ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

SUBMISSION

on the

REPORT OF THE LEGAL ADVISORY GROUP ON DEFAMATION

by

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Global Campaign for Free Expression

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I. Introduction

Defamation law in Ireland, with the Defamation Act 1961 as its centrepiece, is long due a complete overhaul. ARTICLE 19 welcomes the Report of the Legal Advisory Group on Defamation (Report),[1] in particular for its detailed consideration of the issues and for the many commonsensical and commendable recommendations it has made which, if implemented, would bring Irish defamation law largely into line with international standards in this area. We also welcome the willingness of the Minister and the Department to engage in public consultation as part of the drafting of a new Defamation Bill, as well as their determination to bring this area of law into line with international standards.

This Submission provides an analysis of the Report of the Legal Advisory Group against the back-cloth of best international standards and practices. A leading reference in this regard is the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (Defining Defamation),[2] which is reproduced in Appendix I. These Principles set out an appropriate balance between the human right to freedom of expression and the need to protect individual reputations. They 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.

[1] Published in March 2003. Available at: http://www.justice.ie/80256976002CB7A4/vWeb/fsWMAK4Q7JKY.
[2] ARTICLE 19 (London: 2000).

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. Since their formulation, the Principles have been widely endorsed, notably by the three specialised mandates on freedom of expression, the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression.[3]

We also provide, in Appendix II, an analysis by ARTICLE 19 of the jurisprudence of the European Court of Human Rights in the area of defamation. The European *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR),[4] as applied and interpreted by the European Court of Human Rights, is clearly a crucial barometer for respect for the right to freedom of expression in Ireland. This is particularly the case since the entry into force at the beginning of 2004 of the European Convention on Human Rights Act 2003. Under the new Act, all statutory provisions and rules of law must be interpreted and applied in a manner that is consistent with the letter and spirit of the European Convention and certain Protocols thereto. For some time now, it has been possible to take cases from Ireland, including defamation cases, directly to the European Court of Human Rights to be decided under the ECHR. The first defamation case from Ireland, *Independent Newspapers v. Ireland*, is currently pending before the Court, having been declared admissible in June 2003.[5]

II. Defamation Law in Ireland

Defamation law in Ireland presently fails to conform to relevant international human rights standards, and in particular the right to freedom of expression, in important respects. It might be argued that the Defamation Act, 1961, was already anachronistic at the time of its enactment, having been modelled on the United Kingdom Defamation Act 1952. It was, in any case, quickly dated by the emerging broadcasting technologies of that era; further technology-driven changes – including convergence, the Internet and so on – have exacerbated this problem. To these technological changes may be added important social developments, including changes in what is understood as an appropriate balance between protecting reputations and the right to freedom of expression, in part fuelled by a massive growth in direct participatory democracy. Until now, Irish defamation law has failed to keep up with these technological and societal changes.

The problems with Irish defamation law have attracted some attention from international bodies responsible for monitoring and implementing human rights, despite the fact that no case on this from Ireland has so far been decided by the European Court of Human Rights. For example, the UN Human Rights Committee noted, in its Concluding Observations on Ireland in 1993, that the Irish authorities should "take the necessary measures to ensure the enjoyment of the freedom of expression as set out in article 19 of the Covenant".[6] The UN Special Rapporteur on Freedom of Opinion and Expression included specific

[3] Joint Declaration of 30 November 2000. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument

[4] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.

[5] Application No. 55120/00. This case was heard by the Irish Supreme Court and reported as *De Rossa v. Independent Newspapers Ltd.* [1999] 4 I.R. 432. It is discussed in detail, *infra.*

[6] While freedom of expression did not feature *expressis verbis* in the UN Human Rights Committee's Concluding Observations on Ireland in 2000, nevertheless, in the course of the oral hearing on Ireland, two individual members of the Committee did raise the issue of Ireland's defamation law and its effect on the exercise of the right to freedom of expression. See *Memo on the UN Human Rights Committee Session on Ireland*, Le Palais Wilson, Geneva, 13-14 July 2000, on file with ARTICLE 19.

recommendations for the prospective and long-awaited new Defamation Bill in his report on Ireland a few years ago:

> The Special Rapporteur encourages the preparation of a new Defamation Bill. He is of the view that the onus of proof of all elements should be on those claiming to have been defamed rather than on the defendant and where truth is an issue, the burden of proof should lie with the plaintiff. Furthermore, sanctions for defamation should not be so large as to exert a chilling effect on the freedom of opinion and expression and the right to seek, receive and impart information. A range of remedies should also be available, including apology and/or correction. The Special Rapporteur reminds that restrictions on the right to freedom of expression must be limited only to those permissible under article 19 of the International Covenant on Civil and Political Rights.[7]

It is, therefore, welcome that concrete steps are now being taken to address these problems.

III. Summary of Recommendations

- Any new statute dealing with defamation should not provide for a statutory press council, notwithstanding the terms of reference or the recommendations of the Legal Advisory Group on Defamation. This is a complex and controversial issue which, if it is to be addressed at all, deserves full separate treatment.
- In keeping with international standards and best comparative practices, defamation should be completely decriminalised. At a minimum, if a more limited criminal offence of "publication of gravely harmful statements" is to be adopted, it should require actual knowledge of falsity, leave of a court to bring a case and proof beyond all reasonable doubt of the elements of the offence by the party bringing the case.
- The recommendation for the establishment of a defence of reasonable publication should be adopted, provided, however, that it should be available for any statement on a matter of public interest or concern. The standard of reasonableness required should be interpreted in such a manner that it would normally be deemed to be met whenever a journalist acts in accordance with accepted professional standards.
- Opinions should never attract liability in defamation. At a minimum, it should be clear that only the most egregious, unwarranted and unsupported expressions of opinion may attract defamation liability.
- Notwithstanding the recommendation of the Legal Advisory Group, the presumption of falsity in defamation cases should be abandoned, at least for statements on matters of public interest or concern.
- The proposed introduction of a defence of "innocent publication" is welcome. However, special protection should be provided for Internet Service Providers, so that they are protected against defamation liability whenever their function in relation to an impugned statement is simply to provide access to the Internet, to transporting data across the Internet or to storing a website.
- The proposed measures to limit damage awards in defamation cases should be adopted, along with measures to strictly limit the circumstances in which punitive damages may be awarded and the imposition of fixed ceilings on the damages that may be awarded for non-material harm to reputation.
- Far greater consideration should be given to developing alternative, non-pecuniary remedies as redress for defamatory statements.

[7] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 1999/36: Addendum, Report on the mission to Ireland. E/CN.4/2000/63/Add.2 (the UN Special Rapporteur's Report on Ireland), para. 84.

- The various procedural recommendations made by the Legal Advisory Group should all be adopted. Conditions should be placed on the extension of the period of limitation beyond one year and an overall limit of less than the six years suggested should be adopted.
- In recognition of the importance of the protection of journalistic sources, the law should make it clear that no adverse inference may be drawn from any refusal to disclose confidential sources.

IV. Statutory Press Council

In its terms of reference, the Legal Advisory Group was requested "to consider the nature and extent of any statutory intervention which might attach to the establishment of any entity concerned with the regulation of the press, to examine the particular modifications in the law which the establishment of such an entity might warrant, and, to make specific proposals in this regard".[8] The Report recommends the establishment of a statutory press council.

ARTICLE 19 believes that the implementation of this recommendation would be unfortunate, among other things because we are of the view that self-regulation is a preferable option and one that should almost always be possible in established democracies.

More importantly for present purposes, however, we strongly urge that any proposal to establish a statutory press council should be decoupled from the present attempt to reshape Ireland's defamation laws, notwithstanding the particular terms of reference of the Legal Advisory Group. The very question of a statutory press council, regardless of the putative pros and cons of such a body, should not be looked at exclusively, or even primarily through the lens of defamation law. While regulation of the media, in whatever shape or form it may take, would undoubtedly have some impact on defamation, it is certainly not necessary to address this issue prior to agreeing defamation reform.

Furthermore, the imposition of any statutory press council would go well beyond the issue of defamation, raising a host of questions which are quite unrelated to the balance which must be struck between protecting reputations and freedom of expression, or indeed any specific content restriction. Legal treatment of such an important and expansive question as media regulation, including in the form of a statutory press council, requires full consideration in its own right. The question has myriad conceptual and practical ramifications and it deserves wide, detailed and inclusive analysis, preferably in a public consultation exercise analogous to the present one. Only then would justice be done to its inherent complexities, which include maintaining the distinction between ethics and regulation; preserving journalistic autonomy; seeking to raise standards in the media; comprehending and respecting qualitative differences between different kinds of media; facing up to unprecedented technological changes in the mass media landscape; and considering alternative forms of regulation to the traditional State-dominated prototype, such as self-regulation.

