register of Criminals for ten years, while *La Nación*, being jointly liable, was fined 60,000,000 colones in moral damages, as well as 3,810,000 colones in personal damages.

[2] This *amicus curiae* brief, produced by the international human rights NGO, ARTICLE 19, Global Campaign for Free Expression, sets out international and comparative national standards relevant to the issues raised in this case. It argues that the Costa Rican criminal law on defamation, as applied in this case, breaches the right to freedom of expression, guaranteed by Article 13 of the *American Convention on Human Rights*, in a number of important respects.

[3] First, it is submitted that the use of the criminal law to redress harm to reputation, or criminal defamation laws, breach Article 13. Use of the criminal law for this purpose cannot, in particular, be justified as 'necessary' to protect the reputations of others because such laws are disproportionate to the harm done and because other, less intrusive but effective means of protecting reputations exist. The arguments against criminal defamation laws are strongest in just such as case as the present one, which involves a public official, allegations bearing on a matter of significant and legitimate public interest and professional behaviour by the defendant journalist.

[4] We submit that the present case is an important opportunity for this Court to state clearly and unequivocally that criminal defamation laws are not a legitimate restriction on the right to freedom of expression. Such laws have historically been the subject of serious abuse and have been used to suppress the right to freedom of expression, in the Americas and throughout the rest of the world. A clear statement by this Court that such laws are incompatible with Article 13 of the *American Convention on Human Rights* would make an important contribution to eliminating this widespread abuse of the right to freedom of expression.

[5] It is further submitted that the Costa Rican law under which Mr. Herrera Ulloa was convicted breaches the right to freedom of expression because it fails to provide adequate safeguards for freedom of expression, over and beyond the fact that it is criminal in nature.

[6] The Costa Rican defamation law places the onus on the accused to prove the truth of his or her statements. This runs counter to the approach in a number of jurisdictions where it is recognised, even in civil defamation cases, at least in relation to cases on matters of public interest and/or involving public officials, that this places an unacceptable fetter on the free flow of information. Instead, in these jurisdictions, the person bringing the case is required to prove that the allegations were false. This placement of the onus of proof is all the more imperative in a criminal defamation case, where it is required not only by the guarantee of freedom of expression but also by the presumption of innocence.

[7] International and comparative standards make it quite clear that no one should be restricted from proving the truth of his or her allegations and that a finding that a statement is true should absolve the defendant from all liability in defamation. In contrast to this, the Costa Rican law places significant limits on the right of the accused to prove the truth of his or her statements and makes it possible for an accused to be convicted even where he or she can prove the statements are in fact true. The most important such limitation is that truth is only a defence to an accusation of defamation where the impugned statements are deemed to touch on a matter of public interest.

[8] Courts around the world – both international and national – have recognised that it is a breach of the right to freedom of expression to impose strict liability on defamation defendants for publishing false statements. Even the very best journalists make mistakes and to punish them for this would undermine their right to freedom of expression, the public's right to know and the democratic interest in a free flow of information in society. Instead, these courts have recognised that, at least in relation to matters of public interest, defamation defendants should benefit from a defence of reasonableness, whereby they will be absolved of liability if they can show that it was reasonable, in all of the circumstances, for them to have published the impugned statements. No such defence was available to Mr. Herrera Ulloa and *La Nación* newspaper.

[9] Additionally, in the present case, the impugned statements and allegations were drawn largely from reports in respected European newspapers. It is submitted that courts should take this factor into account when assessing whether or not impugned statements are defamatory. This was not done in the present case.

[10] Finally, excessive sanctions for defamation, even for statements which clearly attract liability in defamation, of themselves breach the right to freedom of expression. Criminal sanctions, such as those applied in the present case, are always excessive. Furthermore, it would appear that the pecuniary awards ordered in this case go beyond what was necessary to redress the harm to reputation and, as a result, were punitive in nature. Such sanctions can be justified, if ever, only in the

most egregious cases; the present case is clearly not such a case.

Statement of Interest

[11] ARTICLE 19, Global Campaign for Free Expression, is an international, non-profit human rights NGO, based in London but with offices in different regions of the world, including in Mexico City. We have an International Board, with representatives from all over the world, including from the Americas. Burmese dissident Aung San Suu Kyi is an honorary member of our Board.

[12] Taking its name from Article 19 of the *Universal Declaration of Human Rights*, ARTICLE 19 works globally to protect and promote the right to freedom of expression. ARTICLE 19's mission statement is:

> ARTICLE 19 will work to promote, protect and develop freedom of expression, including access to information and the means of communication. We will do this through advocacy, standard-setting, campaigns, research, litigation and the building of partnerships. We will engage global, regional and State institutions, as well as the private sector, in critical dialogue and hold them accountable for the implementation of international standards.

[13] ARTICLE 19 seeks to achieve its mission by:

- strengthening the legal, institutional and policy frameworks for freedom of expression and access to information at the global, regional and national levels, including through the development of legal standards;
- increasing global, regional and national awareness and support for such initiatives;
- engaging with civil society actors to build global, regional and national capacities to monitor and shape the policies and actions of governments, corporate actors, professional groups and multilateral institutions with regard to freedom of expression and access to information; and
- promoting broader popular participation by all citizens in public affairs and decision-making at the global, regional and national levels through the promotion of free expression and access to information

[14] ARTICLE 19 frequently engages in litigation activities, sometimes providing *amicus curiae* briefs, sometimes representing clients directly and sometimes working with local lawyers to prepare briefs in national cases. Our briefs present arguments based on relevant international and comparative standards with a view to assisting courts to elaborate the specific meaning of the guarantee of freedom of expression in the context of the case being considered, in a manner which best protects this fundamental right.

[15] These precedents and authoritative statements from other jurisdictions are not formally binding on the Inter-American Court of Human Rights. However, the guarantee of the right to freedom of expression in the *American Convention on Human Rights* is put in broad wording, so that there is wide scope for interpretation. Given the fundamental importance of this human right, it is of the utmost importance that this Courts exercise the greatest care when elaborating its meaning in specific contexts.

[16] Jurisprudence from international judicial bodies in other regions of the world and from national courts, as well as non-binding standard-setting documents, such as authoritative international declarations and statements, illustrate the manner in which leading judges and other experts have interpreted international and constitutional guarantees of freedom of expression. As such, they are good evidence of generally accepted understandings of the scope and nature of the guarantee of freedom of expression,[1] binding on all countries. Even if not formally binding, these documents provide valuable insight into possible interpretations of the scope of Article 13 of the *American Convention on Human Rights*.

[17] ARTICLE 19 is well known for its authoritative work in elaborating the implications of the guarantee of freedom of expression in different thematic areas. In July 2000, ARTICLE 19 published, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (*Defining Defamation*),[2] a set of principles on the appropriate balance between the right to freedom of expression and the need to protect reputations. These Principles were the product of a long process of study, analysis and consultation overseen by ARTICLE 19. They were adopted by a group of highly recognised experts in the area of freedom of expression and protection of reputation, and they have been endorsed by all three special international mandates dealing with freedom of expression – the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Cooperation in Europe Representative on Freedom of the Media and the Organisation of American States Special Rapporteur on Freedom of Expression[3] – as well as a large number of other organisations and individuals. These principles are attached as an Annex to this brief.

[18] ARTICLE 19 is submitting this brief to the Inter-American Court of Human Rights with a view to assisting it in its assessment of whether or not Costa Rica has, in the present case, acted in breach of the right to freedom of expression as guaranteed by Article 13 of the *American Convention on Human Rights*.

Brief Statement of Facts and Law

[19] Mr. Herrera Ulloa was convicted under Articles 146 and 152, in conjunction with Article 149, of the Costa Rican Criminal Code of four counts of publishing insults constituting defamation for being the author of four articles published, respectively, on 19, 20 and 21 May 1995 and 13 December 1995, in *La Nación* newspaper.[4] The first article reported that Mr. Przedborski had been implicated in the so-called Agusta affair, a scandal relating to the illegal purchase of Agusta helicopters by the Belgian government. It also included various statements of support for Mr. Przedborski, as well as a reference to the fact that he had received the Belgian

[1] See I. Brownlie, *Principles of Public International Law*, 5th Ed. (Oxford: Oxford University Press, 1998), p. 35, p. 12.
[2] (London: July 2000).
[3] See their Joint Declaration of 30 November 2000.
[4] The articles are: "Diplomático Nacional cuestionado en Bélgica", 19 May 1995 (Questions about a National Diplomat in Belgium); "Autoridades de Bélgica exonerarían a Przedborski", 20 May 1995 (Belgian authorities About to Exonerate Przedborski); "Nexo Tico en Escándalo Belga", 21 May 1995 (A Costa Rican Angle on a Belgian Scandal); and "Polémico Diplomático en la Mira", 13 December 1995 (Diplomatic Spat Brewing).

honour of Great Officer of the Order of Leopold II.

[20] The second article reported that Mr. Przedborski had been barred from entering Germany and that two of his companies had been declared bankrupt but that the Costa Rican authorities had decided that there was insufficient evidence to take action against him. It also quoted from a memorandum from the Belgian prosecuting authorities stating that "no adverse information regarding [Mr. Przedborski] is found in the [Agusta case] file". The third article, in the Sunday edition of *La Nación*, essentially combined the first two articles. These three articles appeared on consecutive days in *La Nación* newspaper.

[21] The fourth article, appearing some months later, on 13 December 1995, was published in the context of recommendations by an official Costa Rican governmental commission to the Minister of Foreign Relations that all unpaid diplomatic posts, including that held by Mr. Przedborski, be abolished. The article reported on the commission's recommendations and also on allegations circulating in the Belgian press to the effect that Mr. Przedborski had engaged in illegal activities, including trade in currency, cigarettes, drugs and weapons, and that he had used his diplomatic status to protect himself against investigation. The article also noted that Mr. Przedborski was suing the Belgian newspapers for having made these allegations.

[22] In publishing these articles, both Mr. Herrera Ulloa and *La Nación* newspaper took care to act in accordance with established professional standards and, in particular, to present both sides of the story and to contact Mr. Przedborski and his representatives and supporters for their side of the story. One example of this from among many is that on 25 May 1995, *La Nación* published a letter from Mr. Przedborski setting out his side of the story.[5] To give just one further example, Mr. Herrera Ulloa contacted the main author of the stories in the Belgian press, as well as a friend of Mr. Przedborski's, before publishing the fourth article.

[23] Based on these articles, Mr. Przedborski filed criminal and civil actions for defamation against Mr. Herrera Ulloa. In a judgment of 29 May 1998, the Criminal Tribunal of the First Judicial Circuit of San José rejected the charges on the basis that Mr. Herrera Ulloa had not acted out of malice or the desire to offend but, rather, out of his "duty to report that questions were being raised abroad about the activities of a Costa Rican public servant"[6] and that the allegations were accurate reports of articles in various European media.

[24] Mr. Przedborski appealed from this decision and, on 7 May 1999, the Third Chamber of the Supreme Court of Justice overturned the original decision on the basis that it was wrong in law in requiring specific intent to defame – a general intention was sufficient – and in finding that the articles were true based on their accurate reporting of the European media – instead, the truth of the actual

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[5] "*Nací en el dolor y respeto a Costa Rica*" (I was born in pain and I respect Costa Rica).

[6] Judgment No. 61/98 Criminal Tribunal of the First Judicial Circuit of San Jose, May 29, 1998, Costa Rica: Final Considerations of Fact and of Law, paragraph 7, cited in the brief of the Inter-American Commission on Human Rights, para. 38.

allegations needed to be proven.

[25] The case was then sent back to a new bench of the Criminal Tribunal of the First Judicial Circuit of San José which, on 12 November 1999, found that Mr. Herrera Ulloa had failed to prove the truth of several material allegations. The court inferred from this that he had acted with the requisite intent.

[26] The Court sentenced Mr. Herrera Ulloa to a fine of 300,000 colones, or 120 times the daily wage. In addition, his name was ordered to be entered into the Judicial Register of Criminals for ten years. This entails a number of consequences, including ineligibility for probation upon further conviction for criminal defamation and being barred from adopting a child, holding a position in the civil service or practising a profession. The Court also ordered *La Nación* to pay Mr. Przedborski 60,000,000 colones in moral damages and 3,810,000 colones in personal damages (a total of over USD150,000), as well as to publish the court's decision and to take various measures to prevent Internet users from accessing the impugned articles.

[27] The defendants appealed from this to the Third Chamber of the Supreme Court of Justice which, on 24 January 2001, rejected their appeal. The defendants then appealed to the Inter-American Commission on Human Rights which found the case to be admissible on 3 December 2001[7] and found a violation of the right to freedom of expression as guaranteed by Article 13 of the *American Convention on Human Rights* (ACHR)[8] on 10 October 2002.[9] The Commission recommended, among other things, that the sentences against the defendants be revoked, that Mr. Herrera Ulloa's name be removed from the criminal register, that Mr. Herrera Ulloa be compensated and that the necessary steps be taken to ensure that a breach of this sort not occur again.[10]

[28] ARTICLE 19 views as a fact that the impugned articles in the present case relate to a public official. Inasmuch as Mr. Przedborski was an honorary diplomat, he was by definition a public official. This post brought him certain advantages, including a diplomatic passport, and also endowed on him certain public powers, namely the right to represent Costa Rica in international fora. As such, he was, at the time the articles were published, clearly a public official.

