

ARTICLE 19

Defining Defamation: Principles on
Freedom of Expression and Protection of
Reputation - Updated version for public
consultation

April 2016

Legal analysis

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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.¹

These Principles are based on international law and standards, evolving state practice (as reflected, *inter alia*, in national laws and judgements 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.² The final steps in this initial 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. In 2016, these Principles were revised and updated, following a meeting of freedom of expression and media experts on 4 December 2015 in London and broader consultations organised subsequently by ARTICLE 19.³

The scope of these Principles is limited to the question of striking an appropriate balance between freedom of expression and injury to reputation.⁴ By reputation is meant the esteem in which a physical person or a legal entity 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.

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

2 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.

3 The lists of participants at these meetings [will be] included in Appendix A.

4 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 **or of entities with the right to sue and be sued**, 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 the 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 relevant 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;

Noting that the proper *raison d'être* of defamation laws is to protect people against false statements of fact which cause damage to their reputation and not to protect subjective feelings or interests;

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 public authorities, public officials and other persons in positions of authority or power;**

Concerned that defamation laws are often misused to pursue goals other than the protection of reputation, including the protection of the privacy, the prosecution of hate speech and blasphemy, and the suppression of protests or legitimate criticism;

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;

Emphasizing the importance of the Internet as an open and widely accessible communication platform that plays a decisive role in the circulation of information and ideas, and concerned that some measures that purport to protect reputation online unduly restrict freedom of expression on the Internet;

Cognisant of the role of the media and **of civil society organisations** in furthering the public's right to know, in providing forums for public debate on matters of public concern, and in acting as 'public watchdogs' to help promote government accountability;

Recognising the **capacity of alternative dispute resolution mechanisms to provide an effective solution to defamation cases and the capacity of the media to restore harm to reputation, and recognizing the importance of self-regulatory mechanisms established by stakeholders in the media sector that are effective and accessible in providing remedies to vindicate reputations, and that do not unduly infringe the right to freedom of expression;**

Mindful that effective access to justice, including the adequate provision of legal aid, is a prerequisite for effective protection of the right to freedom of expression and protection of reputation;

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

We⁵ 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.

⁵ The 'we' here comprises the participants at the meetings organised by ARTICLE 19 on the draft Principles (as provided in Appendix A), 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.

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) Prior censorship, or any restrictions occurring prior to publication, on the grounds of defamation, are never permissible.

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.⁶

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:

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

Comment on Principle 1

Principle 1 is drawn from the text of international and constitutional guarantees of freedom of expression, as authoritatively elaborated upon in international and comparative jurisprudence

⁶ See Principle 2.

and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.⁷

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.

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:
1. prevent legitimate criticism of officials **and public figures** or the exposure of official wrongdoing or corruption;
 2. protect the ‘reputation’ of objects, such as State or religious symbols, flags or national insignia;
 3. protect the ‘reputation’ of the State or nation, as such;
 4. enable individuals to sue on behalf of persons who are deceased;
 5. allow individuals to sue on behalf of a group which does not, itself, have status to sue; or
 6. **protect subjective feelings or a subjective understanding of the sense of honour.**
- 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.

⁷ 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.

- d) Defamation laws should provide, and courts should ensure, that a statement is deemed to be defamatory only if its publication causes substantial or serious harm to reputation, thereby excluding nominal or minor harms.

Comment on Principle 2

In these Principles, “defamation laws” are understood as covering all legislation that purports to strike an appropriate balance between freedom of expression and harm to reputation. These laws may be known, *inter alia*, as insult, libel, slander or desacato laws.

The only legitimate purpose of defamation laws is to protect people from false statements of fact that cause damage to their reputation.

Where the country's domestic legal system does not have a notion of defamation *per se*, reputation might be protected under the umbrella concept of “personality rights.” This term usually refers to a bundle of rights that protect not only reputation but also the dignity, the emotional and psychological integrity, and the inviolability of the person, and privacy and private life more broadly. Personality rights may also include rights over the dissemination of accurate information about the private life of an individual or control over the use of one's own image. In any case, these Principles are concerned with the protection of reputation, no matter the official denomination of the laws that protect reputation in any given country.