V. Decriminalisation of Defamation

The Law Reform Commission of Ireland has recommended that the common law offences of blasphemous, obscene and seditious libel be abolished, a recommendation which the Legal Advisory Group has endorsed. The Legal Advisory Group has, however, proposed that the offence of criminal libel be retained, albeit as a "more confined" offence. Key elements of the proposed new/renamed "offence of publication of gravely harmful statements" are:

[8] Report, para. 2.

"intentional and malicious publication of a false statement in respect of a natural person where that statement was calculated to gravely damage and has so damaged the reputation of that person and was calculated to cause and has caused serious harm to the mind of that person".[9]

At the international level, the problems with criminal defamation laws are increasingly being exposed and criticised. The European Court of Human Rights has never actually ruled out criminal 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.[10]

In that case, *Castells v. Spain*, the Court also stated that criminal measures should only be adopted where States act "in their capacity as guarantors of public order".[11] 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.

Furthermore, the European Court of Human Rights has made it clear that disproportionate sanctions, even of a non-custodial nature, violate Article 10 of the ECHR.[12] The possibility of imprisonment for defamation is a very severe penalty and the European Court of Human Rights has never upheld a prison sentence for defamation. Indeed, it has specifically stated, in relation to criminal penalties for defamation, that such measures should only be adopted where they are:

> [i]ntended to react *appropriately and without excess* to defamatory accusations devoid of foundation or formulated in bad faith. [Emphasis added][13]

Although the Court has upheld criminal defamation convictions, 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 fine in that case was ten times the daily minimum wage.[14]

The position taken within the UN system regarding criminal defamation laws has been far more categorical. The UN Human Rights Committee, the body responsible for overseeing the

[9] Report, para. 60.
[10] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, 14 EHRR 445, para.46.
[11] *Ibid.*
[12] *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No.18139/91.
[13] *Castells v. Spain*, note 10, para.46.
[14] 6 February 2001, Application No. 41205/98, para.69. See also *Constantinescu v. Romania*, 21 March 2000, Application No. 28871/95.

implementation of the ICCPR, has repeatedly expressed its concern about the use of custodial sanctions for defamation.[15]

The UN Special Rapporteur on Freedom of Opinion and Expression has stated unconditionally that imprisonment is not a legitimate sanction for defamation. In his 1999 Report to the UN Commission on Human Rights, he stated:

> 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.[16]

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.[17] 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".[18]

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 Declarations of November 1999, November 2000 and again in December 2002, they called on States to repeal their criminal defamation laws. The 2002 statement read:

> Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.[19]

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."[20]

These standards are encapsulated in *Defining Defamation*,[21] Principle 4(a) of which 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.

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[15] This concern has been expressed in the context of specific country reports. For example in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999).

[16] *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.

[17] 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.

[18] See, for example, Resolution 2003/42, 23 April 2003, para. 3(a).

[19] Joint Declaration of 10 December 2002. Available at: http://www.cidh.oas.org/Relatoria/English/PressRel02/JointDeclaration.htm.

[20] Adopted at the 108th Regular Session, 19 October 2000.

[21] Note 2.

A recent expression of this recommendation was in a joint statement by the OSCE Representative on Freedom of the Media and Reporters Without Borders at the end of 2003. The statement included Recommendations to legislatures, including the following: "Criminal libel and defamation laws should be repealed and replaced, where necessary, with appropriate civil laws."[22]

We strongly endorse the recommendations of both the Law Reform Commission and the Legal Advisory Group to abolish the common law offences of blasphemous, obscene and seditious libel. A recent Irish case illustrates some of the problems with blasphemous libel. The issue came up for the first time since 1855 in *Corway v. Independent Newspapers*,[23] which involved an allegation that a cartoon published in a national newspaper was blasphemous. Geoghegan J., in the High Court, expressed his approval for the minority viewpoint in *R. v. Lemon*[24] and those of the Law Reform Commission in its Consultation Paper on the Crime of Libel, 1991. He said that even if the cartoon did constitute on a *prima facie* basis the crime of blasphemy, he would still not grant leave to institute criminal proceedings against its publishers pursuant to the Defamation Act, on the ground that such a course of action was not required by the public interest; a position subsequently upheld by the Supreme Court.

ARTICLE 19 does not agree with the Legal Advisory Group's recommendation that criminal libel be retained, even in the limited form suggested. As noted, ARTICLE 19 believes that defamation should be dealt with through the civil law. The paucity of criminal defamation cases in the established common law democracies suggests that such an offence is unnecessary. The Law Reform Commission also warned that the offence of criminal libel "runs contrary to many modern principles of criminal liability and fair trial and threatens freedom of speech to a high degree, in theory if not in practice, so long as it continues to exist in its present state".[25]

In case the recommendation to retain a more limited form of criminal defamation is accepted, we would at least recommend that it require actual knowledge of the falsity of the statement, as well as leave of the court to bring a case. This will help to prevent any possibility of abusive application and to ensure that only prosecutions in the public interest could proceed. Obviously the burden of proof under such an offence should be on the party bringing the case, and on the criminal standard of beyond all reasonable doubt.

VI. Defences

VI.1 Reasonable Publication

The Legal Advisory Group recommends that a new defence, to be known as the defence of reasonable publication, should be established. The defence would be available whenever the defendant could show "that the publication in question was made in the course of, or for the purposes of the discussion of some subject of public interest, the public discussion of which was for the public benefit",[26] and would be made out whenever it was reasonable in all of the circumstances for the defendant to publish the statements.

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[22] "Libel and insult laws: what more can be done to decriminalise libel and repeal insult laws?", OSCE Representative on Freedom of the Media and Reporters Without Borders, 24-25 November 2003, Paris.
[23] [1999] 4 I.R. 484.
[24] [1979] 1 All ER 898.
[25] Law Reform Commission, Consultation Paper on the Crime of Libel, 1991, para. 178.
[26] Report, Summary of Recommendations, I.

The Law Reform Commission has also suggested a "defence of reasonable care", under which it would be "a defence to a claim for general damages in respect of a defamatory allegation of fact that the defendant exercised reasonable care prior to publication in attempting to ascertain the truth of the allegation".[27]

ARTICLE 19 fully supports the need for a defence of reasonable publication, as reflected in Principle 9 of *Defining Defamation*:

> 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.[28]

A defence of this nature has been recognised as necessary to mitigate the harsh effect of the traditional rule whereby a publisher would be held liable for any mistakes or inaccuracies, regardless of the circumstances, outside of limited cases covered by other defences.

A rule of strict liability for all false statements is particularly unfair for the media, which are under a duty to satisfy the public's right to know where matters of public concern are involved and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. The nature of the news media is such that stories have to be published when they are topical, particularly when they concern matters of public interest. As the European Court of Human Rights has held:

> [N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[29]

As noted in the Group's Report, variations on this defence have been recognised in many common law jurisdictions and it is also found in civil law countries.

Although any additional defence along these lines is to be welcomed, care must be taken to ensure that the defence accords with good international practice in this area. In the first place, the availability of the defence should be broad. The Group suggests that not only should the matter be one of public interest, but that the discussion of this is for the public benefit. It is not clear when a discussion on a matter of public interest would not be for the public benefit, unless one posits some sort of superhuman referee with the capacity to distinguish between helpful and harmful discussions. In any case, this further limitation can only unduly limit the scope of this defence. It should be open to a defendant to argue it whenever the subject matter of the impugned statements touches on a matter of public interest or concern.

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[27] The Law Reform Commission, *Consultation Paper on the Civil Law of Defamation*, March 1991, para. 385.
[28] Note 2.
[29] *The Sunday Times v. the United Kingdom (No. 2)*, 24 October 1991, Application No. 13166/87, para. 51.

Perhaps even more important is the standard of care to be attached to 'reasonable'. It may be noted that in some jurisdictions, including the US[30] and New Zealand,[31] the defence may be defeated only where the plaintiff proves that the defendant acted with actual malice, or which reckless disregard for the truth. While this perhaps represents a high water mark for the defence, ARTICLE 19 at least suggests that proof that the defendant acted in accordance with accepted professional standards should be enough.