[29] We also take it as given that the articles related to a matter of the greatest public importance, namely the fitness for office of a public official. Indeed, inasmuch as the allegations centred on issues of corruption, illegal behaviour and other wrongdoing on the part of a public official, they are political speech of the very highest order. Such speech epitomises the very most important reasons for guaranteeing freedom of expression. The public interest factor in the present case is further enhanced by the context in which the articles, or at least the last article, were published, namely a public debate about whether or not to abolish honorary

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[7] Admissibility Report No. 128/01 (OAS/Ser./L/V/II.Doc.66).
[8] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.
[9] Report No. 64/02 (OAS/Ser./L/V/II.116).
[10] Cited in the brief of the Inter-American Commission on Human Rights, paras. 23-24.

diplomatic positions.[11]

[30] We note that the fact that expression relates to public officials and/or matters of public interest does not necessarily mean that it may not be restricted in accordance with international law. However, when assessing any restrictions, the important public interest in a free flow of information and ideas about matters of public interest must be weighed against any countervailing personal or public interests that may militate in favour of the restriction.

[31] Defamation (including insult and calumny) is dealt with under Title II of the Penal Code of Costa Rica. Article 146 sets out the offence of defamation, stating:

> The person who dishonours another or who spreads rumours or news of a kind that will affect his reputation, shall be punished with a fine equivalent to 20 to 60 days.

[32] Article 149 provides for the defendant to prove truth as a defence in limited circumstances as follows:

> Insult or defamation is not punishable if it consists of a truthful statement and has not been motivated by the pure desire to offend or by a spirit of malice. Notwithstanding, the accused may prove the truthfulness of the allegation only:
>
> 1. If the allegation is linked to the defence of a matter of current public interest; and
> 2. If the plaintiff demands proof of the allegation against him, provided that such proof does not affect the rights or secrets of third persons.
>
> A defendant accused of libel or defamation may prove the truthfulness of the imputed fact or deed, unless the injured party has not lodged a complaint, where such action is required in order to prosecute.

[33] Mr. Herrera Ulloa was, as noted above, convicted under Article 146 in conjunction with Article 152, which states:

> Anyone who publishes or reproduces, by any means, offences against honour by another party shall be punished as having committed those offences.[12]

[34] Costa Rica ratified the *American Convention on Human Rights* in March 1970 and this treaty came into force for Costa Rica on 18 July 1978.

[35] Article 13 of the ACHR states, in relevant part:

> **Article 13: Freedom of Thought and Expression**
>
> 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

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[11] International and national courts have interpreted the notions of public official and matter of public interest broadly. See below under Public Officials and Matters of Public Concern.

[12] These are unofficial translations of the original Spanish text. The translations of Articles 149 and 152 are cited in the brief of the Inter-American Commission on Human Rights, footnote 13.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
    (a) respect for the rights or reputations of others; or
    (b) the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

[36] Article 14 of the ACHR, also relevant to the present case, states:

Article 14: Right of Reply

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

[37] Article 11of the ACHR states, in relevant part:

1. Everyone has the right to have his honor respected and his dignity recognized.

Freedom of Expression and Human Rights

International Guarantees

[38] Article 19 of the *Universal Declaration of Human Rights*,[13] binding on all States as a matter of customary international law, proclaims the right to freedom of expression in the following terms:

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

[39] Costa Rica's international legal obligations to respect freedom of expression are also spelt out in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),[14] which it ratified in November 1968, and which entered into force for Costa Rica on 3 January 1976. Article 19 of the ICCPR states:

(1) Everyone shall have the right to hold opinions without interference.

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[13] UN General Assembly Resolution 217A(III), 10 December 1948.

[14] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

[40] Costa Rica is also a party to the *American Convention on Human Rights*.

The Fundamental Nature of Freedom of Expression

[41] The overriding importance of freedom of expression – including the right to information – as a human right has been widely recognised, both for its own sake and as an essential underpinning of democracy and means of safeguarding other human rights. At its very first session in 1946 the United Nations General Assembly declared:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[15]

[42] These views have been reiterated by all three regional judicial bodies dealing with human rights.

[43] This Court has stated:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.[16]

[44] The African Commission on Human and Peoples' Rights has noted, in respect of Article 9 of the African Convention:

> This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country.[17]

[45] The European Court of Human Rights (ECHR) has also recognised the key role of freedom of expression:

> [F]reedom 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 … but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".[18]

[46] These views have been reiterated by numerous national courts around the world.

[47] ARTICLE 19 does not consider it necessary to elaborate on the importance of

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[15] Resolution 59(1), 14 December 1946.

[16] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.

[17] *Media Rights Agenda and Others v. Nigeria*, 31 October 1998, Communication Nos. 105/93, 130/94, 128/94 and 152/96, para. 52.

[18] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49.

freedom of expression elaborate before this Court, given the recognition which this Court has already given to this fundamental human right.

[48] We note, however, that this Court has recognised that the right to freedom of expression has two dimensions: an individual dimension and a social dimension. Regarding the latter, this Court has stated:

> In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.[19]

[49] Almost of necessity, most contentious cases involving the right to freedom of expression are brought by individuals or legal entities who claim that their own right to freedom of expression has been violated. However, many such cases, particularly where they involve the media, also involve an important social dimension of freedom of expression. It is submitted that the social dimension is this case is of at least equal important to the individual dimension. We refer to this dimension at times as the public's right to know or indirectly by reference to the importance of the free flow of information in society.

Restrictions on Freedom of Expression

[50] The right to freedom of expression is not absolute. Every system of international and domestic rights recognises carefully drawn and limited restrictions on freedom of expression in order to take into account the values of individual dignity and democracy. Under international human rights law, national laws which restrict freedom of expression must comply with the provisions of Article 19(3) of the ICCPR and Article 13(2) of the ACHR, quoted above, which we note are substantially similar in nature.

[51] Restrictions must meet a strict three-part test.[20] First, the restriction must be provided by law. Second, the restriction must pursue one of the legitimate aims listed in Article 13(2); this list is exclusive. Third, the restriction must be necessary to secure that aim.

Provided by Law

[52] International law and most constitutions only permit restrictions on the right to freedom of expression that are set out in law. This implies not only that the restriction is based in law, but also that the relevant law meets certain standards of clarity and accessibility, sometimes referred to as the "void for vagueness" doctrine.

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[19] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 16, para. 32.

[20] This test has been affirmed by the UN Human Rights Committee. See, *Mukong v. Cameroon*, views adopted 21 July 1994, Communication No. 458/1991, para. 9.7. It has also been confirmed by this Court, which has held that the test for restrictions under Article 13(2) of the ACHR is substantially similar to that applied under the ICCPR and the ECHR. See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 16, paras. 38-46. For an elaboration of the test under the ECHR see *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, 2 EHRR 245, para. 45.

The European Court of Human Rights has elaborated on the requirement of "prescribed by law" under the ECHR:

> [A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.[21]

[53] Vague provisions are susceptible of wide interpretation by both authorities and those subject to the law. As a result, they are an invitation to abuse and authorities may seek to apply them in situations that bear no relationship to the original purpose of the law or to the legitimate aim sought to be achieved. Vague provisions also fail to provide sufficient notice of exactly what conduct is prohibited or prescribed. As a result, they exert an unacceptable "chilling effect" on freedom of expression as individuals stay well clear of the potential zone of application in order to avoid censure.

[54] Courts in many jurisdictions have emphasised the chilling effects that vague and overbroad provisions have on freedom of expression. The US Supreme Court, for example, has cautioned:

> The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech." … [Statutes] must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.[22]

[55] The requirement of "provided by law" also prohibits laws that grant authorities excessively broad discretionary powers to limit expression. In *Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors*, the Ontario High Court considered a law granting the Board of Censors the power to censor any film it did not approve of. In striking down the law, the Court noted that the evils of vagueness extend to situations in which unfettered discretion is granted to public authorities responsible for enforcing the law:

> It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.[23]

[56] The UN Human Rights Committee, the body of 18 independent experts appointed under the ICCPR to monitor compliance with that treaty, has also expressed concern about excessive discretion, specifically in the context of broadcast licensing:

> 21. The Committee expresses its concern … about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has

[21] *The Sunday Times v. United Kingdom*, note 20, para.49.

[22] *Gooding v. Wilson*, 405 U.S. 518 (1972), p. 522.

[23] (1983) 31 O.R. (2d) 583 (Ont. H.C.), p. 592.

> wholly discretionary power to grant or deny licences to radio and television broadcasters.[24]

Legitimate Aim

[57] The ACHR provides a full list of the aims that may justify a restriction on freedom of expression. It is quite clear from both the wording of Article 13(2) of the ACHR and the views of this Court that restrictions on freedom of expression that do not serve one of the legitimate aims listed in Article 13(2) are not valid.[25] This is also the position under the ICCPR and ECHR.[26]

[58] It is not sufficient, to satisfy this second part of the test for restrictions on freedom of expression, that the restriction in question has a merely incidental effect on the legitimate aim. The restriction must be primarily directed at that aim, as the Indian Supreme Court has noted:

> So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.[27]

[59] In assessing the legitimate aim, courts go beyond the general aim the law serves and look at its specific objectives. As the Canadian Supreme Court has noted:

> Justification under s.1 requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees.[28]

[60] In assessing whether a restriction on freedom of expression addresses a legitimate aim, regard must be had to both its purpose and its effect. Where the original purpose was to achieve an aim other than one of those listed, the restriction cannot be upheld:

> [B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.[29]

Necessary in a Democratic Society

[61] Different constitutions and treaties use different terms to describe the third part of the test for restrictions on freedom of expression; treaties normally permit only restrictions which are 'necessary' while national constitutions use a range of terms including 'reasonably justifiable in a democratic society', 'reasonably required in a democratic society' and various other related combinations.

[62] Regardless of the precise phrase used, this part of the test presents a high standard to be overcome by the State seeking to justify the restriction, apparent from the

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[24] Concluding Observations on Kyrgyzstan's Initial Report, 24 July 2000, CCPR/CO/69/KGZ, para. 21.
[25] See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 16, para. 40.
[26] See, for example, *Mukong v. Cameroon,* note 20, para. 9.7.The African Charter takes a different approach, simply protecting freedom of expression, "within the law."
[27] *Thappar v. State of Madras*, (1950) SCR 594, p.603.
[28] *R. v. Zundel*, (1992) 2 SCR 731, p.733.
[29] *R. v. Big M Drug Mart Ltd.*, (1985) 1 SCR 295, p.331 (Supreme Court of Canada).

following quotation, cited repeatedly by the European Court:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[30]

[63] The European Court has noted that necessity involves an analysis of whether:

> [There is a] "pressing social need" [whether] the inference at issue was "proportionate to the legitimate aim pursued" and whether the reasons adduced…to justify it are "relevant and sufficient."[31]

[64] Courts around the world have elaborated on the specific requirements of the necessity part of the test for restrictions on freedom of expression. The Canadian Supreme Court, for example, has held that it includes the following three-part inquiry:

> [T]he party invoking [the limitation] must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd., supra*, at p.352…There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd., supra*, at p.352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."[32]

[65] This Court has recognised similar factors in elaborating the test under Article 13(2) of the ACHR:

> [I]f there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.[33]

[66] The first factor noted by the Canadian Supreme Court means that while States may, perhaps even should, protect various public and private interests, in doing so they must carefully design the measures taken so that they focus specifically on the

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[30] See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.
[31] See *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, EHRR 407, paras. 39-40.
[32] *R. v. Oakes* (1986), 1 SCR 103, pp.138-139. *R. v. Big M Drug Mart Ltd.*, note 29.
[33] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 16, para. 46.

objective. This is uncontroversial. It is a very serious matter to restrict a fundamental right and, when considering imposing such a measure, States are bound to reflect carefully on the various options open to them.

[67] The second factor is also uncontroversial. Any restriction which does not impair the right as little as possible clearly goes beyond what is necessary to achieve its objectives. In applying this factor, courts have recognised that there may be practical limits on how finely honed and precise a legal measure may be. But subject only to such practical limits, restrictions must not be overbroad.

[68] Other courts have also stressed the importance of restrictions not being overbroad. For example, the US Supreme Court has noted:

> Even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved.[34]

[69] Finally, the impact of restrictions must be proportionate in the sense that the harm to freedom of expression must not outweigh the benefits in terms of the interest protected. A restriction which provided limited protection to reputation but which seriously undermined freedom of expression would not pass muster. This again is uncontroversial. A democratic society depends on the free flow of information and ideas and it is only when the overall public interest is served by limiting that flow that such a limitation can be justified. This implies that the benefits of any restriction must outweigh the costs for it to be justified.

