THE HIGH LEVEL PANEL OF LEGAL EXPERTS ON MEDIA FREEDOM

The independent advisory body to the Media Freedom Coalition

International Bar Association Human Rights Institute

Insulting Speech in International Law

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Excerpt from *Freedom of Speech in International Law* (edited by Lord David Neuberger and Ms Amal Clooney, published by Oxford University Press).


INTERNATIONAL BAR ASSOCIATION
Human Rights Institute

This IBAHRI publication is an extracted chapter of Freedom of Speech in International Law, edited by Lord David Neuberger of Abbotsbury and Ms Amal Clooney and published by Oxford University Press in January 2024. The authors of this chapter are Professor Philippa Webb, Professor Dario Milo and Ms Rosana Garciandia . Ms Alice Gardoll is the Assistant Editor of the text. The full text can be purchased in hard copy or as an e-book **here**. All sources and references have been checked for accuracy as of 1 January 2022.

Freedom of Speech in International Law outlines the minimum protections for speech enshrined in international law, focusing on four types of laws that are being weaponized to silence the press and independent voices: laws regulating defamatory or insulting speech, laws regulating false speech, laws regulating hate speech and laws regulating national security. The book provides examples of where states are falling short and makes recommendations about how international standards should be interpreted, updated and enforced.

Recommendations are based on international legal standards that apply to states and that many social media companies have expressed adherence to. The recommendations have been endorsed by the High Level Panel of Legal Experts on Media Freedom, as well as judges and experts from across the world including the Committee to Protect Journalists, Reporters without Borders, the UN Special Rapporteur on Freedom of Expression and the International Bar Association's Human Rights Institute.

The International Bar Association's Human Rights Institute, serves as Secretariat to the High Level Panel of Legal Experts on Media Freedom, providing it with operational, technical, and legal assistance. The work of the High Level Panel, including the research contained in this report, has been supported by the Global Media Defence Fund, administered by UNESCO. At the time of publication, the Chair of the High Level Panel was Lord Neuberger of Abbotsbury and its Deputy Chairs were Professor Can Yeginsu and Ms. Catherine Amirfar.

Cover image: Thanathorn Juangroongruangkit, leader of the Future Forward Party flashes a three finger salute to his supporters as he leaves a police station after hearing a sedition complaint filed by the army in Bangkok, Thailand, April 6, 2019. REUTERS/Athit Perawongmetha

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Insulting Speech

Philippa Webb, Dario Milo and Rosana Garciandia

I. Introduction

Speech about a nation's leaders is at the heart of the democratic process, allowing voters to understand and challenge the actions of elected officials and other powerful figures such as judges, military officers or parliamentarians. [1] But there is a long history of stifling such speech by way of insult, defamation, sedition and similar laws.[2] The infamous Star Chamber in England began to enforce criminal libel laws at the beginning of the 17th century to control the press during the reigns of James I and Charles I and suppress political and religious discussion.[3] Colonial sedition laws used to silence critics and minority voices, including Gandhi in India and Mandela in South Africa, are still in steady use today.[4] Although insult and defamation laws may serve the legitimate function of protecting a person's reputation, in practice these laws can present a threat to freedom of the press and to anyone seeking to express their political views.

Today, more than 160 countries have criminal defamation laws on their books, and many of these—instead of providing extra protection for political speech—include aggravated punishment for speech that criticizes public officials, heads of state, state bodies and the State itself.[5] Civil defamation laws can also result in damages awards so high that they can bankrupt individuals, including journalists and media outlets.[6] And

[1] The authors would like to thank the following: King's College London students in the Media Freedom Seminar (2019–2021) (Olivia Arana Figueroa, Marah Badran, Ezgi Nur Baytok, Laura Bertagnoli, Cai Cherry, Gabriela Commateo, Phoebe Cook, Aya Dardari, Aleksandra Dobrzynska, Misha English-McBeth, Tara Fiechter, Chloe Gershon, Lili Grosser, Carla Hibbert, Celine Hou, Ines Infante, Tanya Joon, Karen Kandelman, Hanna Lehmonen, Isha Murugkar, Andreea M Popovici, Lucia Saborio, Angeliki Salichou, Isabelle Standen, Matthew Tang, Alessandra Thomas, Ilinca Tuvene); student researchers, Emma Montoya and Drishti Suri; expert commentators, including Catherine Anite, Galina Arapova, Matthew Caruana Galizia, Gabriela Cuevas, Karen Eltis, Peter Feeney, Gail Gove, Dougal Hurley, Peter Bartlett, Peter Jacobsen, David Kaye, Marko Milanovic, Michael O'Flaherty, Professor Kate O'Regan, Advocate Gilbert Marcus SC, Maria Ressa, Jennifer Robinson, Judge Robert Sack, Michael Tugendhat, Francoise Tulkens, Nik Williams, Can Yeginsu; the outstanding editorial team of Alice Gardoll, Perri Lyons, Patricia Peña-Drilon, and Nadine Reiner; and the editors Amal Clooney and Lord David Neuberger for their wise guidance and enduring commitment to this important project.

[2] This chapter uses the terms 'insult' and 'defamation' laws interchangeably, to describe the set of laws that impose criminal or civil liability on speech on the grounds that it harms the reputation, honour or dignity of the subject. This includes speech captured by *lèse-majesté* laws, which prohibit insult of the monarchy, as well as 'sedition', an archaic offence criminalizing the incitement of rebellion against the government: see CFJ, *TrialWatch Fairness Report: The Crime of Sedition: At the Crossroads of Reform and Resurgence* (April 2022). Some scholars have articulated a theoretical distinction between defamation and insult laws: 'that the former focus only on the false assertion of fact, while the latter are meant to penalize the truth', or that insult laws protect a person's feelings whereas defamation laws seek to protect their reputation. However, vague and poorly worded defamation laws mean that this distinction is often not clear in practice: see, e.g., E. Yanchukova, 'Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions' (2003) 41 *Columbia Journal of Transnational Law* 861, 863–864; see s. II. (State practice).

[3] V.V. Veeder, 'The History and Theory of the Law of Defamation' (1903) 3 *Columbia Law Review* 546, 567–568.

[4] See s. II.2.2.2. (India); B.T. Balule, 'Insult Laws: A Challenge to Media Freedom in the SADC's Fledgling Democracies?' (2008) 41(3) *The Comparative and International Law Journal of Southern Africa* 404, 408–409; J. Bahkle, 'Savarkar (1883–1966), Sedition and Surveillance: The Rule of Law in a Colonial Situation' (2010) 35 *Social History* 51, 53.

[5] UNESCO, *Journalism is a public good: World Trends in Freedom of Expression and Media Development: Global Report 2021/2022: Highlights* (2021), 12 . See s. II.1.5. (Penalties).

[6] See, e.g., OSCE, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (2017), 209. See s. II.1.5.2. (Civil penalties).

many countries still have sedition and similar laws that allow for the penalization and even criminalization of political speech.[7]

States are not shy about using such laws to suppress insulting political speech. Over 9,000 people were imprisoned for insulting President Erdoğan between 2014 and 2020.[8] In the world's largest democracy, India, more than 7,000 people have faced sedition charges since Narendra Modi was elected prime minister in 2014.[9] Alexei Navalny, the Russian opposition figure, was charged with criminal slander.[10] Maria Ressa, a Nobel Prize-winning Filipino journalist, has faced a string of libel prosecutions that expose her to decades behind bars.[11] And before she was murdered in 2017, Maltese journalist Daphne Caruana Galizia was facing more than 40 libel claims filed by government officials, companies and individuals that her son Matthew described as a 'never-ending type of torture' in response to her reporting on government corruption.[12]

Such practices violate the obligation of states to protect freedom of speech under international law. International standards require states to provide extra protection for speech about matters of public interest, and mandate that they do not penalize speech that is true or expresses an opinion.[13] And these standards strictly restrict the circumstances under which it is ever permissible to impose criminal penalties for speech.[14]

More needs to be done to enforce international standards that exist to protect freedom of speech. But international standards also need clarification or development. For instance, international bodies generally agree that imprisonment is not an appropriate penalty in defamation laws or similar laws used to target insults to public officials.[15] However, some bodies permit criminalization in exceptional cases and the European Court of Human Rights allows states a 'margin of appreciation' to do so.[16] In addition, international standards are not sufficiently clear about the requisite level of culpability required of a speaker before particular penalties can be imposed.[17] And the standards related to speech on matters of 'public interest'—as well as the definition of this term—are yet to be determined in concrete terms by international courts.[18]

[7] Some treason and sedition laws also cover non-speech activities such as the use of force: see, e.g., 18 U.S.C. §2381 (codifying the offence of treason against anyone owing allegiance to the United States who 'levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere'). Other forms of sedition, including words that offend national security laws, fall outside of the scope of this chapter. Likewise, insults that amount to hate speech or blasphemy are not dealt with in this chapter. See ch. 3 (Hate Speech) and ch. 6 (Terrorism Laws).

[8] Stockholm Center for Freedom, '128,872 people have faced criminal investigation for insulting President Erdoğan in five years' (29 March 2021).

[9] K. Purohit, 'Our New Database Reveals Rise In Sedition Cases In The Modi Era' (Article 14, 2 February 2021).

[10] T. Merz, 'Alexei Navalny accuses state of orchestrating war veteran slander case' (The Guardian, 12 February 2021).

[11] See s. II.2.2.3. (Philippines).

[12] G. Phillips, 'How the free press worldwide is under threat' (The Guardian, 28 May 2020). See s. II.2.1.3. (SLAPP and libel tourism).

[13] See s. III.4. (Exclusions, Exceptions and Defences).

[14] See s. III.6.1.1. (Criminalization).

[15] See s. III. 6.1.1. (Criminalization).

[16] See s. II.2.1.3. (SLAPP and libel tourism).

[17] See s. III.3.1. (Intent).

[18] See s. III. 4.2. (Public Interest).

International human rights bodies are also yet to seriously grapple with some of the most pressing contemporary phenomena that threaten free speech, such as 'libel tourism', the use of vexatious suits to silence journalists (known as 'strategic litigation against public participation' or SLAPPs), and the concept of continuous or multiple publication in the digital age.[19] This chapter assesses the current state of the law and proposes recommendations based on international standards and best practices to address gaps or inconsistencies in international human rights law related to political speech.

II. State Practice

1. Overview of Laws Regulating Insulting Speech

A survey of state practice[20] illustrates the range of laws that are used to penalize political speech, including a broad use of defamation laws as well as laws penalizing insult, sedition, contempt and treason. In places like Thailand, so-called *lèse-majesté* laws prohibit insult of the monarchy.[21] And 'cyber libel' laws are used worldwide to target online speech.[22] In assessing the way in which laws can stifle legitimate political speech, a number of elements must be assessed: the type of speech covered by the wording of the law, the mental culpability required of a speaker before punishment can be imposed, the harm that must or might be caused by such speech, the exemptions or defences available under the law and the penalties that can be prescribed. These elements are inter-related and must be assessed as a whole when evaluating national law and practice.

[19] This concept is that each individual publication of speech, even if it is the same (or substantially the same) as that previously published, accrues a cause of action in defamation, and each cause of action has its own separate limitation period.

[20] This survey of state practice does not purport to be comprehensive but rather to identify significant examples and trends. Therefore, where the language of a statute is set out, this does not necessarily include an analysis of all case law interpreting that language in the jurisdiction under review. We have selected the following jurisdictions based on diversity of legal systems and regions: Albania, Algeria, Argentina, Austria, Australia, Azerbaijan, Bahrain, Bangladesh, Barbados, Bulgaria, Belarus, Bolivia, Botswana, Burkina Faso, Burundi, Canada, Cambodia, Chile, Costa Rica, Croatia, Cyprus, Denmark, Ecuador, Ethiopia, England, Wales and Northern Island, Kingdom of Eswatini, France, The Gambia, Germany, Ghana, Greece, Guatemala, Honduras, Hong Kong, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Japan, Jamaica, Republic of Korea, Liberia, Madagascar, Maldives, Malawi, Malta, Mauritius, Mauritania, Montenegro, Morocco, Myanmar, North Macedonia, New Zealand, Nigeria, the Netherlands, Norway, Pakistan, Russia, Rwanda, Romania, Serbia, Sierra Leone, Singapore, South Africa, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Peru, Paraguay, Philippines, Qatar, Saudi Arabia, Turkey, Thailand, Tajikstan, Uganda, Ukraine, Uruguay, Yemen, Zimbabwe.

[21] See s. II.2.2.1. (Thailand).

[22] There is a debate about the extent to which it is permissible under international human rights law to hold a publisher, host or other intermediary liable in a criminal or civil case for the words of an author, or to require a host provider to disclose the personal data of its users. See, e.g., ECtHR (GC), *Magyar Kétfarkú Kutya Párt v. Hungary* (App. no. 201/17), 20 January 2020, §87; ECtHR, *Standard Verlagsgesellschaft mbH v. Austria (No. 3)* (App. no. 39378/15), 7 December 2021. However, intermediary liability for such speech is beyond the scope of this chapter.

1.1. Type of speech

Many domestic laws penalizing political speech by way of defamation and insult laws are exceptionally vague, making it difficult to know what speech is covered and facilitating potential abuse of government critics. A prominent example is the Turkish offence of public speech that 'degrad[es]' the Turkish 'nation', 'government', 'judicial bodies' or 'military and security organisations'.[23] The Council of Europe's Venice Commission considered this language 'not specific enough to meet the requirements of predictability'.[24] Other states which criminalize insult of the state or state officials with vaguely worded laws include Austria, Germany, Spain, India, Iran and Kazakhstan.[25]

1.2. Intent

States' laws vary as to what level of fault (or intent) is required in order to penalize or recover damages for defamatory speech, both when it comes to the falsity of the speech and its likely impact.

Perhaps the most protective legal standard is the 'actual malice' test established by the US Supreme Court in the seminal *Sullivan* case. This provides that if a statement relates to a public official,[26] that official must demonstrate that the speaker acted with 'actual malice' to recover damages for defamation.[27] 'Actual malice' means that the speaker knew the statement was false or acted with a 'high degree of awareness of [its] probable falsity'.[28] This is a high bar:[29] 'failure to investigate'[30] or reliance on 'statements made by a single source' that 'reflect only one side of the story' will not alone support a finding of actual malice[31] as there is 'no duty to corroborate [a] defamatory

[23] Turkish Penal Code Art. 301, see for a translation provided by Council of Europe, CDL-REF(2016)011. See s. III.1. (Legality).

[24] Venice Commission, *Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey* (2015) CDL-AD(2016)002, §§86–87.

[25] Austrian Criminal Code Art. 248(1) ('publicly and in a hateful manner insulting or disparaging the Republic of Austria or one of its provinces'); German Criminal Code s. 90a ('insulting or maliciously expressing contempt toward Germany or one of its states or its constitutional order'); Spanish Criminal Code Arts 491, 496, 504, 556, and 543 (Art. 543 criminalizing any 'offense or insult, by parole, in writing or through actions, against Spain, its Autonomous Communities, or their symbols or emblems when made publicly'); Indian Penal Code 1860 s. 124A (sedition committed by 'whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in [India]'); Iranian Islamic Penal Code 2013 Art. 514; Kazakhstani Criminal Code 2014 Arts 373, 375, 376 and 378.

[26] Later extended to public figures, and then to private figures suing on a matter of public concern where presumed or punitive damages are sought: US Supreme Court, *Curtis Publishing Co v. Butts* 388 U.S. 130, 12 June 1967; US Supreme Court, *Gertz v. Robert Welch Inc* 418 U.S. 323, 25 June 1974; US Supreme Court, *Dun & Bradstreet Inc v. Greenmoss Builders* 472 U.S. 749, 26 June 1985.

[27] See US Supreme Court, *New York Times v. Sullivan* 376 U.S. 254, 9 March 1964. See also R. D. Sack, 'New York Times Co. v. Sullivan–50-year Afterwords' (2014) 66 *Alabama Law Review* 273, 283. Although there have been suggestions that the US Supreme Court would reconsider *New York Times v. Sullivan,* in a recent case concerning 'true threats', the Court (with the exception of Justice Thomas in dissent) affirmed *Sullivan's* reasoning: See A. Liptak, 'Two Justices Say Supreme Court Should Reconsider Landmark Libel Decision' (The New York Times, 2 July 2021); US Supreme Court, *Counterman v. Colorado* 600 U.S. 66, 18 April 2023. See ch. 3 (Hate Speech), s. II.2.3.2. (United States).

[28] US Supreme Court, *Garrison v. Louisiana* 379 U.S. 64, 23 November 1964, 271–272.

[29] See s. IV.B.3. (Recommendations). See, e.g., US Supreme Court, *Berisha v. Lawson* 594 US (2021), 2 July 2021, Gorsuch J, dissenting ('over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability').

[30] US Supreme Court, *Harte-Hanks Communications v. Connaughton* 491 U.S. 657, 22 June 1989, 692.

[31] US Court of Appeals, Fifth Circuit, *New York Times Co. v. Connor* 365 F.2d 567, 4 August 1966, 576.

allegation'[32] and 'no obligation to seek comment' from the subject.[33] And the subjectivity of the standard, confirmed in subsequent cases, remains one of the biggest obstacles to plaintiff victories in defamation suits as damages cannot be recovered in the absence of a finding that the defendant 'in fact … entertained serious doubts' about the truthfulness of their statement.[34]

The *Sullivan* test has been followed, at least on paper, in jurisdictions including Argentina, Hungary, South Korea and the Philippines.[35] However, it has not been adopted by other states, such as Australia, New Zealand, South Africa and England and Wales.[36] These countries' courts and legislators have instead emphasized the 'vital importance'[37] of the protection of reputation[38] and the availability of defences or exemptions related to opinion,[39] fair comment,[40] qualified privilege,[41] reasonable publication[42] and public interest.[43]

Some states impose an objective intent requirement relating to falsity of the speech, such as in Thailand, where the law provides that a speaker can be penalized if they ought to have known about the falsity of the information.[44]

Other states impose an intent requirement related to the *impact* of the statement. For instance, the penal codes of India, Bangladesh, Malaysia and Myanmar require that the speaker intended to harm the reputation of the plaintiff, or knew or had reason to believe the statement would harm their reputation.[45] In South Africa, for non-media

[32] US Court of Appeals, District of Columbia Circuit, *Jankovic v. International Crisis Group* 822 F.3d 576, 10 May 2016, 590.

[33] US Court of Appeals, 10th Circuit, *Spacecon Specialty Contractors, LLC v. Bensinger* 713 F.3d 1028, 15 April 2013, 1043.

[34] US Supreme Court, *St. Amant v. Thompson* 390 U.S. 727, 29 April 1968, 731.

[35] See Argentine Supreme Court, *Patitó v. Diario La Nación,* 24 June 2008; Constitutional Court of Hungary, *Decision 36/1994 on Defamation of Public Officials and Politicians*, 24 June 1994 (although *Sullivan* is not explicitly cited by the Constitutional Court); Supreme Court of South Korea, 2013 Da 74837, 24 April 2014; Supreme Court of South Korea, 2011 Da 40373, 23 August 2012; Philippine Supreme Court, *Borjal v. Court of Appeals* [1999] 301 SCRA 1, 14 January 1999.

[36] High Court of Australia, *Lange v. Australian Broadcasting Corporation* [1997] HCA 25, 8 July 1997 (relating to civil defamation claims in Australia); *Australian Broadcasting Corporation v. O'Neill* (2006) 227 CLR 57, 28 September 2006, 95–96 (Kirby J); Canadian Supreme Court, *Grant v. Torstar Corporation* 2009 SCC 61, 22 December 2009; New Zealand Court of Appeal, *Lange v. Atkinson* [1998] 3 NZLR 424 (CA), 25 May 1998, reaffirmed in New Zealand Court of Appeal, *Lange v. Atkinson* [2000] 3 NZLR 385 (CA), 21 June 2000 (the Court said the common law test for malice still applied); South Africa Constitutional Court, *Khumalo v. Holomisa* [2002] ZACC 12, 14 June 2002; UK House of Lords, *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127, 28 October 1999, 168.

[37] Canadian Supreme Court, *Hill v. Church of Scientology of Toronto* [1995] 2 SCR 1130, 20 July 1995, 1332 (Cory J).

[38] Canadian Supreme Court, *Grant v. Torstar Corporation* 2009 SCC 61, 22 December 2009, §86 (McLachlin CJ); Canadian Supreme Court, *Hill v. Church of Scientology of Toronto* [1995] 2 SCR 1130, 20 July 1995, §137 (Cory J); South African Constitutional Court, *Khumalo v. Holomisa* [2002] ZACC 12, 14 June 2002, §27.

[39] See, e.g., England and Wales Defamation Act 2013 s. 3.

[40] See s. II.1.4.5. (Opinion).

[41] See, e.g., Canadian Supreme Court, *Hill v. Church of Scientology of Toronto* [1995] 2 SCR 1130, 20 July 1995, §§137, 209.

[42] See, e.g., South African Constitutional Court, *Khumalo v. Holomisa* [2002] ZACC 12, 14 June 2002, §43.

[43] See, e.g., England and Wales Defamation Act 2013 s. 4.

[44] Thai Civil and Commercial Code 1925 s. 423.