There is some suggestion that the Group understands the standard of reasonableness rather more narrowly than in other jurisdictions. The Group has listed a number of factors to be considered when determining whether or not a defendant acted reasonably. These include, for example, "whether it was necessary in the circumstances for the matter complained of to be published expeditiously".[32] We suggest that this seriously misstates the appropriate standard. The court should look at any factors militating in favour of rapid publication rather than whether this was necessary.

VI.2 Opinions

Section 23 of the Defamation Act, 1961, deals with the defence of "fair comment", but its wording is not very illustrative of the core of the defence:

> In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved, if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

The Legal Advisory Group has proposed that this defence be renamed "the defence of honest opinion" and that its scope be clarified. The new defence would presumably be broader than the existing one, with the defendant's honest belief and sufficient reliance on facts as its key elements.

ARTICLE 19 is of the view that defamation law should not restrict the expression of opinions. Principle 10 of *Defining Defamation* is quite clear, stating:

> (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).

A seminal principle was articulated by the European Court of Human Rights in this regard, in the much-documented *Lingens* case:

> […] a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof… As regards value-judgments, this requirement [to prove truth] is impossible of fulfilment and it infringes freedom of opinion itself […][33]

[30] See *New York Times Co. v. Sullivan*, 376 US 254, 279 (1964).
[31] See *Lange v Atkinson* [2000] 1 NZLR 257.
[32] Report, para. 13.
[33] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 46.

The Court has not allowed absolute free rein to express value judgements, stating: "Even where the statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive."[34] In practice, however, the Court allows a considerable degree of leeway to statements of opinion. For example, in the case of *Dichand and others v. Austria*, the applicants had published an article alleging that a national politician who also practiced as a lawyer had proposed legislation in parliament in order to serve the needs of his private clients. The applicants were convicted of defamation by the domestic court and appealed to the European Court. The Court first stressed that the statement constituted a value judgment rather than a factual allegation. Furthermore, whilst acknowledging the absence of hard proof for the allegations, as well as the strong language used, the Court stressed that the discussion was on a matter of important public concern.[35] It recalled that:

> It is true that the applications, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that the right to freedom of expression also protects information or ideas that offend, shock, or disturb.[36]

In a recent decision, the Court explained that value judgments need not be accompanied by the facts upon which the judgement is based, holding: "The necessity of a link between a value judgment and its supporting facts may vary from case to case in accordance with the specific circumstances."[37] For example, where certain facts were widely known among the general public there was no need for a journalist basing an opinion on those facts to refer to them explicitly. Furthermore, value judgements may be based on rumours or stories circulating among the general public; they need not be supported by hard, scientific facts.[38] The Court has frequently noted that "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation".[39]

VI.3 Presumption of Falsity

The Legal Advisory Group recommends that there should be no "substantive change" in the "presumption of falsity" in defamation law.

ARTICLE 19 views this conclusion as regrettable. Principle 7 of *Defining Defamation* states, in part:

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

There are a number of reasons for reversing this burden, at least in the context of statements on matters of public concern. Once it is understood that, for factual statements, the wrong is precisely that the statement is false, it will be seen that defamation holds a unique place

[34] *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 43.
[35] *Ibid*., para. 51.
[36] *Ibid*., para. 52.
[37] *Feldek v. Slovakia*, 12 July 2001, Application No. 29032/95, para. 86.
[38] *ThorgeirThorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 65.
[39] *Prager and Oberschlick v. Austria*, 26 April 1995, Application No. 15974/90, para. 38.

among strict liability torts in placing the burden of proof of the essence of the wrong with the defendant.

In practice, proof of truth, according to the strict rules of evidence, "can prove exceedingly hard for a media defendant because of the journalistic practice of promising confidentiality to those who provide information […] Sources, even if not promised anonymity or confidentiality, may be unwilling to appear in court to testify against a plaintiff".[40] As a result, the trend internationally is to reverse this burden.

In his Report on Ireland, noted above, the UN Special Rapporteur stated that "the onus of proof of all elements should be on those claiming to have been defamed rather than on the defendant and where truth is an issue, the burden of proof should lie with the plaintiff".[41] Similarly, in the Joint Declaration issued by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression at the end of 2000, the requirement that "the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern" was identified as one of the minimum standards with which defamation laws should comply.[42]

At the national level, the Law Reform Commission and the Commission on the Newspaper Industry have both argued for the abolition of the presumption of falsity in relation to defamatory allegations.[43] This presumption has long been reversed for statements regarding public officials, understood broadly, in the US.[44]

VI.4 Innocent Publication

The Legal Advisory Group recommends retention and expansion of the defence of innocent dissemination, under the new name of "innocent publication". The defence was originally developed for the purpose of shielding from liability certain persons involved in the 'publishing' process, such as newspaper boys, who had no control over editorial content. One of the shortcomings of this defence has traditionally been its limited scope of application. The Group recommends extension of the application of the defence to printers and broadcasters, as well as specific provision for Internet providers, based on the European Union E-Commerce Directive.[45]

More specifically, the Legal Advisory Group has signalled its intention to follow the approach of the UK Defamation Act, 1996, in this matter. This provides a defence for persons who can show that they are not the "author, editor or publisher" of the statement complained of, that they took reasonable care in relation to the publication and that they did not know, or have any reason to believe, that what they did caused or contributed to the publication of the defamatory statement. The UK Act elaborates in detail on the meaning of "author, editor or publisher", as well as what constitutes reasonable care for the purposes of the defence, which should include factors like the extent of the responsibility of the person for the content of the

[40] McGonagle, Marie, *Media Law* (Second Edition) (Dublin, Thomson Round Hall, 2003), p. 82. See further, Section VIII.
[41] Note 7
[42] 30 November 2000. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument
[43] Law Reform Commission Report on the Civil Law of Defamation (LRC 38-1991), pp. 55-58 and Report of the Commission on the Newspaper Industry, Pn. 2841, June 1996, Dublin, p. 63, para. 7.44.
[44] See *New York Times Co. v. Sullivan*, note 30, p. 272.
[45] Directive 2000/31/EC, 8 June 2000.

statement or the decision to publish it and the previous conduct or character of the author, editor or publisher.

ARTICLE 19 supports these proposals, as far as they go, as they recognise new technological realities, such as the division of labour and responsibilities within publication processes, and locate liability for defamation where it should be. However, we are of the view that they fail sufficiently to take into account the particular situation of Internet service providers (ISPs).

Many different approaches to the liability of ISPs have been canvassed in various fora.[46] It has been suggested: "The objective must be to encourage responsibility and self-regulation, without engendering fear of liability that will cause ISPs to remove postings at the slightest hint of defamation".[47] This last concern is very real: ISPs are often perceived as "tactical targets for those wishing to prevent the dissemination of material on the internet".[48] In particular, ISPs, unlike traditional publishers, have no relationship beyond the purely technical with either the authors or the material they are deemed to 'publish'. As a result, in the face of any allegation of defamation, or indeed any wrong, which might engage their liability, ISPs are likely to simply remove the material, without considering the merits of the allegation. Of some relevance here is the vast quantity and range of material which ISPs may be deemed to 'publish', which often includes large numbers of private or corporate websites simply hosted by the ISP. To provide for the engagement of ISP liability once they have been alerted to potentially defamatory material, effectively allows for reader censorship.

Principle 12 of *Defining Defamation*, therefore, both recognises the defence of innocent publication and also provides for enhanced protection against liability for ISPs:

> (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.

We are of the view that the EU's E-Commerce Directive, which was transposed into Irish law by the European Communities (Directive 2000/31/EC) Regulations 2003, fails to take sufficient account of the problems of defamation over the Internet.[49]

VII. Limiting the Chilling Effect of Remedies

It is increasingly being recognised that one of the more serious threats to freedom of expression is the global trend towards massive pecuniary awards in defamation cases. International courts have held that excessive awards, on their own, represent a breach of the right to freedom of expression and many countries have introduced various measures to

[46] See, for example, "Part II – Liability of Internet Service Providers" in The Law Commission, *Defamation and the Internet: A Preliminary Investigation* (Scoping Study No. 2, The Law Commission, London, December 2002), pp. 5-20.
[47] McGonagle, Marie, *Response to Legal Advisory Group Report on Defamation*, Law Society of Ireland Seminar, Dublin, 27 November 2003.
[48] *Defamation and the Internet*, note 46, para. 2.65, p. 19.
[49] Note 45, Articles 12 ('Mere conduit'), 13 ('Caching') and 14 ('Hosting').

address this problem. The ARTICLE 19 publication, *Defining Defamation*, devotes considerable attention to the question of remedies for defamation, noting that the overriding goal of defamation remedies should be to redress the harm done to the reputation of the plaintiff, not to punish the defendant, and calling for the prioritisation of non-pecuniary remedies wherever possible.[50] The Legal Advisory Group has made a number of recommendations on remedies designed to limit the pronounced trend of Irish Courts to award exorbitant damages in libel cases.