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 reputation, 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.

Importantly, the harm to a person's reputation must reach a certain threshold of significance before it can justify restrictions on freedom of expression; specifically, it must cause "serious harm."

This is particularly important in relation to digital content. In all cases, courts should ensure that the actual circulation of the statement and the actual harm caused are assessed on a strictly factual basis, and that damages are never awarded on the sole basis of the potential dissemination of online content, or for defamatory statements that are rapidly buried by a large volume of online content.

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. The prohibition should extend to the heads of public bodies in relation to legal actions which in essence aim to protect the reputation of the public bodies rather than the individual head.

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 some jurisdictions, notably in countries where public bodies are prohibited from suing for defamation, the heads of these bodies have brought defamation suits with the intention and effect of shielding the entity from criticism rather than seeking to protect their own personal reputational interests.

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. In particular, private entities that undertake public functions should be considered as public bodies for the purposes of this Principle.

SECTION 2: Criminal Defamation

Principle 4: Criminal Defamation

- a) All criminal defamation laws should be abolished without delay, even if they are seldom or never applied. They should be replaced, where necessary, with appropriate civil defamation laws. Steps should be taken, in those States which still have such defamation laws in place, to progressively implement this Principle.

- b) As a practical matter, in recognition of the fact that in many States such laws are the primary means of addressing unwarranted attacks on reputation, and as an interim measure in the process of abolition of all criminal defamation, laws should respect all of these Principles.
- c) Immediate steps should be taken to ensure that any criminal defamation laws still in force conform fully to the following conditions:
1. 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;
 2. the offence of 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 an intention to cause harm to the party claiming to be defamed;
 3. 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;
 4. prison sentences, suspended prison sentences, any other form of deprivation of liberty, 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 penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.
- d) Where they carry effects and consequences similar to criminal defamation laws, administrative defamation laws should be abolished.

Comment on Principle 4

A significant consensus has emerged among international organisations in favour of the decriminalisation of defamation laws. It has been consolidated in General Comment No. 34 of the Human Rights Committee. There has also been an increasing recognition - both in the jurisprudence of regional human rights courts and in many national legislations and practices - of the need to abolish criminal defamation laws.

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 (i.e., the disputed statement must be made with actual knowledge of its falsity or reckless disregard for its verity) are material elements. This principle is of particular importance during elections and electoral campaigns, when defamation laws can easily be abused to prevent the open discussion of candidates.

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.

Administrative defamation laws, carrying either criminal or administrative sanctions, present similar problems and should be treated in the same way as criminal defamation laws.

SECTION 3: Civil Defamation Laws

Principle 5: Fair Trial Guarantees in Defamation Cases

- a) 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, tribunal, or other adjudicatory body which is subject to adequate safeguards against abuse, as an aspect of the rule of law.
- b) Effective access for all to the justice system in the context of defamation suits must be guaranteed by the State. This includes consideration of economic affordability: adequate legal aid, where this is necessary for a defendant to be in a position to present an adequate defence to a claim of defamation, must be available.
- c) The equality of arms must be guaranteed in all legal proceedings relating to defamation cases. The legal framework cannot unreasonably restrict the ability of defendants to establish the substantial truth of their allegations. The legal framework for defamation cases should provide, and courts should ensure, that rules and practices applicable to defamation procedures facilitate the adduction of evidence and do not unduly undermine the ability of the defendant to plead their case.
- d) Laws should provide for alternative dispute resolution mechanisms that help the parties reach quick settlements; courts should ensure that such mechanisms are preferred as a less costly and faster alternative to a trial. However, such mechanisms should not be allowed to result in the application of any lower standard of freedom of expression than that presented in these Principles.

Comment on Principle 5

Under international law, the right to a fair trial includes guarantees that the court will be independent and impartial, and that the equality of arms will be ensured.