[45] Indian Penal Code 1860 s. 499; Bangladeshi Penal Code 1860 s. 499; Myanmar Penal Code 1861 s. 499; Malaysian Penal Code s. 499. See also Botswanan Penal Code ss 192, 193; Moroccan Penal Code 1962 Arts 263, 265; Algerian Penal Code Art. 144. See also laws requiring an intention to share information that insults, defames or slanders: Indonesian Penal Code 1999 Art. 207; Ethiopian Criminal Code Arts 244(1), 613, 614, 615 and 618.

defendants,[46] a speaker is only liable if they had subjective foresight of the possibility that they would actionably defame the plaintiff.[47]

At the lower end of the spectrum are states that impose a negligence standard. This includes US defamation cases not involving public officials or public figures, where at least negligence is required regarding the impact of the statement, but precise standards vary by state,[48] and the South African standard in defamation cases against the media, where negligence is the test (albeit that it is for the media to prove they did not act negligently).[49]

In other jurisdictions, no mental element is required at all either as to the falsity or impact of the statement. Countries such as Russia and Malta[50] have civil defamation laws that do not contain an intent requirement as to the impact of the statement at all. And in England and Wales, no mental element must be proved to establish a cause of action for defamation, the mental element being relevant only to certain defences.[51] And even laws that impose criminal penalties for defamation can be silent or ambiguous on intent, such as in Thailand and Ecuador.[52] Certain criminal sedition laws—for example in India,[53] Bangladesh[54] and Iran[55]—also do not contain an intent requirement.

1.3. Harm

1.3.1. Causal link between the speech and the harm

Some states' laws require that an insulting statement be *capable of* or *likely to* cause harm, such as Australia, Canada and England and Wales for civil defamation,[56] and Botswana, Canada, Nigeria, South Africa, Tanzania and Uganda for criminal

[46] South African Supreme Court of Appeal, *Economic Freedom Fighters v. Manuel* [2020] ZASCA 172, 17 December 2020. See s. II.1.3.2.1. (Measuring harm: identity of the speaker).

[47] D. Milo, *Defamation and Freedom of Speech* (OUP 2008), 187–188.

[48] See US Supreme Court, *Gertz v. Robert Welch Inc* 418 U.S. 323, 25 June 1974. The Ninth Circuit found that 'liability for a defamatory blog post involving a matter of public concern cannot be imposed without proof of fault and actual damages': US Court of Appeals, Ninth Circuit, *Obsidian Finance Group, LLC v. Cox* 740 F.3d 1284, 17 January 2014, 1291–1292.

[49] Milo (n 47) 195–196. See also South African Supreme Court of Appeal, *National Media Ltd v. Bogoshi* [1998] ZASCA 94, 29 September 1998. See also Rwandan Penal Code 2012 Art. 588; Costa Rican Penal Code Art. 153.

[50] Russian Civil Code Art. 152(1); Russian Code of Administrative Offences No. 195-FZ 2001 Arts 5.61, 20.1; Maltese Media and Defamation Act 2018 Art. 3.

[51] UK Committee on Defamation, *Report of Committee on Defamation* (1975) Cmnd 5909, 53–55; UK House of Lords, *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127, 28 October 1999, §168; UK Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (1991), 164.

[52] Thai Penal Code Arts 326–332; Ecuadorian Criminal Code Arts 182, 396.1.

[53] Indian Penal Code 1860 s. 124A.

[54] Bangladeshi Penal Code 1860 Art. 124A.

[55] Iranian Islamic Penal Code 2013, Book 5, Art. 500.

[56] Australian Defamation Act 2005 (NSW) s. 10A ('has caused, or is likely to cause, serious harm'). Defamation actions in Australia are governed by substantially uniform defamation law. The relevant legislation is as follows: Defamation Act 2005 (NSW); Defamation Act 2005 (Qld); Defamation Act 2005 (SA); Defamation Act 2005 (Tas); Defamation Act 2005 (Vic); Defamation Act 2005 (WA); Civil Law (Wrongs) Act 2002 (ACT) and Defamation Act 2006 (NT). A number of the Australian examples included in this chapter relate only to NSW. For a summary of the uniform defamation law and recent amendments thereto, see P. Bartlett & D. Hurley, 'Australian Media Law' in C. Glasser Jr. (ed), *International Libel and Privacy Handbook* (LexisNexis 2022–2023); Canadian Supreme Court, *Botiuk v. Toronto Free Press* [1995] 3 SCR 3, 21 September 1995, §62; Canadian Supreme Court, *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, 17 February 2011 (although civil law varies across Canadian provinces); England and Wales Defamation Act 2013 s. 1(1); UK Supreme Court, *Lachaux v. Independent Print Ltd* [2020] AC 612, 12 June 2019, §§12–16.

defamation.[57] In England and Wales, for instance, claimants must show that the publication of a statement 'has caused or is likely to cause serious harm' to their reputation.[58] The occurrence of actual harm as a result of the speech is required in jurisdictions such as Thailand[59] and the United States[60] for civil defamation and in Madagascar for criminal defamation.[61]

1.3.2. Level of harm caused by the speech

In many jurisdictions, a showing of harm must be made by a plaintiff or prosecutor in a defamation case. In England and Wales, '[a] statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant',[62] to be determined by reference to the actual impact of the statement.[63] This approach has been followed in jurisdictions such as Malta and Australia.[64]

In the United States, a court will consider whether a publication 'tends … to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him' when deciding whether to uphold a claim for damages.[65] And in South Africa, a statement is considered defamatory 'if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published'.[66] But no demonstration of actual harm is required.[67]

Some jurisdictions do not require any showing of actual or potential harm to establish that speech is insulting or defamatory. This includes jurisdictions in which criminal

[57] Botswanan Penal Code, Chapter 08:01, ss 192, 193; Canadian Criminal Code s. 298(1); Nigerian Penal Code (Northern States) Federal Provisions Act (1960) Cap. (P3) Laws of the Federation of Nigeria 2004 s. 391(1); South African Supreme Court of Appeal, *Hoho v. The State* (493/05) [2008] ZASCA 98, 17 September 2008, §23; Tanzanian Media Services Act 2016 s. 35; Ugandan Penal Code Act s. 180 (although a statement will also be defamatory if it has the effect of 'exposing the person to hatred, contempt or ridicule').

[58] England and Wales Defamation Act 2013 s. 1(1).

[59] Thai Civil and Commercial Code 1925, Obligations, Title V, Torts, Chapter 1, s. 423. *But see* s. III.1. (Legality).

[60] US District Court (Western District of Washington), *Hennick v. Bowling* 115 F. Supp. 2d 1204, 14 September 2000; US Supreme Court of Washington, *Mark v. Seattle Times* 96 Wn. 2d 473, 12 November 1981. Cf. US Supreme Court, *Gertz v. Robert Welch Inc*, 418 U.S. 323, 25 June 1974, 350; US Supreme Court, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 472 U.S. 749, 26 June 1985. Further, some categories of statements are defamatory *per se*, meaning that the plaintiff is not required to prove actual damages, such as (1) accusing the plaintiff of a crime; (2) injuring the plaintiff in his or her business; (3) claiming the plaintiff has a 'loathsome disease'; or (4) imputing unchastity to a woman or, later, serious sexual misconduct allegations in relation to either a man or woman: see, e.g., Restatement (Second) of Torts §§569 – 574 (1977).

[61] Madagascar Presidence de la Republique Loi n° 2016–029 Portant Code de la Communication Mediatisee Art. 23. Madagascar requires 'personal and direct damages to the person or body concerned' for a successful prosecution for defamation.

[62] England and Wales Defamation Act 2013 s. 1(1).

[63] UK Supreme Court, *Lachaux v. Independent Print Ltd* [2020] AC 612, 12 June 2019, §14. It is permissible, however, for a claimant to advance an inferential case as to serious harm: §22.

[64] Maltese Media and Defamation Act 2018 s. 3(4); Australian New South Wales Defamation Amendment Act 2020 s. 10(a).

[65] American Law Institute, American (Second) Restatement of Torts, Sec. 559. See, e.g., US Texas Court of Appeals, *Means v. ABCABCO, Inc* 315 S.W.3d 209, 3 June 2010, 215 (requiring 'an element of disgrace'); V. R. Johnson, 'Comparative Defamation Law: England and the United States' (2016) 24 *University of Miami International and Comparative Law Review* 1, 83.

[66] South African Constitutional Court, *Le Roux v. Dey* [2011] ZACC 4, 8 March 2011, §§89, 91; South African Supreme Court of Appeal, *Independent Newspapers Holdings Ltd v. Suliman* [2004] ZASCA 57, 28 May 2004, §31.

[67] Milo (n 47) 227.

penalties may be applied to such speech such as Ecuador,[68] Iran[69] and Thailand (for *lèse-majesté*).[70]

1.3.2.1. Measuring harm: identity of the speaker Defamation and similar laws are used to target political speech by journalists as well as other speakers. Some states have adopted laws that provide *less protection* for defamation emanating from the media, reflecting a view that the media should be held to a higher or different standard than other speakers. That is the case in Spain, Peru, Chile and (in respect of the fault requirement) South Africa.[71]

At the other end of the spectrum, some jurisdictions provide *more protection* to journalists than other speakers who defame others. In South Africa, the media is afforded greater protection than non-media defendants in that the defence of reasonable publication is generally available to the media and not to others.[72] In some jurisdictions, 'secondary publishers' are also entitled to special defences.[73]

In other jurisdictions the identity of the speaker is irrelevant. For example, in US courts, the protections of the First Amendment do not turn on whether the defendant was a trained journalist, or formally affiliated with traditional news entities (although the public profile of the person who is being talked about is).[74] Similarly, Canadian courts have provided defamation defences to 'anyone who publishes material of public interest in any medium'.[75]

1.3.2.2. Measuring harm: the extent to which the speech is public Domestic jurisdictions may require 'publication' of statements for a claim of defamation to be triggered. 'Publish' tends to be broadly understood as 'received in a communicable form'.[76] England and Wales, the United States, Canada, South Africa, Australia, and the Philippines, for example, require the claimant to establish that the defamatory

[68] See, e.g., Ecuadorian Criminal Code Art. 182.

[69] Iranian Islamic Penal Code 2013, Book 5, Arts 514, 609.

[70] Thai Penal Code Art. 112.

[71] Spanish Criminal Code Art. 211; Italian Penal Code Art. 595(3); Peruvian Penal Code Art. 132; Chilean Law No. 19733 Art. 29; In South Africa, non-media defendants benefit from greater protection in that they escape liability if they did not intend to defame the plaintiff; for media defendants, the relevant fault element is negligence: see South African Supreme Court of Appeal, *Economic Freedom Fighters v. Manuel* [2020] ZASCA 172, 17 December 2020, §65.

[72] There are, however, conflicting decisions as to whether the defence should be extended to non-media defendants. See South African High Court, Gauteng Local Division, *Gqubule-Mbeki v. Economic Freedom Fighters* [2020] ZAGPJHC 2, 24 January 2020, §§72–73; cf. South African High Court, Gauteng Local Division, *Manuel v. Economic Freedom Fighters* [2019] ZAGPJHC 157, 30 May 2019, §67. The South African Supreme Court of Appeal in the appeal in *Economic Freedom Fighters v. Manuel* [2020] ZASCA 172, 17 December 2020 left the question open.

[73] Milo (n 47) 212–215. See England and Wales Defamation Act 1996 s. 1(2).

[74] US Court of Appeals, Ninth Circuit, *Obsidian Finance Group, LLC v. Cox* 740 F.3d 1284, 17 January 2014, 1291; see also cases collected at R. D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* (5th edn, vol 1, PLI Press 2017), chapter 5, n. 399.

[75] Canadian Supreme Court, *Grant v. Torstar Corporation* 2009 SCC 61, 22 December 2009, §96 (McLachlin CJ)—quoting Lord Hoffmann in UK House of Lords, *Jameel v. Wall Street Journal Europe (No.2)* [2006] UKHL 44, 11 October 2006, §54.

[76] See, e.g., Australia: publication occurs when it is received in a communicable form by at least one third party (High Court of Australia, *Dow Jones and Company Inc v. Gutnick* [2002] HCA 56, 10 December 2002, 600). See also Canadian Criminal Code Art. 299.

statement was published to at least one party other than the person defamed—it need not be more public than that.[77] Turkish criminal law requires that the defamatory statement must be communicated to at least three people to find a person guilty in the absence of the victim, but does not require a third party when the victim is present.[78] The penalty for defamation is aggravated if it is committed in public in states such as Slovenia, Turkey, Spain and Russia.[79] States including Russia and Honduras provide for increased penalties, or further standalone offences, when defamation is conducted online.[80]

For identifying when 'publication' occurs, there are a variety of rules. Under the single publication rule (applied, for example, in US courts[81]), 'a plaintiff's cause of action accrues only once, at the time of publication, and thus later publications do not give rise to additional defamation causes of action'.[82] Under the multiple publication rule (Canada,[83] the Philippines[84] and Australia[85]), each individual publication of a defamatory statement gives rise to a separate cause of action in law.[86] In England and Wales, a 'new cause of action in libel proceedings' 'accrues each time defamatory material on the Internet is accessed',[87] but for limitation purposes there is a single publication rule with claims barred after 12 months from the date of first publication, provided certain conditions are met.[88]

[77] See, e.g., US Bankruptcy Court, S.D. New York, *In re Food Management Group LLC* 359 B.R. 543, 13 February 2007, 560; US District Court (Western District of Washington), *Hennick v. Bowling* 115 F.Supp.2d 1204, 14 September 2000, 1209; Canadian Criminal Code Art. 299; South African Constitutional Court, *Le Roux v. Dey* [2011] ZACC 4, 8 March 2011; Supreme Court of the Philippines, *Yuchengco v. Manila Chronicle Publishing Corporation* G.R. No. 184315, 25 November 2009; *Pullman v. Walter Hill & Co Ltd* [1891] QB 524 (CA), 19 December 1980, 527, 529, 530; *Jones v. Amalgamated Television Services Pty Ltd* (1991) 23 NSWLR 364, 18 May 1991, 367. In England and Wales, the serious harm requirement under s. 1 of the Defamation Act 2013 (as well as other tools such as abuse of process as in UK House of Lords, *Jameel v. Wall Street Journal Europe (No. 2)* [2006] UKHL 44, 11 October 2006) mean that claims founded on limited publication may face difficulties.

[78] Turkish Penal Code Art. 125.

[79] Slovenian Criminal Code 2008 (amended 2011) Art. 160(1); Turkish Penal Code, Law No. 5237 Art. 125(4); Spanish Criminal Code Arts 211, 209, 206 (if commited 'with publicity', being diffusion via print, broadcast or other media); Russian Penal Code Art. 128.1(1) (with 'online' speech explicitly included in the definition of public); Italian Penal Code Art. 595(3).

[80] Honduran Penal Code Decree No. 130-2017 Art. 232: for insult and slander 'carried out using collective disclosure websites or social networks through the Internet, the respective penalties will be increased from one sixth (1/6) to one half (1/2)'; Russian Code of Administrative Offences No. 195-FZ 2001 Art. 20.1(3) 'Dissemination via information and telecommunication networks, including the internet … shall entail the imposition of an administrative fine in the amount of thirty thousand to one hundred thousand rubles'.

[81] American Law Institute, American (Second) Restatement of Torts, §577A; US Court of Appeals, New York. *Gregoire v. GP Putnam's Sons* 298 N.Y.119, 16 July 1948, referred to and cited in ECtHR, *Times Newspapers Ltd (Nos. 1 and 2) v. United Kingdom* (App. nos. 3002/03 & 23676/03), 10 March 2009, §24.

[82] US Court of Appeals, Sixth Circuit, *Milligan v. United States* 670 F.3d 686, 5 March 2012, 698. See also US Court of Appeals, New York, *Firth v. State of New York* 98 N.Y.2d 365, 2 July 2002.

[83] Canadian Ontario Court of Appeal, *John v. Ballingall* 2017 ONCA 579, 7 July 2017, §35.

[84] Philippines Regional Trial Court, *People of the Philippines v. Santos, Ressa, and Rappler* R-MNL-19-01141-CR, 15 June 2020, 16. The court referred to Supreme Court of the Philippines, *Brillante v. Court of Appeals* G.R. Nos. 118757 & 121571, 19 October 2004, which held that a 'single defamatory statement, if published several times, gives rise to as many offenses as there are publications'.

[85] Australian Model Defamation Amendment Provisions 2020; Australian Supreme Court of Western Australia, *Rayney v. Western Australia (No. 9)* [2017] WASC 367, 15 December 2017, §§822, 824.

[86] UK High Court of England and Wales, Queen's Bench Division, *Duke of Brunswick v. Harmer* (1849) 14 QB 185, 2 November 1849, referred to and cited in ECtHR, *Times Newspapers Ltd (Nos. 1 and 2) v. United Kingdom* (App. nos. 3002/03 & 23676/03), 10 March 2009, §20.

[87] England and Wales Defamation Act 2013 s. 8. The Delhi High Court has reached the same result: Indian High Court, Delhi, *Khawar Butt v. Asif Nazir Mir* CS(OS) 290/2010, 7 November 2013, §14.

[88] See England and Wales Defamation Act 2013 Chapter 26 s. 8.

1.4. Exclusions, exceptions and defences

1.4.1. Truth

The defence of truth is available in many domestic defamation laws, although its scope differs across jurisdictions.[89] Truth is an absolute defence in jurisdictions in which libel carries civil penalties such as Australia, England and Wales, the United States and Russia,[90] and in jurisdictions in which it is also a crime such as Spain, Nigeria, Turkey and Uganda.[91] In some jurisdictions such as Bangladesh, Malaysia and South Africa, it is a partial defence, for example, when the truthful statement was made 'for the public good' or when 'it was for the public benefit that the matter should be published'.[92]

Some states have a narrow version of the truth defence available when a defamatory statement relates to a criminal offence committed by a public official in the course of their duties.[93] Finally, in some jurisdictions, such as Thailand,[94] truth is not a defence because falsity is part of the cause of action.[95] And in Sweden, a court will first decide whether the alleged defamation was 'justifiable' before considering whether it is true or not,[96] meaning that criminal liability can be enlivened even for truthful statements.[97]

1.4.2. Public interest

The public interest in the subject matter of speech may provide some protection from defamation or insult claims, but the nature and extent of that protection varies amongst states. Public interest may be a self-standing defence, an essential ingredient for another defence such as 'reasonable publication', or a justification for imposing a more onerous culpability requirement.[98]

The laws of many jurisdictions have a public interest defence—sometimes expressed as a defence of 'public good' or 'public benefit', or a speaker acting under a 'legal,

[89] See ch. 4 (False Speech).

[90] England and Wales Defamation Act 2013 s. 2; US Supreme Court, *New York Times v. Sullivan* 376 U.S. 254, 9 March 1964; Russian Civil Code Art. 152(1); Australia has a statutory defence of justification: New South Wales Defamation Act 2005 s. 25. It is also a defence at common law that the imputations complained of are true in substance and in fact: High Court of Australia, *Howden v. Truth and Sportsman Ltd* [1937] HCA 74, 15 December 1937.

[91] Spanish Criminal Code Art. 207. The defence of truth is also available for insult against public officials in the exercise of their functions (Art. 210 of the Spanish Criminal Code), and therefore not as an absolute defence; Nigerian Criminal Code Act (1916) Cap (C.38) Laws of the Federation of Nigeria 2004 s. 391; Turkish Penal Code, Law No. 5237 Art. 127; Turkish Constitution Art. 39. See also D. Tezcan & others, *Teorik ve Pratik Ceza Özel Hukuku* (Seçkin Yayınları 2017), 596; Ugandan Penal Code Act of 1950 (cap 120), s. 180.

[92] Bangladeshi Penal Code 1860 s. 499, Malaysian Penal Code s. 499 ('It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact'). See also South African Criminal Procedure Act s. 107; South African Supreme Court of Appeal, *Hoho v. The State* (493/05) [2008] ZASCA 98, 17 September 2008, §24.

[93] See, e.g., Italian Penal Code Art. 596 (Truth is relevant only in defamation cases where offended person is a public official and the fact at issue related to his exercise of duties; where criminal proceedings are ongoing or initiated against the offended person as a result of the fact at issue; or where the claimant requests the judgment to ascertain the truth/falsity of the allegation. In such cases, it is for the defendant to prove the truth of the allegation).

[94] Thai Civil and Commercial Code 1925 s. 423.

[95] Ibid. (the statement must be 'contrary to the truth').

[96] An example of 'justifiable' speech (also translated as 'defensible') is if it is in the public interest: U. Isaksson, 'Sweden Media Law Guide: Defamation and Privacy Laws in Sweden' (Carter-Ruck).

[97] Swedish Penal Code Chapter 5 s. 1; J. Nordberg, 'The Case that Killed #MeToo in Sweden' (The New York Times, 15 March 2022); H. Jemal, 'Truth not a defence against defamation, says law professor' (Sverige Radio, 13 July 2021).