Public Officials and Matters of Public Concern

[70] It has been widely recognised that public officials must tolerate a greater degree of criticism than ordinary citizens. In its very first defamation case, the European Court of Human Rights emphasised:

> The limits of acceptable criticism are … wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.[35]

The Court has affirmed this principle in several cases and it has become a fundamental tenet of its caselaw.[36]

[71] The principle is not limited to criticism of politicians acting in their public capacity. Matters relating to private or business interests can also be subject to this higher standard of tolerance. For example, the "fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic

[34] *Shelton v. Tucker*, 364 US 479 (1960), p. 488.
[35] *Lingens v. Austria*, note 31, para. 42.
[36] See, for example, *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, para. 59; *Wabl v. Austria*, 21 March 2000, Application No. 24773/94, para. 42; and *Lopes Gomez da Silva v. Portugal*, 28 September 2000, Application No. 37698/97, para. 30.

law arises."[37]

[72] The European Court of Human Rights has also held that the standard of higher tolerance applies to public officials and to public servants as well as to politicians for statements relating to their public functions.[38] Although in the case of *Janowski v. Poland*, the European Court held that public servants must "enjoy public confidence in conditions free of perturbation if they are to be successful in performing their tasks," this case did not require the Court to balance the interests of freedom of the media against need to protect public servants. In the later case of *Dalban v. Romania*, the Court found a clear violation of freedom of expression where a journalist had been convicted for defaming the chief executive of a State-owned agricultural company.[39] In the recent case of *Thoma v. Luxembourg*, the Court put the issue beyond doubt:

> Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals.[40]

[73] The European Court has also applied this principle to cases which did not involve either politicians or public officials. In *Tromsø and Stensås v. Norway*, the Court took into account the fact that the statements related to a matter of public concern, namely a local debate about seal hunting.[41]

[74] This principle has been widely endorsed. For example, 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 issue a joint Declaration addressing various freedom of expression issues. In their Joint Declaration of 2000, they specifically addressed the issue of defamation, stating:

> At a minimum, defamation laws should comply with the following standards:
> …
> - 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; in particular, laws which provide special protection for public figures, such as desacato laws, should be repealed….[42]

[75] Principle 8 of *Defining Defamation*, entitled Public Officials, states:

> Under no circumstances should defamation law provide any special protection for public officials, whatever their rank or status. This Principle embraces the manner in which complaints are lodged and processed, the standards which are applied in

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[37] *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 51 (European Court of Human Rights).
[38] See *Janowski v. Poland*, 21 January 1999, Application No. 25716/94, para. 33. See also *Thorgeir Thorgeirson v. Iceland*, note 30.
[39] *Dalban v. Romania*, 28 September 1999, Application No. 28114/95.
[40] *Thoma v. Luxembourg* , 29 March 2001, Application No. 38432/97, para. 47.
[41] 20 May 1999, Application No. 21980/93, para. 63.
[42] Joint Declaration of 30 November 2000.

determining whether a defendant is liable, and the penalties which may be imposed.[43]

[76] The higher standard of protection has been applied broadly to all matters of public interest by the European Court of Human Rights as well as other authoritative bodies. *Defining Defamation* defines the scope of this notion – referred to therein as matters of public concern – as follows:

> As used in these Principles, the term 'matters of public concern' is defined expansively to include all matters of legitimate public interest. This includes, but is not limited to, all three branches of government – and, in particular, matters relating to public figures and public officials – politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic issues, the exercise of power, and art and culture. However, it does not, for example, include purely private matters in which the interest of members of the public, if any, is merely salacious or sensational.[44]

[77] There are a number of reasons for this higher standard of tolerance, particularly in relation to public officials. First, and most importantly, democracy depends on the possibility of open public debate about matters of public interest. Without this, democracy is a formality rather than a reality. This is the underpinning for the frequent references to the press as 'watchdog' of government.[45] 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. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.[46]

[78] Second, as the European Court of Human Rights has noted, a public official, "inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance."[47]

[79] Third, public officials normally have greater access to the means of communication and hence can respond publicly to any allegations whereas this may not be easy for ordinary citizens.

Issues Addressed

[80] The rules relating to criminal defamation in Costa Rica represent a substantial limitation on freedom of expression. This brief assesses that limitation in light of relevant international and comparative constitutional law, submitting that these provisions go beyond the scope of legitimate restrictions on freedom of expression.

[81] Specifically, this brief addresses three separate issues. First, it argues that criminal defamation is not a legitimate restriction on the right to freedom of expression.

[43] Note 2.
[44] *Ibid.*,.
[45] See note 54.
[46] *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312 (PC), p. 318.
[47] *Lingens v. Austria*, note 31, para. 42.

Although historically justified as necessary to maintain public order, this threat no longer pertains in a modern society. Furthermore, criminal defamation is both disproportionate and unnecessary to protect reputations. There are numerous authoritative international statements in support of this, as well as a growing body of national practice.

[82] Second, this brief argues that, regardless of the issue of criminality, the standards for liability for defamation under Costa Rican law do not conform to accepted international rules relating to the balance between the need to protect reputations and the right to freedom of expression. Specifically, Costa Rican law restricts the right to prove truth, fails to recognise defences other than proof of truth and does not accommodate situations where the media are reporting on the statements of others.

[83] Finally, this brief argues that, even if some defamation liability were warranted on the facts of the present case, the sanctions imposed are excessive and represent, on their own, a breach of the right to freedom of expression.

Criminal Defamation

[84] It is everywhere accepted that reputations should be protected by law and that certain types of statements which undermine reputations should attract liability of some sort. ARTICLE 19 submits, however, that where the goal is protection of reputation, the civil law is not only the most appropriate remedy but also the only acceptable remedy under international guarantees of freedom of expression.

[85] Criminal defamation laws have their origins in the need to maintain public order during a period when insults and attacks on reputation posed a real risk of engendering violence, in particular in the form of a duel. This risk no longer applies and, as a result, their public order roots should no longer be used as a justification for criminal defamation laws.

[86] There are two principled reasons why defamation should not be a matter of criminal law. First, use of the criminal law represents a disproportionate means of addressing the problem of unwarranted attacks on reputation, which exerts an unacceptable chilling effect on freedom of expression. This is particularly so in relation to statements regarding public officials or on matters of public interest, both of which are applicable in the present case.

[87] Second, civil defamation laws, on their own, provide adequate redress for harm to reputation. The experience of a number of countries, including countries at a relatively low stage of economic and/or democratic development, conclusively demonstrates this. If civil laws are an effective remedy, they must be preferred to criminal defamation laws, as restrictions on freedom of expression must be carefully designed so as to limit the right as little as possible.

[88] The illegitimacy of criminal defamation as a restriction on freedom of expression finds expression in numerous authoritative international statements. These statements are elaborated in more detail below.

Public Order as an Aim

[89] Criminal defamation provisions find their roots in laws designed to prevent a breach of the peace or, to use a more modern term, to maintain public order. Public order is clearly a legitimate ground for restricting freedom of expression and it is explicitly listed as such in Article 13(2)(b) of the ACHR. Furthermore, most countries use the criminal law to penalise expression that poses a sufficiently close and serious threat to public order, for example, in the form of a criminal prohibition on inciting others to crime.

[90] It is submitted, however, that it is no longer necessary to protect reputations to maintain public order and that this historical rationale for criminal defamation no longer pertains.

[91] The origins of criminal defamation in the United Kingdom provide a good insight into their public order rationale. Criminal defamation in the United Kingdom dates back to the Statute of Westminster in 1275, which established the offence of *Scandalum Magnatum*, providing that:

> … from henceforth none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm.[48]

[92] The purpose of *Scandalum Magnatum* seems to have been mainly to promote peaceful means of redress in a context characterised by constant threats to public order, rather than to protect reputations *per se*. In his renowned *History of English Law*, Holdsworth notes that the purpose of these statutes was, "not so much to guard the reputation of the magnates, as to safeguard the peace of the kingdom," adding, "this was no vain fear at a time when the offended great one was only too ready to resort to arms to redress a fancied injury."[49] At the time, information was scarce and hard to verify and false rumours could all too easily lead to violence, for example in the form of public duels or even insurrection. According to the Supreme Court of Canada, "the aim of the statute was to prevent false statements which, in a society dominated by extremely powerful landowners, could threaten the security of the state."[50]

[93] It is clear that the social conditions which were originally used to justify this rule no longer pertain. In a 1964 case, the US Supreme Court noted:

> Even in Livingston's day [*circa* 1830s], however, preference for the civil remedy, which enabled the frustrated victim to trade chivalrous satisfaction for damages, had substantially eroded the breach of the peace justification for criminal libel laws.[51]

[94] And, further:

> . . . under modern conditions, when the rule of law is generally accepted as a

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[48] Scott, F., "Publishing False News" (1952) 30 *Canadian Bar Review* 37, pp. 38-9.
[49] *A History of English Law, v. III, 5th Ed.* (London, Methuen & Co., 1942), p. 409.
[50] *R. v. Keegstra* [1990] 2 SCR 697, p. 722.
[51] *Garrison v. Louisiana*, 379 U.S. 64 (1964), p. 69.

> substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.[52]

[95] Outside, perhaps, of a barroom brawl – and defamation laws are hardly the most effective way to prevent these – the risk of public disorder from defamation is now extremely remote. In any case, Costa Rica, like most modern States, has a number of other more appropriate legal rules specifically designed to maintain order. Where a real threat to the peace or of disorder exists, these rules, rather than defamation law, should be employed.

Principled Grounds for Abolishing Criminal Defamation

[96] There are two main principled reasons why criminal defamation laws fail to meet the necessity part of the test for restrictions on freedom of expression. The first is that a criminal prohibition is a disproportionate response to the problem of harm to reputation. The second is that criminal defamation laws are not the least restrictive means to achieve the legitimate aim of protecting reputations; civil laws are sufficient to serve this goal and, being a less intrusive remedy, should be preferred over criminal laws.

Proportionality

[97] It is well-established that restrictions on freedom of expression meet the necessity part of the test only if they are proportionate, in the sense that the goal they secure outweighs the harm done to freedom of expression. As this Court has stated: "[T]o be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees."[53]

[98] Of particular importance here is the chilling effect that criminal prohibitions on defamation have on freedom of expression. The "chilling effect" refers to the fact that such restrictions affect expression well beyond the actual scope of the prohibition. Individuals will be deterred from publishing anything which, even on a slight probability, may risk falling foul of the rules due to the extreme consequences this may entail.

[99] Both international and national courts have noted this "chilling effect" in their jurisprudence. In *Lingens v. Austria*, the European Court of Human Rights recognised that criminal sanctions for defamation can lead to the censorship of important expression. Referring to the fine imposed on the applicant for defamation, the Court stated:

> In the context of political debate, such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.[54]

[52] *Ibid.*, quoting from Emerson, "Toward a General Theory of the First Amendment" (1963) 72 Yale L. J. 877, p. 924.
[53] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 46.
[54] *Lingens v. Austria,* note 31, para.44.

As a result of this threat, the Court recognised the need for restraint when applying criminal sanctions for abuse of the right to freedom of expression

[100] The chilling effect of criminal sanctions has also been noted by the Inter-American Commission on Human Rights, which notes, in the conclusion of its *Report on the Compatibility of "Desacato" Laws With the American Convention on Human Rights*, "the inevitable chilling effect [criminal sanctions] have on freedom of expression".[55]

[101] The chilling effect of the statements in question in the present case must be assessed in light of the fact that they not only concern a public official, but also relate to a matter of great public importance. The important 'watchdog' role of the media[56] requires that, at least in this area, they be free to report without fear of criminal sanction. In the present case, the chilling effect is compounded by the sanctions imposed, which include being entered into the Judicial Register of Criminals, with all of the consequences that entails.

[102] It is submitted that the present case is in fact a perfect example of the risk criminal defamation laws pose to the free flow of information and ideas about matters of public importance. In the present case, an accomplished journalist, Mr. Herrera Ulloa, working for a highly professional media outlet, *La Nación*, published a series of articles on a matter of great public importance involving a public official, after undertaking investigations in line with accepted professional journalistic standards. The subject of those articles, Mr. Przedborski, was given ample opportunity, both directly and through his supporters, to comment on and respond to the allegations against him. The impugned articles contained much material which was favourable to Mr. Przedborski. If such behaviour is deemed criminal, journalists cannot carry on their work of reporting in the public interest.

[103] As set out below, weighed against the chilling effect is the very dubious question of any additional benefit that may be secured by criminal, as opposed to civil, defamation laws. We submit that such benefits are non-existent or, at the very best, extremely limited in nature so that they cannot possibly outweigh the harm done to freedom of expression by criminal defamation laws.