For the purposes of these Principles, the notion of a tribunal or court also includes other independent adjudicatory bodies, provided that they present all guarantees of the right to a fair trial, as protected by international human rights law.

In order to guarantee that the access to justice becomes effective for all, the provision of legal aid is a requirement under international human rights law. Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy in defamation cases.

Part (c) of this Principle is in response to the fact that in some jurisdictions, certain practices unreasonably restrict the ability of defendants to establish the truth of their allegations. The rules on burden of proof may weigh too heavily on the defendant or other rules may prohibit the introduction, in defamation cases, of normally admissible evidence (see below, comment to Principle 10).

Alternative dispute resolution mechanisms can provide a faster, less costly alternative to trials. As such, they may lead to a quick settlement of disputes to the satisfaction of all parties. However, as they may take place outside of the judiciary, they do not necessarily take into consideration legal and constitutional guarantees of fundamental freedoms. Whenever they are asked to give legal force to a solution resulting from an alternative dispute resolution mechanism, courts should ensure that the interests of freedom of expression have been duly taken into consideration.

Principle 6: Procedural Protection against Vexatious Litigation

- a) Laws should be adopted and constructed to prevent the chilling effect of litigation by raising substantive and procedural hurdles to potential abusive claimants to ensure that only viable and well-founded defamation claims are brought. Defendants should have an effective remedy where plaintiffs bring clearly unsubstantiated cases with a view to exerting a chilling effect on debates of public concern, rather than vindicating their reputations.
- b) Such effective remedy can either take the form of specific legislation concerning strategic lawsuits against public participation or result from general procedural rules. In either case, and as a minimum, courts should have the power, at the request of the defendant or on their own motion, to dismiss defamation claims that target a contribution to a debate of public concern and are frivolous, clearly unsubstantiated or otherwise clearly lacking any chance of success.

Comment on Principle 6

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.

This has given rise to the term of 'Strategic Lawsuits Against Public Participation' (SLAPP), which refers to situations where a plaintiff (typically a powerful entity) resorts to defamation proceedings in order to silence criticism or political expression. The real objective of the claimant is not to win their case and obtain damages, but to drown the defendants in lengthy and costly procedures.

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.

Anti-SLAPP laws traditionally provide a mechanism which allows the defendant, after service of the complaint, to file a motion to strike out or dismiss the complaint as targeting speech directly related to and arising from a matter of public concern. The burden of proof is upon the defendant to convince the court that the speech in question is directly related to and arising from a matter of ongoing public concern, and to set forth the legal justifications for publication.

In the event that the court agrees that the speech is directly related to and arising from a matter of ongoing public concern, the claim is deemed a SLAPP case and the following substantive and procedural rules apply.

- All collateral litigation, including discovery and/or disclosure demands, is immediately frozen;
- The burden of proof is upon the claimant to show with convincing clarity, from the four corners of the complaint alone, that they would prevail in a libel trial; and
- In the event that the claimant fails to make the above showing, the court can award appropriate attorney's fees and costs to the prevailing defendant

In countries where no specific legislation has been adopted, malicious prosecutions may be dealt with by general rules of procedure that allow the courts to condemn the claimant for abusive proceedings, if the judge finds that

- the proceedings have no serious nature or
- are engaged recklessly on no sensible grounds.

Principle 7: Jurisdiction

a) Laws should provide, and courts should ensure, that jurisdiction is only asserted in cases where there is a substantial connection to, and an actual damage has been suffered in, the State. To that end, consideration should be given to:

1. whether the plaintiff has a meaningful reputation in the State and whether the plaintiff's reputation has suffered substantial harm there;
2. whether the jurisdiction is clearly the most appropriate one in which to bring the defamation action.

b) In any case, the assertion of jurisdiction should not result in the application of any lower standard of freedom of expression than that presented in these Principles.

Comment on Principle 7

This Principle seeks to limit plaintiffs' ability to resort to legal proceedings to jurisdictions where their reputations actually suffered from harm, rather than seeking out jurisdictions where they are most likely to win their cases or obtain the highest possible damage awards regardless of the degree of their connection to that jurisdiction.