[98] See s. III.3.1. (Intent).

moral or social duty'. This includes criminal defamation laws in Denmark, India, Iraq, Japan, Korea, Malawi, Malaysia, the Netherlands, Nigeria, Singapore, Switzerland and Uganda,[99] and civil defamation laws in Australia, Barbados, Israel and Mauritius.[100]

Despite its importance, the concept of 'public interest' is rarely defined in legislation or case law.[101] In England and Wales, however, judges have made clear that it does not mean 'what the public is interested in' or what is 'newsworthy', nor—at the other end of the spectrum—what the public 'need to know'; but rather that 'there must be some real public interest in having this information in the public domain'.[102]

The US approach reflects a focus on the person rather than the issue. Speech about a public official or public figure is protected by a high intent requirement ('actual malice').[103] And the Supreme Court has explicitly decided 'not to fully extend the *Sullivan* protection to all communications about matters of public interest'.[104]

The criminal laws of certain states including India, Bangladesh, Malaysia and Myanmar similarly suggest that there should be a higher tolerance for insulting speech that is directed at public officials.[105] In South Africa[106] and in England and Wales,[107] government bodies cannot sue for defamation.[108] And in Canada, while sedition laws exist, 'seditious intention' does *not* include communications made in good faith to criticize measures taken by the government or monarch.[109]

[99] Danish Criminal Code No. 1719 2018 s. 269; Indian Penal Code 1860 s. 499; Iraqi Penal Code Law No. 111 1969 Art. 433; Japanese Penal Code (1907, as amended in 2022) Arts 230–232; South Korean Penal Code Art. 310; Malawian Penal Code Chapter 7:01 of the Laws of Malawi s. 205; Malaysian Penal Code s. 499; Dutch Criminal Code (1881, as amended in 2014) Art. 266, §2; Nigerian Penal Code (Northern States) Federal Provisions Act (1960) Cap. (P3) Laws of the Federation of Nigeria 2004 s. 391(2); Singaporean Penal Code Art. 499; Swiss Criminal Code Art. 173 (although this defence is only applicable to statements that the speaker had reason to believe were true); Ugandan Penal Code Act of 1950 (cap 120) ss 182, 184.

[100] New South Wales Defamation Act 2005 s. 29A; Barbados Defamation Act Chapter 199 s. 8(1) (see also s. 34(2) in relation to criminal defamation); Israeli Defamation Law 5725-1965 s. 14 (but the media defendant must also prove that the statement was true, depending on the seriousness of the defamation): I. Zamir & S. Colombo (eds), *The Law of Israel: General Surveys* (Harry and Michael Sacher Institute for Legislative Research and Comparative Law, the Hebrew University of Jerusalem 1995), 385). See also T. Gidron, 'Defamation Law in Turbulence: Does Israel Need 'Libel Reform'?' (2013) 46 *Israel Law Review* 95; Mauritian Criminal Code 1838 Art. 288(4)(a)–(c), (e), (g)–(j); Mauritian Supreme Court, *Soornack Nandanee v. Le Mauricien ltd* 2013 SCJ 58, 6 February 2013.

[101] Canadian Supreme Court, *Grant v. Torstar Corporation* 2009 SCC 61, 22 December 2009, §105 (internal citations omitted).

[102] UK House of Lords, *Jameel v. Wall Street Journal Europe (No. 2)* [2006] UKHL 44, 11 October 2006, §147.

[103] See s. III.3.1. (Intent).

[104] Sack (n 27) 273, 291, citing US Supreme Court, *Gertz v. Robert Welch Inc* 418 U.S. 323, 25 June 1974. Whether a plaintiff is a public figure may depend, though, on the relationship, if any, between them and a matter of public interest. The US Supreme Court in *Gertz v. Robert Welch Inc* 418 U.S. 323, 25 June 1974, said, for example, that public figures ordinarily 'have assumed roles of especial prominence in the affairs of society' at 345, and to have 'assume[d] special prominence in the resolution of public questions' at 351. The Court has imposed the 'actual malice' standard on private plaintiffs suing for presumed or punitive damages on matters of public concern: See s. III.3.1. (Intent) and s. IV.2. (Recommendations).

[105] Indian Penal Code 1860 s. 499 (which carves out an exception for any 'good faith' expression of opinion on the 'conduct of a public servant in the discharge of his public functions'); Bangladeshi Penal Code 1860 Art. 499; Malaysian Penal Code s. 499 (cf. Federal Court of Malaysia, *Chong Chieng Jen v. Government of State of Sarawak & Anor* [2019] 3 MLJ 300, 26 September 2018); Myanmar Penal Code 1861 Art. 499 Second Exception.

[106] Milo (n 47) 67–68.

[107] England and Wales House of Lords, *Derbyshire County Council v. Times Newspapers Limited* [1993] UKHL 18, [1993] AC 534, 18 February 1993.

[108] There is, however, no prohibition on individual officials suing for defamation. See UK House of Lords, *Derbyshire County Council v. Times Newspapers Limited* [1993] UKHL 18, [1993] AC 534, 18 February 1993, 550; *Spoorland v. South African Railways* 1946 (AD) 999, Separate Concurring Opinion of Schreiner, JA, 1012–1013.

[109] Canadian Criminal Code ss 59–61.

At the other end of the spectrum, in states like Thailand, the approach is inverted: there is a *lower* tolerance for insulting speech directed at public officials.[110] Singaporean law provides lesser protection to speech about the judiciary.[111] Symbols are protected from insulting speech in Russia,[112] India,[113] and Burundi,[114] and Hong Kong Law prohibits certain uses of the national flag and national emblem.[115] Increased penalties for defamation of public officials as compared to private individuals is a feature of the criminal laws in Italy,[116] Spain,[117] and Turkey.[118]

1.4.3. Reasonable publication

In some jurisdictions, a defence, sometimes labelled 'reasonable publication', allows a standard of care displayed by a speaker to provide protection from defamation claims. In Canada, for example, a defence to civil defamation is 'responsible communication on matters of public interest'; this allows 'publishers to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest'.[119] A similar approach is also adopted in Austria, Australia, England and Wales, Ethiopia, Ireland and New Zealand.[120]

1.4.4. Fair and accurate reporting of official documents

The defence of fair and accurate reporting protects the speaker who relied on an official public document or statement by a public official, made clear that the document or

[110] Thai Penal Code ss 393, 136.

[111] Singaporean Administration of Justice (Protection) Act 2016 s. 3 (which defines the offence of contempt of court as including any person who 'scandalises the court' by publishing or doing anything that 'imputes improper motives to or impugns the integrity, propriety or impartiality of any court' or 'poses a risk that public confidence in the administration of justice would be undermined').

[112] Russian Code of Administrative Offences No. 195-FZ 2001 Art. 20.1(3); Russian Penal Code Art. 354.1(3) (insulting 'symbols of military glory').

[113] Indian Prevention of Insults to National Honour (Amendment) Act 2005 ss 2, 3 (protecting 'the Indian national flag, the Constitution of India and the national anthem').

[114] Burundian Penal Code Art. 383.

[115] Hong Kong National Flag and National Emblem Ordinance 1997 (2021 Amendment) s. 4.

[116] Italian Penal Code Art. 595(4) (defamation). See also Italian Penal Code Arts. 278, 290–292 (regarding defamation committed against the President, the Republic, the constitutional institutions, the Army, the Italian nation, the flag or other symbols of the state).

[117] Spanish Criminal Code Arts 496, 504(1), 504(2) (serious defamation of public officials); cf. Art. 209 (defamation of anyone).

[118] See paragraph 3(a) of Turkish Penal Code Art. 125 (insult), determining one years' imprisonment as the minimum punishment for insulting public officials due to their performance of their duty, while the minimum punishment under paragraph one is three months of imprisonment. See also Turkish Penal Code, Law No. 5237 Art. 299 (insult to the president), providing for a punishment with a higher minimum and maximum term of imprisonment than that of Art. 125 and excluding fine as an alternative punishment, which is provided for under Art. 125.

[119] Canadian Supreme Court, *Grant v. Torstar Corporation* 2009 SCC 61, 22 December 2009, §85 (emphasis added).

[120] Austrian Federal Act on the Press and other Publication Media (Media Act) 1981 Art. 29; New South Wales Defamation Amendment Act 2020 s. 29; England and Wales Defamation Act 2013 s. 4. See ch. 5 (Espionage and Official Secrets Laws), s. II.2.1.1. (United Kingdom). See also Ethiopian Civil Code Arts 2046, 2049; Irish Defamation Act 2009 ss 16, 18, 20, 26. The defences of truth, qualified privilege and honest opinion are also available; New Zealand Court of Appeal, *Durie v. Gardiner* [2018] NZCA 278, 31 July 2018. Other jurisdictions do not explicitly tie the defence to public interest speech. See, e.g., South Africa (South African Supreme Court of Appeal, *National Media Ltd v. Bogoshi* [1998] ZASCA 94, 29 September 1998, 1212–1213); Sierra Leonean Public Order Act 1965 s. 30(e) in particular.

statement was the source, and fairly and accurately used the source. It typically covers copies, extracts and summaries of certain official publications.[121]

The defence is recognized in many states with civil defamation laws, especially common law jurisdictions including Australia, England and Wales, Canada, South Africa and the United States,[122] as well as jurisdictions that have criminal libel laws such as Bangladesh, Kenya, Malaysia, Nigeria and Uganda.[123]

In England and Wales, absolute privilege covers a contemporaneous fair and accurate report of words spoken in public legal proceedings.[124] Qualified privilege attaches to fair and accurate copies, extracts or summaries of public speech by or on behalf of a legislature or government anywhere in the world.[125] US courts have taken a less global view than the UK courts, so far refusing to apply the defence to speech by foreign governments.[126]

In South Africa, there is a defence in civil proceedings of qualified privilege for fair and accurate reports of legal, quasi-legal or parliamentary proceedings.[127] Bangladeshi[128] and Indian[129] penal codes also provide that the crime of defamation exempts 'substantially true' reports of court proceedings.

1.4.5. Opinion

Whereas the defence of truth relates to the facts in a statement, the defence of opinion is concerned with value judgements. In the United States, for example, the plaintiff in a civil defamation case usually has to show that a statement is *not* an opinion in order for liability to attach.[130]

In Australia,[131] Singapore,[132] Hong Kong[133] and Kenya,[134] civil defamation laws refer to a defence of 'fair comment' or 'honest opinion' that protects against liability for an

[121] See, e.g., UK Defamation Act 1996 Schedule 1.

[122] See, e.g., Australian New South Wales Defamation Act 2005 ss 27, 29, 30; see ch. 5 (Espionage and Official Secrets Laws), s. II.2.2.2. (Australia); UK Defamation Act 1996 ss 14–15; Canadian Ontario Libel and Slander Act s. 3; Civil: Canadian Ontario Superior Court of Justice, *1522491 Ontario Inc v. Stewart, Esten Professional Corporation* [2010] ONSC 727, 6 January 2010; Ontario Court of Appeal, *Soliman v. Bordman,* 2021 ONSC 7023; Canadian Criminal Code s. 60; South African Appellate Division (as it then was), *Borgin v. De Villiers* 1980 3 SA 556 (A); US California Civil Code s. 47; US Florida Statutes Chapter 836 Defamation, Libel, Threatening Letters and Similar Offenses s. 836.08; US Ohio Revised Code ss 2317.04, 2317.05; US Michigan Compiled Laws s. 600.2911(3); US Texas Civil Practice and Remedies Code s. 73.002.

[123] Bangladeshi Penal Code 1860 Art. 499; Kenyan Penal Code ss 198–199; Kenyan Defamation Act 2010 ss 10–12; Malaysian Penal Code s. 499; Nigerian Criminal Code Act (1916) Cap (C.38) Laws of the Federation of Nigeria 2004 s. 379; Ugandan Penal Code Act of 1950 (cap 120) ss 182, 183.

[124] This covers national and international courts: England and Wales Defamation Act 2013 s. 7 amending s. 14 of UK Defamation Act 1996.

[125] England and Wales Defamation Act 1996 Schedule 1, s. 9(1).

[126] Johnson (n 65) 95.

[127] D. Milo & P. Stein, *A Practical Guide to Media Law* (Lexis Nexis-Butterworths 2013), 42–43.

[128] Bangladeshi Penal Code 1860 Art. 499.

[129] Indian Penal Code 1860 Chapter XXI s. 499.

[130] Johnson (n 65) 38. See also US Court of Appeals, Ninth Circuit, *Herring Networks, Inc. v. Maddow* 8 F.4th 1148, 17 August 2021 (in which a talk show host's comments that a US news network 'really literally is paid Russian propaganda' were considered protected 'opinion' in furtherance of her constitutional right to free speech on a public issue, rather than 'an assertion of objective fact').

[131] New South Wales Defamation Amendment Act 2020 s. 31. In Australia, the common law defence of fair comment operates alongside the statutory defence of honest opinion: see, e.g., Federal Court of Australia, *Dutton v. Bazzi* [2021] FCA 1474, 24 November 2021, [180].

[132] Singaporean Defamation Act 1975 s. 9.

[133] Hong Kong Defamation Ordinance Cap 21 s. 27 (providing for the defence of fair comment).

[134] Kenyan Defamation Act 2010 s. 15.

expression of opinion. Under Australian statutory law, the defence is limited to a subset of opinions that are 'based on proper material'.[135]

In England and Wales, the common law defence of 'fair comment' was replaced by a statutory defence of 'honest opinion', which applies when the statement is a statement of opinion,[136] indicates the basis of the opinion and 'an honest person' could have held the opinion given the facts existing at the time the allegedly defamatory statement was made.[137]

In some jurisdictions, there is a defence to criminal defamation focused on opinions about public officials, a 'public question' or for the 'public good', such as in Bangladesh, India, Malaysia, Uganda and Nigeria.[138] In South Africa, a defence of 'protected comment' applies to opinions expressed without malice based on facts that are true and in relation to matters of public interest.[139] In Chile,[140] 'personal opinions' and criticism of 'politics, literature, history, art, science and sports' cannot be considered insult or defamation, unless 'their tenor reveals the *purpose* of insulting, in addition to criticizing'. States such as Iran and Mauritania, on the other hand, provide no defence related to opinions at all.[141]

1.5. Penalties

1.5.1. Criminal penalties

Over 160 states allow criminal penalties for defamatory speech[142] and many states have specific laws criminalizing sedition and the insult of heads of state, although decriminalization of defamation has taken place in some regions.

Many European states with criminal defamation laws allow for imprisonment as a possible punishment for defamation.[143] Prison sentences tend to range between two months and two years, but can be longer (e.g., three years in Greece, Italy,[144] and

[135] New South Wales Defamation Amendment Act 2020 s. 31. Being 'based on proper material' may be satisfied by material that is substantially true, published on an occasion or absolute or qualified privilege, or published on an occasion that attracts the defence of honest opinion, 'publication of public documents' or 'fair report of proceedings of public concern'.

[136] England and Wales Defamation Act 2013 s. 3(2).

[137] This also extends to anything said to be a fact in a privileged statement published before the impugned statement was made. See England and Wales Defamation Act 2013 s. 3(4) ('an honest person could have held the opinion on the basis of (a) any fact which existed at the time the statement complained of was published; (b) anything asserted to be a fact in a privileged statement published before the statement complained of').

[138] Bangladeshi Penal Code 1860 Art. 499; Indian Penal Code 1860 s. 499; Malaysian Penal Code s. 499; Ugandan Penal Code Act 1950 (cap 120), ss 183, 184; Nigerian Criminal Code Act (1916) Cap (C.38) Laws of the Federation of Nigeria 2004 s. 377. See s. III.4.2. (Public interest).

[139] South African Constitutional Court, *The Citizen 1978 (Pty) Ltd v. McBride* [2011] ZACC 11, 8 April 2011, §83.

[140] Chilean Law No. 19,733 Art. 29 (emphasis added). Cf. Costa Rican Criminal Code Art. 151.

[141] Article 19, 'Islamic Republic of Iran: Computer Crimes Law' (2012), 3, 25–26, 35; No defences for defamation, insult or libel are provided in the Iranian Islamic Penal Code 2013 Arts 513–514, 608–609, 697–700. Mauritanian Penal Code 1983 Art. 348.

[142] UNESCO, *Journalism is a public good: World Trends in Freedom of Expression and Media Development: Global Report 2021/2022: Highlights* (2021) .

[143] With the exception of countries including Russia, Albania, Croatia and Bulgaria.

[144] Italian Penal Code Art. 595(3) (which provides higher penalties for defamation emanating from the press or advertising).

Switzerland for wilful defamation[145] and up to five years in Germany).[146] Even so, in Europe, it is rare that a conviction for defamation will result in a prison sentence.[147]

In the Asian states that retain criminal defamation laws, prison sentences generally range from one to three years, with higher sentences available for example in Indonesia (six years).[148] Bangladesh, India, Iraq and Pakistan allow life imprisonment for sedition.[149] In Thailand, defamation of the King can result in imprisonment for 15 years per count.[150]

In some states, criminal fines can be imposed, as in Greece,[151] Serbia,[152] Italy[153] and The Gambia.[154] Under the Russian Penal Code, defamation, combined with the accusation of a person of a grave or especially grave crime, is punishable by a fine of over $60,000 US dollars, three years of the convicted person's salary or income, or by compulsory labour for up to 480 hours.[155] Some states, such as the United States, retain such defamation laws on their books but prosecutors seldom, if ever, apply them in practice.[156]

There is a trend towards decriminalization of defamation laws, though the momentum has been uneven. In Africa, Liberia, Kenya and Burkina Faso have abolished prison sentences for defamation or insult.[157]

In Europe, Norway,[158] Romania,[159] Ireland,[160] England and Wales, Malta,[161] Montenegro, North Macedonia,[162] and Serbia[163] have each repealed criminal

[145] Swiss Criminal Code Art. 174(1).

[146] German Criminal Code s. 187 (for public defamatory statments that are capable of damaging a person's reputation or jeopardizing their creditworthiness).

[147] CPJ, 'Explore CPJ's database of attacks on the press' (2019).

[148] Indonesian Law No. 11 on Electronic Information and Transactions 2008 Art. 45(1).

[149] Bangladeshi Penal Code 1860 Art. 124A; Indian Penal Code 1860 s. 124A; Iraqi Penal Code Law No. 111 1969 Art. 160; Pakistani Penal Code 1860 Art. 124A.

[150] Thai Penal Code §112. In some cases, an even longer prison term is imposed: see s. II.2.2.1. (Thailand).

[151] ECtHR, *Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece* (App. no. 72562/10), 22 February 2018.

[152] ECtHR, *Lepojić v. Serbia* (App. no. 13909/05), 6 November 2007.

[153] Italian Penal Code Art. 595(1)–(3).

[154] ECOWAS CCJ, *Federation of African Journalists v. The Gambia* (Suit no. ECW/CCJ/APP/36/15), 13 February 2018, 4 (fine of approximately 4,200 USD for sedition and the publication of false news, payable within two hours). The criminal law on defamation is under review by The Gambia's National Assembly (at a committee level) and The Gambia's sedition provision remains in place.

[155] Russian Penal Code Art. 128.1(5).

[156] Sack (n 74), §3.2, n. 17.1. citing US Court of Appeals, Eighth Circuit, *Tollett v. United States* 485 F.2d 1087, 2 October 1973, §§1094–1099.

[157] Liberian Kamara Abdullah Kamara (KAK) Act of Press Freedom 2019; Burkinabe Law 057-2015/CNT; UNESCO, 'African Court's landmark decision to ensure prosecution of crimes against journalists' (12 March 2021); Constitutional and Human Rights Division of the High Court of Kenya, *Jacqueline Okuta & another v. Attorney General & 2 others* [2017] eKLR, 6 February 2017.

[158] Norwegian Penal Code s. 185 still envisages fines or imprisonment, but in practice the Supreme Court does not award immediate custodial punishments for defamation and insult (Norwegian Supreme Court Judgment 29 January 2020, HR-2020-184-A).

[159] The decriminalization of the defamation offence (domestically regulated as the offence of slander and/or the offence of insult) occurred by the adoption of the new Romanian Criminal Code (adopted in 2009, through Law no. 286/2009), effective since 1 February 2014.

[160] Irish Defamation Act 2009 s. 35.

[161] Maltese Media and Defamation Act 2018 Art. 25.

[162] In 2012, North Macedonia adopted the Law on Civil Liability for Insult and Defamation and repealed Arts 172, 176, and 184 of the Criminal Code, thereby decriminalizing defamation. COE Committee of Ministers, *Action Report: Makraduli v. North Macedonia* (12 June 2019). Planned reform of the North Macedonian Law on Civil Liability for Insult and Defamation which will hopefully see fines reduced has been delayed by Covid-19; N. Georgievski, 'The coronavirus crisis postpones the drafting of new Law on Civil Liability for Insult and Defamation until September' (Meta, 24 May 2020).