Least Restrictive Remedy

[104] It is well established that the guarantee of freedom of expression requires States to use the least restrictive effective remedy to secure the legitimate aim sought. This flows directly from the need for any restrictions to be necessary; if a less restrictive remedy is effective, the more restrictive one cannot be necessary. This reasoning also forms part of the jurisprudence of this Court, which has stated:

> [I]f there are various options to achieve [a compelling governmental interest], that which least restricts the right protected must be selected.[57]

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[55] 1994 Annual Report of the Inter-American Commission on Human Rights, Chapter V.

[56] See note 54.

[57] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 53, para. 46.

[105] As a result, to the extent that civil defamation laws are effective in appropriately redressing harm to reputation, there is no justification for criminal defamation laws. Perhaps the best evidence of the sufficiency of civil defamation laws in redressing harm to reputation comes from the growing number of jurisdictions where they are either the preferred means of redress or growing in popularity, even though criminal defamation laws are still on the books. This is the case, for example, in many European countries, including Austria and the Netherlands. In other countries, criminal defamation laws have fallen into virtual desuetude. There has been no successful attempt to bring a criminal prosecution for defamation in the United Kingdom for many years and no private actor has even attempted to do so for over 20 years.[58]

[106] A number of countries have recently completely abolished criminal defamation laws. These include Ghana (2001), Sri Lanka (2002) and the Ukraine (2001), all countries with a lower development ranking, according to the United Nations Development Programme, than Costa Rica.[59] These countries have not experienced any noticeable increase in defamatory statements, either of a qualitative or quantitative nature, since they abolished criminal defamation.

[107] In the United States, criminal defamation laws have never been upheld by the Supreme Court.[60] Other US courts have also struck down criminal defamation laws and they have been repealed in some States, including California and New York.

[108] It may be concluded that the experience of a range of countries where criminal defamation laws have been struck down by the courts, repealed by the authorities or fallen into virtual disuse shows that such laws are not necessary to provide appropriate protection for reputations. In these countries, civil defamation laws have proven adequate to this task. Furthermore, this experience is not limited to established democracies but also includes countries undergoing a transition to democracy, and from different regions of the world.

Authoritative International Statements on Criminal Defamation

[109] The principled grounds for rejecting criminal defamation laws find support in a wide range of authoritative statements by various international bodies.

[110] Within the UN system, statements either explicitly rejecting criminal defamation or casting serious doubt on its legitimacy have been made by the Human Rights Committee, the Commission on Human Rights and the Special Rapporteur on Freedom of Opinion and Expression.

[111] The UN Human Rights Committee has not yet had the opportunity to address the issue of criminal defamation through an individual communication addressed to it.

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[58] Historical attempts include *Goldsmith v. Pressdram* [1977] QB 83, *Gleaves v. Deakin* [1980] AC 477 and *Desmonde v. Thorpe* [1982] 3 All ER 268. None of these cases have gone to trial because either the plaintiffs failed to obtain leave to proceed or the cases were discontinued.

[59] See UNDP, *Human Development Report 2003: Millennium Development Goals: A Compact Among Nations to End Human Poverty* (Oxford University Press, Oxford, 2003).

[60] They have been struck down on at least two occasions. See *Garrison v. Louisiana*, note 51 and *Ashton v. Kentucky*, 384 US 195 (1966).

However, it has repeatedly expressed its concern about criminal defamation and, in particular, the use of custodial sanctions for defamation, in the context of its regular reviews of country reports.

[112] For example, in its Concluding Observations on Trinidad and Tobago in 2000, the Committee noted:

> The Committee is concerned that the existing laws on defamation could be used to restrict criticism of the Government or public officials.
>
> The State party should proceed with its proposals to reform the law of defamation, ensuring a due balance between protection of reputation and freedom of expression. (Art. 19)[61]

[113] Similarly, in relation to Norway, the Committee stated:

> The Committee recommends early action to review and reform laws relating to criminal defamation. (Art. 19)[62]

[114] The Committee has stated outright that ‘desacato’ laws breach the right to freedom of expression in its Concluding Observations on the Dominican Republic:

> The Committee takes note of the existence of a crime of “desacato” (disrespect of authority), which it deems contrary to article 19 of the Covenant.
>
> The State party should take steps to abolish that crime.[63]

[115] The Committee has expressed such concerns on numerous other occasions in recent years.[64]

[116] On the other hand, the Committee has applauded countries that have repealed their criminal defamation laws. In December 2003, the Committee noted certain concerns in relation to Sri Lanka, while “appreciating the repeal of the statutory provisions relating to criminal defamation”.[65]

[117] The UN Special Rapporteur on Freedom of Opinion and Expression has dealt with the issue of criminal defamation in a number of his reports. In his 1999 Report to the UN Commission on Human Rights, he focused on the illegitimacy of criminal sanctions for defamation, stating:

> Sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied.[66]

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[61] 3 November 2000, CCPR/CO/70/TTO, para. 19.
[62] 1 November 1999, CCPR/C/79/Add.112, para. 14.
[63] 26 April 2001, CCPR/CO/71/DOM, para. 22.
[64] For example, in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), Cameroon, Mexico, Morocco, Norway and Romania (1999), Kyrgyzstan (2000), Azerbaijan, Guatemala and Croatia (2001), and Slovakia (2003).
[65] 1 December 2003, CCPR/CO/79/LKA, para. 17.
[66] *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.

[118] In his Report in 2000, and again in 2001, the Special Rapporteur went even further, calling on States to repeal all criminal defamation laws in favour of civil defamation laws.[67] In the 2000 Report, for example, he stated:

> [A]t minimum, it must be understood that:
>
> - Criminal defamation laws should be repealed in favour of civil laws as the latter are able to provide sufficient protection for reputations….[68]

[119] 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".[69]

[120] 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 – called on States to repeal their criminal defamation laws in their joint Declarations of November 1999, November 2000 and again in December 2002. 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.[70]

[121] In October 2000, the Inter-American Commission on Human Rights adopted a *Declaration of Principles on Freedom of Expression*. Paragraph 10 of this Declaration states, among other things: "[T]he protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest."[71] While this does not go so far as to call for the complete abolition of criminal defamation, it is certainly broad enough to cover the facts of the present case.

[122] The Commission's *Report on the Compatibility of "Desacato" Laws With the American Convention on Human Rights* goes further, suggesting that all matters relating to the protection of reputation should be dealt with as a matter of civil law:

> The Commission considers that the State's obligation to protect the rights of others is served by providing statutory protection against intentional infringement on honor and reputation through civil actions and by implementing laws that guarantee the right of reply.[72]

[123] The European Court of Human Rights has never actually ruled out criminal

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[67] 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, para. 42.
[68] *Ibid.*
[69] See, for example, Resolution 2003/42, 23 April 2003, para. 3(a).
[70] Joint Declaration of 10 December 2002.
[71] Adopted at the 108th Regular Session, 19 October 2000.
[72] Note 55, Conclusion.

defamation and there are a small number of cases in which it has allowed criminal defamation convictions. Nonetheless, the Court has clearly recognised that there are serious problems with criminal defamation; it has frequently reiterated the following statement in the context of defamation cases:

> [T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.[73]

[124] In *Castells v. Spain*, the Court stated that criminal measures should only be adopted where States act "in their capacity as guarantors of public order".[74] It is significant, in our view, that in that case, which involved a conviction for defamation, the Court referred to the application of criminal measures only as a means of maintaining public order, and not as a means of protecting reputations. As noted above, in our view defamation laws can no longer be justified as a means of ensuring public order.

[125] In those cases in which the ECHR has formally upheld criminal convictions for defamation, it has been at pains to point out that the sanctions were modest and hence met the requirement of proportionality (see below, under Sanctions).

[126] Principle 4(a) of *Defining Defamation* states categorically:

> All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws. Steps should be taken, in those States which still have criminal defamation laws in place, to progressively implement this Principle.[75]

[127] A set of Recommendations adopted by a joint OSCE-Reporters without Borders conference on 25 November 2003 included the following statement:

> Criminal libel and defamation laws should be repealed and replaced, where necessary, with appropriate civil laws.[76]

Standards of Liability

[128] To be consistent with the guarantee of freedom of expression, defamation laws may impose liability only in conformity with certain standards. Proof of the truth of the impugned statements should always absolve the defendant of liability and, in certain circumstances, the onus should be on the plaintiff to prove that the statements were false, rather than on the defendant to prove they were true. Defendants should also benefit, in certain circumstances, from a defence based on the idea that they have acted reasonably in all of the circumstances, even if, in the result, the statements eventually turn out to contain some errors.

[129] In addition, where relevant, courts should take into account the origins of the

[73] *Castells v. Spain*, 24 April 1992, 14 EHRR 445, para.46.
[74] *Ibid.*
[75] Note 2.
[76] "Libel and insult laws : what more can be done to decriminalise libel and repeal insult laws?"

impugned statements and, in particular, whether these are derived from authoritative external sources. Where those sources are considered sufficiently authoritative, or where the matter is sufficiently pressing in terms of the public's right to know, the effect of this should be to absolve the defendant of liability.

[130] The arguments in this section of the brief have been derived primarily from civil defamation laws and cases. However, they apply with at least as much force to criminal defamation cases. For example, it is a cardinal principle of criminal law, based on the presumption of innocence, that the party bringing the case, normally the State, must prove all the elements of the offence, and beyond all reasonable doubt. As we argue below, falsity of the impugned statements is central to liability in civil defamation cases and, in certain circumstances, the onus should be on the plaintiff to prove falsity. *A fortiori*, this onus lies on the party bringing the case in a criminal defamation proceeding.

[131] As noted above, *Defining Defamation* calls for the replacement of all criminal defamation laws with appropriate civil defamation laws. At the same time, in recognition of the fact that many States still have criminal defamation laws in force, Principle 4(b) states, in part:

> (b) As a practical matter, in recognition of the fact that in many States criminal defamation laws are the primary means of addressing unwarranted attacks on reputation, immediate steps should be taken to ensure that any criminal defamation laws still in force conform fully to the following conditions:
>
> i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;
> ii. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed; …[77]

Truth

A Complete Defence

[132] It is clear that proof of the truth of any impugned statements should fully absolve defamation defendants of any liability in relation to an allegation of harm to reputation. This is recognised in many countries around the world and reflects the basic principle that no one has the right to defend a reputation they do not deserve. If the matter complained of is true, the plaintiff has no right to claim that it should not be publicised.

[133] This is reflected in Principle 7(a) of *Defining Defamation*, which states: "In all cases, a finding that an impugned statement of fact is true shall absolve the defendant of any liability."[78]

[134] Article 149 of the Penal Code of Costa Rica provides that proof of truth will

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[77] Note 2.
[78] *Ibid*

only be effective if the statement is also related to matter of public interest. A similar matter came before the UK House of Lords in *Gleaves v. Deakin*, a case involving criminal defamation, which required not only proof of the truth of the statements, but also proof that publication was for the public benefit. As Lord Diplock stated: "This is to turn article 10 of the [European Convention on Human Rights] on its head ... article 10 requires that freedom of expression shall be untrammelled [unless interference] is necessary for the protection of the public interest."[79] The same principle underlies Article 13 of the ACHR.

[135] International and national courts have also held that a defendant in a defamation case should always be allowed to prove the truth of their statements. In *Castells v. Spain*, Castells, then a senator, had been charged with insulting the government in a magazine article about violence in the Basque Country. The Court ruled that the failure of the Spanish courts to allow Castells to prove the truth of his statements was a violation of his right to freedom of expression which could not be justified in a democratic society.[80]

[136] In contrast to these standards, Article 149 of the Penal Code of Costa Rica limits the right to prove truth in several important respects. First, as noted above, such proof is permissible only in relation to statements on matters of public interest. Furthermore, the right to prove the truth of any allegations is limited to cases where the plaintiff demands such proof, but only as long as this does not affect the rights of a third party. There is a clear interest in protecting the rights of third parties, but it is far from clear that this should result in defamation liability. Instead, as argued below, the plaintiff should be required to prove that the statements were false and, if necessary, be prevented from doing so where this would harm the rights of others. This would respect the presumption in favour of freedom of expression, as reflected in the need for the State to show that restrictions are necessary.

Onus of Proof

[137] Closely related to the question of the impact of proof of truth is the question of whether or not falsity should be presumed or, to put it another way, a question of where the burden of proof should lie; with the defendant to prove truth or with the plaintiff to prove falsity.

[138] It seems clear that the heavy onus on the State to justify any restriction on freedom of expression dictates that it be presumed that a statement is true until and unless the contrary is shown. This rule should at least apply to statements relating to public officials, as well as other matters of legitimate public interest, given the importance of open debate about them.

[139] A number of courts have adverted to the chilling effect of a requirement to prove truth for purposes of civil defamation law. For example, the House of Lords, holding that a local authority did not have a right to sue for damages for defamation, noted:

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[79] [1980] AC 477, p. 483.

[80] *Castells v. Spain*, note 73, para. 48.