It provides safeguards against "libel tourism" or "forum shopping", in which plaintiffs seek to bring defamation claims in jurisdictions to which they have little connection. It recognises, nevertheless, that in a globalized world reputations can indeed be transnational and extend far beyond a plaintiff's home country or place of residence.

The criteria under Principle 7(a) include considerations such as whether the author of the defamatory comment is established in the jurisdiction; whether the defamatory statement was uploaded online in the jurisdiction; whether the media platform or online service that has been used to publish the defamatory statement was specifically targeting an audience in the jurisdiction; to what extent the defamatory statement was actually disseminated in the jurisdiction; and whether the defamatory statement was issued in an official or commonly-spoken language of the jurisdiction.

The Principle applies not only to cross-border disputes but also to national interstate litigation.

Principle 8: Limitation and Reasonable Dispatch

- 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.
- c) At the same time, under no circumstances should cases proceed so rapidly as to deny defendants a proper opportunity to conduct their defence.
- d) For cases where an author republishes an essentially identical statement in the same format and medium, the limitation period should start to run from the first date of publication (single publication rule – limitation period).
- e) A plaintiff should only be able to sue once in relation to a substantially identical statement (single publication rule – cause of action).
- f) Where a defamation suit targets the online archive of news media, courts should ensure that the least restrictive remedy is applied, which will normally require a note to be attached to the archived news item indicating that it has been found to be defamatory, rather than the deletion of the item.

Comment on Principle 8

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, whom they do not wish to expose in court.

Publication is to be understood as the fact of making information or content available to other persons than the author; thus, the date of publication is the moment when information or content becomes accessible to the public.

The single publication rule provides that the plaintiff should only be allowed to sue once for a substantially identical statement, and that the limitation period should start running from the moment of the first publication. The rule only applies to the republication by the same person, of a substantially identical statement, to a substantially identical audience, in a similar format and medium. The rule does not cover cases where the initial statement is altered or published to a different audience. Furthermore, only one cause of action should lie in respect of such a publication.

Multiple publication rules, i. e. where each new publication of the same statement may give rise to a new cause of legal action, or restart the statute of limitation period, should be abolished.

Online repositories of material may contain content that is later judged to be defamatory, but can still be accessed as part of an historical archive. In such cases, the best approach is simply to require the archive to affix a notice to the material indicating that the relevant part of it has been found to be defamatory. This solution is less restrictive of freedom of expression than any attempt at removing a defamatory article from online archives.

Principle 9: 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 separate detriment in the context of a defamation case simply for refusing to disclose the identity of a confidential source.

Comment on Principle 9

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.

Under international law, the right not to disclose the identity of confidential sources applies not only to “professional journalists” but equally to other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information. It also applies to any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication. From the perspective of international law on freedom of expression, it is the nourishment of public

debate that deserves protection, not other factors such as the profession of the person who makes information available to the public.

Principle 10: Proof of substantial truth

In all cases, a finding that an impugned statement of fact is **substantially** true shall absolve the defendant of any liability.⁸

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.

Comment on Principle 10

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 for true statements 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.

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, 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.

Requiring a proof of absolute truth would create an excessive burden upon the defendant. Facts are by their nature complex and intricate, and, in most matters, it is almost impossible to avoid slight inaccuracies in reporting. Showing that every single detail of a story is perfectly true would simply be impracticable. While a standard of absolute truth would have a chilling effect upon freedom of expression, the standard of substantial truth rightly encourages the accurate reporting of facts.

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.

⁸ See also Principle 12 on Reasonable Publication.

The question of who should bear the burden of proof regarding the falsehood or truthfulness of a statement is an important one. The claim that a statement is false is central to a defamation suit and, as a result, it is fairest, and certainly least harmful to freedom of expression, for the plaintiff to bear the burden of proving this. Furthermore, the plaintiff, having raised the claim, often has best access to the evidence required to prove falsity. Finally, a risk of being taken to court and having to prove the truth of every single statement published would discourage journalists from writing about controversial topics.