[163] Reform of the Serbian Criminal Code in 2012 abolished criminal defamation, but insult remains a criminal offence (Serbian Criminal Code Art. 170).

defamation laws and Croatia has removed custodial penalties.[164] Norway also repealed its *lèse-majesté* law in 2015[165] and Cyprus has decriminalized defamation with a few exceptions.[166] But some European states such as Hungary have actually strengthened or reintroduced legislation on criminal defamation.[167] Russia decriminalized defamation in 2011 only to reintroduce the offence one year later.[168]

In the Americas, states have increasingly adopted reforms decriminalizing defamation or limiting enforcement of defamation laws.[169] Jamaica was the first independent Caribbean state to have no criminal defamation laws, including seditious libel.[170] In 2020, Honduras removed criminal sanctions for *desacato*, 'a class of legislation that criminalizes expression which offends, insults or threatens a public official in the performance of his or her duties', but maintains criminal penalties for so-called 'crimes against honor', including insult and slander.[171] Uruguay and Guatemala have also decriminalized *desacato*.[172]

In Asia, decriminalization of defamation has been limited. Although states such as Sri Lanka[173] and the Maldives[174] have decriminalized defamation, 38 of 44 states retain criminal defamation laws[175] and states such as Bangladesh and Myanmar have strengthened criminal provisions on defamation.[176] States with notorious *lèse-majesté*

[164] OSCE, 'OSCE media watchdog praises Croatia's abolition of prison sentences for defamation' (29 June 2006).

[165] Norwegian Penal Code 1902 s. 135 was repealed with the Norwegian Penal Code 2005.

[166] Criminal defamation was repealed in 2003 by Cyprus Law 84(I)/2003, which amended the Criminal Code, Cap. 154. However, insulting the armed forces of the Republic of Cyprus, defaming foreign heads of state, and insulting the memory of the deceased remain criminal offences. A. Spaic & others, 'Decriminalization of Defamation—The Balkans Case a Temporary Remedy or a Long Term Solution?' (2016) 47 *International Journal of Law, Crime and Justice* 21. 'Decriminalisation of Defamation' (Centre for Media Pluralism and Media Freedom, January 2019). Civil defamation operates under the Cyprus Civil Wrongs Law. Defamation is defined under s. 17(1) of the Cyprus Civil Wrongs Law, Cap. 148.

[167] Hungarian Criminal Code s. 226A. See also s. 226B (punishes making such a recording accessible to the public). Cf. P. Judit & A.H. Kávai, 'No imprisonment for defamatory or libellous articles in the press, Hungarian Parliament votes' (Telex, 23 May 2023). Similarly, the Republika Srpska of Bosnia and Herzegovina re-criminalized defamation: see OHCHR, 'Bosnia and Herzegovina: UN experts alarmed by re-criminalisation of defamation in the Republika Srpska entity' (25 July 2023).

[168] Russian Penal Code Art. 128.1 (although defamation with respect to judges and some other public officials remained throughout this period); V. Khachatryan & P. Roudik, 'Russia: Defamation is Criminalized Again' (Law Library of Congress, 20 August 2012). It also adopted the so-called 'Disrespect for Authority' Law in 2019: S. Kiselyov, 'Russia Passes Legislation Banning "Disrespect" of Authorities and "Fake News" ' (The Moscow Times, 7 March 2019).

[169] L. Holt & others, 'Decriminalizing Defamation: A Comparative Law Study' (*GW Law International Law and Policy Brief*, March 2022). See also J. Simon & others, 'Weaponizing the Law: Attacks on Media Freedom' (Thomson Reuters and Tow Centere for Digital Journalism, April 2023), 43: noting that *desacato* laws have been repealed or declared unconstitutional in many countries in Latin America.

[170] Jamaican Defamation Act 2013 s. 7.

[171] CPJ, 'La Corte Suprema de Justicia deroga el delito de desacato' (26 May 2005). *Desacato* remained in the Honduran Penal Code until it was amended in 2020; CPJ, 'Honduras enacts penal code maintaining "crimes against honor" ' (26 June 2020).

[172] Although exceptions to decriminalization of *desacato* apply under Uruguayan law, such as when the claimant can 'demonstrate the existence of real malice': Uruguayan Criminal Code Art. 336. CPJ & others, 'Critics Are Not Criminals: Comparative Study of Criminal Defamation Laws in the Americas' (2016), 47; Guatemalan Constitutional Court, *Partial Judgment of General Unconstitutionality,* Case file 1122-205, 1 February 2006, 3.

[173] 'Sri Lanka abolishes criminal defamation' (Zee News, 18 June 2002).

[174] 'Anti-defamation law repealed' (Maldives Independent, 14 November 2018).

[175] UNESCO, 'Defamation laws and SLAPPs increasingly "misused" to curtail freedom of expression' (8 December 2022).

[176] Amnesty International, 'Bangladesh: New Digital Security Act is attack on freedom of expression' (12 November 2018); OHCHR, *The Invisible Boundary—Criminal prosecutions of journalism in Myanmar* (11 September 2018), 9–11; OHCHR, 'Myanmar: UN report details silencing by law of independent journalism' (11 September 2018).

laws such as Thailand and Turkey maintain such laws in force and use them often.[177] Cambodia also introduced a new *lèse-majesté* provision to the Penal Code in 2018.[178]

Abolition of sedition laws has followed a similar mixed trajectory. The crime of sedition—defined in English common law as the oral or written publication of words with seditious intent—was abolished in the England, Wales and Northern Ireland in 2010[179] and denounced as an 'arcane' offence.[180] Eight Commonwealth states have abolished these laws over the past 25 years: Kenya, Ghana, New Zealand, England, Wales and Northern Ireland, Jamaica, Sierra Leone, Maldives and most recently in October 2021, Singapore.[181] Courts in Uganda and the Kingdom of Eswatini have declared those countries' sedition laws unconstitutional.[182]

Yet it remains a colonial legacy in some Commonwealth states. Sometimes it is a dead letter—Canada has not prosecuted anyone for sedition since 1951.[183] In the United States, sedition carries a potential sentence of 20 years in prison but this offence has long since developed from its origins as a speech-related offence to a rarely charged crime of 'threatened or actual use of force' against the US Government.[184]

[177] '903 minors among thousands tried or jailed for insulting Turkey's ruler Erdogan' (Arab News, 19 December 2020). See Turkish Penal Code, Law No. 5237 Art. 299; 'Thailand jails man for 35 years for insulting the monarchy on Facebook' (The Independent, 12 June 2017); 'Lese-majeste explained: How Thailand forbids insult of its royalty' (BBC, 6 October 2017).

[178] Cambodian Criminal Code Art. 437bis. P. Chan Thul, 'Cambodia parliament adopts lese-majeste law, prompting rights concerns' (Reuters, 14 February 2018). The law provides for imprisonment between one and five years' and a fine between 500 and 2,500 USD.

[179] Abolished in UK Coroners and Justice Act 2009 s. 73. J.C. Smith & B. Hogan, *Criminal Law* (3rd edn, Butterworths 1973), 646, cited in Law Commission of England and Wales, Working Paper No. 72 Second Programme, Item XVIII: Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), 41. Although in 1951 the Canadian Supreme Court noted that 'probably no crime has been left in such vagueness of definition' as the offence of sedition, the classical definition of seditious intent is an 'intention to bring into hatred or contempt, or to excite disaffection against the person of, Her Majesty, her heirs or successors, or the government and constitution of the United Kingdom … or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects': CFJ, TrialWatch Fairness Report (n 2) 4, citing J.F. Stephen, *A Digest of the Criminal Law* (4th edn, MacMillan and co. 1887), 66 (Art. 93). However, UK and Canadian authorities have added that seditious intent must also 'be founded in an intention to incite to violence or to create public disturbance or disorder against His Majesty or the institutions of government': UK Divisional Court, *R v. Chief Metropolitan Stipendiary Magistrate ex parte Choudhury* [1991] 1 QB 429, 9 April 1990, 453; Canadian Supreme Court, *Boucher v. R* [1951] SCR 265, 18 December 1950, 315 (Kellock J).

[180] UK Minster Claire Ward's words were quoted in a senate hearing in Canada: Senate of Canada, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs Issue No. 47 (14 June 2018).

[181] CFJ, TrialWatch Fairness Report (n 2). Ghanaian Repeal of the Criminal and Seditious Laws (Amendment) Act 2001, July 2001. Jamaica has abolished the criminal offence of seditious libel, but retained other offences for which elements of the crime include seditious intent: see, e.g., Jamaican Seditious Meetings Act.

[182] CFJ, TrialWatch Fairness Report (n 2) 11, citing Ugandan Constitutional Court, *Mwenda v. Attorney General* [2010] UGSC 5, 25 August 2010; Swazi High Court, *Maseko v. The Prime Minister of Swaziland* (2180/2009) [2016] SZHC 180, 16 September 2016. But the Eswatini Supreme Court has reinstated the state's appeal against this decision: P. Fabricius, 'Historic Swazi court judgment striking down parts of sedition and terrorism laws is under threat' (Daily Maverick, 29 September 2022).

[183] Canadian Supreme Court, *Boucher v. R* [1951] SCR 265, 18 December 1950, §288.

[184] US Code Title 18 Crimes and Criminal Procedure ss 2384–2385; Sack (n 27) 273, 276 ('the early American Republic did adopt the English statutory and common laws of sedition, criminalizing certain criticism of government. These gave way, by the time of Sullivan, to well-settled doctrine, expressly recognized in Sullivan, that sedition laws—in particular ours of 1798—were generally barred by the First Amendment'). See also Sack (n 74) §3.2 ('Criminal libel lives on in American law, but barely; prosecutions for criminal libel … appear to be rare'); M. Alfaro, 'What is sedition?' (The Washington Post, 13 January 2022).

But countries like Malaysia, Hong Kong, India and Pakistan[185] still have such laws on their books.[186] And although Australia amended its Criminal Code to remove 'sedition' offences it reintroduced them as new classes of offences under anti-terrorism laws.[187]

1.5.2. Civil penalties

Civil penalties in national defamation laws mainly consist of damages for injury to reputation and costs of legal proceedings. Some jurisdictions award nominal damages, such as the 'one franc in symbolic compensation' awarded by French courts.[188] Others award damages that are relatively low but can still have serious consequences for some speakers.[189]

Some states award damages that are objectively large. Extremely high defamation awards have been secured in the United States in recent years and the mere risk of such substantial claims is in itself a potential chilling factor. Three defamation trials against a radio host named Alex Jones brought by the families of 10 victims of a massacre at Sandy Hook school that Jones had denied resulted in total damages of nearly $1.5 billion US dollars.[190] In one trial, a jury handed down $965 million US dollars in compensatory damages against Mr. Jones, described as the 'largest defamation verdict in US history', at least for compensatory damages.[191] Fox News and its parent company, Fox Corp, faced a $1.6 billion US dollars defamation suit filed by Dominion Voting Systems, a technology company, following claims aired on Fox News that Dominion rigged its voting machines to steal the 2020 Presidential election from Donald Trump.[192] The case was ultimately settled by Fox News paying Dominion $787.5 million.[193]

Large damages awards used to be a feature of the system in England and Wales, when the assessment of damages for defamation was the province of the jury with no upper limit. This led, for instance, to an award of approximately $1.8 million US dollars against a historian who wrote a pamphlet in the mid-1990s alleging that Lord

[185] See s. II.2. (Application of national laws).

[186] See, e.g., Malaysia: Human Rights Watch, 'Malaysia: End Use of Sedition Act' (17 July 2019); CFJ, TrialWatch Fairness Report (n 2) 13–14. However, the Lahore High Court has struck Pakistan's sedition law as unconstitutional, a decision which remains subject to review by the Supreme Court: 'Pakistani court strikes down sedition law in win for free speech' (Al Jazeera, 30 March 2023).

[187] Australian Anti-Terrorism Act (No. 2) 2005 Schedule 7. In 2010 the term 'sedition' was replaced by the phrase 'urging violence': Australian National Security Legislation Amendment Act 2010 Schedule 1.

[188] See ECtHR, *Brasilier v. France* (App. no. 71343/01), 11 April 2006; ECtHR, *Giniewski v. France* (App. no. 64016/00), 31 January 2006, 55 (the Court still emphasized the chilling effect of the sanction). French Code of Criminal Procedure Art. 475-1 (relating to civil proceeding following a conviction).

[189] See, e.g., ECtHR, *Kasabova v. Bulgaria* (App. no. 22385/03), 19 April 2011, §71 (sum awarded against Bulgarian journalist that was made up of fines, costs and damages and amounted to 35 times her actual monthly salary).

[190] E. Williamson, 'With New Ruling, Sandy Hook Victims Win Over $1.4 Billion From Alex Jones' (The New York Times, 10 November 2022).

[191] S. S. Ali, 'Alex Jones unlikely to escape 'historically high' defamation award, legal experts say' (NBC, 14 October 2022). In June 2023, Alex Jones appealed the $1.4 billion verdict: R. Chumney, 'Conspiracy theorist Alex Jones appeals $1.4 billion defamation verdict awarded to Sandy Hook victims' (newstimes, 3 June 2023).

[192] C. McGreal, 'Is Dominion's $1.6 bn defamation lawsuit a death blow for Murdoch and Fox News?' (The Guardian, 12 December 2022);

[193] S. Levine & K. Lerner, 'Fox and Dominion settle for $787.5m in defamation lawsuit over US election lies' (The Guardian, 18 April 2023).

Aldington, a member of Parliament, was a war criminal.[194] But awards are now in practice made by judges and typically are not greater than the equivalent of approximately $300,000 US dollars in a defamation case.[195] However Irish defamation law still leaves the decision on damages to the jury.[196] Norway also has a track record of their courts awarding large damages in civil proceedings of tens, if not hundreds, of thousands of Euros.[197] And the Singapore High Court ordered a blogger to pay Prime Minister Lee Hsien Loong 100,441 US dollars for sharing an article on Facebook that falsely linked the Prime Minister to a corruption scandal.[198]

Some states seek to control damages through judicial assessment or statutory caps. In South Africa, the quantum of damages is generally not substantial, with the overarching principle being that the purpose of a damages award is to compensate the plaintiff for their impaired reputation and vindicate the plaintiff in the eyes of the public—not to punish the defendant.[199] A number of factors are taken into account, including the seriousness of the defamation, the breadth of distribution, the motivation and conduct of the defendant and the public profile of the plaintiff.[200] This is the principle in England and Wales as well.[201] In Australia, New South Wales recently amended defamation law provides for a statutory cap on non-economic loss approximately $292,000, noting the maximum amount will be awarded only in 'a most serious case'.[202] Prior to this amendment, the actor Geoffrey Rush was awarded a record amount of $2 million US dollars in his case against a newspaper that published an article portraying him as a sexual predator.[203]

[194] ECtHR, *Tolstoy Miloslavsky v. United Kingdom* (App. no. 18139/91), 13 July 1995. The case remains relevant today, as it would make it difficult for a claimant to obtain enforcement in England of the very high awards of damages which are still awarded in other jurisdictions, including the United States (UK High Court of England and Wales, *Adelson v. Anderson* [2011] EWHC 2497 (QB), 7 October 2011, §§85–86).

[195] A. Mullis & C. Doley, *Carter-Ruck on Libel and Privacy* (6th edn, LexisNexis 2010), §§15.26–15.33.

[196] For claims over 75,000 EUR. See, e.g., over 10 million EUR order reduced to 250,000 EUR on appeal: Irish Court of Appeal, *Kinsella v. Kenmare Resources PLC* [2019] IECA 54, 28 February 2019. See also ECtHR, *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15), 15 June 2017, §§105, 129 (a jury awarded 1,872,000 EUR for damages. The Supreme Court found it excessive and reduced it to 1,250,000 EUR and the ECtHR found a violation of article 10, considering that 'relevant and sufficient reasons' need to be given for such a high award). There have also been recent proposals to remove juries from defamation trials: Irish Draft General Scheme of the Defamation (Amendment) Bill (28 March 2023). A recent report by the Oireachtas justice committee called for keeping juries in Irish High Court defamation actions: 'Keep juries for defamation – Oireachtas committee' (Law Society Gazette Ireland, 3 October 2023).

[197] See, e.g., ECtHR, *Bergens Tidende v. Norway* (App. no. 26132/95), 2 May 2000, 4.7 million Norwegian Kroner is approximately 391,503.86 EUR.

[198] Singaporean High Court, *Lee Hsien Loong v. Leong Sze Hian* [2021] 4 SLR 1128 (HC), 24 March 2021 (75,520 USD in general damages, 24,921 USD in aggravated damages).

[199] Milo & Stein (n 127) 43–44.

[200] See, e.g., South African High Court, Gauteng Local Division, *Manuel v. Economic Freedom Fighters* [2019] ZAGPJHC 157, 30 May 2019, §§31–37.

[201] Since the England and Wales Defamation Act 2013 reversed the presumption that defamation cases be tried by jury: England and Wales Defamation Act 2013 s. 11. Judges now assess damages with the current notional cap on general damages set at around 305,000 USD (See, e.g., UK High Court of England and Wales, *Gilham v. MGN Limited* [2020] EWHC 2217 (QB), 12 August 2020, §32).

[202] New South Wales Defamation Amendment Act 2020 Schedule 1, §34, amending s. 35 of the Australian New South Wales Defamation Act 2005. The court may order aggravated damages, to which the cap does not apply, that exceed the cap if it 'is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages'. New South Wales Defamation Act 2005 s. 35(2B) and (2A).

[203] Australian Federal Court, *Nationwide News Pty Limited v. Rush* [2020] FCAFC 115, 2 July 2020 (the amount included 659,651 USD in non-economic loss and aggravated damages and one million in past economic loss).

Apart from damages, the order to pay legal costs may lead to huge financial burdens on journalists in some jurisdictions. In one case, supermodel Naomi Campbell sued a newspaper after it published a photograph of her attending a Narcotics Anonymous clinic.[204] She ultimately won her claim in the English courts and was awarded only approximately 4,000 Euros in damages. However, under the conditional fee agreement, if the appeal succeeded (which it did), her solicitors and counsel were entitled to base costs as well as success fees amounting to approximately 1,256,562.94 Euros.[205] England and Wales later abolished such 'success fees' in defamation and privacy cases.[206]

1.5.3. Other penalties

States have placed restrictions on journalism licences or publications or limited other civil liberties following convictions for defamation. Politicians may be barred from holding positions in public office as a result of convictions for criminal defamation.[207] Criminal defamation laws may ban work as a journalist permanently or for a specific period of time. There is precedent for this penalty in nations such as the Netherlands,[208] Indonesia,[209] Iran[210] and Yemen.[211] In Russia, the withdrawal of the right to hold certain posts for a specific period of time has been imposed on bloggers[212] and journalists.[213] Courts have seized or permanently blocked publication of information in defamation proceedings in Austria[214] and Russia.[215] The banning or closure of media outlets is a penalty in Bahrain,[216] Ukraine,[217] and Qatar.[218] And an injunction of publication or republication can, for example, be sought in Austria[219] and South Africa.[220]

[204] The case was for breach of confidence but the law on defamation was discussed at length. See also UK Supreme Court, *Times Newspapers Ltd v. Flood* [2017] UKSC 33, 11 April 2017.

[205] ECtHR, *MGN Limited v. United Kingdom* (App. no. 39401/04), 18 January 2011 (finding a breach of Art. 10 and chilling effect of costs).

[206] UK Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 13) Order 2018 SI/2018/1287.

[207] J. Reed, 'Rahul Gandhi barred from India's parliament following conviction over Modi remarks' (Financial Times, 25 March 2023).

[208] Dutch Criminal Code Art. 271, §3 (which penalizes insults concerning a deceased person and provides that if the offender commits this offence 'in his profession' he may 'be deprived of the exercise from that profession').

[209] Indonesian Penal Code 1999 Arts 137, 155(2). Indonesia recently passed a new criminal code that will enter into force in 2025, which contains 'dozens' of 'online and offline criminal defamation' provisions: Human Rights Watch, 'Indonesia: New Criminal Code Disastrous for Rights' (8 December 2022).

[210] Iranian Press Law 2002 Art. 27 (criminalizing insults against the 'Leader of the Islamic Republic of Iran or the true Sources of Emulation').

[211] Yemeni Press and Publications Law No. 25 1990 Art. 106.

[212] Reporters Without Borders, 'Jailed journalist to spend total of three years in prison camp' (23 January 2015).

[213] ECtHR, *Stomakhin v. Russia* (App. no. 52273/07), 9 May 2018, §128.

[214] ECtHR, *Oberschlick v. Austria* (App. no. 11662/85), 23 May 1991, §26.

[215] See Russian Federal Law No. 149-FZ on Information, Information Technologies and the Protection of Information 2006 Art. 15.1.1.

[216] Bahraini Decree-by-law No. 47 Art. 19 (the ministerial decision to ban an outlet can be challenged before a civil court within 15 days of the decision).

[217] The Law of Ukraine 'On Media' No. 2849-IX 2022 Art. 99.

[218] Qatari Law No. 8 of 1979 on Publications and Publishing Art. 84.

[219] Austrian Civil Code Art. 1330 (2).

[220] See, e.g., South African Supreme Court of Appeal, *Economic Freedom Fighters v. Manuel* [2020] ZASCA 172, 17 December 2020.