> The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech. … What has been described as 'the chilling effect' … is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public. [81]

[140] Similarly, in the leading *New York Times Co. v. Sullivan* case, decided by the U.S. Supreme Court in 1964, Justice Brennan held that a requirement that the defendant prove the truth of allegations relating to public officials breached the First Amendment guarantee of free speech, noting:

> 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.[82]

[141] As a result, courts and authoritative commentators have argued that the onus should be on the plaintiff to prove falsity, rather than on the defendant to prove truth, at least in the context of statements on matters of public interest. In the *New York Times Co. v. Sullivan* case, noted above, the U.S. Supreme Court held that, in relation to statements about public officials, the onus was on the plaintiff not only to prove that the statements were false, but also that they had been published in malice or with reckless disregard for the truth.[83]

[142] The three special international mandates for promoting freedom of expression, in their Joint Declaration of 2000, noted that, "the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern".[84] Similarly, *Defining Defamation* states:

> In cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.[85]

[143] In the present case, the onus was on Mr. Herrera Ulloa to prove the truth of his statements, in breach of these standards, despite the fact that the impugned statements referred to a public official and related to a matter of undoubted public concern.

Reasonableness Defence

[144] It has been widely recognised that defamation laws which do not allow for any errors in relation to statements of fact, even if the author has acted in accordance

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[81] *Derbyshire County Council v. Times Newspapers Ltd* [1993] 1 All ER 1011 (HL), pp. 1017-1018. Similarly, the US Supreme Court has stated: "Allowance of the defense of truth … 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." *New York Times v. Sullivan*, *op cit.*, pp. 278-9.
[82] *New York Times Co. v. Sullivan*, 376 US 254, 279 (1964), p. 279.
[83] *Ibid.*, pp. 279-80.
[84] Note 42.
[85] Note 2, Principle 7(b).

with the highest professional standards, cannot be justified. A strict liability rule of this nature is particularly untenable for the media, which are under a duty to satisfy the public's right to know 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. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably, while allowing plaintiffs to sue those who have not.

[145] In a case involving statements held in the national court to be false and defamatory, the European Commission of Human Rights stated:

> [F]reedom of the press would be extremely limited if it were considered to apply only to information which could be proved to be true. The working conditions of journalists and editors would be seriously impaired if they were limited to publishing such information.[86]

In that case, which involved statements in the media based on an official report, the European Court held that to hold the defendants liable in defamation for these statements would be a breach of the right to freedom of expression, even though it accepted that the statements were, in fact, inaccurate.[87]

[146] Similarly, the Judicial Committee of the Privy Council[88] has noted the chilling effect of a rule which penalises any statement which is inaccurate:

> [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.[89]

[147] In *National Media Ltd v. Bogoshi*, the South African Supreme Court of Appeal recognised the unacceptability of a strict liability rule for inaccurate statements, noting, "nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error."[90]

[148] Similarly, the United States Supreme Court, in the *New York Times v. Sullivan* case, noted:

> 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

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[86] *Tromsø and Stensås v. Norway*, Application No. 21980/93, Report of 9 July 1998, para. 80.
[87] *Tromsø and Stensås v. Norway*, note 41.
[88] This is the final court of appeal for a number of common law countries and is comprised of judges from the House of Lords.
[89] *Hector v. Attorney-General of Antigua and Barbuda*, note 46, p. 318.
[90] 1998 (4) SA 1196, p. 1210.

> zone." *Speiser v. Randall*, *supra*, 357 U.S., at 526.[91]

[149] Courts and legislators around the world, in recognition of the above, have developed various alternative defences to proof of truth, which we will refer to here generically as 'reasonableness defences', while noting that these vary considerably in nature. All of these defences, or rules for liability, apply to statements of fact, even where such statements are false and defamatory. Their effect is to absolve the defendant of any liability in defamation for the statement.

[150] In *Tromsø and Stensås v. Norway*, noted above, the European Court of Human Rights held recently that to punish certain false and defamatory statements breached the guarantee of freedom of expression. The Court placed some emphasis on the fact that the statements concerned a matter of great public interest which the plaintiff newspaper had, overall, covered in a balanced manner.[92] Perhaps even more important was the fact that the newspaper had relied on an official report of a seal hunting inspector. The Court noted that "the press should normally be entitled, when contributing to a debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research."[93]

[151] A leading national case in this area is *New York Times Co. v. Sullivan*, noted above, decided by the U.S. Supreme Court. The plaintiff, a police commissioner, alleged that an advertisement in the *New York Times* accusing the police of excessive violence, and which did contain some factual errors, damaged his reputation. As "erroneous statement is inevitable in free debate,"[94] the court ruled that a public official could only recover damages 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."[95] The fact that the plaintiff may have suffered "injury to official reputation" did not justify "repressing speech that would otherwise be free."[96] This case thus replaces the 'truth' standard with one of 'actual malice', placing the burden on the plaintiff to prove this. Although *Sullivan* is restricted in application to public officials, subsequent cases have extended it to candidates for public office[97] and public figures who do not hold official or government positions.[98]

[152] In *Rajagopal*, 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

[91] Note 82, p. 279. *Speiser v. Randal*, 357 U.S. 513 (1958).
[92] Note 87, para. 33.
[93] *Ibid.*, para. 68.
[94] Note 82, p. 271.
[95] *Ibid.*, pp. 279-80.
[96] *Ibid.*, p. 272.
[97] *Monitor Patriot Co. v. Roy* (1971) 401 US 265.
[98] *Curtis Publishing Co. v. Butts* (1967) 388 US 130.

> 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.[99]

[153] In *Lange v. Australian Broadcasting Corporation*, the Australian High Court adapted the traditional defence of qualified privilege based on an implied constitutional guarantee of freedom of political communication.[100] This defence normally does not apply to publications to the public at large, and so is not available to media outlets. However, the Court held that everyone "has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters.... The duty to disseminate such information is simply the correlative of the interest in receiving it."[101] As a result, such communications were covered by the defence of qualified privilege. However, unlike traditional qualified privilege, which could be overcome only by malice, due to the large audience in that case, the Court held that the standard was one "of reasonableness ... which goes beyond mere honesty".[102] Furthermore, in Australia, the onus is on the defendant to prove reasonableness, because the information required to do so is "peculiarly within the knowledge of the defendant."[103]

[154] In *Lange v. Atkinson*,[104] the New Zealand Court of Appeal also relied on qualified privilege to protect certain categories of false and defamatory statements. 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. The Court rejected the Australian standard of reasonableness, holding that the traditional approach, whereby the privilege could only be defeated by malice, was more appropriate. In addition, the Court held that the plaintiff bears the onus of proving malice.

[155] The United Kingdom House of Lords adopted an analogous but slightly different approach in its 1999 decision in *Reynolds v. Times Newspapers*.[105] The Lords rejected the idea of a general category of privilege covering statements of political information, as well as the idea of a defence of reasonable care in relation to political statements. Instead, Lord Nicholls elaborated 10 factors to be taken into account in determining whether, in all the circumstances, the privilege ought to be extended, including the seriousness of the allegation, the source of the information and steps taken to verify its accuracy, the urgency of the matter, whether comment was sought from the plaintiff and the tone of the article.[106]

[156] Recognition of the undue harshness of a strict liability rule in relation to truth is not restricted to common law jurisdictions. A reasonableness defence for defamation has been recognised in South Africa, which has a Roman-Dutch system

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[99] *Rajagopal & Anor v. State of Tamil Nadu* [1994] 6 SCC 632 (SC), p. 650.
[100] The Australian Constitution does not include a bill of rights.
[101] (1997) 71 ALJR 818, p. 832-3.
[102] *Ibid.*
[103] *Theophanous v. Herald & Weekly Times Ltd* (1994) 124 ALR 1, p. 24.
[104] *Lange v Atkinson* [2000] 1 NZLR 257.
[105] *Reynolds v. Times Newspapers Ltd and others*, [1999] 4 All ER 609.
[106] *Ibid.*, p. 625.

of law.[107] In Germany, the Federal Constitutional Court has held that while statements must not be given in a thoughtless manner, the requirement of truth must not be so stringent as to deter persons from making statements for fear of prosecution.[108] In addition, where the public interest is involved, there is a presumption in favour of freedom of expression.[109] Similarly, in the Netherlands, the press is not required to provide conclusive evidence of the correct factual basis of its reporting.[110] Section 261(3) of the Criminal Code provides that journalists do not need to prove the truth of their accusations as long as they acted in good faith in the public interest.[111] In Hungary as well, the simple fact that an assertion is untrue is not sufficient, at least where public officials are involved, to sustain an action in defamation.[112]

[157] These rules vary in important respects. Some place the onus on the plaintiff while some place it on the defendant. Some are based on a standard of malice, or reckless disregard for the truth, while others require the defendant to have acted reasonably. They all, however, provide some form of protection against liability for defendants even where the impugned statements are false and defamatory.

[158] The three special international mandates for promoting freedom of expression have also recognised the need for a defence of this sort, stating 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".[113]

[159] *Defining Defamation* also provides for a 'reasonableness' defence as follows:

> Even where a statement of fact on a matter of public concern has been shown to be false, defendants should benefit from a defence of reasonable publication. This defence is established if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. In determining whether dissemination was reasonable in the circumstances of a particular case, the Court shall take into account the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters.[114]

The Commentary to this Principle notes: "For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test."

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[107] See *National Media Ltd v. Bogoshi*, note 90.

[108] 54 FCC 208 (1980) (*Heinrich Böll* case) and 85 FCC 1 (1994) (*Auschwitz-Luege* case). See also See also Declaration of Dr. Ulrich Karpen, Written Comments on Comparative European Law Submitted by ARTICLE 19 and INTERIGHTS to the European Court of Human Rights in *Prager & Oberschlick v. Austria*, p. 9.

[109] 7 FCC 198 (1958) (*Lueth* case). *Ibid.*

[110] 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.

[111] See van Lenthe, F. and Boerefijn, I., in ARTICLE 19, *Press Law and Practice* (1993, London), p.105.

[112] See Decision 36/1994. (VI.24) AB, Constitutional Court and See also Declaration of Dr. Agnes Frech, Written Comments on Comparative European Law Submitted by ARTICLE 19 and INTERIGHTS to the European Court of Human Rights in *Prager & Oberschlick v. Austria*, p. 5.

[113] Their Joint Declaration of 30 November 2000.

[114] Note 2, Principle 9.

[160] The values that underpin these decisions rest on the ideas that, at least in relation to matters of public concern, open debate must be promoted in the interest of the public's right to know and that open debate is the best way for the truth to emerge. If a journalist cannot publish critical comments without being sure that he or she can prove that they are true, to the satisfaction of a court, taking into account the rules of evidence and the fact that he or she may have relied on confidential sources, open debate is gravely fettered and many true allegations will be suppressed.

[161] Furthermore, even where the allegations are false, the promotion of open debate is in many cases the best way for this to be exposed and for the target of those allegations to clear his or her name. Often, the allegations will be circulating in some form among at least a sector of the population and the effect of the published statements will essentially be to raise these to the level of a national debate. In the present case, for example, many people in Costa Rica will have been aware of these allegations via the Internet, through contacts abroad and so on. The articles in *La Nación* promoted a national debate about them. This is surely the best way for the question of their veracity or otherwise to be settled in an authoritative manner.

[162] Under the Penal Code of Costa Rica, no defence analogous to those described above, no reasonableness defence, is available. In particular, the defendant will not be absolved of liability in defamation even if he or she can prove that the highest standards of professionalism were observed in publishing the impugned statements.

[163] This is not a theoretical point in relation to the present case. Mr. Herrera Ulloa is a highly respected journalist and *La Nación* is a leading Costa Rican daily. The evidence reveals that he researched the allegations carefully, using reliable sources which he checked out carefully, including respected European newspapers and legislators. He made efforts to contact Mr. Przedborski, successfully after the first three articles had been published, and also contacted friends and supports of Mr. Przedborski. Alongside the negative allegations about Mr. Przedborski, the impugned articles included positive statements, including the fact that Mr. Przedborski has been awarded the Great Officer of the Order of Leopold II and the support shown to him by former presidents of Costa Rica. *La Nación* published a long letter from Mr. Przedborski, just days after the original allegations had been made.[115] This behaviour must surely qualify as reasonable in these circumstances.

Reporting the Statements of Others

[164] It has been recognised that where statements have been quoted from external sources, particularly authoritative sources, this needs to be taken into account in relation to any defamation claims regarding those statements. This can be seen as an aspect of a reasonableness defence, as a separate defence or as a way of interpreting other defences or rules. It is probably limited to cases where the statements relate to a matter of public concern, although this has not been fully established by the jurisprudence. The effect, where the sources are considered sufficiently authoritative or where the matter is sufficiently pressing in terms of the public's right to know, is to absolve the defendant of liability.

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[115] "Nací en el dolor y respeto a Costa Rica", *La Nación*, 25 May 1995.