At a minimum, the burden of proof should fall upon the plaintiff in cases involving matters of public interest, such as discussion of the activities of politicians and public officials. While this may in some cases make it difficult for those individuals to pursue even a well-founded defamation claim, the hardship imposed on plaintiffs (usually public figures) is justified by the importance of safeguarding debate on matters of public interest. Requiring the defendant to prove the truth of his or her claims promotes self-censorship, as individuals will refrain from making statements not because they are false or believed to be false, but out of fear that they cannot be proven to be true in a court of law or because of the high cost of defending a defamation suit.

In some jurisdictions, certain rules unreasonably restrict the ability of defendants to establish the truth of their allegations. Unsuccessful defendants may even 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 11: Public Officials

- a) Under no circumstances should defamation law provide any special protection for public officials, whatever their rank or status.
- b) 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 11

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. A number of countries still retain laws on *lèse-majesté*, *desacato*, disrespect for authority, defamation of the head of state, and the protection of the honour of public officials.

Public officials are persons who hold a function within the State administration, including heads of State, heads of government, other senior officials, or a function that is officially sanctioned by the State. By contrast, public figures are individuals who also attract attention from the public but do not hold any official role. Under international standards on freedom of expression, both categories have to tolerate more, rather than less, criticism than ordinary citizens, since they are directly involved in matters of public concern.

It is clear that any law that provides a special protection for public officials falls foul of this rule.

Principle 12: Reasonable Publication and Matters of Public Concern

- a) 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.
- b) In determining whether dissemination was reasonable in the circumstances of a particular case, courts 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. The defence of reasonable publication should benefit equally any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication. However, communicators who are not media professionals should not be held to the same standards of liability as media professionals.

Comment on Principle 12

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.

This Principle also recognises that thanks to digital technologies, communicators who are not media professionals can effectively contribute to debates of public concern. Under international law, all information and ideas about matters of public concern should receive the same consideration, without regard to the profession of their author. The defence of reasonable publication should therefore be open to all those who contribute information to debates of public concern. At the same time, as social media communicators have neither the same training as journalists nor the same resources when it comes to producing, verifying and

publishing information, they should not be held to the same standards. In the assessment of a non-professional contribution to a debate of public concern, courts should take into account the specific features and personal context of the author when deciding whether it was reasonable for him or her to publish the disputed statement. In any case, the capacity of a disputed statement to contribute to a debate of public concern should be a decisive factor in the court's decision.

The Principle also takes into consideration the active dynamics of digital communications in their various forms. Some forms of online republication (e.g. hyperlinks or sharing mechanisms on social media) merely facilitate the circulation of content; the individuals who republish information (through hyperlinks or retweets, for instance) do not necessarily endorse any possible defamatory meaning. Courts should ensure that the use of ordinary web devices or of the ordinary sharing mechanisms of social media is not automatically construed as the republication of a defamatory statement.

Principle 13: 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:
 1. does not contain a factual connotation which could be proved to be false; or
 2. cannot reasonably be interpreted as stating actual facts given all the circumstances, including the context and language used (such as rhetoric, hyperbole, satire or jest).
- c) Courts should take into account all the circumstances of a statement, including the language and genre used, when assessing whether a statement is an opinion. Where it is obvious that the statement is understood by the audience to be made in a humorous, provocative or satirical tone, it should be deemed to be an opinion.

Comment on Principle 13

By its very nature, the truth of an opinion cannot be proved, while it is possible to debate the truth or the accuracy of a statement of facts. ~~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 international jurisprudence that opinions – also referred to as value judgements – 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.

In cases where an opinion relies on factual connotations, or can objectively be understood as implying a statement of fact, Principles 10 and 12 should be applied.

In assessing whether a statement is an opinion, the circumstances, including the language, should be taken into consideration. Where the author and the immediate audience (for instance, the people in a room or the usual readership of a satirical newspaper) understand that the statement is not meant as a literal factual allegation, no liability should be imposed.