VII.1 Damage Awards

The Legal Advisory Group recommends that the jury continue to play a role in assessing damages, but that the parties should be allowed to address this issue and that the judge should provide juries with guidance on damages. The Group recommends that the Supreme Court be able to vary damages upon appeal. The Group also made the following recommendation, in relation to punitive damages: "Not only should the circumstances governing the availability of exemplary or punitive damages be clarified but the circumstances in which aggravated damages may be awarded should also be clarified by relating such an award specifically to the manner in which the defendant conducts his or her defence".[51] Finally, the Group recommends that a cap of €50,000 in damages be set for cases before a Circuit Court.

It is widely agreed that the inhibitive nature of massive damage awards creates a chilling effect and leads to a climate of self-censorship which thwarts robust, investigative journalism. The UN Special Rapporteur on Freedom of Opinion and Expression adverted to this problem in the Irish context: "Writers, editors and publishers may become increasingly reluctant to report and publish matters of public interest because of the large costs of defending such actions and the big awards granted in these cases. This creates a restraint on the freedom of expression, access to information and the free exchange of ideas."[52]

As noted above, the problem of excessive damages for defamation has been addressed by the European Court of Human Rights. In *Ceylan v. Turkey*[53] and *Tammer v. Estonia*,[54] the Court noted that "the nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference [with the right to freedom of expression]".[55] More specifically, in the *Tolstoy Miloslavsky* case, the Court noted that, "under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered."[56] Central to the deliberations in that case was the fact that the sum of damages awarded was three times the size of the highest libel award previously made in England.

Defining Defamation calls for strict limits on the level of pecuniary awards in defamation cases. Such awards should be made only where non-pecuniary remedies are insufficient to redress the harm done. Furthermore:

> (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.

[50] Note 2, Principles 13 and 14.
[51] Summary following para. 43 of the Report.
[52] The UN Special Rapporteur's Report on Ireland, note 7, paras. 73 and 84.
[53] 8 July 1999, Application No. 23556/94.
[54] Note 14.
[55] *Ceylan v. Turkey*, note 53, para. 37.
[56] *Tolstoy Miloslavsky v. the United Kingdom*, note 12, para. 49.

> (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.[57]

Analyses of the *Miloslavsky* judgment often point accusing fingers at the latitude afforded to juries in the assessment of damages, coupled with the lack of instruction they receive from the judge. These criticisms have resurfaced in the context of the much-publicised Irish case, *De Rossa v. Independent Newspapers*, currently on appeal to the European Court of Human Rights.[58] That case arose out of a newspaper article making reference to "special activities" (of a criminal nature) which "served to fund the Workers' Party", of which Proinsias de Rossa had been the head. The damages awarded in that case – IR£300,000 – were, at the time, approximately twenty times the annual industrial wage in Ireland. Prior to that, the highest jury award in a defamation case to be upheld by the Supreme Court was IR£90,000.[59] The issue was revisited recently when the Supreme Court overturned an IR£250,000 award in the case of *O'Brien v. Mirror Group Newspapers*,[60] and ordered a retrial on the quantum of damages only.

The dissenting opinion of Denham J. in the *De Rossa* case is, it is submitted, more consistent with international norms. In the concluding part of her judgment, she noted: "More specific guidelines on the level of damages would help juries and the administration of justice by bringing about more consistent and comparable awards of damages and awards which would be seen as such. Specific guidelines would also inform an appellate court in its determination as to whether an award is reasonable and proportionate."[61]

The approach of Denham J. is also consistent with the recommendation of the Commission on the Newspaper Industry that the instructions issued to juries for the purpose of assessing damages, including all considerations liable to affect such an assessment, "should in every case be fully and amply given."[62] These recommendations have been buttressed by leading academic opinion.[63] Better jury direction could help to reduce the likelihood of arbitrary and inordinately high damages being awarded in libel actions.

Another proposal to limit excessive damage awards, provided by the Law Reform Commission in its 1991 Consultation Paper on the Civil Law of Defamation,[64] is that "the damages in such actions should be assessed by the judge, but the jury should determine the

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[57] Note 2, Principle 15.
[58] Note 5.
[59] *McDonagh v Newsgroup Newspapers*, ITLR 27 December 1993.
[60] [2001] 1 I.R. 1.
[61] Note 5., Judgment of Denham J., p. 483. See also the judgments of Henchy and Finlay JJ., in *Barrett v. Independent Newspapers Ltd.* [1986] IR 13.
[62] Report of the Commission on the Newspaper Industry, note 43, p. 61, para. 7.35.
[63] See Boyle, Kevin and McGonagle, Marie, "Defamation – The Path to Law Reform", in Marie McGonagle (Ed.), *Law and the Media: The Views of Journalists and Lawyers* (Round Hall Sweet & Maxwell, Dublin, 1997), at p. 74 and Boyle, Kevin and McGonagle, Marie, *A Report on Press Freedom and Libel* (National Newspapers of Ireland, Dublin, 1988), Recommendation 13, pp. 31-32. These authors have stressed the need to establish clearly the criteria governing the mitigation of damages. See "Defamation – The Path to Law Reform", p. 82. They have also posited that the provision of clear guidelines on the scope of the rights to freedom of expression and to reputation to juries by the courts could arguably be required by the Irish Constitution. See *A Report on Press Freedom and Libel*, p. 31.
[64] The Law Reform Commission (LRC), Consultation Paper on The Civil Law of Defamation, Ireland, March 1991.

nature of the damages that should be awarded i.e. nominal, compensatory or punitive."[65] It further recommended "that there be a statutory provision setting out the factors to be considered by the court when assessing damages."[66]

We support measures to limit the level of damage awards, but we are of the view that the recommendations of both the Law Reform Commission and the Legal Advisory Group, while welcome, do not go far enough in this regard. As is clear from the principles noted above, ARTICLE 19 is of the view that punitive damages should be provided only in highly exceptional cases. Furthermore, we advocate a fixed ceiling on the level of damages for non-material harm to reputation.

VII.2 Alternative Remedies

The Legal Advisory Group's Report devotes little attention to the question of alternative remedies, beyond reiterating, and vaguely endorsing, various recommendations of the Law Reform Commission, including the following: "an offer of an apology or the making of an apology by the defendant should not be construed as an admission of liability and it should be lawful for such apology or offer of apology to be used in mitigation of damages."[67]

ARTICLE 19 notes that, under Irish defamation law, damages are, in effect, the sole remedy available. There is a veritable groundswell of support for the view that a plethora of alternative remedies could usefully be explored and implemented. Amongst these are published declarations, clarifications, corrections, apologies, "timely and conspicuous retractions",[68] and the practice of according aggrieved parties the right of reply. Such measures would provide viable alternatives to the present "winner-takes-all defamation trial"[69] by shifting the focus from monetary compensation after harm has been done to the immediate and effective vindication of the good name of the plaintiff which should be the main purpose of defamation law.

Principle 13(c) of *Defining Defamation* notes: "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." We are of the view that the need for alternative remedies is driven by our primary perspective on remedies, which is that they should focus on redressing the harm done. In many cases, alternative remedies are far more appropriately tailored to this end. A rapid apology and/or correction, for example, focuses directly on restoring reputation, something that a damage award cannot do.[70]

VIII. Procedural Recommendations

VIII.1 Offer of Amends

The Legal Advisory Group recommends that the procedural mechanism of making an offer of amends be retained, but in a more modern form.

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[65] *Ibid.*, p. 449.
[66] *Ibid.*
[67] Report, para. 62.
[68] Boyle, Kevin and McGonagle, Marie, "Defamation – The Path to Law Reform", note 63, p. 69.
[69] *Ibid.*
[70] A damage award can, at best, only compensate for harm to reputation, as well, of course, as compensating for any direct losses as a result of harm to reputation.