[165] The European Court of Human Rights has taken the source of the impugned statements into account on a number of occasions in holding that imposing defamation liability for those statements was a breach of the right to freedom of expression. For example, in *Thorgeir Thorgeirson v. Iceland*, the applicant had published two articles complaining of brutality on the part of the Reykjavik police, based on stories and rumours he had collected from several persons. In fact, some of the allegations proved to be unfounded and the applicant was convicted, in part because he was unable to prove the truth of his statements. The ECHR, noting that the articles essentially reported on what others had said, stated:

> In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task.[116]

[166] The case is significant, in part because the source of the 'information' was simply widespread rumours. The Court clearly took into consideration the working reality of journalists, and the options realistically open to Mr. Thorgeirson. It was not possible to verify the reports and yet they were so widely held that he was justified in treating them as something other than mere lies. Furthermore, the matter was clearly one of great public interest. It was clear that in a situation like this, Mr. Thorgeirson was bound to publish, even though he could not absolutely confirm the rumours.

[167] The facts of *Thoma v. Luxembourg*, also decided by the European Court of Human Rights, are very similar to those of the present case. In that case, a radio journalist had quoted from a newspaper article which alleged that of all eighty forestry officials in Luxembourg, only one was not corrupt. The journalist was convicted of defamation at the national level but the European Court held that the conviction constituted a violation of his right to freedom of expression, stating:

> [P]unishment 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."[117]

[168] The Court dismissed the contention that the journalist should have formally distanced himself from the allegation, warning the public that he was quoting from a newspaper report:

> A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas.[118]

[169] In the present case, the impugned statements were largely taken from articles in established, respected European newspapers based, among other things, on allegations made by a Belgian congressman. The allegations they contained related

[116] Note 11, para. 65.
[117] *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 62.
[118] *Ibid.*, para. 64.

to a Costa Rican public official and, furthermore, touched on a matter of significant and current public interest, namely the future of honorary diplomatic posts. It would have been virtually impossible, taking into account practical realities, for Mr. Herrera Ulloa to directly confirm the validity of these stories and so he found himself very much in the position of Mr. Thorgeirson. His choices were either to publish important and apparently authoritative allegations of great public importance or to refuse to do so because he could not directly verify the truth of every allegation. It is submitted that legal rules which force Mr. Herrera Ulloa to follow the second course of action, such as those under consideration in the present case, breach the right to freedom of expression, deny the public's right to know and stifle the free flow of information.

[170] In the present case, at least one of the European newspapers which originally published the allegations – *De Morgen* – was itself sued in defamation and found liable in January 1999. *La Nación* reported on this shortly thereafter, as well as the fact that *De Morgen* published an apology to Mr. Przedborski in April 2003. This exemplifies the fact that, in the context of repeated allegations, the target of those allegations has a direct remedy against the original authors.

[171] It may be noted that every day, newspapers in every country in the world publish stories they obtain 'over the wires' from news agencies such as Reuters, Associated Press, Agence France Presse and so on, as well as stories printed directly from other newspapers. It is clearly impossible for newspapers to assess the validity of these stories directly. A system of defamation law which failed to take into this practical media reality would, if applied, act as a severe fetter on freedom of expression. The facts of the present case differ from that of a story taken directly from a foreign source, but we submit that the penal provisions under consideration in the present case would treat them in the same way.

Sanctions

[172] It is clear that unduly harsh sanctions, even for statements found to be defamatory, breach the guarantee of freedom of expression. In the case of *Tolstoy Miloslavsky v. the United Kingdom*, the European Court of Human Rights stated that "the award of damages and the injunction clearly constitute an interference with the exercise [of the] right to freedom of expression."[119] Therefore, any sanction imposed for defamation must bear a "reasonable relationship of proportionality to the injury to reputation suffered" and this should be specified in national defamation laws.[120]

[173] In the *Miloslavsky* case, the Court held that an award of damages which was three times the largest previous award represented a breach of the right to freedom of expression, even though it accepted that the impugned statements were grossly defamatory. The United Kingdom responded by making important amendments to its rules relating to damages, which are assessed by the jury, in particular by requiring judges to provide direction to juries regarding the quantum of damages in personal injury cases and by allowing the Court of Appeal to vary damages. As a

[119] 13 July 1995, Application No. 18139/91, para. 35.
[120] *Ibid.*, para. 49.

result of these changes, the level of damage awards in the United Kingdom has dropped significantly.

[174] The idea that excessive sanctions may, on their own, represent a breach of the right to freedom of expression finds support in a number of other authoritative international statements on this issue. For example, the African Commission on Human and Peoples' Rights recently adopted a *Declaration of Principles on Freedom of Expression in Africa*. Principle XII of the Declaration, entitled, Protecting Reputations, states, in part:

> 1. States should ensure that their laws relating to defamation conform to the following standards:
> …
> - sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.[121]

[175] One aspect of the requirement of proportionality for damages is that less intrusive remedies, and in particular non-pecuniary remedies such as appropriate rules on the right to reply, should be prioritised over pecuniary remedies.[122] Another aspect is that any remedies already provided, for example on a voluntary or self-regulatory basis, should be taken into account in assessing court-awarded damages. To the extent that remedies already provided have mitigated the harm done, this should result in a corresponding lessening of any pecuniary damages.

[176] 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 – addressed this issue specifically in their Joint Declaration in 2000, stating:

> At a minimum, defamation laws should comply with the following standards:
> …
> - civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritize the use of a range of non-pecuniary remedies.[123]

[177] Similarly, in a *Declaration on Freedom of Political Debate in the Media*, the Committee of Ministers of the Council of Europe stresses the need for sanctions both to be proportionate and to take into account any other remedies provided:

> Damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others, taking into consideration any possible effective and adequate voluntary remedies….[124]

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[121] Adopted at the 32nd Session, 17-23 October 2002.
[122] See, for example, *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).
[123] Note 42.
[124] Adopted 12 February 2004.

[178] *Defining Defamation* deals at some length with the issue of pecuniary awards for defamation, based on the serious chilling effect that excessive damages can have. Principle 15: Pecuniary Awards, states:

> (a) Pecuniary compensation should be awarded only where non-pecuniary remedies are insufficient to redress the harm caused by defamatory statements.
> (b) In assessing the quantum of pecuniary awards, the potential chilling effect of the award on freedom of expression should, among other things, be taken into account. Pecuniary awards should never be disproportionate to the harm done, and should take into account any non-pecuniary remedies and the level of compensation awarded for other civil wrongs.
> (c) Compensation for actual financial loss, or material harm, caused by defamatory statements should be awarded only where that loss is specifically established.
> (d) The level of compensation which may be awarded for non-material harm to reputation – that is, harm which cannot be quantified in monetary terms – should be subject to a fixed ceiling. This maximum should be applied only in the most serious cases.
> (e) Pecuniary awards which go beyond compensating for harm to reputation should be highly exceptional measures, to be applied only where the plaintiff has proven that the defendant acted with knowledge of the falsity of the statement and with the specific intention of causing harm to the plaintiff.[125]

[179] It is also significant that Article 14 of the ACHR requires States to provide for a right of reply for anyone who has been injured by statements in the media.[126] While this article specifically preserves any other legal remedies that may be available to the individual, it can be understood both as ensuring that everyone has access in practice to a remedy and as providing an effective remedy for harmful statements which is less intrusive than damages, fines or other harsh sanctions.

[180] It may be noted that the primary goal of remedies should be to redress the harm done to reputation and not to punish the defendant. Given the importance of freedom of expression, punitive remedies can only be justified in the most egregious cases where this is justified by the unacceptable behaviour of the defendant.

[181] These principles apply with at least equal force to criminal sanctions as to civil sanctions, given the additional chilling effect of the former due to the social sanction which accompanies them. Indeed, one of the more serious problems with criminal defamation, as noted above, is precisely the severe nature of the sanctions normally associated with it.

[182] The European Court of Human Rights has upheld criminal defamation convictions on occasion but, in these cases, it has been at pains to point out that the sanctions were modest and hence met the requirement of proportionality. For example, in *Tammer v. Estonia*, the Court specifically noted, "the limited amount of the fine imposed" in upholding the conviction; the total fine in that case was ten times the daily minimum wage.[127]

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[125] Note 2.

[126] See also Resolution (74)26 on the right of reply – position of the individual in relation to the press, adopted by the Committee of Ministers of the Council of Europe, 2 July 1974.

[127] 6 February 2001, para.69. See also *Constantinescu v. Romania*, 21 March 2000.

[183] In its *Report on the Compatibility of "Desacato" Laws With the American Convention on Human Rights*, the Inter-American Commission on Human Rights also noted the particular problem with sanctions of a criminal nature, stating:

> The fear of criminal sanctions necessarily discourages people from voicing their opinions on issues of public concern particularly when the legislation fails to distinguish between facts and value judgments. [128]

[184] As noted above, *Defining Defamation* calls for the replacement of all criminal defamation laws with appropriate civil defamation laws. At the same time, in recognition of the fact that many States still have criminal defamation laws in force, Principle 4(b) states, in part:

> (iv) prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practice journalism or any other profession, excessive fines and other harsh criminal penalties, should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.[129]

[185] In the present case, Mr. Herrera Ulloa was entered into the Judicial Register of Criminals, the consequences of which have been noted above. He was also fined 300,000 colones, or 120 times the daily wage. *La Nación* was ordered to pay Mr. Przedborski 60,000,000 colones in moral damages and 3,810,000 colones in personal damages (a total of over USD150,000). Finally, *La Nación* was ordered to publish the court's decision and to take various measures to prevent Internet users from accessing the impugned articles.

[186] We submit, in accordance with the above, that criminal sanctions for defamation can never be justified as a restriction on freedom of expression. As a result, entering Mr. Herrera Ulloa's name into the Judicial Register of Criminals is a breach of the right to freedom of expression as guaranteed by Article 13 of the ACHR.

[187] Our primary submission is that the articles in question should not attract any liability in defamation. Regardless of this, any assessment of damages must take into account any voluntary or other non-pecuniary remedies that may already have been provided to Mr. Przedborski. We note, in this regard, that Mr. Przedborski has had several opportunities to respond to the allegations in *La Nación*, and that the original articles also included a number of statements in support of him.

[188] We are not in a position to assess the social and financial implications of the personal damages awarded in this case either for Mr. Przedborski or for Mr. Herrera Ulloa and *La Nación* newspaper. However, we submit that personal damages should be subject to an overall ceiling, in practice if not in law. This ceiling should take into account the implications of large damage awards on freedom of expression, as well as the need to keep personal damages within realistic limits. In particular, the romantic tendency of juries and even courts to escalate personal damage awards in

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[128] Part IV(B).
[129] Note 2.

defamation cases, a tendency which has been observed in many countries, with the result in some cases that these reach a level far beyond damages for even the most severe personal injury cases, must be contained in the interests of ensuring a free flow of information to the public. We understand that in the present case the quantum of personal damages significantly exceeds the highest amount ever previously awarded.

[189] It is amply clear that, on the facts of this case, an award of punitive damages could not be justified. As has been stressed throughout this brief, Mr. Herrera Ulloa and *La Nación* have acted professionally and in a context characterised by a significant public interest in the content of the impugned allegations. We note that in some cases, courts characterise as personal damages awards which, by virtue of their extreme quantum, can only realistically be understood as punitive damages.

Conclusion

[190] We have argued that Costa Rica has in the present case breached the right to freedom of expression as guaranteed by Article 13 of the *American Convention on Human Rights* in three ways: by imposing criminal liability for defamation; by imposing liability for defamation beyond what is necessary for appropriate protection of reputation; and by imposing unduly harsh sanctions in response to statements deemed to have been defamatory.

[191] As we have noted above, this is an important opportunity for this Court to make a clear statement about the illegitimacy of criminal defamation laws. Such laws inevitably exert a chilling effect on freedom of expression and have historically been abused by officials to prevent critical reporting on their activities. They undermine the ability of the press and others to report in the public interest and to act as watchdog of government. As a result, they have no place in a democracy. At a minimum, based on the facts of this case, we submit that this Court should recognise that no one should be criminally liable for reporting on a public official or a matter of public interest.

[192] We also submit that this Court should find Costa Rica in breach of its obligations based on the following characteristics of its defamation laws:

- proof of truth does not always absolve a defendant of liability;
- the onus is on the defendant to prove the truth of his or her statements, even when these relate to a public official and/or a matter of public interest;
- no 'reasonableness' defence is available to defendants; and
- the law fails to place appropriate limits on the sanctions that may be imposed.

Dated: London, United Kingdom
29 March 2004

Toby Mendel
Law Programme Director

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ANNEX

Defining Defamation

Principles on Freedom of Expression and Protection of Reputation

INTERNATIONAL STANDARDS SERIES

Defining Defamation

Principles on Freedom of Expression and Protection of Reputation

ARTICLE 19

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ARTICLE 19 is grateful to UNESCO for its financial support for the development and publication of these principles. The position taken on defamation issues in this document does not necessarily reflect the views of UNESCO.

