Putting Expression Behind Bars:

Criminal Defamation and Freedom of Expression

Background Paper for EU NGO Forum

London

8-9 December 2005

Introduction

Defamation laws serve an important social purpose, namely the protection of reputations or, put differently, the prevention of unwarranted allegations that lower the esteem in which people are held in society. For this interest to be engaged, a statement tending to have this effect must be printed, broadcast, spoken or otherwise communicated to others. As a result, defamation laws necessarily represent an interference with the right to freedom of expression. In many cases, this interference will be justified. At the same time, international courts have often found that national laws in this area are not justified, in particular because they fail to promote an appropriate balance between the need to protect reputations and the fundamental right to freedom of expression.

Defamation laws may fail to strike an appropriate balance between freedom of expression and reputations for a number of reasons. In some countries, defamation laws go beyond the legitimate purpose of protecting individual reputations, broadly prohibiting criticism of heads of State, foreign governments, the flag and/or State symbols. Officials and other public figures are naturally tempted to abuse defamation laws to silence their critics and, in some countries, they have effectively muzzled debate and critical voices by invoking harsh defamation laws. In others, the technicalities of litigation and the cost of defending defamation actions serve to chill free discussion on matters of public interest. Traditional defences may offer inadequate protection for free speech in a democracy, while excessively heavy sanctions may inhibit open political debate.

In this paper, we argue that criminal defamation laws inherently fail to strike an appropriate balance between reputations and freedom of expression. Criminal defamation laws are a major obstacle to freedom of expression in many parts of the world. The key problem with criminal defamation is that a breach may lead to a custodial sentence or another form of severe criminal sanction, such as a suspension of the right to practise journalism. The stigma of a criminal conviction can harm a journalist's career long after the penalty has formally been discharged. The threat of such sanctions casts a wide shadow as journalists and other steer well clear of the prohibited zone to avoid any risk of conviction. This can lead to serious problems of self-censorship, stifling legitimate criticism of government and public officials.

This paper examines international standards relating to freedom of expression generally and then in the particular context of defamation laws, focusing mainly on the jurisprudence of the European Court of Human Rights. These standards, as well as comparative standards in this area, have been encapsulated in the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* (Defining Defamation) (see Annex One).[1] These principles have attained significant international endorsement, including 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.[2]

The paper goes on to outline ARTICLE 19's key concerns with criminal defamation laws, arguing that they often fail to serve a legitimate aim, that they are disproportionate to the harm caused and that they are not necessary as civil defamation laws offer adequate redress for harm to reputation.

---

[1] ARTICLE 19, London, 2000. Available at: http://www.article19.org/publications/law/standard-setting.html.

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

International Standards on Freedom of Expression

Global Standards

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. Article 19 of the *Universal Declaration on Human Rights* (UDHR),[3] a United Nations General Assembly resolution, guarantees the right to freedom of expression in the following terms:

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

The *International Covenant on Civil and Political Rights* (ICCPR)[4] elaborates on many rights included in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR.

Freedom of expression is also protected in all three regional human rights treaties, at Article 10 of the *European Convention on Human Rights* (ECHR),[5] at Article 13 of the *American Convention on Human Rights*[6] and at Article 9 of the *African Charter on Human and Peoples' Rights*.[7]

Freedom of expression is a key human right. Not only is it a fundamental human value in and of itself, freedom of expression also provides a key underpinning for democracy – there can be no democracy if people are not free to say what they want and do not receive sufficient information to cast an informed vote – and it is key to enforcing other rights. This has been recognised by international courts and bodies worldwide. It is worth recalling that at its very first session, in 1946, the UN General Assembly adopted Resolution 59(I) which states: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."[8]

This has been echoed by other courts and bodies. For example, the UN Human Rights Committee has said:

> The right to freedom of expression is of paramount importance in any democratic society.[9]

International law permits limited restrictions on the right to freedom of expression in order to protect various interests, including reputation. The parameters of such restrictions are provided for in Article 19 of the ICCPR, which states:

---

[3] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[4] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[5] Adopted 4 November 1950, E.T.S. No. 5, in force 3 September 1953.
[6] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, in force 18 July 1978.
[7] Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), in force 21 October 1986.
[8] 14 December 1946. "Freedom of information" is referred to in the broad sense of the free circulation of information and ideas.
[9] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Any restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by the Human Rights Committee,[10] the body of independent experts responsible for overseeing States' implementation of the ICCPR, requires that any restriction must be:

(1) provided by law;
(2) for the purpose of safeguarding a legitimate interest (including, as noted, protecting the reputations of others); and
(3) necessary to secure this interest.