Other forms of punishment for defamation include correctional labour (Belarus)[221] and loss of the right to hold office or serve in the army (the Netherlands).[222] A requirement to 'rectify' publications to declare their falsity or to publish a judgment is also a civil penalty available in Russia.[223]

2. Application of National Laws

Across the world, governments and other powerful actors have sought to chill political speech through a range of civil and criminal laws, from defamation to *lèse-majesté* provisions or sedition charges. How these laws are misused varies widely: from lengthy terms of imprisonment handed down for social media posts or legitimate journalism,[224] to powerful plaintiffs harassing journalists with an onslaught of civil charges that are cripplingly expensive to defend.[225]

According to a report by the Committee to Protect Journalists, 'over two-thirds of the governments' in the Americas 'routinely use [criminal defamation] laws to silence dissent and to deprive citizens of information on matters of public interest'.[226] These laws are also alive and well in Asia. Thailand is using *lèse-majesté* laws regularly against students and protesters.[227] India deploys criminal defamation laws—as well as sedition laws—to devastating effect on citizens and the media.[228] And Hong Kong has revived sedition laws that have been dormant for five decades for use against those who criticize the state.[229] Some striking cases are surveyed below, and illustrate how such practices are developing across each region.

2.1. Europe

2.1.1. Spain

A prominent European case involving a restriction on political speech in recent years has been the trial of Catalonia independence leaders in Spain. In October 2019, Spain's Supreme Court unanimously convicted nine Catalan leaders of sedition and other crimes—such as embezzlement of public funds—sentencing them to between nine

[221] Belarusian Criminal Code Art. 188 (meaning deductions are made from the earnings of a convicted person at his place of work and provided to the state).

[222] Dutch Criminal Code Art. 262 §2.

[223] Russian Civil Code Art. 152; ECtHR, *Dyuldin v. Russia* (App. no. 25968/02), 31 July 2007. See also Russian Federal Law No. 149-FZ on Information, Information Technologies and the Protection of Information 2006 Art. 15.1.1. See further South Africa and Slovakia: South African Supreme Court of Appeal, *Economic Freedom Fighters v. Manuel* [2020] ZASCA 172, 17 December 2020; Slovak Civil Code Art. 11 et ss.

[224] See, e.g., s. II.2.2.1. (Thailand). See, e.g., R. Ratcliffe, 'Woman jailed for record 43 years for insulting Thai monarchy' (The Guardian, 19 January 2021).

[225] See s. II.2.1.3. (SLAPP and libel tourism).

[226] CPJ & others, 'Critics Are Not Criminals: Comparative Study of Criminal Defamation Laws in the Americas' (2016), 9; see, e.g., s. II.2.3.1. (Ecuador).

[227] CFJ TrialWatch Fairness Report: (n 2), 18–19.

[228] Freedom House, *Freedom in the World 2023 Country Report: India* (2023). US Department of State, *Country Reports on Human Rights Practices: India* (2022), 1, 10: In 2022, the Supreme Court of India suspended the application of their colonial-era sedition law while it undergoes judicial review.

[229] CFJ, TrialWatch Fairness Report (n 2) 13–14.

and 13 years' imprisonment.[230] The Working Group on Arbitrary Detention found that their peaceful 'calls for the organization of processes that promote public participation' had been 'legitimate expressions of the exercise of freedom of opinion and expression' that should not have been criminalized.[231] And Amnesty International commented that the 'Supreme Court's interpretation of the crime of sedition' had been 'overly broad and resulted in criminalising legitimate acts of protest'.[232]

In January 2023, an amendment to the Criminal Code entered into force, eliminating the crime of sedition (article 544)[233] and incorporating instead the crime of aggravated public disorder. It envisages prison sentences of three to five years, lower than those associated with sedition (10 to 15 years).[234]

Spain has also been urged to amend the provisions of its Criminal Code on 'insult to the crown' and 'exhaulting terrorism', given the growing number of convictions of artists for controversial expressions on social media.[235]

2.1.2. Turkey

Since President Erdoğan took office, tens of thousands of prosecutions have taken place under Turkish laws related to insulting speech.[236] This includes article 299 of the Turkish Penal Code, which criminalizes insult to the President by up to four years' imprisonment.[237] In 2014, the year of President Erdoğan's election, 132 prosecutions were instigated under this provision.[238] These figures have sharply increased, with over 6,000 prosecutions filed in 2017 alone.[239]

Prominent convictions include a 14-month suspended prison sentence handed down to a former Miss Turkey for insulting the president on Instagram after she posted

[230] Catalonia's former vice-president Oriol Junqueras, various officials and civil society activists were also sentenced to prison terms. See Spanish Supreme Court, *Judgment No. 459/2019*, Special Proceedings No. 20907/2017, 14 October 2019. The various convictions included in this decision were confirmed by the Constitutional Court when deciding on separate appeals filed by the defendants. See also Spanish Supreme Court, *Judgment No. 459/2019*, Special Proceedings No. 20907/2017, 14 October 2019, 78–97.

[231] WGAD, *Jordi Cuixart I Navarro v. Spain* (Opinion no. 6/2019), 25 April 2019, §§110, 120. Although none of the convictions related solely to speech, in its bill of indictment committing the defendants to trial, the Supreme Court observed that the defendants had the 'ability to mobilise hundreds of thousands of followers from the pro-sovereignty organisations, from their speeches in the media and multiple messages on digital platforms', through which, the Court alleged, they 'encouraged a massed force to clash with the police and prevented voting'. Spanish Supreme Court, *Judgment No. 459/2019*, Special Proceedings No. 20907/2017, 14 October 2019.

[232] Amnesty International, 'Spain's conviction for sedition of Jordi Sànchez and Jordi Cuixart threatens rights to freedom of expression and peaceful assembly' (19 November 2019). In June 2021, Spain issued partial pardons for all nine defendants, releasing all from prison but retaining their ban on a return to public office for the duration of their original sentences. And in December 2022, Spain repealed the crime of sedition, replacing it with an 'aggravated public disorder' offence carrying between three and five years' imprisonment. C. Giles, 'Spanish govt reforms sedition law in nod to Catalan allies' (Associated Press, 22 December 2022).

[233] Spanish Organic Law 14/2022 Art. 1.20, derogating Art. 544 of the Spanish Criminal Code.

[234] Spanish Criminal Code Art. 557.

[235] Spanish Criminal Code Arts 578, 490, 491; COE Commissioner for Human Rights, Letter to the Spanish Minister of Justice dated 11 March 2021; OHCHR, ' "Two legal reform projects undermine the rights of assembly and expression in Spain"—UN experts' (23 February 2015). See ch. 6 (Terrorism Laws), s. II. 2.1.1. (Spain).

[236] Turkey has been characterized in this chapter as a European nation because it is a member of the Council of Europe, state party to the European Convention on Human Rights and is subject to the jurisdiction of the European Court of Human Rights.

[237] See s. III.4.2. (Public Interest).

[238] Human Rights Watch, 'Turkey: End Prosecutions for "Insulting President" ' (17 October 2018).

[239] Ibid.

a satirical poem adapting the national anthem and referencing a corruption scandal.[240] Even public officials have been charged under these offences. For example, the mayor of Istanbul, Ekrem Imamoğlu, was sentenced to more than two and a half years' imprisonment for insulting members of the Supreme Electoral Council in December 2022.[241] Mr. Imamoğlu, seen as a key opponent to the President, was sentenced for 'insult' after he told the media that those who cancelled the 2019 Istanbul mayoral election that he won were 'fools'.[242] The Court has also banned Mr. Imamoğlu from holding political office.[243]

2.1.3. SLAPP and libel tourism

Strategic Litigation Against Public Participation (SLAPP)[244] refers to frivolous charges filed by powerful subjects against individuals who have expressed a critical position on an issue of public significance, aimed at silencing their voices. Because of the time and costs involved in such litigation, such cases present a serious threat to journalists, activists, academics or bloggers who are forced to defend themselves from such libel charges. The problem of SLAPP suits and libel tourism in Europe in particular is growing, but is emblematic of a broader global trend, and has resulted in the Council of Europe making specific recommendations to reduce SLAPP suits.[245]

The case of investigative journalist Daphne Caruana Galizia illustrates the problem of SLAPP suits in Malta. At the time Galizia was murdered, her assets had been frozen in conjunction with four libel suits brought by Maltese Economy Minister Chris Cardona and his consultant.[246] Galizia described the lawsuits against her at the time as 'an intimidation strategy'.[247] At the time of her murder, she was facing 43 civil and five criminal libel suits filed by a range of prominent politicians and businessmen.[248] Her lawsuits have now been passed on to her family.[249]

In the *El Universo* decision, the Inter-American Court recently held that the recourse by 'public officials to judicial channels to file lawsuits for crimes of slander or insult, not with the objective of obtaining a rectification, but to silence the criticisms made

[240] 'Ex-Miss Turkey sentenced for Erdogan poem' (DW, 31 May 2016).
[241] 'Istanbul mayor sentenced to prison for insulting public officials' (Al Jazeera, 14 December 2022).
[242] Human Rights Watch, 'Turkey: Court Convicts Istanbul Mayor Ekrem Imamoğlu' (14 December 2022).
[243] Pursuant to Turkish Penal Code Art. 53. Human Rights Watch, 'Turkey: Court Convicts Istanbul Mayor Ekrem Imamoğlu' (14 December 2022).
[244] The term 'anti-SLAPP' ('Strategic Lawsuits Against Public Participation') was first used by Professors George Pring and Penelope Canan of the University of Denver in the 1980s. See G. Pring & P. Canan, *SLAPPS: Getting Sued for Speaking Out* (Temple University Press 1996); see also J.W. Beatty, 'The Legal Literature on SLAPPS: A Look Behind the Smoke Nine Years After Pring and Canan First Yelled "Fire"' (1997) 9 *University of Florida Journal of Law & Public Policy* 85, 87, n. 11. The term 'anti-SLAPP' can be somewhat unhelpful insofar as the anti-SLAPP laws may relate, e.g., to 'a party's exercise of the right of free speech, right to petition, or right of association', US Texas Civil Practice and Remedies Code §27.003(a), not merely 'public participation'.
[245] See, e.g., CASE Coalition Against SLAPPs in Europe, 'SLAPPs'; Article 19, 'Europe: ARTICLE 19 welcomes Council of Europe anti-SLAPPs initiatives' (30 March 2022).
[246] E. Allaby, 'After journalist's murder, efforts to combat SLAPP in Europe' (Columbia Journalism Review, 24 April 2019).
[247] D. Caruana Galizia, 'We're the ones who should be suing them for the disaster they've brought to Malta' (Running Commentary: Daphne Caruana Galizia's Notebook, 12 May 2017).
[248] Daphne Caruana Galizia Foundation, 'Defence against frivolous and vexatious libel suits'; Allaby (n 246).
[249] Allaby (n 246).

regarding their actions in the public sphere, constitutes a threat to freedom of expression'; '[t]his type of process, known as "SLAPP"', the Court said, 'constitutes an abusive use of judicial mechanisms that must be regulated and controlled by the States'.[250] UN Special Rapporteurs have also expressed concern at the practice.[251] And the Council of Europe (COE) Rapporteur has explained that 'the risk of being drawn into costly and time-consuming legal proceedings can create a climate of fear and self-censorship'.[252]

The COE Rapporteur has recommended 15 good practices, including 'the prohibition of abuse of rights' and the use of the *forum non conveniens* doctrine to address cases of abusive forum shopping.[253]

Anti-SLAPP legislation has also been introduced in the United States and Canada, allowing the person sued to file a motion to strike out the case on the basis that it involves speech on a matter of public concern.[254] Costs sustained by the defendant can be recouped and there are measures in place to penalize abuse, such as fining the plaintiff. In the United States, anti-SLAPP laws currently exist in 32 states and the District of Columbia,[255] but these may not protect against lawsuits brought in federal courts.[256] In South Africa, a SLAPP defence was recognized under common law through the doctrine of abuse of court process.[257]

The problem of frivolous suits by powerful defendants is magnified when such cases can be filed all over the world, posing a threat to journalists in jurisdictions far from where they live and work. In England and Wales, although effective common law means were available for a defendant to obtain early dismissal of frivolous claims[258] and the Defamation Act 2013 brought forward a number of reforms, SLAPP and libel tourism remain a threat to journalists and other speakers. Although the entry into force of the UK Defamation Act resulted in a 40 per cent reduction in defamation claims in one year,[259] foreign journalists and news outlets continue to face claims in English courts.[260]

[250] IACtHR, *Palacio Urrutia v. Ecuador* (Series C, no. 446), 24 November 2021, §95. See also IACtHR, *Baraona Bray v. Chile* (Series C, no. 481), 24 November 2022, §91; See s. IV.13 (Recommendations).

[251] UN Special Rapporteur M. Sekaggya, *Report of the Special Rapporteur on the situation of human rights defenders* (2013) UN Doc. A/HRC/25/55, §§59, 70; COE Special Rapporteur E. Prévost, *Liability and Jurisdictional Issues in Online Defamation Cases* (2019) DGI(2019)04, 9.

[252] ≤IBT≥COE Rapporteur E. Prévost, *Liability and Jurisdictional Issues in Online Defamation Cases* (2019) DGI(2019)04, 8.

[253] Ibid., 35–36.

[254] In Canada, Ontario, British Columbia and Quebec have such laws: Ontario Protection of Public Participation Act, 2015, S.O. 2015 c. 23 (resulting in the addition of sections 137.1 to 137.5 of Ontario's Courts of Justice Act, RSO 1990 c. C-43); British Columbia Protection of Public Participation Act, SBC 2019 c. 3; Quebec: Code of Civil Procedure CQLR c C-25 Arts 51–54.

[255] A. Vining & S. Matthews, 'Overview of Anti-SLAPP Laws' (Reporters Committee for Freedom of the Press).

[256] See, e.g., US Court of Appeals, Second Circuit, *La Liberte v. Reid* 966 F.3d 79, 15 July 2020, 85–89 (California anti-SLAPP statute held inapplicable in federal case pending in New York-based federal court inasmuch as procedures established by the statute conflict with those applied under the Federal Rules of Civil Procedure).

[257] South African Constitutional Court, *Mineral Sands Resources (Pty) Ltd v Reddell* [2022] ZACC 37, 14 November 2022.

[258] This includes early rulings on meanings and striking out, in particular for abuse of process (UK Court of Appeal, *Jameel v. Dow Jones* [2005] EWCA Civ 75, 3 February 2005). See Mullis & Doley (n 195), chapter 28.

[259] 227 in 2014 down to 135 in 2015: UK Ministry of Justice, *Civil Justice Statistics Quarterly, England and Wales* (*Incorporating The Royal Courts of Justice 2015*) (2016).

[260] A report including a survey of over 60 journalists in 41 countries investigating cross-border financial crime and corruption has concluded that 31 per cent had been threatened with court action in London, mainly for defamation or privacy claims, with the United Kingdom as the most common jurisdiction for legal threats after a

And despite commitments to 'moving decisively to stamp out SLAPPs', the UK Government has yet to do so.[261]

The Defamation Act established a serious harm threshold for actionable claims[262] and a defence of publication on matters of public interest.[263] It also requires that, if a defendant is domiciled outside of the United Kingdom, the court will not have jurisdiction to hear and determine an action unless England and Wales is 'clearly the most appropriate place' in which to bring an action.[264] A similar shift has been observed in Canada, though there the initiative was largely taken by the courts not the legislature.[265] In the United States some provisions that could discourage libel tourism seem to have limited effects.[266] France has also attracted libel tourism as libel is a criminal offence and therefore provides a powerful threat against the speaker.[267]

2.2. Asia Pacific

2.2.1. Thailand

In Asia, Thailand's *lèse-majesté* law is used to suppress insult of 'the King, the Queen, the Heir-apparent or the Regent' and provides for 'imprisonment of three to fifteen years' per count that is charged. Because a count often relates to one statement, cases often carry the threat of multiple decades in prison.[268]

Thailand experienced a wave of *lèse-majesté* prosecutions following the 2014 coup d'ĕtat, with at least 127 individuals charged between 2014 and 2018.[269] After the 2020 pro-democracy protests, hundreds more were charged and many have been subjected to decades long sentences.[270] A sentence of 70 years (reduced to 35 years on a guilty plea) was imposed on one person for posting content on Facebook that allegedly exposed the King, Rama IX, and other members of the royal family to 'public hatred and humiliation'.[271] And a former civil servant was sentenced to 87 years in prison (reduced

journalist's home country: S. Coughtrie & P. Ogier, 'Unsafe for Scrutiny: Examining the pressures faced by journalists uncovering financial crime and corruption around the world' (The Foreign Policy Centre, 2 November 2020), 6.

[261] UK Ministry of Justice, 'Consultation Outcome: Strategic Lawsuits Against Public Participation (SLAPPs)' (17 March 2022).

[262] England and Wales Defamation Act 2013 s. 1(1).

[263] Ibid., s. 4(1).

[264] Ibid., s. 9(2).

[265] Canadian Supreme Court, *Éditions Écosociété Inc. v. Banro Corp*., 2012 SCC 18, 18 April 2012; Canadian Supreme Court, *Haaretz.com v. Goldhar* 2018 SCC 28, 6 June 2018 following Canadian Supreme Court, *Club Resorts Ltd v. Van Breda* 2012 SCC 17, 18 April 2012.

[266] US Code Title 28 Judiciary and Judicial Procedure s. 4102(a)(l)(A); US Securing the Protection of our Enduring and Established Constitutional Heritage Act (2010) which bars US courts from recognizing foreign libel judgments, unless it finds that the foreign judgment does not infringe the First Amendment rights: US Code Title 28 Judiciary and Judicial Procedure §4102(a)(l)(A); J. Larkin, 'False Havens: Assessing New Developments in the Libel Tourism Debate' (2019) 11 *Journal of Media Law* 82.

[267] D. Sullivan, *Libel Tourism: Silencing the Press Through Transnational Legal Threats* (Center for International Media Assistance, 2010), 21.

[268] Thai Penal Code s. 112. See CFJ, 'Thailand Should Dismiss Charges Against 22 Protest Leaders' (16 January 2023).

[269] In early 2018 a policy shift resulted in a brief moratorium halting use of this provision. International Federation for Human Rights & others, *Second Wave: The return of lèse-majesté in Thailand* (2021) (reporting 124 individuals were charged under Art. 112 between November 2020 and August 2021), 4–5.

[270] Ibid.

[271] See Columbia Global Freedom of Expression, 'Public Prosecutor v. Wichai'.

to 43 years and six months upon pleading guilty) for posting 'audio clips to Facebook and YouTube with comments critical of the monarchy'.[272] UN experts have criticized Thailand's use of *lèse-majesté* and sedition laws to suppress speech, calling on the government to 'stop the repeated use of such serious criminal charges against individuals for exercising their rights to freedom of peaceful expression'.[273]

2.2.2. India

In India, there is increasing use of colonial-era sedition laws to stifle criticism. The vast majority of sedition cases filed against Indian journalists, students, academics and opposition politicians for criticizing governments and politicians over the last decade were registered after 2014, when Prime Minister Modi took power, and more than 7,000 individuals have been charged since.[274] In January 2021, eight journalists who reported on protests by farmers regarding agricultural reform were charged with sedition and 'making statements inimical to national integration'.[275] An investigative news magazine, Caravan, has had 10 sedition cases brought against its senior editorial staff for a story and tweet relating to a protester's death.[276] Sedition charges are among the myriad charges levelled against Indian journalist Rana Ayyub,[277] whose reporting on issues affecting Indian Muslims and vulnerable individuals in the Covid-19 pandemic has seen her subjected to what the UN has called 'judicial harassment' by Indian authorities.[278]

A report by Freedom House warned that 'India, the world's most populous democracy, is … sending signals that holding the government accountable is not part of the press's responsibility'.[279] India's Law Commission has called for reform, noting 'instances where people have been charged with sedition for making statements that in no manner undermine the security of the nation'.[280] And recent developments evince the potential for the law to be overturned: in May 2022, the Indian Supreme Court urged the government to refrain from bringing any new sedition cases pending a review of the law, and the Modi Government informed the Court that it will review it.[281]

2.2.3. Philippines

Perhaps the most high-profile application of libel laws to silence political speech in the Philippines has been the case of Maria Ressa, veteran journalist, CEO of Rappler Inc. and

[272] R. Ratcliffe, 'Woman jailed for record 43 years for insulting Thai monarchy' (The Guardian, 19 January 2021).
[273] 'Thailand: UN rights office deeply troubled by treason charges for protestors' (UN News, 18 December 2020).
[274] Purohit (n 9).
[275] S. Biswas, 'Why journalists in India are under attack' (BBC News, 4 February 2021).
[276] Ibid.
[277] C. Cadwalladr, 'Reviled, harassed, abused: Narendra Modi's most trenchant critic speaks out' (The Guardian, 27 February 2022).
[278] 'Halt all retaliation attacks against Indian journalist Rana Ayyub—UN experts' (UN News, 21 February 2022).
[279] S. Repucci, 'Freedom and the Media 2019: Media Freedom: A Downward Spiral' (Freedom House, 2019).
[280] U. Trivedi, 'India Top Court to Consider Quashing Colonial-Era Sedition Law' (Bloomberg, 15 July 2021); Law Commission of India, Consultation Paper on 'Sedition' (2018), §7.3.
[281] 'India's top court puts colonial-era sedition law on hold for review' (Reuters, 11 May 2022). In August 2023, a new law introduced in Parliament proposed to replace the sedition law with a provision criminalizing 'acts endangering sovereignty, unity and integrity of India': A. Sharma, 'India moves to replace British colonial-era sedition law with its own version' (AP News, 12 August 2023).

winner of the 2021 Nobel Peace Prize. On 15 June 2020, a Manila Regional Trial Court Judge found Ressa guilty of cyberlibel for allegedly defaming a businessman, Wilfredo Keng, following Rappler's publication of an article written by another journalist alleging that there were 'shady' dealings between Mr Keng and a former Chief Justice of the Supreme Court.[282] She was sentenced to approximately six years' imprisonment for this offence and ordered to pay approximately $7,100 US dollars in damages.[283] The decision, affirmed by the Court of Appeals, has been considered a death knell for democracy in the Philippines and the UN has repeatedly called on the Philippines to repeal the criminal penalties attached to its defamation laws.[284]

Ressa was convicted even though cyberlibel was not a crime at the time of the publication and the article related to alleged corruption by a justice facing impeachment at that time: a matter of clear public interest.[285] And instead of relying on the one-year limitation period prescribed for 'the crime of libel and other similar offences',[286] prosecutors relied on a general limitation period of 12 years[287] even though the Supreme Court had declared 'cyberlibel is … not a new crime'.[288]

As a result, Ressa was convicted for an article she did not write, based on a law that did not exist when the article was written, and by way of a prosecution initiated six years after the limitation period had expired.[289] The verdict in this case comes after a long line of politically motivated allegations against Ressa, including additional libel charges,[290] exposing her to a cumulative sentence of over 50 years in prison.[291] Multiple

[282] Philippine Regional Trial Court, *People of the Philippines v. Santos, Ressa, and Rappler* R-MNL-19-01141-CR, 15 June 2020; Philippine Cybercrime Prevention Act of 2012 s. 4(c)(4).