An offer of amends, including an offer to make a correction and/or apology, when timely and sincere, can be effective both as a means of limiting the cost of defamation litigation and as a potential source of mitigation of damages. It can also be usefully considered when awarding costs. Such an offer of amends could take the form of an offer to make a correction and/or apology; to publish a correction and/or apology; and/or to pay such compensation as may be agreed. To be effective, the rejection of an offer should bar the plaintiff from bringing or continuing a defamation action in respect of the defamatory meaning to which the offer relates, while the acceptance of an offer should mean that any remaining issues are limited to the question of the sufficiency of the apology/correction and the compensation offered.

At present, the procedural complexities associated with the offer of amends defence, at section 21 of the Defamation Act, 1961, have seriously undermined its usefulness and resulted in relatively limited reliance on it. These need to be addressed if the defence is to live up to its potential to "present a viable 'exit strategy' to disentangle the media from a troublesome action in most cases except where 'bad faith' can be shown by the claimant".[71] We therefore endorse the recommendation of the Legal Advisory Group in this regard, in line with our comments above.

VIII.2 Payment into Court

The Legal Advisory Group recommends: "Defendants in defamation cases should be able to make lodgments without an admission of liability". Furthermore: "A plaintiff who accepts a lodgment should have the option of informing the court of the fact that they have accepted the lodgment and of the consequences for them of the resolution of the court proceedings". In making these recommendations, the Group was prompted by its expectation that such reforms would encourage the early settlement of actions and help to reduce concomitant legal costs. We support these recommendations.

VIII.3 Summary Disposal of Claims

The Legal Advisory Group has largely endorsed the recommendations of the Law Reform Commission for parties to defamation actions to be able to move for a summary hearing. Each of the four elements of the suggested "fast-track procedure" put forward by the Group has the potential to make an important contribution to the development of relevant procedures. It is appropriate that this possibility should be available to plaintiffs and defendants alike. That the summary relief would take the form of declaratory judgments or correction orders, and expressly preclude the possibility of damages, accords with ARTICLE 19's emphasis on non-pecuniary remedies. Similarly, that such hearings would be presided over by one judge should also augur well for the swiftness of the procedures.

A separate recommendation of the Legal Advisory Group is as follows "Provision should be made to enable a judge sitting alone to determine, as a preliminary issue, whether or not the matter complained of is reasonably capable of carrying the imputation pleaded by the plaintiff and, if it is, whether that imputation is reasonably capable of bearing a defamatory meaning."[72] This is also welcome as it may help to filter out cases that are clearly without merit, thereby avoiding the unnecessary dissipation of time, energy and money.

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[71] Johnson, Howard, "Apologies and costs – the Offer of Amends defence in the law of defamation", 8 *[Tolley's] Communications Law* (No. 5, 2003), pp. 367-370, at p. 369.
[72] Report, Summary following para. 58.

VIII.4 Limitation Period

The Legal Advisory Group recommends that the limitation period be one year, save in exceptional cases where a court should have discretion to extend this period, up to a maximum of six years. The Group notes that one of the purposes of a limitation period is, on the one hand, to prevent "stale claims" from being pursued and, on the other hand, to ensure that plaintiffs have long enough to prepare their case, without disadvantaging the defendants.[73] Empirical evidence would suggest that the overwhelming majority of defamation actions in the High Court are commenced within six months of publication of the contested statement.[74] There would thus appear to be a cogent case for reducing the current six-year limit.

The Group's recommendation in this area is largely consistent with Principle 5(a) of *Defining Defamation*, which also provides for a one-year limitation period, save in exceptional circumstances. However, we also recommend that clear legislative criteria should apply to the question of whether the one-year limit should be subject to extension in any given case. The Group notes that the court should have to be "satisfied that any prejudice which the plaintiff might suffer if the action were not to proceed significantly outweighs any prejudice which the defendant might suffer if the action were to proceed".[75] This is a step in the right direction, but additional detail and refinement would be desirable. Allowing courts largely unfettered discretion to extend the one-year deadline provided for in the UK Defamation Act of 1996, where the key consideration is whether this is "equitable", has not escaped criticism.[76]

The proposal for an overall limitation of six years seems excessive. It is submitted that it would be more in keeping with the overall tenor of the proposed reform if the possibility of initiating defamation proceedings were to be subject to more stringent limits, say of between two and three years.

VIII.5 "Single Publication" Rule

Closely linked to the issue of the limitation period is a consideration of the date from which the time limit should run. The Legal Advisory Group has proposed a "single publication" rule, tailored to the specificities of "publication" in electronic format, including the Internet. The Group recommends first: "As a general rule, a person should have only a single cause of action in defamation in respect of a multiple publication". Second, it notes "Where the defamation proceedings relate to an electronic publication, it should be made clear that this rule also applies and that, in that context, the number of times a particular publication might be accessed should be disregarded". The Group predicts that these twin recommendations would be likely to ensure effective equality in the treatment of electronic and non-electronic publications.

The present "multiple publication" rule is extremely problematic, not least because it considers every copy of a newspaper or book – and presumably every hit on a website as well – to constitute a separate publication to each recipient of the publication. Of course, successive "separate" publications, being new causes of action, have the effect of

[73] Report, para. 56.
[74] Preliminary data from a study by Boyle, Kevin and McGonagle, Marie, referred to in McGonagle, Marie, *Response to Legal Advisory Group Report on Defamation*, Law Society of Ireland Seminar, Dublin, 27 November 2003.
[75] Report, para. 53.
[76] See Robertson, Geoffrey and Nicol, Andrew, *Media Law* (4th Edition) (London, Sweet & Maxwell, 2002), p. 104.

continuously pushing back the limitation period for commencing defamation proceedings. The sale of back issues of books, and visits to online newspaper and other archives, for instance, posit practical examples of the adverse effect of the multiple publication rule.[77] We therefore endorse these recommendations.

IX. Protection of Sources

An issue upon which the Legal Advisory Group did not touch is the right of journalists to protect their confidential sources of information. This principle, most famously enshrined in the *Goodwin*[78] case, is also of relevance in the context of defamation actions. Principle 6 of *Defining Defamation* deals with this issue in the context of defamation law:

> (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.

The first part of this Principle should probably find expression in general legislation. However, it is certainly appropriate for a defamation act to give express recognition to the latter, namely that no adverse inference should be drawn from the refusal by a defendant in a defamation action to name his/her source(s).

X. Conclusion

As mentioned at the outset, Irish defamation law is in urgent need of reform. We welcome this consultation process and the stated objective of bringing Irish defamation law into line with international legal standards and best practices from comparable jurisdictions. We also appreciate the considered, thorough approach of the Legal Advisory Group, and the progressive nature of their recommendations. Indeed, with the exception of the proposed statutory press council, the Group's recommendations would collectively bring Irish defamation law very significantly into line with widely recognised best international practice, for example, as enshrined in *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*.

However, as detailed above, we believe that a number of the Group's recommendations would benefit from stronger procedural or substantive safeguards to ensure appropriate consideration is taken of the right to freedom of expression.

[77] See further, the discussion in "Part III – Liability for Online Archives", in The Law Commission, *Defamation and the Internet: A Preliminary Investigation* (Scoping Study No. 2, The Law Commission, London, December 2002), pp. 21-26.
[78] *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90.

Defining Defamation

Principles on Freedom of Expression and Protection of Reputation

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ARTICLE 19, 33 Islington High St., London N1 9LH • Tel. +44 20 7278 9292 • info@article19.org • www.article19.org

CONTENTS

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.[1]

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.[2] 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.[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 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

[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] A list of participants at this Workshop is included as 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, 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[5] 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.

[5] 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.[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:

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.

Comment on Principle 1

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.[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.

[6] See Principle 2.

[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.

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:

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;

iii. 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;

iv. 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.[8]

(b) In cases involving statements on matters of public concern,[9] 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.

[8] See also Principle 9 on Reasonable Publication.

[9] 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.

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:

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

iv. 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

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.

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 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.