The first part of this test implies not only that the restriction is based in law, but also that the relevant law meets certain standards of clarity and accessibility. The law must be formulated with sufficient precision that it is possible to foresee in advance what is being prohibited.[11]

Article 19(3) of the ICCPR provides an exclusive list of aims in pursuit of which the exercise of the right to freedom of expression may be restricted for purposes of the second part of this test.

The necessity requirement set out in the third part of the test implies, in particular, that the law should restrict freedom of expression as little as possible, should be designed carefully to achieve the objective in question and should not be arbitrary, unfair or based on irrational considerations. Vague or broadly defined restrictions, even if they satisfy the "provided by law" part of the test, are unacceptable because, at least potentially, they go beyond what is strictly required to protect the legitimate interest. Furthermore, restrictions on freedom of expression, must be proportionate to the harm done and not go beyond what is strictly necessary in all of the circumstances to protect reputation.

The European Convention on Human Rights

Freedom of expression is protected in Article 10(1) of the European Convention:

> 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.

The European Court of Human Rights has recognised the vital role of freedom of expression as an underpinning of democracy:

> 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.[12]

[10] See, for example, *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.
[11] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para.49.
[12] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

The Court has also made it clear that the right to freedom of expression protects offensive and insulting speech, stating repeatedly:

> [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'.[13]

It has similarly emphasised: "Journalistic freedom … covers possible recourse to a degree of exaggeration, or even provocation."[14] This means, for example, that the media are free to use hyperbole, satire or colourful imagery to convey a particular message.[15] 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.[16] 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,[17] while in the *Lingens* case, the Court stressed that the circumstances in which the impugned statements had been made "must not be overlooked."[18]

The Court attaches particular value to political debate and deliberation on other matters of public importance. Any statements made in the conduct of such debate can be restricted only when this is absolutely necessary. As the Court has frequently noted: "There is little scope … for restrictions on political speech or debates on questions of public interest."[19]

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"[20] and has stated:

> 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.[21]

Closely related, and as the Court has stressed in nearly every case before it concerning the media:

> The press plays an essential role 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

[13] *Ibid.*, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.
[14] *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.
[15] See *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras 50-54.
[16] 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.
[17] *Oberschlick v. Austria (No. 2)*, 1 July 1997, Application No. 20834/92, para. 34.
[18] *Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407. para. 43.
[19] See, for example, *Dichand and others v. Austria*, note 14, para. 38.
[20] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[21] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

> 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". [references omitted][22]

While the right to freedom of expression is not absolute, any limitations must remain within strictly defined parameters. Article 10(2) 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.

This is quite similar in practice to the three-part test for restrictions under the ICCPR.

Defamation and the ECHR

The European Court of Human Rights has decided a large number of cases involving defamation. These cases establish a number of principles on freedom of expression and defamation, which are outlined belwo. These principles apply *a fortiori* to criminal defamation laws, even though some of these cases are based on civil defamation laws, given the more intrusive nature of criminal defamation as a restriction on freedom of expression.

It is well-established that defamation liability constitutes an interference with freedom of expression, even when no award for damages is made.[23] As a result, defamation laws must remain within the parameters set by the Convention and, in particular, must meet the three-part test established under Article 10(2) of the Convention. In considering these cases, the Court strictly follows the structure of Article 10(2).

The requirement that the restriction on the ground of defamation be prescribed by law is usually found by the Court to be easily met,[24] even though some such laws are phrased, and interpreted by the judicial organs, extremely loosely so that it is not possible to determine in advance, even with the assistance of a legal expert, what, exactly, is prohibited.