Introduction

These Principles set out an appropriate balance between the human right to freedom of expression, guaranteed in UN and regional human rights instruments as well as nearly every national constitution, and the need to protect individual reputations, widely recognised by international human rights instruments and the law in countries around the world. The Principles are based on the premise that in a democratic society, freedom of expression must be guaranteed and may be subject only to narrowly drawn restrictions which are necessary to protect legitimate interests, including reputations. In particular, they set out standards of respect for freedom of expression to which legal provisions designed to protect reputations should, at a minimum, conform.[130]

These Principles are based on international law and standards, evolving state practice (as reflected, *inter alia*, in national laws and judgments of national courts), and the general principles of law recognised by the community of nations. They are the product of a long process of study, analysis and consultation overseen by ARTICLE 19, including a number of national and international seminars and workshops.[131] The final steps in this process were a Workshop on Defamation Law, held from 29 February - 1 March 2000 in London, United Kingdom and broad consultation around the draft that emerged from that Workshop.[132]

The scope of these Principles is limited to the question of striking an appropriate balance between freedom of expression and injury to reputation.[133] By reputation is meant the esteem in which an individual is generally held within a particular community. These Principles should neither be taken as foreclosing nor as approving restrictions designed to protect other interests – including in such areas as privacy, self-esteem or hate speech – which deserve separate treatment.

ARTICLE 19, London, August 2000

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[130] Nothing in the present Principles shall imply that States may not provide greater protection for freedom of expression than set out herein.

[131] These include formal statements on defamation law and freedom of expression in the *Ota Platform of Action on Media Law Reform in Nigeria*, adopted by participants at the Media Law Reform Workshop, held at Ota, Nigeria, from 16-18 March 1999, and the *Declaration Regarding Principles on Freedom of Expression and Defamation*, adopted by participants at the International Colloquium on Freedom of Expression and Defamation Law, 15-17 September 1999, Colombo, Sri Lanka.

[132] A list of participants at this Workshop is included as Appendix A.

[133] For the purposes of these Principles, laws which purport, at least at a *prima facie* level, to strike this balance will be referred to as 'defamation laws', recognising that in different countries these laws go by a variety of other names, including insult, libel, slander and *desacato*.

Preamble

Considering, in accordance with the principles proclaimed in the Charter of the United Nations, as elaborated in the Universal Declaration of Human Rights, that recognition of the equal and inalienable rights of all human beings is an essential foundation of freedom, justice and peace;

Reaffirming the belief that freedom of expression and the free flow of information, including free and open debate regarding matters of public interest, even when this involves criticism of individuals, are of crucial importance in a democratic society, for the personal development, dignity and fulfilment of every individual, as well as for the progress and welfare of society, and the enjoyment of other human rights and fundamental freedoms;

Taking into consideration relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights and Fundamental Freedoms, as well as provisions in national constitutions;

Bearing in mind the fundamental necessity of an independent and impartial judiciary to safeguard the rule of law and to protect human rights, including freedom of expression, as well as the need for ongoing judicial training on human rights, and in particular on freedom of expression;

Mindful of the importance to individuals of their reputations and the need to provide appropriate protection for reputation;

Cognisant also of the prevalence of defamation laws which unduly restrict public debate about matters of public concern, of the fact that such laws are justified by governments as necessary to protect reputations, and of the frequent abuse of such laws by individuals in positions of authority;

Aware of the importance of open access to information, and particularly of a right to access information held by public authorities, in promoting accurate reporting and in limiting publication of false and potentially defamatory statements;

Cognisant of the role of the media in furthering the public's right to know, in providing a forum for public debate on matters of public concern, and in acting as a 'public watchdog' to help promote government accountability;

Recognising the importance of self-regulatory mechanisms established by the media that are effective and accessible in providing remedies to vindicate reputations, and that do not unduly infringe the right to freedom of expression;

Desiring to promote a better understanding of the appropriate balance between the right to freedom of expression and the need to protect reputations;

We[134] recommend that national, regional and international bodies undertake appropriate action in their respective fields of competence to promote the widespread dissemination, acceptance and implementation of these Principles:

SECTION 1 General Principles

Principle 1: Freedom of Opinion, Expression and Information

(a) Everyone has the right to hold opinions without interference.

(b) Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.

(c) The exercise of the right provided for in paragraph (b) may, where this can be shown to be necessary, be subject to restrictions on specific grounds, as established in international law, including for the protection of the reputations of others.

(d) Anyone affected, directly or indirectly, by a restriction on freedom of expression must be able to challenge the validity of that restriction as a matter of constitutional or human rights law before an independent court or tribunal.

[134] The 'we' here comprises the participants at the London Workshop referred to in footnote 3, a broad consensus of opinion among the much larger group of individuals who have been involved in the process of developing these Principles , as well as a growing list of individuals and organisations who have formally endorsed them.

(e) Any application of a restriction on freedom of expression must be subject to adequate safeguards against abuse, including the right of access to an independent court or tribunal, as an aspect of the rule of law.

Principle 1.1: Prescribed by Law

Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous and narrowly and precisely drawn so as to enable individuals to predict with reasonable certainty in advance the legality or otherwise of a particular action.

Principle 1.2: Protection of a Legitimate Reputation Interest

Any restriction on expression or information which is sought to be justified on the ground that it protects the reputations of others, must have the genuine purpose and demonstrable effect of protecting a legitimate reputation interest.[135]

Principle 1.3: Necessary in a Democratic Society

A restriction on freedom of expression or information, including to protect the reputations of others, cannot be justified unless it can convincingly be established that it is necessary in a democratic society. In particular, a restriction cannot be justified if:

i. less restrictive, accessible means exist by which the legitimate reputation interest can be protected in the circumstances; or

ii. taking into account all the circumstances, the restriction fails a proportionality test because the benefits in terms of protecting reputations do not significantly outweigh the harm to freedom of expression.

<u>Comment on Principle 1</u>

Principle 1 is drawn from the text of international and constitutional guarantees of freedom of expression, as authoritatively elaborated in international and comparative jurisprudence and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.[136] The three-part test for assessing the legitimacy of restrictions on freedom of expression, as reflected in Principles 1.1 to 1.3, or a version thereof, is repeated in most international, and much national, jurisprudence on freedom of expression.

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[135] See Principle 2.

[136] These Principles acknowledge the enduring applicability of the Siracusa Principles, adopted in May 1984 by a group of experts convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences.

Principle 2: Legitimate Purpose of Defamation Laws

(a) Defamation laws cannot be justified unless their genuine purpose and demonstrable effect is to protect the reputations of individuals – or of entities with the right to sue and be sued – against injury, including by tending to lower the esteem in which they are held within the community, by exposing them to public ridicule or hatred, or by causing them to be shunned or avoided.

(b) Defamation laws cannot be justified if their purpose or effect is to protect individuals against harm to a reputation which they do not have or do not merit, or to protect the 'reputations' of entities other than those which have the right to sue and to be sued. In particular, defamation laws cannot be justified if their purpose or effect is to:

i. prevent legitimate criticism of officials or the exposure of official wrongdoing or corruption;

ii. protect the 'reputation' of objects, such as State or religious symbols, flags or national insignia;

iii. protect the 'reputation' of the State or nation, as such;

iv. enable individuals to sue on behalf of persons who are deceased; or

v. allow individuals to sue on behalf of a group which does not, itself, have status to sue.

(c) Defamation laws also cannot be justified on the basis that they serve to protect interests other than reputation, where those interests, even if they may justify certain restrictions on freedom of expression, are better served by laws specifically designed for that purpose. In particular, defamation laws cannot be justified on the grounds that they help maintain public order, national security, or friendly relations with foreign States or governments.

Comment on Principle 2

The only legitimate purpose of defamation laws is to protect reputations. At the same time, the practice in many parts of the world is to abuse defamation laws to prevent open public debate and legitimate criticism of wrongdoing by officials. Many countries have laws designed to safeguard the honour of certain objects, including national or religious symbols. Inasmuch as an object, as such, cannot have a reputation, these laws do not serve a legitimate aim.

The harm from an unwarranted attack on someone's reputation is direct and personal in nature. Unlike property, it is not an interest that can be inherited; any interest surviving relatives may have in the reputation of a deceased person is fundamentally different from that of a living person in their own reputation. Furthermore, a right to sue in defamation for the reputation of deceased persons could easily be abused and might prevent free and open debate about historical events.

Groups which have no legal existence do not have an individual reputation in any credible sense of that term. Defamation laws which purport to protect such groups' reputations cannot, as a result, be justified. Principle 2(b)(v) covers both class defamation actions on behalf of all members of the group, and actions by individuals who claim to be indirectly defamed as part of a group. Individual members of a group may be able to sue in defamation, as long as they can establish that they are personally identified and directly affected.

Some States seek to justify defamation laws, particularly those of a criminal nature, on the basis that they protect public interests other than reputations, such as maintaining public order or national security, or friendly relations with other States. Since defamation laws are not carefully and narrowly designed to protect these interests, they fail the necessity part of the test for restrictions on freedom of expression, elaborated in Principle 1.3. Such interests, where legitimate, should be protected by laws specifically devised for that purpose.

Principle 3: Defamation of Public Bodies

Public bodies of all kinds – including all bodies which form part of the legislative, executive or judicial branches of government or which otherwise perform public functions – should be prohibited altogether from bringing defamation actions.

Comment on Principle 3

> Superior national 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 an action for defamation. This is in recognition of the vital importance in a democracy of open criticism of government and public authorities, the limited and public nature of any reputation these bodies have, and the ample means available to public authorities to defend themselves from criticism. In applying this Principle, regard should be had to the international trend to extend the scope of this prohibition to an ever-wider range of public bodies.

SECTION 2 Criminal Defamation

Principle 4: Criminal Defamation

(a) All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws. Steps should be taken, in those States which still have criminal defamation laws in place, to progressively implement this Principle.

(b) As a practical matter, in recognition of the fact that in many States criminal defamation laws are the primary means of addressing unwarranted attacks on reputation, immediate steps should be taken to ensure that any criminal defamation laws still in force conform fully to the following conditions:

iii. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;

iv. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;

v. 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;

vi. prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

Comment on Principle 4

The criminalisation of a particular activity implies a clear State interest in controlling the activity and imparts a certain social stigma to it. In recognition of this, international courts have stressed the need for governments to exercise restraint in applying criminal remedies when restricting fundamental rights. In many countries, the protection of one's reputation is treated primarily or exclusively as a private interest and experience shows that criminalising defamatory statements is unnecessary to provide adequate protection for reputations.

In many countries, criminal defamation laws are abused by the powerful to limit criticism and to stifle public debate. The threat of harsh criminal sanctions, especially imprisonment, exerts a profound chilling effect on freedom of expression. Such sanctions clearly cannot be justified, particularly in light of the adequacy of non-criminal sanctions in redressing any harm to individuals' reputations. There is always the potential for abuse of criminal defamation laws, even in countries where in general they are applied in a moderate fashion. The illegitimacy of the use of criminal defamation laws to maintain public order, or to protect other public interests, has already been noted. For these reasons, criminal defamation laws should be repealed.

At the same time, it is recognised that in many countries criminal defamation laws are still the primary means of addressing unwarranted attacks on reputation. To minimise the potential for abuse or unwarranted restrictions on freedom of expression in practice, it is essential that immediate steps be taken to ensure that these laws conform to the four conditions set out in Sub-Principle (b). A basic principle of criminal law, namely the presumption of innocence, requires the party bringing a criminal case to prove all material elements of the offence. In relation to defamation, the falsity of the statement and an appropriate degree of mental culpability are material elements. The frequent abuse of criminal defamation laws by public officials, including through the use of State resources to bring cases, along with the fundamentally personal nature of protection of one's reputation, is the basis for the third condition. The fourth condition derives from the requirement that sanctions neither be disproportionate nor exert a chilling effect on future expression.

SECTION 3 Civil Defamation Laws

Principle 5: Procedure

(a) The limitation period for filing a defamation suit should, except in exceptional circumstances, be no more than one year from the date of publication.

(b) Courts should ensure that each stage of defamation proceedings is conducted with reasonable dispatch, in order to limit the negative impact of delay on freedom of expression. At the same time, under no circumstances should cases proceed so rapidly as to deny defendants a proper opportunity to conduct their defence.

Comment on Principle 5

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 the ability of plaintiffs to obtain adequate timely redress. At the same time, in some jurisdictions the law imposes unreasonably short time limits on parties to defamation cases. This means, among other things, that defendants are unable to present a proper defence. This problem can be exacerbated – especially in relation to evidence of truth – where defendants have relied upon confidential sources for information which they do not wish to expose in court.

Principle 6: Protection of Sources

(a) Journalists, and others who obtain information from confidential sources with a view to disseminating it in the public interest, have a right not to disclose the identity of their confidential sources. Under no circumstances should this right be abrogated or limited in the context of a defamation case.

(b) Those covered by this Principle should not suffer any detriment in the context of a defamation case simply for refusing to disclose the identity of a confidential source.