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
Kevin Boyle	Member of the Executive Committee of ARTICLE 19, Professor of Law and Director of the Human Rights Centre, Essex University, Colchester, United Kingdom
Aurelie Bregou	Member of the French Bar specialising in Media Law, Paris, France
Param Cumaraswamy	Member of the International Board of ARTICLE 19 and Special Rapporteur of the UN Commission on Human Rights on the independence of judges and lawyers and, Kuala Lumpur, Malaysia
Helen Darbishire	Media Law Program Manager, Constitutional Law and Policy Network and Network Media Program, Open Society Institute, Budapest, Hungary
Tunde Fagbhunlu	Barrister and Director of Legal Services, Media Rights Agenda, Lagos, Nigeria
Wendy Harris	Constitutional and Defamation Lawyer, Member of the Victorian Bar, Melbourne, Australia
Fiona Harrison	Head of Europe Programme, ARTICLE 19, London, UK
Paul Hoffman	Member of the International Board of ARTICLE 19, Defamation Lawyer and Adjunct Professor of Defamation and Freedom of Expression Law, Loyola Law School, Los Angeles, United States
Ulrich Karpen	Professor of Constitutional and Administrative Law, University of Hamburg, Germany
Gilbert Marcus	Advocate of the Supreme Court of South Africa, Johannesburg, South Africa
Marie McGonagle	Lecturer in Law, Law Faculty, National University of Ireland, Galway, Ireland
Toby Mendel	Head of Law Programme, ARTICLE 19, London, UK
Andrew Puddephatt	Executive Director, ARTICLE 19, London, UK
Evan Ruth	Legal Officer, ARTICLE 19, London, UK
Malcolm Smart	Member of the International Board of ARTICLE 19 and Program Director, Human Rights Watch, New York, USA
Willem Van Manem	Lawyer, Amsterdam, Netherlands
Steingrim Wolland	Lawyer and Advisor to Norwegian Press Organisations, Oslo, Norway

Defamation and the European Convention on Human Rights[1]

I. Introduction

In the 17 years since the European Court of Human Rights (the Court) delivered its first judgment in a defamation case,[2] it has built up a rich body of case-law on this crucial topic. The cases have often been brought by journalists complaining of defamation actions initiated by politicians or other public figures attempting to muffle criticism voiced in the press and it is clear that the proceedings often concerned matters of important public interest. In the overwhelming majority of cases, the judgments delivered by the Court have clarified the important status of freedom of expression, particularly with regard to debate on matters of public interest, and have helped bolster democratic values in all Council of Europe Member States. As such, it is fair to say that the body of law developed by the Court in defamation cases provides an important underpinning for democracy.

This chapter gives a brief overview of the judgments of the Court in defamation cases. First, it emphasises the overwhelming importance of freedom of expression in democratic societies, particularly with regard to the role of the media and political debate. Then it examines in detail a number of principles developed by the Court in defamation cases, such as the status of public officials and the distinction that is to be made between value judgements and statements of fact. Particular attention is also paid to the question whether criminal defamation laws as such are compatible with the right to freedom of expression.

II. The Fundamental Status of Freedom of Expression

Freedom of expression is protected in Article 10 of the *European Convention on Human Rights* (ECHR),[3] which states, in Paragraph 1:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. The European Court of Human Rights has repeatedly stated:

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[1] This paper was drafted by Peter Noorlander, Legal Officer, ARTICLE 19, and edited by Toby Mendel, Law Programme Director, ARTICLE 19.

[2] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82.

[3] E.T.S. No. 5, adopted 4 November 1950, in force 3 September 1953.

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.[4]

The Court has also made it clear that the right to freedom of expression protects offensive and insulting speech. It has become a fundamental tenet of its jurisprudence that the right to freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'."[5]

It has similarly emphasised that "[j]ournalistic freedom … covers possible recourse to a degree of exaggeration, or even provocation."[6] This means, for example, that the media are free to use hyperbole, satire or colourful imagery to convey a particular message.[7] The choice as to the form of expression is up to the media. For example, the Court will not criticise a newspaper for choosing to voice its criticism in the form of a satirical cartoon and – it has urged – neither should national courts.[8] The context within which statements are made is relevant as well. For example, in the second *Oberschlick* case, the Court considered that calling a politician an idiot was a legitimate response to earlier, provocative statements by that same politician while in the *Lingens* case, the Court stressed that the circumstances in which the impugned statements had been made "must not be overlooked."[9]

The Court attaches particular value to political debate and debate on other matters of public importance. Any statements made in the conduct of such debate can be restricted only when this is absolutely necessary: "There is little scope … for restrictions on political speech or debates on questions of public interest."[10] The Court has rejected any distinction between political debate and other matters of public interest, stating that there is "no warrant" for such distinction.[11] The Court has also clarified that this enhanced protection applies even where the person who is attacked is not a 'public figure;' it is sufficient if the statement is made on a matter of public interest.[12] The flow of information on such matters is so important that, in a case involving newspaper articles making allegations against seal hunters, a matter of intense public debate at the time, the

[4] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[5] *Ibid.* Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.
[6] *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.
[7] *See Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras 50-54.
[8] See, for example, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 63 and *Bergens Tidende and Others v. Norway*, 2 May 2000, Application No. 26131/95, para. 57.
[9] *Oberschlick v. Austria (No. 2)*, 1 July 1997, Application No. 20834/92, para. 34 and *Lingens v. Austria*, note 2, para. 43.
[10] See, for example, *Dichand and others v. Austria*, note 6, para. 38.
[11] *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 64.
[12] See, for example, *Bladet Tromsø and Stensaas v. Norway*, note 8.

journalists' behaviour was deemed reasonable, and hence not liable, even though they did not seek the comments of the seal hunters to the allegations.[13]

The guarantee of freedom of expression applies with particular force to the media. The Court has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law"[14] and stated that,

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[15]

In nearly every case before it concerning the media, the Court has stressed the "essential role [of the press] in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."[16] In the context of defamation cases, the Court has emphasised that the duty of the press goes beyond mere reporting of facts; its duty is to interpret facts and events in order to inform the public and contribute to the discussion of matters of public importance.[17]

While the right to freedom of expression is not absolute, any limitations must remain within strictly defined parameters. It is well-established that defamation cases constitute an interference with freedom of expression, even when no award for damages is made,[18] and so they must remain within the parameters set by the Convention. The second paragraph of Article 10 recognises that freedom of expression may, in certain narrowly prescribed circumstances, be limited:

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

[13] *Ibid.*
[14] *Thorgeirson v. Iceland*, note 11, para. 63.
[15] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
[16] See, for example, *Dichand and others v. Austria*, note 6, para. 40.
[17] *The Sunday Times v. The United Kingdom*, 26 April 1979, Application No. 6538/74, para. 65.
[18] See, for example, *McVicar v. the United Kingdom*, 7 May 2002, Application No. 46311/99.

Restrictions must meet a strict three-part test. First, the interference must be provided for by law. The Court has stated that this requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[19] Second, the interference must pursue a legitimate aim. The list of aims in Article 10(2) of the Convention is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.[20]

This test is mirrored in the *International Covenant on Civil and Political Rights*[21] and cases decided in that jurisdiction as well as before the European Court have made it clear that it represents a high standard which any interference must overcome:

> 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.[22]

III. Freedom of Expression and Defamation under the ECHR

In considering defamation cases, the Court strictly follows the structure of Article 10(2) of the Convention. The requirement that the defamation restriction be prescribed by law is usually found by the Court to be easily met. This section considers the application by the Court of the remaining two conditions of Article 10(2), namely that the defamation action pursues a 'legitimate aim' and that it be 'necessary in a democratic society'.

III.1. The Legitimate Aim of Defamation Laws

As stated above, Article 10(2) of the Convention provides an exclusive list of aims in pursuit of which the exercise of the right to freedom of expression may be restricted. In virtually all cases before the Court, the "protection of the reputation or rights of others" has been invoked to justify defamation laws,[23] although in one case, the Court considered that the speech complained of was potentially inflammatory and could lead to large-scale public unrest. In those circumstances, the Court found that the respondent Government could invoke the "prevention of disorder" as a legitimate aim.[24]

While most defamation laws in the Council of Europe are uncontroversial insofar as they aim to protect honour and dignity, it should be borne in mind that any laws that penalise

[19] *The Sunday Times v. United Kingdom*, note 17, para. 49.
[20] *Lingens v. Austria*, note 2, paras. 39-40.
[21] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.
[22] See, for example, *Thorgeirson v. Iceland*, note 11, para. 63 (European Court of Human Rights).
[23] *Ibid.*, para. 59 and *Schwabe v. Austria*, 28 August 1992, Application No. 13704/88, para. 25.
[24] *Castells v. Spain*, note 15, paras. 38-39.