This is of particular importance for the digital environment. Courts should ensure that the specific context and culture of Internet communications (which includes, for example, frequent resort to a humorous, satirical or provocative tone) is duly taken into account when assessing the nature of an online statement.

Principle 14: Privileges

- a) Certain types of statements should never attract liability under defamation law. At a minimum, these should include:
1. 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;
 2. any statement made in the course of proceedings at local authorities, by members of those authorities;
 3. any statement made in the course of any stage of judicial proceedings (including interlocutory and pre-trial processes), or in the course of other proceedings with judicial characteristics, 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;
 4. any statement made before a body with a formal mandate to investigate or inquire into human rights abuses, including a truth commission;

~~statements made by one officer of state to another in the course of his/her official duty;~~
 5. any document ordered to be published by a legislative body;
 6. statements contained in official reports written by certain statutory officers and bodies;
 7. any statement made under the penalty of perjury or under oath;
 8. a fair and accurate report of the material described in points (i) – (vii) above; and

9. 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 14

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)-(vii) 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.

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.

Principle 15: Innocent Publication and Words of Others

- a) No one should be liable for fairly and accurately reporting the words of others.
- b) 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 technically contribute to the dissemination of a defamatory **or otherwise unlawful statement**.
- c) **Internet intermediaries should be immune from liability under defamation law, in accordance with this Principle, for third-party content in circumstances where they have not been involved in modifying that content. They should never be required to monitor content proactively. Intermediaries should never be required to restrict content on the basis that it is defamatory unless an order has been issued by a tribunal or an independent adjudicatory body that has determined that the material at issue is defamatory. Any liability imposed on an intermediary should be proportionate and directly correlated to the intermediary's wrongful behaviour in failing to appropriately comply with a content restriction order.**

Comment on Principle 15

The defence of 'words of others' recognises that the media have a responsibility to cover the news and that this may include reporting on remarks which undermine the reputation of others. Furthermore, journalists are not required specifically to distance themselves from the

statements, or to check the truthfulness of every remark. This would make the work of the media very difficult and thereby harm the flow of information to the public.

Professional ethics and good practices cover how and when journalists should report the words of others (including in situations where the original author has retracted the disputed statement). Generally, reporting the words of others, and in particular reporting anonymous statements, should be subject to the standard of reasonable publication (Principle 12).

The Principle applies equally to social communicators who are not media professionals.

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.

Internet intermediaries differ from what are in some systems of defamation law known as publishers in a number of important respects. Significantly, 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 a number of countries, a conditional immunity for liability has therefore been provided.⁹

Sub-Principle c) is directly inspired by the Manila Principles.¹⁰ For the purposes of these Principles, the Manila Principles are considered as adequately describing the rules that should be applied to the conditional liability of intermediary service providers.

Discussions on the scope of the notion of 'intermediary service provider' are ongoing in a number of jurisdictions and extend to questions such as the liability of search engines for snippets, automated suggestions to complete a search query or hyperlinks. Search engines and social media platforms are major facilitators of freedom of expression and information in the online environment. Holding them liable for third-party content would result in a chilling effect on online freedom of expression. While issues related to the results of algorithmic selection of content (search results, auto-complete and similar) are not settled under international law, it is nonetheless of the utmost importance that the online flow of information and ideas is not unduly restricted. The standard of reasonable publication of the words of others, combined with the principle that no intermediary service provider (including search engines and social media or content-sharing platforms) should be liable for third-party content that they have not modified, offer adequate guidance in this area.

⁹ See ARTICLE 19, Internet intermediaries: Dilemma of liability, July 2013, <http://bit.ly/1QlhOMp>.

¹⁰ See the Manila Principles at <https://www.manilaprinciples.org/>.