[283] Philippine Regional Trial Court, *People of the Philippines v. Santos, Ressa, and Rappler* R-MNL-19-01141-CR, 15 June 2020, 36 (ordering 200,000 Philippine pesos (approximately 3,500 USD) for moral damages and 200,000 pesos (approximately 3,500 USD) for exemplary damages).

[284] The trial court sentenced her to a maximum of six years' imprinsonment. On appeal, the Philippine Court of Appeals imposed a longer maximum sentence of six years, eight months and 20 days upon Ressa and her co-accused: see OHCHR, 'Philippines: UN expert slams court decision upholding conviction of Maria Ressa and shutdown of media outlets' (14 July 2022).

[285] Ibid.

[286] Philippine Revised Penal Code Art. 90.

[287] Philippine Commonwealth Act No. 3326 s. 1(d) (which provides a 12-year limitation period for offences that are silent as to their limitation period and are punishable by over six years' maximum imprisonment); Philippine Cybercrime Prevention Act of 2012 s. 6.

[288] Philippine Revised Penal Code Art. 353, in relation to Art. 355 of the Revised Penal Code already punishes it; Philippine Supreme Court, *Disini v. Secretary of Justice* G.R. No. 203335, 11 February 2014.

[289] The article was published on Rappler.com on 29 May 2012 and a typographical error was corrected changing one letter on 19 February 2014. The Philippine Cybercrime Prevention Act was signed into law on 12 September 2012. Between 9 October 2012 and 22 April 2014, the Cybercrime Prevention Act was the subject of a temporary restraining order imposed by the Supreme Court: Supreme Court of the Philippines, *Disini, et al. v. Secretary of Justice, et al.,* G.R. Nos. 203335, 203299, 203306, 203359, 203378, 203391, 203407, 203440, 203453, 203454, 203469, 203501, 203509, 203515 & 203518, 18 February 2014. Ms. Ressa was charged for the alleged cyberlibel offence in 2019.

[290] See, e.g., Doughty Street Chambers, 'Maria Ressa's Legal Team Welcome Dismissal of Libel Charge against Maria Ressa in the Philippines' (12 August 2021).

[291] R. Ratcliffe, 'Journalist Maria Ressa found guilty of "cyberlibel" in Philippines' (The Guardian, 15 June 2020). Ressa was acquitted of four tax charges in January 2023: J. Gutierrez & M. Ives, 'Maria Ressa, Philippine Journalist and Nobel Laureate, Is Acquitted of Tax Evasion' (The New York Times, 17 January 2023). In September 2023, Ressa was aquitted of her final tax charge: A. France-Presse, 'Philippine Nobel prize winner Maria Ressa acquitted of tax charges' (The Guardian, 12 September 2023).

governments, the UN and the European Parliament have called on the Philippines to drop the charges.[292]

2.3. North and South America

2.3.1. Ecuador

Like in the Philippines, many countries in the Americas allow private citizens to file a complaint seeking to have prosecutors institute criminal proceedings.[293] A high-profile example in Ecuador concerns former President Rafael Correa's defamation complaint against the opinion editor, Emilio Palacio, and three executives of the El Universo daily paper.[294] Palacio's column referred to Correa as 'the dictator' and suggested he had ordered the army to shoot at civilians during a police uprising in 2010, and that his actions may have amounted to crimes against humanity.[295] Correa argued that the defendants should be punished with a prison term of three years and 80 million US dollars in damages.[296]

The judge convicted the defendants of criminal defamation of an authority and sentenced them to three years in prison and a fine of $30 million US dollars.[297] He ordered El Universo to pay an additional 10 million US dollars in damages.[298] The Inter-American Commission and Court of Human Rights, reviewing the case, held that such criminal sanctions violated the right to freedom of expression and condemned the conviction.[299] While the Court stopped short of expressly saying criminal penalties or even imprisonment could never be appropriate for defamation, a position that had been urged by parties intervening in the case, the Court arguably went further than previous cases in concluding that, within a reasonable period of time, Ecuador must adopt legislative measures to 'prevent public officials from resorting to judicial channels to file lawsuits for slander and insult with the aim of silencing criticism of their actions in the public sphere'.[300] The Court also held that to uphold 'media pluralism and diversity' 'requires … on the part of the State' to 'establish, for the protection of the honor of public

[292] See, e.g., Doughty Street Chambers, 'Amal Clooney and Caoilfhionn Gallagher QC condemn court decision affirming Maria Ressa's conviction and sentence for 'cyber libel'' (11 July 2022).

[293] See, e.g., s. II.2.2.3. (Philippines); American Bar Association and CFJ, 'Peru: A Preliminary Report on Proceedings Against Journalist Paola Ugaz' (25 October 2020)('In the Peruvian system, private citizens can file complaints regarding certain offenses, including criminal defamation, without the participation of a public prosecutor').

[294] E. Palacio, 'NO a las mentiras' (NO to lies) (El Universo, 6 February 2011).

[295] CPJ, 'Ecuadorian editor and executives sentenced to prison' (21 July 2011).

[296] Ibid.

[297] Ibid; Ecuadorian Criminal Code Art. 493.

[298] CPJ, 'Ecuadorian editor and executives sentenced to prison' (21 July 2011). CPJ, 'El Universo verdict bad precedent for free press in Americas' (16 February 2012). In 2012, President Correa announced that he would pardon the defendants. According to El Universo, the sentences have not been executed, but they have also not been declared invalid. 'Correa Forgives But Does not Forget' (Ecuador Times, 27 February 2012); P. Nalvarte, 'I/A Court HR admits case from newspaper EL Universo against the State of Ecuador after criminal sentence for defamation in 2012' (Knight Center LatAm Journalism Review, 26 February 2020).

[299] IACtHR, *Palacio Urrutia v. Ecuador* (Series C, no. 446), 24 November 2021, §127; IACmHR, *Merits Report No. 29/19* (March 2019) OEA/Ser.L/V/II. Doc. 34; OAS, Press Release R20/12 (12 February 2012).

[300] IACtHR, *Palacio Urrutia v. Ecuador* (Series C, no. 446), 24 November 2021, §182.

officials, alternatives to the criminal process, for example, rectification or response, as well as the civil process'.[301]

2.4. Middle East and Africa

2.4.1. South Africa

In South Africa, former students were held liable under defamation laws for a computer-created image they created and circulated in which the face of a 'deputy principal of the school was super-imposed alongside that of the school principal on an image of two naked men sitting in a sexually suggestive posture'.[302] The Constitutional Court confirmed that the applicants were liable for defamation, but lowered the damages awarded from approximately $2,500 to $1,400 US dollars given the young age of the speakers.[303] This case is significant because the photoshopped image was crude, so that the reasonable person would not believe it to be a true image of the principal.[304] The case therefore sets a precedent for the potential suppression of satirical artworks.

2.4.2. Saudi Arabia

In Saudi Arabia, defamation laws are applied regularly to silence political criticism by journalists. In 2018, newspaper columnist Saleh al-Shehi was sentenced to five years in prison for 'insulting the royal court', with a five-year travel ban going into effect after release.[305] His arrest followed his appearance on a television show in which he said that any Saudi citizen who has a contact within the royal court or someone associated with it 'automatically has an advantage in buying strategically located land otherwise not available to the public'.[306]

Similarly, human rights activist and lawyer Waleed Abulkhair was sentenced to 15 years in prison, a 15-year overseas travel ban and a fine of over $50,000 US dollars for seeking to discredit state legitimacy, inciting public opinion and insulting the judiciary.[307] The convictions stem from his peaceful activism, 'including statements to news media and tweets criticizing human rights abuses in Saudi Arabia'.[308]

[301] Ibid., §96; M. Cepeda & D. Milo, 'The Beginning of the End for Criminal Defamation in the Americas? The El Universo Case' (Just Security, 3 May 2022). The El Universo case is part of a string of similar cases stifling political dissent in Ecuador. In 2014, an Assembly member, a former union leader, and a journalist were convicted of slandering former President Rafael Correa, resulting in up to 18 months' imprisonment, the obligation to issue a public apology and an order to pay reparations of 140,000 USD (18 months' imprisonment for the journalist, and six months for the union leader): IACmHR, *Fernando Alcibíades Villavicencio Valencia et al.* (Ecuador) (Precautionary Measures 30-14), 24 March 2014.

[302] South African Constitutional Court, *Le Roux v. Dey* [2011] ZACC 4, 8 March 2011, 1.

[303] South African Constitutional Court, *Le Roux v. Dey* [2011] ZACC 4, 8 March 2011.

[304] Ibid., 89.

[305] CPJ, 'Saudi journalist jailed for five years for insulting royal court' (8 February 2018). Saleh al-Shehi was released from prison on 19 May 2020 and died, reportedly from illness, approximately two months later: Reporters Without Borders, 'RSF calls for probe into Saudi journalist's death after release from prison' (24 July 2020).

[306] CPJ, 'Saudi Arabian authorities arrest local journalist following critical commentary' (5 January 2018).

[307] WGAD, *Waleed Abulkhair v. Saudi Arabia* (Opinion no. 10/2018), 19 April 2018, §§15, 17, 26–27; J. El-Hage & C. Assaf Boustani, 'Waleed Abulkhair sits in a Saudi jail for speaking out' (Human Rights Foundation, 12 July 2016). Saudi Arabian Anti-Cyber Crime Law and the Saudi Arabian Penal Law concerning Crimes of Terrorism and its Financing.

[308] Human Rights Watch, 'Saudi Arabia: 15-Year Sentence for Prominent Activist' (7 July 2014).

III. International Legal Standards

The right to freedom of expression is enshrined in article 19 of the Universal Declaration of Human Rights, article 19 of the International Covenant on Civil and Political Rights (ICCPR) and its regional equivalents.[309] In addition, the right to a fair trial applies to any defendant in a criminal or civil case, and a journalist or speaker who has suffered an unfair trial may bring a claim for violation of that right.[310]

Under article 19(3) of the ICCPR, a state is permitted to restrict speech if the state can prove that the restriction is (1) 'provided by law' (legality requirement); (2) pursues one of the following legitimate objectives: (i) 'for respect of the rights or reputations of others' or (ii) 'for the protection of national security or of public order … or of public health or morals' (legitimacy requirement); and (3) is 'necessary' to achieve that aim (necessity requirement).[311] An analysis of necessity includes an assessment of proportionality, namely that restrictions are 'appropriate to achieve their protective function', 'the least intrusive instrument amongst those which might achieve their protective function', and 'proportionate to the interest to be protected'.[312] And given that the right to freedom of expression has likely crystallized into customary international law, even those few states who have not ratified the ICCPR or regional treaties are nonetheless bound to give effect to the right under international law, and to treat article 19 of the ICCPR as a floor, not a ceiling, for the protection of the right.[313] In addition, while these treaty provisions were drafted to bind states, today, all the major technology companies involved in speech-regulation have recognized the relevance of international human rights standards to their policies on content-moderation.[314]

1. Legality

International human rights bodies agree that laws restricting freedom of expression must be precise and that states must ensure that citizens can access the law and understand what conduct is proscribed.[315] This is a requirement for the rule of law.[316]

[309] ECHR Art. 10; ACHR Art. 13; ACHPR Art. 9; Arab Charter Art. 32; ASEAN Human Rights Declaration Art. 23; Cairo Declaration on Human Rights in Islam Art. 22. See ch. 1 (Introduction), s. II.1.1. (Treaty language).

[310] See A. Clooney & P. Webb, *The Right to a Fair Trial in International Law* (OUP 2021).

[311] See also HRC, General Comment No. 34 (2011), §22.

[312] Ibid., §34.

[313] See ch. 1 (Introduction), s. II.2. (Customary International Law).

[314] See, e.g., Twitter, 'Defending and respecting the rights of people using our service'; @jack, 'Tweet dated 10 August 2018'; Meta, 'Corporate Human Rights Policy'; Meta, 'Facebook Community Standards'. See also R. Allan, 'Hard Questions: Where Do We Draw the Line on Free Expression?' (Meta Newsroom, 9 August 2018); Global Network Initiative, GNI Principles on Freedom of Expression and Privacy. See ch. 3 (Hate Speech), s. IV (Approach of private companies to online hate speech).

[315] HRC, General Comment No. 34 (2011), §§24–25; Art. 19(3) of the ICCPR requires that any restriction be 'provided by law'; WGAD, *Chen Shuqing and Lü Gengsong v. China* (Opinion no. 76/2019), 21 November 2019, §43.

[316] Venice Commission, *Report on the Rule of Law* (2011) CDL-AD(2011)003rev, §41.

In its country reports, the Human Rights Committee has called on various states to 'clarify the vague and broad definition of key terms' contained in their laws relating to defamation, insult and sedition.[317]

The Working Group on Arbitrary Detention similarly criticized certain Chinese laws as 'vague' and in violation of international human rights law, for instance those that refer to 'incit[ing] others by spreading rumours . . . to subvert State power or overthrow the socialist system'.[318] And it has criticized Thailand's *lèse-majesté* law on the basis that it 'leaves the determination of whether an offence has been committed entirely to the discretion of the authorities', which rendered the provision 'so vague as to be inconsistent with international human rights law'.[319]

The European Court of Human Rights provides that restrictions to speech 'must be formulated with sufficient precision to enable the persons concerned . . . to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[320] The Court's assessment focuses on whether laws are 'interpreted and applied by the domestic courts in a rigorous and consistent manner'.[321] And it has held that the meaning of the words used by a speaker should be determined by judges objectively, on the basis of how the words would have been understood by reasonable members of the audience of the speech and not based on the subjective understanding of the audience in question.[322]

The Court has typically chosen to examine claims regarding freedom of expression under the necessity ('necessary in a democratic society') prong,[323] and very few have resulted in a violation being found on the basis of overbroad and vague legislation or interpretation alone.[324] The leading case on legality relates to a Turkish politician (who later became a history professor) who published an editorial criticizing the prosecution of the editor of a newspaper for 'denigrating Turkishness'.[325] He requested, 'in an expression of solidarity, to be prosecuted on the same ground for his opinions' that the events in 1915–1919 could be described as the Armenian genocide.[326] He was subsequently investigated for 'insulting Turkishness'.[327] The Court considered that the

[317] See, e.g., HRC, *Concluding Observations*, *Kazakhstan* (2016) UN Doc. CCPR/C/KAZ/CO/2, §§49–50; see Kazakshtani Criminal Code Art. 373; HRC, *Concluding Observations*, *Algeria* (2018) UN Doc. CCPR/C/DZA/CO/4, §43; HRC, *Concluding Observations*, *Kuwait* (2016) UN Doc. CCPR/C/KWT/CO/3, §§40–41.

[318] WGAD, *Chen Shuqing and Lü Gengsong v. China* (Opinion no. 76/2019), 21 November 2019, §44. See Chinese Criminal Code Art. 10. See also WGAD, *Zhen Jianghua and Qin Yongmin v. China* (Opinion no. 20/2019), 1 May 2019, §73.

[319] WGAD, *Siraphop Kornaroot v. Thailand* (Opinion no. 4/2019), 24 April 2019, §55; Thai Penal Code s. 112. See also WGAD, *Anchan v. Thailand* (Opinion no. 64/2021), 17 November 2021, §66. WGAD, *Le Dinh Luong v. Vietnam* (Opinion no. 45/2019), 15 August 2019, §§54–58; Vietnamese Penal Code Art. 79.

[320] ECtHR, *Akçam v. Turkey* (App. no. 27520/07), 25 October 2011, §87.

[321] ECtHR, *Savva Terentyev v. Russia* (App. no. 10692/09), 28 August 2018, §55.

[322] ECtHR, *Milosavljević v. Serbia* (App. no. 57574/14), 25 May 2021, §64 (objective meaning of 'rapist').

[323] See, e.g., ECtHR, *Dilipak v. Turkey* (App. no. 29680/05), 15 September 2015, §60. See also ECtHR, *Cumhuriyet Vakfı v. Turkey* (App. no. 28255/07), 8 October 2013, §54.

[324] See ECtHR, *Akçam v. Turkey* (App. no. 27520/07), 25 October 2011, §93; ECtHR, *Editorial Board of Pravoye Delo v. Ukraine* (App. no. 33014/05), 5 May 2011, §§56–59.

[325] ECtHR, *Akçam v. Turkey* (App. no. 27520/07), 25 October 2011, §7; The crime of 'denigrating Turkishness' is under Turkish Penal Code, Law No. 5237 Art. 301.

[326] ECtHR, *Akçam v. Turkey* (App. no. 27520/07), 25 October 2011, §§7–10.

[327] Ibid., §72.

provision did not meet the 'quality of law' required 'since its unacceptably broad terms result in a lack of foreseeability as to its effects'.[328] And the scope of law, as interpreted by the Turkish judiciary, was 'too wide and vague', failing to enable 'individuals to regulate their conduct or to foresee the consequences of their acts'.[329]

The Inter-American Court also requires that restrictions on freedom of expression 'must be established by law', and in particular that criminal sanctions be formulated in 'an express, accurate, and restrictive manner' that sets out the elements of the offense and clearly limits punishable conduct.[330] Similarly, the Inter-American Commission held that a Cuban law on sedition contained 'ambiguous concepts that invite[d] arbitrary judicial interpretation', was 'not specific in terms of the punishable conduct and … use[d] vague and indeterminate concepts … making it impossible to know in advance what conduct is punishable'.[331]

The African human rights courts have aligned their approach with that of the Human Rights Committee, requiring that laws be 'drafted with sufficient clarity to enable an individual to adapt his behaviour to the rules'.[332] The East African Court of Justice determined that the 'broad and imprecise wording' of Tanzanian legislation meant that it was unclear 'what exactly is prohibited, such that [citizens] may regulate their actions'.[333] The ECOWAS Court similarly assessed that The Gambia's criminal laws on defamation, libel, false news and sedition were not prescribed by law.[334] In the case of sedition, the Court held that '[the] vagueness with which these laws have been framed and the *mens rea* ambiguity of the (seditious intention), makes it difficult to discern with any certainty what constitutes seditious offence'.[335]

The UN Special Rapporteur on Freedom of Expression has also expressed concerns about cases in which journalists have been charged with vague offences such as 'incitement to violation' (Iran), 'instigating hatred and disrespect against the ruling regime' (Bahrain), 'incitement to offences that damage public tranquillity' (Myanmar) and 'misrepresenting events' (Somalia).[336]

[328] Ibid., §95. This was despite government amending the legislation to replace 'Turkishness' and 'Republic' with 'Turkish Nation' and 'State of the Republic of Turkey'. The Court held that 'there seems to be no change or major difference in the interpretation of these concepts because they have been understood in the same manner by the Court of Cassation': §§90–91.

[329] ECtHR, *Akçam v. Turkey* (App. no. 27520/07), 25 October 2011, §93.

[330] See, e.g., IACtHR, *Kimel v. Argentina* (Series C, no. 177), 2 May 2008, §63; IACtHR, *Usón Ramírez v. Venezuela* (Series C, no. 207), 20 November 2009, §§55–57.

[331] IACmHR, *Roca Antúnez v. Cuba* (Case 12.127), 24 February 2018, §91.

[332] ACtHPR, *Konaté v. Burkina Faso* (App. no. 4/2013), 5 December 2014, §128; EACJ, *Media Council of Tanzania and others v. Attorney General of the United Republic of Tanzania* (Ref no. 2/2017), 28 March 2019, §66.

[333] EACJ, *Media Council of Tanzania and others v. Attorney General of the United Republic of Tanzania* (Ref no. 2/2017), 28 March 2019, §73. The media services legislation referred, inter alia, to 'unwarranted invasion of privacy', 'hinder or cause substantial harm to the Government to manage the economy', and 'damage the information holder's position': §§64, 66.

