
Defining Defamation

Principles on Freedom of Expression and
Protection of Reputation



INTERNATIONAL STANDARDS SERIES

Defining Defamation

**Principles on Freedom of Expression and
Protection of Reputation**

ARTICLE 19

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ISBN 1 902598 25 3

July 2000

CONTENTS

Introduction	1
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Preamble	2
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SECTION 1 GENERAL PRINCIPLES

Principle 1. Freedom of Opinion, Expression and Information	3
--	----------

Principle 1.1 Prescribed by Law

Principle 1.2 Protection of a Legitimate Reputation Interest

Principle 1.3 Necessary in a Democratic Society

Principle 2. Legitimate Purpose of Defamation Laws	5
---	----------

Principle 3. Defamation of Public Bodies	6
---	----------

SECTION 2 CRIMINAL DEFAMATION

Principle 4. Criminal Defamation	7
---	----------

SECTION 3 CIVIL DEFAMATION LAWS

Principle 5. Procedure	9
-------------------------------------	----------

Principle 6. Protection of Sources	9
---	----------

Principle 7. Proof of Truth	10
--	-----------

Principle 8. Public Officials	11
Principle 9. Reasonable Publication	12
Principle 10. Expressions of Opinion	12
Principle 11. Exemptions from Liability	13
Principle 12. Scope of Liability	14

SECTION 4 REMEDIES

Principle 13. Role of Remedies	15
Principle 14. Non-Pecuniary Remedies	16
Principle 15. Pecuniary Awards	17
Principle 16. Interim Injunctions	17
Principle 17. Permanent Injunctions	18
Principle 18. Costs	18
Principle 19. Malicious Plaintiffs	19

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*.

Principles on Freedom of Expression and Protection of Reputation

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

Defining Defamation

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;

We⁵ recommend that national, regional and international bodies undertake appropriate action in their respective fields of competence to promote the widespread dissemination, acceptance and implementation of these Principles:

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.
- (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.

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.

Principles on Freedom of Expression and Protection of Reputation

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.

Principle 2: Legitimate Purpose of Defamation Laws

- (a) Defamation laws cannot be justified unless their genuine purpose and demonstrable

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.

Defining Defamation

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;

Principles on Freedom of Expression and Protection of Reputation

- 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.

Principles on Freedom of Expression and Protection of Reputation

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.

Defining Defamation

Comment on Principle 7 (continued....)

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

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

Principle 8: Public Officials

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

Comment on Principle 8

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

Principle 9: Reasonable Publication

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

Comment on Principle 9

An increasing number of jurisdictions are recognising a ‘reasonableness’ defence – or an analogous defence based on the ideas of ‘due diligence’ or ‘good faith’ – due to the harsh nature of the traditional rule in some jurisdictions according to which defendants are liable whenever they disseminate false statements, or statements which they cannot prove to be true. This traditional rule is particularly unfair for the media, which are under a duty to satisfy the public’s right to know and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably, while allowing plaintiffs to sue those who have not. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test.

Principle 10: Expressions of Opinion

- (a) No one should be liable under defamation law for the expression of an opinion.
- (b) An opinion is defined as a statement which either:
 - i. does not contain a factual connotation which could be proved to be false; or
 - ii. cannot reasonably be interpreted as stating actual facts given all the circumstances, including the language used (such as rhetoric, hyperbole, satire or jest).

Defining Defamation

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

Principles on Freedom of Expression and Protection of Reputation

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.

Principles on Freedom of Expression and Protection of Reputation

(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.

Defining Defamation

Comment on Principle 14 (continued....)

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

Principle 15: Pecuniary Awards

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

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

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

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

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

Principle 16: Interim Injunctions

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

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

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

Principles on Freedom of Expression and Protection of Reputation

- 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