Legitimate Aim

As noted 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.[25] In one case, the Court also 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

[22] See, for example, *Dichand and others v. Austria*, note 14, para. 40.
[23] See, for example, *McVicar v. the United Kingdom*, 7 May 2002, Application No. 46311/99.
[24] Overly broad and/or vaguely defined offences should not, in principle, be considered to be prescribed by law but in practice the Court has been very reluctant to find a breach on this basis alone in defamation cases.
[25] See, for example, *Lingens v. Austria*, note 18, para. 36 and *Schwabe v. Austria*, 28 August 1992, Application No. 13704/88, para. 25.

"prevention of disorder" as a legitimate aim.[26]

ARTICLE 19 considers that the European Court has devoted insufficient attention to the question of legitimate aim. Although there is little doubt that defamation laws in almost all cases do in general provide protection for reputation, in many actual cases, we question whether this is the real aim of the defamation action. Rather, it may be to prevent criticism of government, to undermine an opposition party or to serve some other aim unrelated to reputation. Given that the Court's mandate is to consider the facts of the case before it, rather than the law in general, it should look carefully at the facts to determine whether the real aim of the case was to vindicate reputation.

Many defamation laws aim to protect honour and dignity but, depending on how this is interpreted, it may be rather different than reputation, which focuses on external perceptions rather than internal feelings. Furthermore, laws that penalise 'insult' or 'giving offence' without linking this to the reputation of the offended party should fail the 'legitimate aim' test.

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:

> 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.[27]

The Court has affirmed this principle in several cases and it has become a fundamental tenet of its caselaw.[28] 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."[29]

In statements on matters of public interest, the principle applies to public officials and to public servants as well as to politicians.[30] 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 in the public interest. In the later case of *Dalban v. Romania*, the Court resolutely found a violation of freedom of expression where a

[26] *Castells v. Spain*, note 21, paras. 38-39.
[27] *Lingens v. Austria*, note 18, para. 42.
[28] 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.
[29] *Dichand and others v. Austria*, note 14, para. 51.
[30] See *Janowski v. Poland*, 21 January 1999, Application No. 25716/94, para. 33. See also *Thorgeir Thorgeirson v. Iceland*, note 20.

journalist had been conviction for defaming the chief executive of a State-owned agricultural company.[31] 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.[32]

Indeed, the Court has rejected any distinction between political debate and other matters of public interest, stating that there is "no warrant" for such distinction.[33] 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 relates to a matter of public interest.[34]

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]."[35]

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.[36]

The Defence of '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 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.[37]

---

[31] *Dalban v. Romania*, 28 September 1999, Application No. 28114/95.
[32] *Thoma v. Luxembourg* , 29 March 2001, Application No. 38432/97, para. 47.
[33] *Thorgeir Thorgeirson v. Iceland*, note 20, para. 64.
[34] See, for example, *Bladet Tromsø and Stensaas v. Norway*, note 16.
[35] *Dichand and others v. Austria*, note 14, para. 42.
[36] 12 July 2001, Application No. 29032/95.
[37] *The Sunday Times v. the United Kingdom (No. 2)*, 24 October 1991, Application No. 13166/87, para. 51.

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 European 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 order to provide accurate and reliable information in accordance with the ethics of journalism."[38]

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.[39]

Statements of Others

The European Court has also 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."[40] 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.[41]

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 European 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."[42] Thus, because freedom of

---

[38] *Bladet Tromsø and Stensaas v. Norway*, note 16, para 65.
[39] *Ibid*.
[40] *Thoma v. Luxembourg*, note 32, para. 62.
[41] *Ibid*., para. 64.
[42] *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.

parliamentary debate is the every essence of modern-day democracies, statements made in Parliament may justifiably attract absolute immunity.[43]

In the case of *Nikula v. Finland*, the Court held that statements made in the course of judicial proceedings should enjoy a similarly high degree of protection.[44] 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"[45] and they must be free to defend their client to the best of their ability. The Court 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.[46]

Sanctions

It is clear that unduly harsh sanctions, even for statements found to be defamatory, breach the guarantee of freedom of expression. In the case of *Tolstoy Miloslavsky v. the United Kingdom*, the European Court of Human Rights stated that "the award of damages and the injunction clearly constitute an interference with the exercise [of the] right to freedom of expression."[47] 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.[48]

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

> Damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others, taking into consideration any possible effective and adequate voluntary remedies….[49]

This is clearly of the greatest relevance to criminal defamation.