[334] ECOWAS CCJ, *Federation of African Journalists v. The Gambia* (Suit no. ECW/CCJ/APP/36/15), 13 February 2018, 50–51.

[335] Ibid., 43; The provision on seditious intent defined it by reference to, amongst others, 'any action likely (a) to bring hatred or contempt or to excite disaffection against the person of the President, or the Government of The Gambia as by law established' (Gambian Criminal Code s. 51). The Court found that the prosecution of journalists under the law on sedition violated the right to free speech under Art. 12(2) of the ACHPR, Art. 19(2) of the ICCPR, and Art. 66(2) of the Revised ECOWAS Treaty: 56.

[336] UN Special Rapporteur F. La Rue, *Promotion and protection of the right to freedom of opinion and expression* (2012) UN Doc. A/67/357, §51.

2. Legitimacy

International law provides a list of objectives that permit the penalization of speech.[337] Under article 19(3), speech can be legitimately restricted when this is necessary for the 'respect of the rights or reputations of others' as well as to protect 'national security or of public order' or 'public health or morals'.[338] The Human Rights Committee has held that this list is exhaustive.[339]

Regional human rights treaties contain a similar list.[340] And even though article 10 of the European Convention on Human Rights enumerates some 'aims' that are not listed in the ICCPR and other treaties, the Human Rights Committee has considered 'public order' to encompass the additional aims expressly listed in article 10 of the European Convention.[341] And both treaties, as well as the American Convention on Human Rights, include the 'rights' or 'reputation' of individuals as a listed ground.[342] The African Court on Human and Peoples' Rights does not specifically list grounds but has accepted in its case law that the grounds listed in article 19(3) of the ICCPR contain legitimate grounds for restrictions.[343]

Defamation and insult laws are usually justified by states on the basis of protection of the 'rights of others', namely their reputational rights,[344] whereas sedition and *lèse-majesté* generally purport to protect national security and public order.[345] Although some cases have held that the aim being advanced by the state did not in fact correspond to these categories,[346] most cases turn on whether the advancement of this aim is necessary and proportionate to the measures restricting speech.[347]

[337] See ch. 1 (Introduction), s. II.1.1. (Treaty language).
[338] Ibid.
[339] Ibid.
[340] Ibid.
[341] See HRC, *Lovell v. Australia* (Comm. no. 920/2000), 29 March 2004, §9.4; HRC, General Comment No. 34 (2011), §31 ('Contempt of court proceedings relating to forms of expression may be tested against the public order (ordre public) ground'); HRC, *Agazade and Jafarov v. Azerbaijan* (Comm. no. 2205/2012), 27 October 2016, §7.5; HRC, *Aleksandrov v. Belarus* (Comm. no. 1933/2010), 24 July 2014, §7.4 (holding that Belarus had not explained how the actions of a protestor 'would have violated the rights and freedoms of others or would have posed a threat to public safety or public order (*ordre public*)'). See also COE, *Report of the Committee of Experts to the Committee of Ministers on the problems arising from the co-existence of the UN Covenants on Human Rights and the European Convention on Human Rights* (1970) H(70)7, 2, §§175–177. See ch. 1 (Introduction), s. II.1.1. (Treaty language).
[342] See ch. 1 (Introduction), s. II.1.1. (Treaty language).
[343] Ibid.
[344] See, e.g., ECtHR, Guide on Article 10 of the European Convention on Human Rights—Freedom of Expression, 31 August 2022, §123 ('The protection of the reputation or rights of others is, by far, the legitimate aim most frequently relied on in the Article-10 cases brought before the Court'); HRC, *Adonis v. The Philippines* (Comm. no. 1815/2008), 26 October 2011, §4.2.
[345] See, e.g., UN Special Rapporteur D. Kaye, *Promotion and protection of the right to freedom of opinion and expression* (2016) UN Doc. A/71/373, §§19, 31–32 ('Political and human rights activists have been especially targeted by such rules against criticism [as sedition and treason], often under the pretext of protecting public order'); WGAD, *Somyot Prueksakasemsuk v. Thailand* (Opinion no. 35/2012), 30 August 2012, §15 (Thai authorities arguing that 'views or unfair criticisms that are disrespectful of the monarchy … can generate spontaneous actions … and could cause the country to disintegrate into factions' and that the 'lèse majesté law is therefore legitimate and indispensable for national security').
[346] ECtHR, Guide on Article 10 of the European Convention on Human Rights—Freedom of Expression, 31 August 2022, §85 ('The Court may find that an interference does not serve to advance the legitimate aim relied on … or choose to retain only one of the legitimate aims relied on by the State, while dismissing others').
[347] See, e.g., ibid., §61. See s. III.1. (Legality).

3. Necessity

Most of the case law at the international level concerns whether a restriction on speech that advances a legitimate aim is 'necessary'.[348] This in turn has been held to depend on a number of factors including (i) the intent of the speaker; (ii) the causal link between the speech and the harm suffered by the target and (iii) the type and level of harm suffered by the target of the speech. An assessment of the level of harm depends on the context which may include the identity of the speaker and the target, the subject matter of the speech and an assessment of whether and to what extent the speech is made public.

3.1. Intent

International human rights bodies have not taken a consistent approach to the type of intent (or *mens rea*) required for defamation to constitute a necessary restriction on speech. While the Human Rights Committee and Inter-American bodies formulate intent by reference to the United States' 'actual malice' test, the European and African human rights bodies have not endorsed this test.

The 'actual malice' test is derived from the seminal US Supreme Court decision in *New York Times v. Sullivan*,[349] in which the Supreme Court held that a speaker is liable in defamation if they knew the statement about a public official was false or acted with 'reckless disregard' as to the statement's truth.[350] The Human Rights Committee has endorsed this standard for speech about public figures, considering that '[a]t least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in *error but without malice*'.[351] The Committee also recommended that the United Kingdom 'consider the utility of a so-called "public figure" exception, requiring proof by the plaintiff of actual malice in order to go forward on actions concerning reporting on public officials and prominent public figures'.[352]

The Inter-American Commission has also taken the position that 'actual malice' or at least 'gross negligence' is required to justify civil liability for defamation in cases involving 'a public official, a public person or a private person who has voluntarily become involved in matters of public interest'.[353] In such cases 'it must be proven that in disseminating the news, the social communicator *had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence* in

[348] ECtHR, Guide on Article 10 of the European Convention on Human Rights—Freedom of Expression, 31 August 2022, §61.

[349] US Supreme Court, *New York Times v. Sullivan* 376 U.S. 254, 9 March 1964, 376. See s. II.1.2. (Intent).

[350] US Supreme Court, *New York Times v. Sullivan* 376 U.S. 254, 9 March 1964, 376. Under US jurisprudence, 'recklessness' for these purposes means not some degree of extreme negligence, but 'subjective awareness of probable falsity', US Supreme Court, *Gertz v. Robert Welch Inc* 418 U.S. 323, 25 June 1974, 335, n. 6 (citing US Supreme Court, *St. Amant v. Thompson* 390 U.S. 727, 29 April 1968, 731: 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication').

[351] HRC, General Comment No. 34 (2011), §47 (emphasis added).

[352] HRC, *Concluding Observations, The United Kingdom of Great Britain and Northern Ireland* (2008) UN Doc. CCPR/C/GBR/CO/6, §25.

[353] IACmHR, Declaration of Principles on Freedom of Expression (2000), Principle 10 (emphasis added), §46.

efforts to determine the truth or falsity of such news'.[354] And in another case the Inter-American Commission welcomed a Uruguayan law that eliminated criminal sanctions for 'divulging opinion or information on public officials or regarding matters of public interest, *except* when the allegedly affected person can demonstrate the existence of *true malice*'.[355]

In cases in which the Inter-American Court has assessed criminal penalties for defamatory speech, the Court has required 'intent' or some form of 'malicious intent', which was translated as 'actual malice' in one case.[356] The Court noted that it would consider 'the extreme seriousness of the conduct of the individual who expressed the opinion, *his actual malice*, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception'.[357] The Court has not explicitly adopted 'actual malice' as the standard to be applied in all cases involving public interest speech but has required a 'specific intention of inflicting harm on the person or persons affected by the article' in such cases.[358]

The European Court has also declined to set a single standard for the intent requirement for insulting speech that states seek to penalize. In the cases in which it does articulate a standard, however, it is not that of 'actual malice'.[359] In cases involving 'denigration' of a person or authority, the Court has stated that the speech may be unprotected where 'the sole intent of the offensive statement is to insult'.[360] But such cases appear to conflate intent and motive and differ from the 'actual malice' standard by not considering whether the speaker knew of or was reckless to the falsity of the statement. At the other end of the intent spectrum, the Court has found that convicting a person for defamation for 'negligent' criticism of a public prosecutor violated article 10 and had a 'chilling effect'.[361]

The position of the African Court on intent is not clear. It has found the right to freedom of speech to be violated when a journalist was prosecuted for defamation and Burkina Faso 'failed to prove' that the journalist's use of the name 'People's Democratic Republic' was 'for the purpose of poisoning the minds of the public … or that it is

[354] IACmHR, Declaration of Principles on Freedom of Expression (2000), Principle 10 (emphasis added). See also IACmHR, *The Inter-American Legal Framework regarding the Right to Freedom of Expression* (2009) OEA/Ser.L/V/II/CIDH/RELE/INF. 2/09, §115 (emphasis added); IACtHR, *Canese v. Paraguay* (Series C, no. 111), 31 August 2004, §72(h).

[355] IACmHR, *Dogliani v. Uruguay* (Petition 228-07), 16 March 2010, §16 (emphasis added).

[356] See IACtHR, *Tristán Donoso v. Panama* (Series C, no. 193), 27 January 2009, §120. See also IACtHR, *Usón Ramírez v. Venezuela* (Series C, no. 207), 20 November 2009, §56; IACtHR, *Mémoli v. Argentina* (Series C, no. 265), 22 August 2013, §§139, 141.

[357] IACtHR, *Tristán Donoso v. Panama* (Series C, no. 193), 27 January 2009, §§119–120, 125 (emphasis added).

[358] See, e.g., IACtHR, *Moya Chacón v. Costa Rica* (Series C, no. 451), 6 September 2022, §88.

[359] ECtHR, *McVicar v. United Kingdom* (App. no. 46311/99), 7 May 2002, §§27, 65, 73; ECtHR, *Kasabova v. Bulgaria* (App. no. 22385/03), 19 April 2011, §§48, 63–68.

[360] ECtHR, *Tuşalp v. Turkey* (App. nos. 32131/08 & 41617/08), 21 February 2012, §48; the Court held that the 'use of vulgar phrases in itself is not decisive in the assessment of an offensive expression' for these purposes. See also ECtHR, *Skałka v. Poland* (App. no. 43425/98), 27 May 2003, §34; ECtHR, *Rujak v. Croatia* (App. no. 57942/10), 2 October 2012, §29; ECtHR, *Mengi v. Turkey* (App. nos. 13471/05 & 38787/07), 27 November 2012, §58.

[361] ECtHR, *Nikula v. Finland* (App. no. 31611/96), 21 March 2002, §54. See also ECtHR, *Paraskevopoulos v. Greece* (App. no. 64184/11), 28 June 2018, §40 (domestic courts 'are asked to consider whether the context of the case, the public interest and the intention of the author of the impugned article justified the possible use of a dose of provocation or exaggeration').

intended to subvert the integrity and status of Burkina Faso or to bring it to disrepute. Furthermore, it has not shown that such designation is used in bad faith by the Applicant'.[362] Similarly, the African Commission has stated that speech regarding the judiciary can only be restricted if it is 'aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public'.[363] But on other matters, the African bodies have followed the approach of the Human Rights Committee, including its General Comment No. 34 which applies the 'malice' test.[364]

When assessing the intent of a speaker, the context—including whether the speech was oral or written, spontaneous or premeditated, can be relevant. For instance, the European Court has also accorded protection to 'statements [that] were made orally during a live television broadcast, so that [the journalist] had no possibility of reformulating, refining or retracting them before they were made public'.[365] The Court has also recognized that the reporting of oral statements by the press can leave little or no opportunity for a journalist to reformulate, perfect or retract their statements before publication.[366]

3.2. Causal link between the speech and the harm

A state seeking to justify restrictions on speech should establish a causal link between the defamatory or insulting speech and concrete harms that are said to result from it, but international human rights bodies have not settled on a common description of the required causal link.

According to the Human Rights Committee, a state 'must demonstrate … the necessity and proportionality of the specific action taken, in particular by establishing a *direct and immediate connection* between the expression and the threat'.[367]

The European Court has, as part of its context-specific approach to cases involving freedom of expression, considered whether speech had the 'capacity—*direct or indirect*—to lead to harmful consequences'.[368] But the Inter-American Court's case law

[362] ACtHPR, *Konaté v. Burkina Faso* (App. no. 4/2013), 5 December 2014, §72.

[363] ACmHPR, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe* (Comm. no. 284/03), 3 April 2009, §91.

[364] See, e.g., ch. 1 (Introduction), s. II.3.1.6. (Criminal penalties for speech) (regarding the similar approach taken by the HRC and African bodies to criminal penalties for defamatory speech).

[365] ECtHR, *Gündüz v. Turkey* (App. no. 35071/97), 4 December 2003, §49. See also ECtHR, *Ghiulfer Predescu v. Romania* (App. no. 29751/09), 27 June 2017, §52; ECtHR, *Filatenko v. Russia* (App. no. 73219/01), 6 December 2007, §47 (noting the 'obvious constraints of a live television show where time was of essence'). Cf. ECtHR, *Sipos v. Romania* (App. no. 26125/04), 3 May 2011, §32. See further ECtHR (GC), *Pedersen & Baadsgaard v. Denmark* (App. no. 49017/99), 17 December 2004, §79 (allegations made during peak viewing time on television have a more 'powerful effect' than print).

[366] ECtHR (GC), *Nilsen v. Norway* (App. no. 23118/93), 25 November 1999, §48.

[367] HRC, General Comment No. 34 (2011), §35 (emphasis added). See also WGAD, *Jordi Cuixart I Navarro v. Spain* (Opinion no. 6/2019), 25 April 2019, §§111–115, 119; WGAD, *Joaquín Forn I Chiariello v. Spain* (Opinion no. 12/2019), 26 April 2019, §§100–102, 109. In the context of incitement to violence, the UN-approved Rabat Plan of Action provides that in restricting speech 'the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, *recognizing that such causation should be rather direct*'. Rabat Plan of Action, §29(f).

[368] ECtHR, *Alekhina v. Russia* (App. no. 38004/12), 17 July 2018, §220 (emphasis added). See also ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §207. See ch. 3 (Hate Speech).

on defamation has generally appeared to assume that harm occurs and does not directly address causation.[369]

Similarly, the African Commission's 2019 Declaration of Principles of Freedom of Expression only speaks of 'a close causal link between the risk of harm and the expression' in the context of restricting speech on public order or national security grounds, although this should presumably be transferable to other contexts.[370]

3.3. Level of harm caused by the speech

International human rights law requires the existence of a requisite level of harm to the target of defamatory speech to justify a restriction on speech, but the definition of the required harm varies among human rights bodies.[371]

The Human Rights Committee has not set out a requisite level of harm to reputation in defamation cases, but it has found a violation of freedom of expression in a case in which the damage to the public servant's reputation was 'only of a limited nature' because the speaker sent his letter criticizing state officials to the Minister of Finance of Belarus without making it public through media.[372]

The European Court has held that insulting or defamatory speech must 'attain a certain level of seriousness and be in a manner causing prejudice to personal enjoyment of' the rights of the target of the speech.[373] The requisite level of seriousness was found to have been met in a case in which a public servant working at a multi-ethnic radio station was accused of 'being disrespectful in regard to another ethnicity and religion', as this was 'not only capable of tarnishing her reputation, but also of causing her prejudice in both her professional and social environment'.[374] The threshold was also met in a case in which a politician was accused of 'a typical act of corruption by political influence' by working as a member of parliament while also practising as a lawyer.[375] However, the level of seriousness was *not* attained when a joke was made

[369] It considers causation in determining damages and reparations: see IACtHR, *Tristán Donoso v. Panamá* (Series C, no. 193), 27 January 2009, §120. For speech alleged to have incited violence, the Court requires that the imposition of sanctions 'must be backed up by actual, truthful, objective and strong proof that the person was not simply issuing an opinion (even if that opinion was hard, unfair or disturbing), but that the person had the clear intention of committing a crime and the actual, real and effective possibility of achieving this objective': IACmHR, *Inter-American Legal Framework Regarding the Right to Freedom of Expression* (2009) OEA/Ser.L/V/II, CIDH/RELE/INF. 2/09, §58. See ch. 3 (Hate Speech).

[370] ACmHPR, Declaration of Principles of Freedom of Expression and Access to Information in Africa (2019), Principle 22.

[371] Certain jurisdictions impose a requirement that 'serious harm' to reputation or a likelihood of it must result from the publication of the words complained of filter out weak or frivolous defamation claims. See s. II.1.3.2. (Level of harm caused by the speech). See England and Wales Defamation Act 2013 s. 1(1) and New South Wales Defamation Act 2005 s. 10A.

[372] HRC, *Kozlov v. Belarus* (Comm. no. 1986/2010), 24 July 2014, §7.6. See s. III.3.3.2. (Measuring harm: the extent to which the speech is public). The former UN Special Rapporteur on Freedom of Expression has also observed that a defamatory statement must be 'injurious' because 'there is no defamation without injury', but did not specify a threshold. UN Special Rapporteur A. Ligabo, *Implementation of General Assembly Resolution 60/251 of March 2006 Entitled "Human Rights Council"* (2007) UN Doc. A/HRC/4/27, §47.

[373] ECtHR (GC), *Axel Springer AG v. Germany* (App. no. 39954/08), 7 February 2012, §83; ECtHR, *A v. Norway* (App. no. 28070/06), 9 April 2009, §64 (in the context of Art. 8, not 10).

[374] ECtHR (GC), *Medžlis Islamske Zajednice Brčko v. Bosnia and Herzegovina* (App. no. 17224/11), 27 June 2017, §79.

[375] ECtHR, *Macovei v. Romania* (App. no. 53028/14), 28 July 2020, §85.

about a well-known television host in the context of a television comedy show, taking into account 'the playful and irreverent style' of the show.[376]

Similarly, the Inter-American Court has found that, when it comes to criminal penalties, defamation must constitute a 'serious attack' or do 'serious damage' to the right to have one's reputation protected.[377] For civil liability to be imposed on the speaker, the Court's case law suggests that the right to reputation must be 'clearly harmed or threatened'.[378]

3.3.1. Measuring harm: subject matter of speech or identity of the target

The European Court has held that 'a fundamental requirement of the law of defamation is that in order to give rise to a cause of action the defamatory statement must refer to a particular person'.[379] It found a violation of article 10 in a case in which a newspaper was ordered to pay damages to members of a regional government after it had published an 'open letter' criticizing the regional authority but did not name any of the government officials who had sued.[380]

International human rights bodies have also considered that even though public figures have the right to protect their reputation, 'the interest of public officials being free from insult pales in comparison to the societal interests facilitated by the freedom of expression'.[381] According to the Human Rights Committee, 'in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high'.[382] This is in line with the position of the Working Group[383] as well as certain national laws imposing a higher intent requirement of 'actual malice' for speech about a public figure[384] and why speech about matters of public interest is often exempt from or a recognized defence under laws that penalize insulting speech.[385]

[376] ECtHR, *Sousa Goucha v. Portugal* (App. no. 70434/12), 22 March 2016, §§26, 52–55.

[377] IACtHR, *Usón Ramírez v. Venezuela* (Series C, no. 207), 20 November 2009, §§73–75.

[378] IACmHR, *The Inter-American Legal Framework regarding the Right to Freedom of Expression* (2009) OEA/Ser.L/V/II/CIDH/RELE/INF. 2/09, §§77, 107; IACtHR, *Canese v. Paraguay* (Series C, no. 111), 31 August 2004, §72(f).

[379] ECtHR, *Dyuldin v. Russia* (App. no. 25968/02), 31 July 2007, §43. This point does not appear to have been addressed by other international human rights bodies.

[380] Ibid. See also ECtHR, *OOO Memo v. Russia* (App. no. 2840/10), 15 March 2022, §47 ('civil defamation proceedings brought, in its own name, by a legal entity that exercises public power may not, as a general rule, be regarded to be in pursuance of the legitimate aim of 'the protection of the reputation … of others' under Article 10 § 2 of the Convention', but 'this does not exclude individual members of a public body' from bringing such claims).

[381] E.L. Carter, 'Error but Without Malice" in Defamation of Public Officials: The Value of Free Expression in International Human Rights Law' (2016) 21 *Communication Law and Policy* 301, 321. See also HRC, General Comment No. 34 (2011), §38; see HRC, *Bodrožić v. Serbia and Montenegro* (Comm. no. 1180/2003), 31 October 2005; HRC, *Adonis v. The Philippines* (Comm. no. 1815/2008), 26 October 2011.