'insult' or 'giving offence' without linking this to the honour and dignity of the offended party will fail the 'legitimate aim' test.

III.2. Criminal Defamation

In many member States of the Council of Europe, civil defamation laws are now the primary or only means by which reputation is protected. Criminal defamation laws in many countries have either fallen into disuse – in the United Kingdom, for example, there has not been a public prosecution of the media in the last twenty years[25] – or their use has come under heavy criticism, including from the European Court of Human Rights.[26] One of the most serious problems with criminal defamation laws is that a breach may lead to a harsh sanction, such as a heavy fine or suspension of the right to practise journalism. Even where these are not applied, the problem remains, since the severe nature of these sanctions means they cast a long shadow. It is now well-established that unduly harsh penalties, of themselves, represent a breach of the right to freedom of expression even if the circumstances justify some sanction for abuse of this right.[27] In the very first defamation case before it, the Court considered that,

> the penalty imposed on the author … amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future … 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.[28]

The Court has never directly ruled on the legitimacy of criminal defamation laws; the nature of its jurisdiction means that its judgments are usually restricted to the facts of the individual case before it. But it should be noted that it has never upheld a prison sentence or other serious sanction in a criminal defamation case.[29] In *Castells v. Spain*, the Court noted:

> [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.[30]

In the same case, the Court stated that criminal measures should only be adopted where States act "in their capacity as guarantors of public order" and where such measures are, "[i]ntended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith."[31] In the vast majority of defamation cases, neither of these factors will apply. It is significant that in the *Castells* case, the Court approved

[25] The UK Law Commission, as long ago as 1985, recommended the offence be abolished. See Law Commission, *Criminal Law: Report on Criminal Libel* (Law Com. No. 149, Cm. 9618, 1985).
[26] See, for example, *Colombani v. France*, 25 June 2002, Application No. 51279/99.
[27] For more on this, see below under III.8 Sanctions.
[28] *Lingens v. Austria*, note 2, para. 44.
[29] In the above-mentioned *Lingens* case, the Court found a violation of the right to freedom of expression.
[30] Note 15, para. 46.
[31] *Ibid.*

the application of criminal measures only as a means of maintaining public order, and not as a means of protecting reputations.

III.3. Public Officials

The Court has been very clear on the matter of public officials and defamation: they are required to tolerate more, not less, criticism, in part because of the public interest in open debate about public figures and institutions. In its very first defamation case, the Court emphasised that:

> 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.[32]

The Court has affirmed this principle in several cases and it has become a fundamental tenet of its caselaw.[33] The principle is not limited to criticism of politicians acting in their public capacity. Matters relating to private or business interests can be equally relevant. 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 law arises."[34]

In statements on matters of public interest, the principle applies to public officials and to public servants as well as to politicians.[35] Although in the case of *Janowski v. Poland*, the 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 and, importantly, did not concern statements on a matter of public interest. In the later case of *Dalban v. Romania*, the Court resolutely found a violation of freedom of expression where a journalist had been conviction for defaming the chief executive of a State-owned agricultural company.[36] 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.[37]

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[32] *Lingens v. Austria*, note 2, para. 42.
[33] See, for example, *Lopes Gomez da Silva v. Portugal*, 28 September 2000, Application No. 37698/97, para. 30; *Wabl v. Austria*, 21 March 2000, Application No. 24773/94, para. 42; and *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, para. 59.
[34] *Dichand and others v. Austria*, note 6, para. 51.
[35] See *Janowski v. Poland*, 21 January 1999, Application No. 25716/94, para. 33. See also *Thorgeir Thorgeirson v. Iceland*, note 11.
[36] *Dalban v. Romania*, 28 September 1999, Application No. 28114/95.
[37] *Thoma v. Luxembourg* , 29 March 2001, Application No. 38432/97, para. 47.

III.4. Facts vs. Opinions

The Court has made it clear that defamation law needs to distinguish between statements of fact and value judgments. This is because the existence of facts can be demonstrated, whereas the truth of a value judgment is not susceptible of proof. It follows that: "The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right to [freedom of expression]."[38]

In a number of cases before the Court, domestic courts had wrongly treated allegedly defamatory publications as statements of fact. For example, in *Feldek v. Slovakia*, the Court disagreed that the use by the applicant of the phrase "fascist past" should be understood as stating the fact that a person had participated in activities propagating particular fascist ideals. It explained that the term was a wide one, capable of encompassing different notions as to its content and significance. One of them could be that a person participated as a member in a fascist organisation; on this basis, the value-judgment that that person had a 'fascist past' could fairly be made.[39]

However, the freedom to express value judgements is not entirely unfettered under the jurisprudence of the Court, which has noted: "Even where the statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive."[40] In practice, however, the Court allows a considerable degree of leeway to statements of opinion. For example, in the case of *Dichand and others v. Austria*, the applicants had published an article alleging that a national politician who also practiced as a lawyer had proposed legislation in parliament in order to serve the needs of his private clients. The applicants were convicted of defamation by the domestic court and appealed to the European Court. The Court first stressed that the statement constituted a value judgment rather than a factual allegation. Furthermore, whilst acknowledging the absence of hard proof for the allegations, as well as the strong language used, the Court stressed that the discussion was on a matter of important public concern.[41] It recalled that:

> It is true that the applications, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that the right to freedom of expression also protects information or ideas that offend, shock, or disturb.[42]

In the case of *Unabhängige Initiative Informationsvielfalt v. Austria*, the Court expressed its concern that domestic courts had required journalists to supply factual proof beyond a reasonable doubt to support value judgements expressed by them, stating: "The degree of precision for establishing the well-foundedness of a criminal charge by a competent court

[38] *Dichand and others v. Austria*, note 6, para. 42.
[39] 12 July 2001, Application No. 29032/95.
[40] *Dichand and others v. Austria*, note 6, para. 43.
[41] *Ibid.*, para. 51.
[42] *Ibid.*, para. 52.

can hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern, in particular when expressing his opinion in the form of any value judgment."[43] In a recent decision, the Court explained that value judgments need not be accompanied by the facts upon which the judgement is based, holding: "The necessity of a link between a value judgment and its supporting facts may vary from case to case in accordance with the specific circumstances."[44] For example, where certain facts were widely known among the general public there was no need for a journalist basing an opinion on those facts to refer to them explicitly. Furthermore, value judgements may be based on rumours or stories circulating among the general public; they need not be supported by hard, scientific facts.[45]

Where a statement is found to be a statement of fact, a defendant must be allowed to present relevant evidence before the domestic courts.[46] This was at issue in the case of *Castells v. Spain*, where the domestic courts had refused to permit the applicant to try to establish the truth of his claim that the government had intentionally failed to investigate the murders of people accused of belonging to a separatist movement. While the Court recognized that the article included statements of opinion as well as fact, and that some of the accusations were serious, it attached decisive importance to the fact that the domestic courts had precluded him from offering any evidence as to the truth of his assertions. The Court ruled that the article had to be considered as a whole, and that the applicant should have been allowed to try to establish the truth of his factual assertions as well as his good faith.[47]

III.5. Defences: 1. Burden of Proof

ARTICLE 19's *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations*[48] is an authoritative collection of principles on defamation law endorsed by the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.[49] Principle 7(b) of *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." This re-states the general principle developed by constitutional courts, including the US Supreme Court, which has made it clear that placing the burden of proof with the defendant will have a significant chilling effect on the right to freedom of expression. In delivering the judgment of that court in the seminal case of *New York Times v. Sullivan*, Brennan J commented:

[43] 26 February 2002, Application No. 28525/95, para. 46.
[44] *Feldek v. Slovakia*, note 39, para. 86.
[45] *ThorgeirThorgeirson v. Iceland*, note 11.
[46] *Castells v. Spain*, note 15, para. 49.
[47] *Ibid.*
[48] (London: ARTICLE 19, 2000).
[49] Joint Declaration of 30 November 2000. See also, UN Doc. E/CN.4/2001/64, 13 February 2001, para. 48.

> Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defence as an adequate safeguard have recognised the difficulties of adducing legal proof that the alleged libel was true in all its factual particulars. ... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'.[50]

The European Court has agreed that, particularly where a journalist is reporting from reliable sources in accordance with professional standards, it will be unfair to require them to prove the truth of their statements.[51] This is particularly so where the publication concerns a matter of public concern. In the case of *Dalban v. Romania*, the Court stated: "It would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth."[52] However, the Court has required that when they make serious allegations, journalists should make a real effort to verify their truth, in accordance with general professional standards.[53]

III.6. Defences: 2. 'Reasonable Publication'

It is now becoming widely recognised that in certain circumstances even false, defamatory statements of fact should be protected against liability. A rule of strict liability for all false statements is particularly unfair for the media, which are under a duty to satisfy the public's right to know where matters of public concern are involved and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. The nature of the news media is such that stories have to be published when they are topical, particularly when they concern matters of public interest. In response to a submission to this effect by ARTICLE 19, the Court has held:

> [N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[54]

A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably in publishing a statement on a matter of public concern, while allowing plaintiffs to sue those who have not, what might be termed the defence of reasonable publication. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test. This has been confirmed by the Court, which has stated that the press should be allowed to publish stories that are in the public interest subject to the proviso that "they are acting in good faith in

[50] *New York Times Co. v. Sullivan*, 376 US 254 (1964), p. 279.
[51] See, for example, *Colombani v. France*, 25 June 2002, Application No. 51279/99, para. 65.
[52] *Dalban v. Romania*, 28 September 1999, Application No. 28114/95, para. 49.
[53] *McVicar v. the United Kingdom*, 7 May 2002, 46311/99, paras. 84-86 and *Bladet Tromsø and Stensaas v. Norway*, note 8, para 66.
[54] *The Sunday Times v. the United Kingdom (No. 2)*, 24 October 1991, Application No. 13166/87, para. 51.

order to provide accurate and reliable information in accordance with the ethics of journalism."[55]

Applying these principles in the case of *Tromsø and Stensaas v. Norway*, the European Court of Human Rights placed great emphasis on the fact that the statements made in that case concerned a matter of great public interest which the plaintiff newspaper had covered overall in a balanced manner.[56] This follows the line taken by constitutional courts of various countries which have recognised the principle that, where the press have acted in accordance with professional guidelines, they should benefit from a defence of reasonable publication. The House of Lords in the United Kingdom, for example, has held that a number of factors are relevant in deciding whether a defendant in a defamation case should benefit from a defence of 'reasonable publication', including the nature of the allegations, the steps taken to verify the information, the urgency of the matter and whether comment was sought from the plaintiff.[57] Similarly, the Supreme Court of Appeal of South Africa has held:

> In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion, and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information.[58]

In a related development, the Court has recently held that journalists should not automatically be held liable for repeating a potentially libellous allegation published by others. In the case of *Thoma v. Luxembourg*, 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 for libel but the European Court held that the conviction constituted a violation of his right to freedom of expression: "[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."[59] The Court also 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.[60]

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[55] *Bladet Tromsø and Stensaas v. Norway*, note 8, para 65.
[56] *Ibid.*
[57] *Reynolds v. Times Newspapers Ltd and others*, [1999] 4 All ER 609, p. 625.
[58] *National Media Ltd and Others v. Bogoshi*, [1999] LRC 616, p. 631.
[59] *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 62.
[60] *Ibid.*, para. 64.

III.7. Exemptions from Liability

Certain statements should never attract liability for defamation. This applies, for example, to statements made in legislative assemblies or in the course of judicial proceedings, or reports of official statements or reports quoting from the findings of official reports.

With regard to statements made in legislative assemblies, the Court has recognised that, "[the] aim of the immunity accorded to members of the … legislature [is] to allow such members to engage in meaningful debate and to represent their constituents on matters of public interest without having to restrict their observations or edit their opinions because of the danger of being amenable to a court or other such authority."[61] Thus, because freedom of parliamentary debate is the every essence of modern-day democracies, statements made in Parliament may justifiably attract absolute immunity.[62]

In the case of *Nikula v. Finland*, the Court held that statements made in the course of judicial proceedings should enjoy a similar high degree of protection.[63] Statements made in court by lawyers should receive protection in particular, since they play an important role as "intermediaries between the public and the courts"[64] and they must be free to defend their client to the best of their ability. The Court has explained:

> [T]he threat of an ex post facto review of counsel's criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential 'chilling effect' of even a relatively light criminal sanction or an obligation to pay compensation for harm suffered or costs incurred.[65]

The media and others should also be free to report, accurately and in good faith, official findings or official statements.[66] This is based on the public interest in ensuring wide dissemination of official findings and the status of such findings. In *Tromsø and Stensaas v. Norway*, the European Court of Human Rights held:

> [T]he 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.[67]

In the recent case of *Colombani and others v. France*, the European Court of Human Rights extended this principle, holding that the applicants were entitled to rely on the

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[61] *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97, quoting with approval the admissibility decision of the European Commission of Human Rights in *Young v. Ireland*, 17 January 1996, Application No. 25646/94.
[62] See also *Jerusalem v. Austria*, 27 February 2001, Application No. 26958/95, para. 36.
[63] *Nikula v. Finland*, 21 March 2002, Application No. 31611/96, para. 55.
[64] *Ibid*., para. 45.
[65] *Ibid*., para. 54.
[66] *Defining Defamation*, note 48, Principle 11.
[67] *Bladet Tromso and Stensaas v. Norway*, note 8, para. 72.

contents of a confidential report which had been leaked to them by sources inside a European Union agency, even though they themselves had not investigated the facts.[68]

III.8. Sanctions

It is clear that unduly harsh sanctions, even for statements found to be defamatory, breach the guarantee of freedom of expression. The Court has clearly stated that "the award of damages and the injunction clearly constitute an interference with the exercise [of the] right to freedom of expression."[69] 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.[70]

One aspect of this requirement 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.[71] 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.

III.9. Proceedings

The conduct of defamation proceedings can raise serious questions under Article 6 of the Convention, which guarantees fairness in both civil and in criminal proceedings. This means that journalists will need to be given adequate time to prepare their defence, that proceedings should be open to the public and that, in criminal cases, a defendant must be presumed innocent until proven guilty, for example. One particular issue that has arisen before the Court in relation to civil defamation proceedings is the availability – or lack thereof – of legal aid. Another important issue is protection during proceedings of a journalist's confidential sources.

III.9.1 Legal aid

In the case of *McVicar v. the UK*,[72] the applicant complained that the limited legal assistance he had received in defending himself in a defamation case had effectively denied him a fair trial. In its assessment of the complaint, the Court held that despite the absence of an explicit guarantee in Article 6 for legal aid in civil cases,

> Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court, either

[68] *Colombani v. France*, note 51.
[69] *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 35.
[70] *Ibid.*, para. 49.
[71] See, for example, *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).
[72] *McVicar v. the United Kingdom*, note 18.

> because legal representation is rendered compulsory, or by reason of the complexity of the procedure or of the case.[73]

However,

> Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants a right of effective access to court. The question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer.[74]

In that case, the Court considered that the defendant was a well educated journalist, that the issues at trial had not been particularly complex and that, up to the commencement of the actual proceedings, the applicant did have legal representation.[75] Therefore, it did not find a violation of the right to a fair trial. However, it is implicit in the Court's findings that had the trial been more complex or had the applicant not enjoyed legal assistance before the trial, it may have found a violation.[76]

III.9.2 Confidentiality of sources

The Court has recognised, as a matter of fundamental principle, that defendants in defamation cases should not suffer any detriment simply for failing to reveal confidential sources of information.[77] In the standard-setting of case of *Goodwin v. the United Kingdom*, it stated:

> Protection of journalistic sources is one of the basic conditions for press freedom as is reflected in the laws and professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potential chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest.[78]

The importance of this principle in defamation cases has been confirmed in a recent Recommendation by the Committee of Ministers of the Council of Europe, which specifies: "In legal proceedings against a journalist on grounds of an alleged infringement

[73] *Ibid*, para. 47.
[74] *Ibid.*, para. 48.
[75] *Ibid.*, para. 60.
[76] An important case on the same issue is currently pending before the Court. See *Steel and Morris v. the United Kingdom*, partial admissibility decision of 22 October 2002, Application No. 68416/01.
[77] *De Haes and Gijsels v. Belgium*, 24 February 1997, Application No. 19983/92, paras. 55 and 58.
[78] *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90, para. 39.

of the honour or reputation of a person, authorities … may not require for that purpose the disclosure of information identifying a source by the journalist."[79]

Thus, while there may be cases where mandatory disclosure of confidential sources is justified, for example for the defence of a person accused of a criminal offence, this can never be justified in the context of a defamation case.

[79] Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information, adopted on 8 March 2000, Principle 4.