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.[50] 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.

---

[43] See also *Jerusalem v. Austria*, 27 February 2001, Application No. 26958/95, para. 36.
[44] *Nikula v. Finland*, 21 March 2002, Application No. 31611/96, para. 55.
[45] *Ibid*., para. 45.
[46] *Ibid*., para. 54.
[47] 13 July 1995, Application No. 18139/91, para. 35.
[48] *Ibid*., para. 49.
[49] Adopted 12 February 2004.
[50] See, for example, *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).

ARTICLE 19's Key Concerns with Criminal Defamation

The criminalisation of a particular activity implies a clear State interest in controlling the activity and imparts a certain social stigma to it. 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. Criminal defamation laws in many countries have either fallen into disuse or their use has come under heavy criticism. In *Castells v. Spain*, the European Court of Human Rights 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.[51]

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 of a "chilling effect" remains, since the severe nature of these sanctions means that they cast a long shadow. As noted above, 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. 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.[52]

A number of authoritative statements have been made by various international officials to the effect that criminal defamation laws and penalties breach the right to freedom of expression. The UN Special Rapporteur on Freedom of Opinion and Expression has reiterated this on numerous occasions. 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.[53]

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.[54] Every year, the UN Commission on Human Rights, in its resolution on freedom of expression, notes its concern with "abuse of legal provisions on defamation and criminal libel".[55]

The three special international mandates for promoting freedom of expression – the UN

---

[51] *Castells v. Spain*, note 21, para. 46.
[52] *Lingens v. Austria*, note 18.
[53] *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.
[54] 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.
[55] See, for example, Resolution 2005/38, 19 April 2005, para. 3(a).

Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – have also taken this issue up jointly. In their 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.[56]

Similarly, the UNESCO sponsored *Declaration of Sana'a* declared, "Disputes involving the media and/or the media professionals in the exercise of their profession…should be tried under civil and not criminal codes and procedures."[57]

The UN Human Rights Committee has repeatedly expressed its concern about the use of custodial sanctions for defamation.[58] The Committee has often commented on criminal defamation laws, welcoming their abolition where this has occurred,[59] calling for "review and reform [of] laws relating to criminal defamation,"[60] and expressing serious concerns about the potential for abuse of criminal defamation laws, particularly where expression on matters of public concern is at stake.[61]

So far, international courts have not gone so far as to rule out criminal defamation *per se*, and the European Court has implicitly approved it by failing find a breach of the right to freedom of expression in some criminal defamation cases. However, in *Castells*, 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."[62] It is significant that the Court approved the application of criminal measures only as a means of maintaining public order, and not as a means of protecting reputations.

Furthermore, two recent cases decided by the Inter-American Court of Human Rights, both of which resulted in a finding of a breach of the right to freedom of expression, reflect the increasingly suspicious stance of international courts towards this form of restriction on freedom of expression.[63]

---

[56] Joint Declaration of 10 December 2002.

[57] *Declaration of Sana'a*, 11 January 1996, endorsed by the General Conference by Resolution 34, adopted at the 29th session, 12 November 1997.

[58] 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 and Slovakia (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999), Azerbaijan, Guatemala and Croatia (2001), and Serbia and Montenegro (2004).

[59] For example in the case of Sri Lanka. See Concluding Observations on Sri Lanka, 1 December 2003, CCPR/CO/79/LKA, para. 17.

[60] For example, in its Concluding Observations on Norway, 1 November 1999, CCPR/C/79/Add.112, para. 14.