Comment on Principle 6

It is well established that the guarantee of freedom of expression entitles journalists, and others who disseminate information in the public interest, to refuse to disclose the identity of a confidential source. This Principle simply applies that right in the context of defamation law. Where individuals do refuse to reveal confidential sources, they may still introduce evidence of the existence of these sources in court. It will be up to the trier of fact to determine how much weight this evidence should be given.

Principle 7: Proof of Truth

(a) In all cases, a finding that an impugned statement of fact is true shall absolve the defendant of any liability.[137]

(b) In cases involving statements on matters of public concern,[138] the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.

(c) Practices which unreasonably restrict the ability of defendants to establish the truth of their allegations should be revised.

Comment on Principle 7

The first part of this Principle has already been given effect in the defamation laws of many States. It derives from the basic idea that disseminating a true statement should not be actionable since one cannot defend a reputation one does not deserve in the first place. As has already been noted, these Principles do not necessarily rule out the possibility of action in other areas, such as protection of privacy. In some jurisdictions, for example, privacy laws impose some limitations on the publication of information about past convictions.

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[137] See also Principle 9 on Reasonable Publication.

[138] As used in these Principles, the term ‘matters of public concern’ is defined expansively to include all matters of legitimate public interest. This includes, but is not limited to, all three branches of government – and, in particular, matters relating to public figures and public officials – politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic issues, the exercise of power, and art and culture. However, it does not, for example, include purely private matters in which the interest of members of the public, if any, is merely salacious or sensational.

Comment on Principle 7 (continued….)

> Part (b) of this Principle is in response to the traditional rule in many jurisdictions, which has been that defamatory statements of fact have been presumed to be false, subject to proof by the defendant that the statements were true. In a number of constitutional cases, however, this has been held to place an unreasonable burden on the defendant, at least in relation to statements on matters of public concern, on the basis that it exerts a significant chilling effect on freedom of expression.

In some jurisdictions, certain practices unreasonably restrict the ability of defendants to establish the truth of their allegations. Unsuccessful defendants may be required to pay extra damages simply for having maintained that their statements are true, whatever the reasons why they were ultimately unable to prove this to be the case. This may unjustifiably deter defendants from adducing evidence of truth, even when the statements are actually true, out of fear that their evidence will not be sufficient. Similarly, any rules prohibiting the introduction, in defamation cases, of normally admissible evidence, unjustifiably undermine defendants' ability to establish that their statements are true. Examples of this include refusing to allow defendants to introduce evidence of past convictions of the plaintiff or of other historical facts.

Principle 8: Public Officials

Under no circumstances should defamation law provide any special protection for public officials, whatever their rank or status. This Principle embraces the manner in which complaints are lodged and processed, the standards which are applied in determining whether a defendant is liable, and the penalties which may be imposed.

Comment on Principle 8

In many jurisdictions, defamation laws provide greater protection for certain public officials than for ordinary citizens. Examples of such benefits include assistance from the State in bringing a defamation action, higher standards of protection for the reputations of public officials and higher penalties for defendants held to have defamed them. It is now well established in international law that such officials should tolerate more, rather than less, criticism. It is clear that special protection for public officials falls foul of this rule.

Principle 9: Reasonable Publication

Even where a statement of fact on a matter of public concern has been shown to be false, defendants should benefit from a defence of reasonable publication. This defence is established if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. In determining whether dissemination was reasonable in the circumstances of a particular case, the Court shall take into account the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters.

Comment on Principle 9

> 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 in some jurisdictions according to which defendants are liable whenever they disseminate false statements, or statements which they cannot prove to be true. This traditional rule is particularly unfair for the media, which are under a duty to satisfy the public's right to know 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. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably, while allowing plaintiffs to sue those who have not. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test.

Principle 10: Expressions of Opinion

(a) No one should be liable under defamation law for the expression of an opinion.

(b) An opinion is defined as a statement which either:

i. does not contain a factual connotation which could be proved to be false; or

ii. cannot reasonably be interpreted as stating actual facts given all the circumstances, including the language used (such as rhetoric, hyperbole, satire or jest).

Comment on Principle 10

The precise standard to be applied in defamation cases involving the expression of opinions – also referred to as value judgements – is still evolving but it is clear from the jurisprudence that opinions deserve a high level of protection. In some jurisdictions, opinions are afforded absolute protection, on the basis of an absolute right to hold opinions. The highly subjective nature of determining whether an opinion is 'reasonable' also argues in favour of absolute protection.

Some statements may, on the surface, appear to state facts but, because of the language or context, it would be unreasonable to understand them in this way. Rhetorical devices such as hyperbole, satire and jest are clear examples. It is thus necessary to define opinions for the purposes of defamation law in such a way as to ensure that the real, rather than merely the apparent, meaning is the operative one.

Principle 11: Exemptions from Liability

(a) Certain types of statements should never attract liability under defamation law. At a minimum, these should include:

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.

Comment on Principle 11

On other occasions, the making of certain statements – which the author is under duty to make, or has a specific interest in making – has been protected unless it has been done maliciously. The international trend is to interpret the scope of this protection increasingly broadly, given the particular importance of freedom of expression on these occasions.

It is widely recognised that on certain occasions it is in the public interest for people to be able to speak freely without fear or concern that they may have to answer in court for what they have said. The statements described in Parts (a)(i)-(v) of this Principle are commonly exempted from liability under defamation law. It is also of the greatest importance that newspapers and others are able to provide the public with fair and accurate reports of these statements and documents, as well as of certain other official material, even where the original authors are not protected.

Principle 12: Scope of Liability

(a) No one should be liable under defamation law for a statement of which he or she was not the author, editor or publisher and where he or she did not know, and had no reason to believe, that what he or she did contributed to the dissemination of a defamatory statement.

(b) 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. Such bodies may, however, be required to take appropriate action to prevent further publication of the statement, pursuant either to an interim or to a permanent injunction meeting the conditions, respectively, of Principle 16 or 17.

Comment on Principle 12

A large number of people may be involved in the dissemination of a defamatory statement. Individuals who have played no part in the production or publication of the statement, and who have no reason to believe it is defamatory, such as media distributors and news agents or vendors, should not be subject to liability for that statement.

The bodies described in Part (b) of this Principle, and in particular Internet Service Providers (ISPs), differ from what are in some systems of defamation law known as publishers in a number of important respects. These include that they lack any direct link to the statements whose dissemination they facilitate and so cannot be expected to defend or to stand up for these statements where they may risk liability for doing so. If they are subjected to the same regime of liability as publishers, they are likely simply to remove any statement from the Internet as soon as anyone challenges it or threatens legal action, regardless of the legitimacy or quality of that challenge. In some countries, ISPs have been insulated from liability for defamatory statements, to prevent powerful individuals and/or corporations from effectively censoring the Internet simply by issuing challenges, as described above.

SECTION 4 Remedies

Note on Remedies

Disproportionate remedies or sanctions can significantly limit the free flow of information and ideas. As a result, it is now well established that remedies or sanctions, like standards, are subject to scrutiny under the test for restrictions on freedom of expression.

Principle 13: Role of Remedies

(a) No mandatory or enforced remedy for defamation should be applied to any statement which has not been found, applying the above principles, to be defamatory.

(b) The overriding goal of providing a remedy for defamatory statements should be to redress the harm done to the reputation of the plaintiff, not to punish those responsible for the dissemination of the statement.

(c) In applying remedies, regard should be had to any other mechanisms – including voluntary or self-regulatory systems – which have been used to limit the harm the defamatory statements have caused to the plaintiff's reputation. Regard should also be had to any failure by the plaintiff to use such mechanisms to limit the harm to his or her reputation.

Comment on Principle 13

No one should be required by law to take any action or to provide any other remedy unless they have been found to be responsible for the publication of defamatory statements, in accordance with the above principles. This does not imply, however, that newspapers or others may not take action, for example on a voluntary or self-regulatory basis, in the context of a claim that their statements have caused harm to reputations.

Freedom of expression demands that the purpose of a remedy for defamatory statements is, in all but the very most exceptional cases, limited to redressing the immediate harm done to the reputation of the individual(s) who has been defamed. Using remedies to serve any other goal would exert an unacceptable chilling effect on freedom of expression which could not be justified as necessary in a democratic society.

It is a general principle of law that plaintiffs in civil cases have a duty to mitigate damage. In the area of defamation law, this implies that the plaintiff should take advantage of any available mechanisms, such as those described in Part (c) of this Principle, which might redress or mitigate the harm caused to his or her reputation.

Principle 14: Non-Pecuniary Remedies

Courts should prioritise the use of available non-pecuniary remedies to redress any harm to reputation caused by defamatory statements.

Comment on Principle 14

The 'necessity' part of the test for restrictions on freedom of expression precludes reliance on certain restrictions where less chilling but still effective alternatives exist. Non-pecuniary remedies often have less impact on the free flow of information and ideas than their pecuniary counterparts and may at the same time provide an effective means of redressing any harm done to individuals' reputations. Such remedies should, therefore, be prioritised.

Comment on Principle 14 (continued….)

Different remedies which are less chilling than pecuniary remedies will be available in different jurisdictions. These may include the issuance of an apology, correction and/or reply, or publication of any judgment which finds the statements to be defamatory.

Principle 15: Pecuniary Awards

(a) Pecuniary compensation should be awarded only where non-pecuniary remedies are insufficient to redress the harm caused by defamatory statements.

(b) In assessing the quantum of pecuniary awards, the potential chilling effect of the award on freedom of expression should, among other things, be taken into account. Pecuniary awards should never be disproportionate to the harm done, and should take into account any non-pecuniary remedies and the level of compensation awarded for other civil wrongs.

(c) Compensation for actual financial loss, or material harm, caused by defamatory statements should be awarded only where that loss is specifically established.

(d) The level of compensation which may be awarded for non-material harm to reputation – that is, harm which cannot be quantified in monetary terms – should be subject to a fixed ceiling. This maximum should be applied only in the most serious cases.

(e) Pecuniary awards which go beyond compensating for harm to reputation should be highly exceptional measures, to be applied only where the plaintiff has proven that the defendant acted with knowledge of the falsity of the statement and with the specific intention of causing harm to the plaintiff.

Principle 16: Interim Injunctions

(a) In the context of a defamation action, injunctions should never be applied prior to publication, as a form of prior restraint.

(b) Interim injunctions, prior to a full hearing of the matter on the merits, should not

be

applied to prohibit further publication except by court order and in highly exceptional cases where all of the following conditions are met:

i. the plaintiff can show that he or she would suffer irreparable damage – which could not be compensated by subsequent remedies – should further publication take place;

ii. the plaintiff can demonstrate a virtual certainty of success, including proof:
   - that the statement was unarguably defamatory; and
   - that any potential defences are manifestly unfounded.

Comment on Principle 16

Interim injunctions represent an extreme restriction on freedom of expression. Where applied prior to publication, they are a form of prior restraint which is completely forbidden under certain international human rights instruments. Even where applied after the original publication, they should be used extremely rarely, and only where circumstances absolutely demand. In particular, where the defendant adduces any evidence of a defence, this should normally be sufficient to show that the defence is not manifestly unfounded and thereby defeat the motion for an injunction.

Principle 17: Permanent Injunctions

Permanent injunctions should never be applied except by court order and after a full and fair hearing of the merits of the case. Permanent injunctions should be limited in application to the specific statements found to be defamatory and to the specific people found to have been responsible for the publication of those statements. It should be up to the defendant to decide how to prevent further publication, for example by removing those
particular statements from a book.

Principle 18: Costs

In awarding costs to both plaintiffs and defendants, courts should pay particular

attention to the potential effect of the award on freedom of expression.

Comment on Principle 18

Defamation litigation is becoming increasingly complex in many jurisdictions and defending such cases can be extremely expensive. In some cases, cost awards to successful defendants cover only a small proportion of the actual legal costs of the defence. This can seriously inhibit the future publication of information of public concern.

Principle 19: Malicious Plaintiffs

Defendants should have an effective remedy where plaintiffs bring clearly unsubstantiated cases with a view to exerting a chilling effect on freedom of expression, rather than vindicating their reputations.

Comment on Principle 19

In some instances, wealthy or politically powerful individuals and corporations have instituted defamation cases, even where they have no prospect of success, to try to prevent media criticism of their actions. Defendants should have some legal means at their disposal to address this type of behaviour.

The particular remedy will vary between jurisdictions but possible options include the right to bring a case for abuse of civil process and/or the availability of a procedural mechanism to strike out the claim early on in the proceedings unless the plaintiff can show some probability of success.

APPENDIX A
Participants at the International Workshop on
Freedom of Expression and Defamation

London, February 29 – March 1, 2000

The following experts participated in the Workshop that produced these Principles. Experts participated in their personal capacity; organisations and affiliations are listed for purposes of identification only.

Vesna Alaburic	Member of the Croatian Bar, Specialising in Media Law, Zagreb, Croatia
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Helen Darbishire	Media Law Program Manager, Constitutional Law and Policy Network and Network Media Program, Open Society Institute, Budapest, Hungary
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Evan Ruth	Legal Officer, ARTICLE 19, London, UK
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