Principle 16: Anonymity and Defamation

- a) As the right to freedom of expression can be exercised anonymously, any restriction in respect to defamation must comply with the three-part test in Principle 1.
- b) As a matter of principle, the mandatory disclosure of an individual's online identity should only be ordered by the courts, which are best placed to properly balance the right to anonymous expression with other interests. When considering a request to lift anonymity to allow a plaintiff to sue for defamation, courts should ensure that a number of conditions are fulfilled, including notice to the anonymous poster, details of the allegedly defamatory statements, and evidence of a *prima facie* case against the anonymous poster. Consideration should be given to the balance between the right to anonymous speech and the *prima facie* case, and the interests of a public debate on a matter of public concern, taking into account the need for disclosure of identity in order for the case to proceed.

Comment on Principle 16

Ability to exercise the right to freedom of expression anonymously – that is without being identified – is a vital enabler of freedom of expression in relation to digital technologies. Hence, any lifting of anonymity in defamation cases should be subject to strong procedural safeguards. As a matter of principle, the mandatory disclosure of an individual's online identity should only be ordered by the courts, which are best placed to properly balance the right to anonymous expression with other interests.

Similarly, mandatory real-name registration systems as a prerequisite to access and use of the Internet are contrary to international human rights law and should be abolished.

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 17: 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 17

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 18: Non-Pecuniary Remedies

- a) Courts should prioritise the use of available non-pecuniary remedies to redress any harm to reputation caused by defamatory statements, such as the right of correction or right of reply.
- b) The right of reply should be clearly distinguished from a right of correction. A right of correction should be limited to pointing out erroneous information published earlier, with an obligation on the media itself to correct the mistaken material. A right of reply, on the other hand, requires the media to grant space to an individual whose rights have been harmed by an allegation based on erroneous facts, to 'set the record straight'.
- c) The right of reply should only apply when the right of correction is not sufficient to redress the damage suffered by the plaintiff's reputation.
- d) Where a right of reply is organized through self-regulation or prescribed by law, it should conform to the following criteria:
 1. A reply should only be available to respond to incorrect facts or in case of a breach of a legal right, not to comment on opinions that the reader/viewer doesn't like or that present the reader/viewer in a negative light;
 2. The reply should receive similar, but not necessarily identical, prominence to the original article;
 3. The media should not be required to carry a reply unless it is proportionate in length to the original article/broadcast;
 4. The media should not be required to carry a reply which is abusive or illegal;
 5. A reply should not be used to introduce new issues or to comment on correct facts.
- e) Where the author has expressed an appropriate, clear and comprehensive rectification for a defamatory statement, no liability should be imposed unless it can be proved that the harm suffered has not been appropriately repaired.

Comment on Principle 18

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.

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 the publication of any judgement that finds the statement to be defamatory.

Principle 19: 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, such as the publication of an apology or the exercise of a right of reply, and the level of compensation awarded for other civil wrongs. Pecuniary awards should take into account the actual financial capacity of the defendant.
- 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, but there should be no statutory minimum level of compensation. The 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.

Comment on Principle 19

This Principle is based on the requirement of proportionality for restrictions to the right to freedom of expression in defamation cases. Pecuniary awards should be provided only when non-pecuniary remedies are incapable of redressing the actual harm suffered by a plaintiff's reputation. Where non-pecuniary remedies have already been granted, pecuniary awards should only be awarded if they are needed to achieve complete reparation of the harm to reputation.

The amount of compensation should always be determined in reference to the harm suffered. The level of damages must not act as a potential deterrent to legitimate expression. The courts should also take into account the financial capacity of defendants when awarding damages: the level of damage should not, for instance, lead a media defendant to bankruptcy.

Hence, laws should provide for a maximum ceiling (amount) for pecuniary awards. At the same time, minimum levels of compensation should be abolished as they may be disproportionate.

Principle 20: 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:
1. 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;
 2. the plaintiff can demonstrate a virtual certainty of success, including proof:
 - i. that the statement was unarguably defamatory; and
 - ii. that any potential defences are manifestly unfounded.

Comment on Principle 20

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 21: 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 22: 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 22

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.