[61] For example, in relation to Kyrgyzstan: "[The Committee] is especially concerned about the use of libel suits against journalists who criticize the Government. Such harassment is incompatible with the freedom of expression…. The State party should ensure that journalists can perform their profession without fear of being subjected to prosecution and libel suits for criticizing government policy or government officials. Journalists and human rights activists subjected to imprisonment in contravention of articles 9 and 19 of the Covenant should be released, rehabilitated and given compensation pursuant to articles 9.5 and 14.6 of the Covenant." Concluding Observations on Kyrgyzstan, 24 July 2000, CCPR/C/69/KGZ, para. 20. See also the Concluding Observations referred to above, note 58.

[62] *Castells v. Spain,* note 21, para 46.

[63] *Herrera-Ulloa v. Costa Rica*, 2 July 2004, Series C, No. 107 and *Ricardo Canese v. Paraguay*, 31 August

1. Criminal defamation laws frequently fail to pursue a legitimate aim

As noted above, defamation laws are frequently abused to serve aims other than the protection of the reputation of the plaintiff. This is a particular problem in the context of criminal defamation laws, given that in many countries these may be enforced by official rather than private prosecutions. While this may not, as a matter of legal argument, be sufficient reason to hold that these laws, *per se*, represent a breach of the right to freedom of expression – after all, practically any law can be abused, particularly where judicial oversight is weak – it is, nevertheless, a good argument for doing away with these laws.

Also as noted above, laws which provide special protection for the reputations of public officials cannot be justified; in fact, these individuals should be required to tolerate greater criticism than ordinary citizens. Again, it is often criminal defamation laws which provide for special protection for officials. These laws may favour public officials by substantive or procedural rules, including State assistance in bringing or prosecuting cases, or because they provide for heavier penalties for defamation of public officials than for private individuals.

2. Criminal defamation laws are not necessary because civil laws provide adequate protection for reputation

It is well established that the guarantee of freedom of expression requires States to use the least restrictive effective remedy to secure the legitimate aim sought. This flows directly from the need for any restrictions to be necessary; if a less restrictive remedy is effective, the more restrictive one cannot be necessary. In its judgment in *Castells v. Spain*, the European Court struck down a criminal defamation provision, stressing that restraint should be used in resorting to the criminal law, "*particularly where other means are available* for replying to the unjustified attacks and criticisms of its adversaries or the media" (emphasis added).[64] The Inter-American Court of Human Rights has put the matter even more clearly:

> [I]f there are various options to achieve [a compelling governmental interest], that which least restricts the right protected must be selected.[65]

As a result, to the extent that civil defamation laws are effective in appropriately redressing harm to reputation, there is no justification for criminal defamation laws. Perhaps the best evidence of the sufficiency of civil defamation laws for this task comes from the growing number of jurisdictions where they are either the preferred means of redress or growing in popularity, even though criminal defamation laws are still on the books. This is the case, for example, in many European countries, including Austria and the Netherlands. In other countries, criminal defamation laws have fallen into virtual desuetude. There has been no successful attempt to bring a criminal prosecution for defamation in the United Kingdom for many years and no private actor has even attempted to do so for over 25 years.[66]

A number of countries have recently completely abolished criminal defamation laws. These

---

2004, Series C, No. 111.

[64] *Castells v. Spain,* note 21, para 46.

[65] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 46.

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

include Bosnia-Herzegovina (2002), Georgia (2004), Ghana (2001), Sri Lanka (2002) and the Ukraine (2001). These countries have not experienced any noticeable increase in defamatory statements, either of a qualitative or quantitative nature, since they abolished criminal defamation.

In the United States, criminal defamation laws have never been upheld by the Supreme Court.[67] Other US courts have also struck down criminal defamation laws and they have been repealed in some States, including California and New York.

It may be noted that civil actions are, in any case, better equipped to remedy the harm of defamation than criminal actions, because they are designed to remedy the injury to the victim's reputation by compensation in terms of damages. In contrast, criminal sanctions do not for the most part aim to remedy the actual harm caused to the victim but, rather, to punish the defendant.

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

Another way in which criminal defamation laws do not represent the least restrictive approach is that, in many countries, they shift the burden of proof onto a criminal defendant by requiring the defendant to prove the truth of his or her statement, the "reasonableness" of his or her opinion, or that the publication was for the public benefit.

Addressing this point in the English case of *Gleaves v. Deakin,* Lord Diplock expressed the view that the offence of criminal libel violated Article 10 of the European Convention on Human Rights. Indeed, he said it turned Article 10 "on its head" because:

> Under our criminal law a person's freedom of expression, wherever it involves exposing seriously discreditable conduct of others, is to be repressed by public authority unless he can convince a jury ex post facto that the particular exercise of the freedom was for the public benefit; whereas article 10 requires that freedom of expression shall be untrammelled by public authority except where its interference to repress a particular exercise of the freedom is necessary for the protection of public interest. [68]

3. Criminal defamation laws are not necessary because the sanctions they envisage are disproportionate

As noted above, disproportionate sanctions for defamation, of themselves, represent a breach of the right to freedom of expression. Criminal sanctions for defamation fall foul of this rule because they are unduly harsh, taking into account the harm caused. The threat of a criminal record, a penal sentence or even a suspended sentence all impose a great and unnecessary burden on a potential critic. There may also be penalties associated with having a criminal record. In the case of Mr. Herrera Ulloa, whose conviction by the Costa Rican courts for criminal defamation was found to breach his right to freedom of expression by the Inter-

[67] They have been struck down on at least two occasions. See *Garrison v. Louisiana*, 379 U.S. 64 (1964) and *Ashton v. Kentucky*, 384 US 195 (1966).
[68] Gleaves v. Deakin, note 66, 483.

American Court of Human Rights,[69] these included ineligibility for probation upon further conviction for criminal defamation, and being barred from adopting a child, holding a position in the civil service or practising a profession.

The European Court of Human Rights has upheld criminal defamation convictions on occasion but, in these cases, it has been at pains to point out that the sanctions were modest and hence met the requirement of proportionality. For example, in *Tammer v. Estonia*, the Court specifically noted, "the limited amount of the fine imposed" in upholding the conviction; the total fine in that case was ten times the daily minimum wage.[70]

The Court's jurisdiction is limited to assessing the facts of the case before it so that, if a sanction is limited, it must recognise that. However, a more general assessment of criminal defamation laws leads to the conclusion that the possibility of criminal sanctions exerts a serious chilling effect on freedom of expression and cannot be justified. In its *Report on the Compatibility of "Desacato" Laws With the American Convention on Human Rights*, the Inter-American Commission on Human Rights noted the particular problem with sanctions of a criminal nature, stating:

> The fear of criminal sanctions necessarily discourages people from voicing their opinions on issues of public concern…. [71]

This has also been echoed by the UN Human Rights Committee, which has made it clear that criminal convictions for defamation tend to be disproportionate to any damage caused, stating that, "the severity of the sanctions imposed on the author [a prison sentence and a fine] cannot be considered as a proportionate measure to protect … the honour and the reputation of the President …".[72]

Conclusion: Abolishing Criminal Defamation Laws

In many countries, criminal defamation laws are abused by the powerful to limit criticism and to stifle public debate. ARTICLE 19 considers that the threat of harsh criminal sanctions, especially imprisonment, exerts a profound chilling effect on freedom of expression. As the jurisprudence and decisions of the UN and regional human rights bodies testify, 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. ARTICLE 19 therefore calls on States to repeal such laws.

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 international standards.

Recommendations:

(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

[69] Note 63.
[70] 6 February 2001, para.69. See also *Constantinescu v. Romania*, 21 March 2000.
[71] Part IV(B).
[72] *Morais v. Angola*, 18 April 2005, Communication No. 1128/2002, para. 6.8 (UN Human Rights Committee).

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.

Annex One

Defining Defamation: Principles on Freedom of Expression and Protection of Reputations

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[73] 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.

[73] 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.[74]

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.

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;

[74] See Principle 2.

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.

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.

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:

v. 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;

vi. 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;

vii. 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;

viii. 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.

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.

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.

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.[75]

(b) In cases involving statements on matters of public concern,[76] 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.

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.

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.

---

[75] See also Principle 9 on Reasonable Publication.

[76] 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 10: Expressions of Opinion

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

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

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

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

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.

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.

SECTION 4 Remedies

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.

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.

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.

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.

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.