[382] HRC, General Comment No. 34 (2011), §38. See also HRC, *Adonis v. The Philippines* (Comm. no. 1815/2008), 26 October 2011, §7.9, n. 12, citing HRC, General Comment No. 34 (2011), §47; HRC, *Bodrožić v. Serbia and Montenegro* (Comm. no. 1180/2003), 31 October 2005, §7.2. See also WGAD, *Agnès Uwimana Nkusi v. Rwanda* (Opinion no. 25/2012), 29 August 2012, §58.

[383] WGAD, *Mikalai Statkevich v. Belarus* (Opinion no. 13/2011), 4 May 2011, §9. See also WGAD, *Farah v. Somalia* (Opinion no. 17/2022), 31 May 2022, §58; WGAD, *Anchan v. Thailand* (Opinion no. 64/2021), 17 November 2021, §61 (holding that '[t]he mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties').

[384] See s. III.3.1. (Intent).

[385] See s. III.4.2. (Public interest).

In assessing whether the test of necessity is satisfied, the European Court has considered whether the speech makes a contribution to a debate of general interest; how well known the target of the speech is and the subject matter of the speech.[386] The Inter-American and African courts similarly take into account that speech related to public officials is 'afforded greater protection'[387] and the African Court agrees that 'freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures'.[388]

3.3.1.1. Statements about public officials including heads of state or government International human rights bodies have considered that laws that afford a head of state or government greater protection from insults or which stipulate heavier penalties violate the right to freedom of expression. The Human Rights Committee has stated that 'all public figures, including those exercising the highest political authority *such as heads of state and government*, are legitimately subject to criticism and political opposition'.[389] In a case in which a journalist was successfully prosecuted for defamation and slander after writing articles that were critical of the Angolan President, the Committee found that 'the severity of the sanctions imposed … cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition'.[390] The Working Group on Arbitrary Detention has taken the same view.[391]

The European Court has also consistently held that heads of state are not shielded from criticism 'solely on account of their function or status, irrespective of whether the criticism is warranted'; such a 'special privilege … cannot be reconciled with modern practice and political conceptions'.[392] This applies to both foreign heads of state and the heads of the state itself. For example, a collage by a British artist depicting the then Turkish Prime Minister Erdoğan as a dog held on a leash decorated with the colours of the US flag was considered protected speech because a politician must show greater tolerance towards criticism, especially when it takes the form of satire.[393]

The Inter-American Court has reached the same result. It held that reporting regarding 'the elected public official of the highest-ranking position in the country

[386] ECtHR (GC), *Von Hannover v. Germany (No. 2)* (App. nos. 40660/08 & 60641/08), 7 February 2012, §§62, 108–113 (in the context of balancing freedom of expression with the right to private life). See also ECtHR, *Satakunnan Markkinapörssi Oy v. Finland* (App. no. 931/13), 27 June 2017, §165.

[387] IACtHR, *Fontevecchia v. Argentina* (Series C, no. 238), 29 November 2011, §47. See also IACtHR, *Palamara Iribarne v. Chile* (Series C, no. 135), 22 November 2005, §84; IACtHR, *Kimel v. Argentina* (Series C, no. 177), 2 May 2008, §86.

[388] ACtHPR, *Konaté v. Burkina Faso* (App. no. 4/2013), 5 December 2014, §155. See also ACmHPR, *Media Rights Agenda v. Nigeria* (Comm. nos. 105/93 & others), 31 October 1998, §74.

[389] HRC, General Comment No. 34 (2011), §38 (emphasis added); HRC, *Marques de Morais v. Angola* (Comm. no. 1128/2002), 29 March 2005, §6.8. See also UN Special Rapporteur F. La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2012) UN Doc. A/HRC/20/17, §88.

[390] HRC, *Marques de Morais v. Angola* (Comm. no. 1128/2002), 29 March 2005, §6.8.

[391] WGAD, *Amer v. Egypt* (Opinion no. 35/2008), 20 November 2008, §§32–33; WGAD, *Mohammed Rashid Hassan Nasser al-Ajami v. Qatar* (Opinion no. 48/2016), 22 November 2016, §42.

[392] ECtHR, *Colombani v. France* (App. no. 51279/99), 25 June 2002, §68; ECtHR, *Castells v. Spain* (App. no. 11798/85), 23 April 1992, §46; ECtHR, *Otegi Mondragon v. Spain* (App. no. 2034/07), 15 March 2011, §55.

[393] ECtHR, *Dickinson v. Turkey* (App. no. 25200/11), 2 February 2021, §55.

involved matters of public interest, which were in the public domain',[394] with a lower standard of protection applying to officials, especially those who were elected, and to information concerning matters of public interest.[395] The Court considers that public officials voluntarily expose themselves to 'the scrutiny of society'[396] and their activities 'enter the realm of a public debate'.[397]

International human rights bodies have also considered that public officials and civil servants should not benefit from laws that 'protect their honour' that are used to suppress reporting about the performance of their duties.[398] The European Court has suggested that civil servants acting in an official capacity are subject to a wider limit of acceptable criticism than private individuals, though not as wide as speech about politicians,[399] when defamatory speech relates to claims of inappropriate or unlawful exercise of official duties.[400]

The European Court also gives an 'elevated level of protection' to freedom of expression in Parliament because '[p]arliament is a unique forum for debate in a democratic society, which is of fundamental importance'.[401] According to the European Court, greater tolerance should also to be shown when allegedly defamatory statements are made *in response* to statements by politicians that were 'clearly intended to be provocative and consequently to arouse strong reactions'.[402]

3.3.1.2. Statements about the military, police or security forces Wider limits of permissible criticism may also apply to the military, police, armed forces or security forces.[403] International human rights bodies have found reports about the military to be in the public interest, thereby granting them special protection. For example, the European Court has held that 'limits of journalistic freedom' were not crossed by reports with 'certain exaggerated or provocative assertions' about, *inter alia*, members of the Azerbaijani armed forces.[404] The Inter-American Court has also found that criminal sanctions imposed on reporting critical of the military violate the right to freedom of expression.[405] The Human Rights Committee has

[394] IACtHR, *Fontevecchia v. Argentina* (Series C, no. 238), 29 November 2011, §71.
[395] Ibid., §59.
[396] Ibid., §60.
[397] Ibid., §47.
[398] See, e.g., HRC, General Comment No. 34 (2011), §38; HRC, *Concluding Observations, Costa Rica* (2007) UN Doc. CCPR/C/CRI/CO/5, §11; HRC, *Marques de Morais v. Angola* (Comm. no. 1128/2002), 29 March 2005; HRC, *Bodrožić v. Serbia and Montenegro* (Comm. no. 1180/2003), 31 October 2005.
[399] ECtHR, *Janowski v. Poland* (App. no. 25716/94), 21 January 1999, §33; ECtHR, *Nikula v. Finland* (App. no. 31611/96), 21 March 2002, §48. Cf. ECtHR, *Fedchenko v. Russia (No. 2)* (App. no. 48195/06), 11 February 2010, §60.
[400] ECtHR, *Milosavljević v. Serbia* (App. no. 57574/14), 25 May 2021, §61.
[401] ECtHR (GC), *Karácsony v. Hungary* (App. nos. 42461/13 & 44357/13), 17 May 2016, §138.
[402] ECtHR, *Oberschlick v. Austria (No. 2)* (App. no. 20834/92), 1 July 1997, §31; ECtHR, *Eon v. France* (App. no. 26118/10), 14 March 2013.
[403] See ch. 5 (Espionage and Official Secrets Laws) and ch. 6 (Terrorism Laws).
[404] ECtHR, *Fatullayev v. Azerbaijan* (App. no. 40984/07), 22 April 2010, §100. It was pertinent that there was an ongoing debate about what had happened in the Khojaly massacre and therefore public interest in discussing the event.
[405] IACtHR, *Usón Ramírez v. Venezuela* (Series C, no. 207), 20 November 2009, §84; IACtHR, *Uzcátegui v. Venezuela* (Series C, no. 249), 3 September 2012, §192.

also noted that 'there can be no legitimate restriction under article 19, paragraph 3 [of the ICCPR], which would justify the arbitrary arrest, torture, and threats to life' of a journalist who accused security forces of corruption and abuse.[406]

3.3.1.3. Statements about the judiciary Prosecutors and law enforcement officials, including judges, may need to be protected from unfounded accusations to be able to exercise their functions.[407] In a case concerning alleged defamatory comments about a member of the judiciary in Burkina Faso, the African Court held that laws 'with respect to dishonouring or tarnishing the reputation of public figures, such as the members of the judiciary, should therefore not provide more severe sanctions than those relating to offenses against the honor or reputation of an ordinary individual'.[408]

Article 10 of the European Convention expressly permits restrictions on freedom of expression 'for maintaining the authority and impartiality of the judiciary',[409] and the European Court recognizes that the judiciary '[a]s the guarantor of justice' must 'enjoy public confidence if it is to be successful in carrying out its duties'.[410] As a result, the European Court will 'protect the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that judges are prevented from reacting by their duty of discretion'.[411] For example, the Court found no violation of article 10 when a journalist was convicted of defamation for alleging bullying and poor treatment of defendants by judges sitting on Austrian criminal courts.[412] The Court held the 'extremely serious' allegations were insufficiently researched, as the journalist had not attended a single criminal trial before a judge he had defamed, and 'thus not only damaged [the impugned judges'] reputation, but also undermined public confidence in the integrity of the judiciary as a whole'.[413] But the European Court has also held that 'this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system'.[414]

[406] HRC, *Njaru v. Cameroon* (Comm. no. 1353/2005), 19 March 2007, §6.4.

[407] ECtHR, *Lešník v. Slovakia* (App. no. 35640/97), 11 March 2003, §54 (public prosecutors); ECtHR (GC), *Pedersen & Baadsgaard v. Denmark* (App. no. 49017/99), 17 December 2004, §80 (Chief Superintendent of Police). Cf. ECtHR, *Busuioc v. Moldova* (App. no. 61513/00), 21 December 2004.

[408] ACtHPR, *Konaté v. Burkina Faso* (App. no. 004/2013), 5 December 2014, §156.

[409] A committee of experts reporting to the Council of Europe on the 'co-existence of the human rights obligations' under the European Convention and the ICCPR suggested that a restriction cannot be imposed on this ground under the ICCPR unless it could be included within the notion of 'public order', but that they could not confirm this position: COE, *Report of the Committee of Experts to the Committee of Ministers* (1970) H(70)7, §§176–177.

[410] ECtHR, *Prager and Oberschlick v. Austria* (App. no. 15974/90), 26 April 1995, §34.

[411] ECtHR (GC), *Morice v. France* (App. no. 29369/10), 23 April 2015, §168.

[412] ECtHR, *Prager and Oberschlick v. Austria* (App. no. 15974/90), 26 April 1995.

[413] Ibid., §§36–39.

[414] ECtHR (GC), *Morice v. France* (App. no. 29369/10), 23 April 2015, §168. See also ECtHR, *Benitez Moriana and Iñigo Fernandez v. Spain* (App. nos. 36537/15 & 36539/15), 9 March 2021, §50. See ss II.1.4. (Exclusions, exceptions and defences) and II.1.4.2. (Public interest).

3.3.1.4. Statements about national symbols The Human Rights Committee has expressed concern regarding laws which prohibit or punish 'disrespect for flags and symbols'.[415] Then UN Special Rapporteur Frank La Rue has explained that defamation is intended to protect the rights and reputation of others and should not be used to protect abstract or subjective notions or concepts such as the state, national symbols, national identity, cultures, schools of thought, religions, ideologies or political doctrines.[416] And the European Court reached a similar conclusion when assessing a Hungarian law that banned the red star, a symbol of the international workers' movement, noting its chilling effect on freedom of expression.[417]

3.3.2. Measuring harm: the extent to which the speech is public

In considering the harm caused by speech,[418] international human rights bodies may consider whether a statement was made in public or private and the extent of its publication and dissemination.[419] For example, the Human Rights Committee observed that damage to a person's reputation was 'only of a limited nature' when the author sent his letter regarding that person to the Minister of Finance only 'without making it public through media or otherwise'.[420] And when a managing director of a company sent a document critical of an employee to her, and received a suspended sentence of five months' imprisonment for slanderous defamation, the European Court held that a 'private dispute' which 'did not reach the public' presented 'no justification for the imposition of a prison sentence'.[421]

A speaker may be responsible for the 'publishing' of speech by republishing an allegation made by a third party. However, the European Court has clarified that liability does not arise from posting a hyperlink because the person 'does not exercise control over the content of the website to which a hyperlink enables access, and which might be changed after the creation of the link'.[422]

Timing and location of speech may also be relevant to an assessment of the harm caused by its publication. Insults in the aftermath of an event may be judged differently by a court than an insult made at a less volatile time. The European Court has held that

[415] HRC, General Comment No. 34 (2011), §38.

[416] UN Special Rapporteur F. La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2010) UN Doc. A/HRC/14/23, §84. See also Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (2017), Principle 2(c).

[417] ECtHR, *Vajnai v. Hungary* (App. no. 33629/06), 8 July 2008, §54. The US Supreme Court has taken the same approach: see US Supreme Court, *Texas v. Johnson* 491 U.S. 397, 21 June 1989, 417 (finding that a criminal conviction for flag desecration for publicly burning an American flag as a means of political protests was inconsistent with the First Amendment as '[t]here is … no indication—in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone').

[418] Whether it was private, public or leaked, spontaneous or pre-meditated, may also be relevant to the question of intent. See s. III.3.1. (Intent).

[419] A. Clooney & P. Webb, 'The Right to Insult in International Law' (2017) 48(2) *Columbia Human Rights Law Review* 1, 30.

[420] HRC, *Kozlov v. Belarus* (Comm. no. 1986/2010), 24 July 2014, §7.6. Cf. WGAD, *Mohammed Rashid Hassan Nasser al-Ajami v. Qatar* (Opinion no. 48/2016), 22 November 2016, §§5, 7, 16, 45 (the fact that poem insulting Qatar's Emir, originally recited to seven people in a private apartment, was later uploaded to YouTube did not change the fact that it was protected artistic expression).

[421] ECtHR, *Matalas v. Greece* (App. no. 1864/18), 25 March 2021, §60.

[422] ECtHR, *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16), 4 December 2018, §§75–77.

passage of time may mean that such insults come to be viewed as part of a historical debate, and protected from criminalization on this basis.[423]

4. Exclusions, Exceptions and Defences

International human rights law recognizes at least five defences or exceptions to liability for speech that are of particular importance for political speech. These include: (i) truth, (ii) public interest, (iii) reasonable publication (also known as 'responsible journalism'), (iv) fair and accurate reporting of official proceedings and (v) opinion including artistic expression.

Truth and reasonable publication are alternative bases to avoid liability—if either of them applies, the defendant should not be liable for their speech. 'Reasonable publication' can be less exacting to establish than truth, as its focus is on the journalistic *process* as opposed to the *outcome*: if the speaker acted reasonably, it does not matter that they cannot prove the statement to be true. On the other hand, while issues such as tone, balance and right of reply are relevant to showing a reasonable publication, they are not necessary to establish the truth of a statement. Fair and accurate reporting is a powerful defence—again not dependent on the truth of the statement—but it tends to apply in the narrow context of, for instance, contemporaneous reporting of judicial and legislative proceedings or reporting official documents. The defence of opinion (also known as fair comment) is also available—and extends to artistic speech such as cartoons and satire—but its contours, in particular the extent to which an opinion must be based on verifiable facts, are not clear.

4.1. Truth

The defence of truth is an essential and absolute defence to insult and defamation laws in international law.[424] And rightly so: there can be no greater travesty than punishing a speaker for speaking the truth. This is particularly important in a democracy when the speaker is a journalist reporting on a matter of public interest. And from the perspective of reputation, 'disseminating a true statement should not be actionable since one cannot defend a reputation one does not deserve in the first place'.[425] It is therefore no surprise that international bodies prioritize the importance of the truth of factual statements, either as a defence or by requiring that the plaintiff must prove falsity (for instance as part of proving 'actual malice').[426] But not all international bodies explicitly explain the role of truth as an exemption or defence. Nor do they explain whether the standard expected in relation to publishing truth is one of *substantial* or *exact* truth.[427]

[423] ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §249; ECtHR, *Leroy v. France* (App. no. 36109/03), 2 October 2008, §§6, 45. See ch. 3 (Hate Speech), ss III.2.4.2. (Opinion) and VI. (Recommendations).

[424] HRC, General Comment No. 34 (2011), §47.

[425] Article 19, *Defining Defamation* (n 416) 10.

[426] See s. III.3.1. (Intent).

[427] See ch. 4 (False Speech), s. III.4.1. (Truth).

According to the Human Rights Committee, '[d]efamation laws … in particular penal defamation laws, should include such defences as the defence of truth'.[428] The Committee has therefore criticized the approach of Angolan courts in a case where the journalist's 'proposed truth defence against the libel charge was ruled out by the courts' in his attempt to prove his allegations of corruption against the President of Angola.[429] And it has been critical of a narrow approach to a truth defence, 'not[ing] with concern' that South Korean defamation law allowed for criminal prosecution 'even for making statements that [are] true, except when such statements are made solely for the public interest'.[430]

The European Court also regards a truth defence as critical to the protection of freedom of expression in defamation cases.[431] For example, the Court held that article 10 had been violated because a lawyer and politician had been deprived by Spanish courts of the opportunity of establishing the truth of the statements he had published regarding the government.[432] A violation was also found in a case in which the editor-in-chief of *Le Monde* and a journalist at the newspaper were not able to rely on a defence of truth in a prosecution for a report insulting the King of Morocco.[433]

The European Court appears to accept that 'substantial truth', as opposed to 'exact truth', is a sufficient basis to avoid liability in civil defamation cases. In one case, a Norwegian newspaper published a number of accounts of patients who were dissatisfied with their cosmetic surgery.[434] In finding a violation of article 10, the European Court emphasized that it placed 'considerable weight' on the fact that the patient's accounts of their treatment was 'essentially correct'.[435] The 'general tenor' or 'common sting' of the articles lay in the 'true allegation that Dr. R had failed in his duties as a cosmetic surgeon'.[436]

Along the same lines, when allegations of corrupt practices 'contain a combination of value judgments and statements of fact', the Court has held that in order to avoid liability there must be a 'sufficiently accurate and reliable factual basis proportionate to the nature and degree of the … statements and allegations'.[437]

[428] HRC, General Comment No. 34 (2011), §47.

[429] HRC, *Marques de Morais v. Angola* (Comm. no. 1128/2002), 29 March 2005, §6.8; HRC, *Adonis v. The Philippines* (Comm. no. 1815/2008), 26 October 2011.

[430] HRC, *Concluding Observations, Republic of Korea* (2015) UN Doc. CCPR/C/KOR/CO/4, §46.

[431] Closely linked to the availability of defences to defamation is the ability to present defences and supporting evidence before the Court, which can be of 'decisive importance' in determining whether the right to freedom of expression has been violated: ECtHR, *Castells v. Spain* (App. no. 11798/85), 23 April 1992, §48. See, e.g., ECtHR, *Filatenko v. Russia* (App. no. 73219/01), 6 December 2007, §47 (finding a violation of article 10 when a Russian court determined the falsity of a journalist's statement solely on the basis that no criminal proceedings had been initiated against the subject of the speech).

[432] ECtHR, *Castells v. Spain* (App. no. 11798/85), 23 April 1992, §48.

[433] ECtHR, *Colombani v. France* (App. no. 51279/99), 25 June 2002, §66. The court also noted that the defence of 'justification' ('that is to say proving the truth of the allegation') should have been allowed. See also ECtHR, *Csánics v. Hungary* (App. no. 12188/06), 20 January 2009, §§41, 43.

[434] ECtHR, *Bergens Tidende v. Norway* (App. no. 26132/95), 2 May 2000.

[435] Ibid., §56.

[436] Ibid.

[437] ECtHR, *Macovei v. Romania* (App. no. 53028/14), 28 July 2020, §89; ECtHR, *Reznik v. Russia* (App. no. 4977/05), 4 April 2013, §46; ECtHR, *Rungainis v. Latvia* (App. no. 40597/08), 14 June 2018, §63. It is also important that journalists not be compelled to reveal their sources as a requirement of proving the truth defence: see COE, Recommendation No. R(2000)7 of the Committee of Ministers to member states on the right of journalists not to

The Inter-American Court and Commission also consider that truth should be an exemption or defence in defamation laws.[438] The Inter-American Court has stated that requiring a journalist to prove the veracity of the facts contained in passages from other news reports he reproduced and failing to accept the defence of truth (*exceptio veritatis*) 'is an excessive limitation on freedom of expression that does not comport with Article 13.2 of the [American] Convention'.[439] The Inter-American Commission's Declaration of Principles on Freedom of Expression also provides that 'prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments'.[440] This suggests that falsity should be an element of any civil wrong or criminal offence based on speech.

While the African Court has not yet pronounced on the need for defamation or insult laws to ensure that a defence of truth is available,[441] the African Commission has made clear that '[n]o one shall be found liable for true statements', suggesting that laws could either provide that falsity should be an element that must be shown to establish liability for speech or at a minimum that truth should be a defence that a speaker can seek to establish,[442] and the African Court has generally followed the approach of the Human Rights Committee on article 19 of the ICCPR.[443]

4.2. Public interest

International human rights law sources are in agreement on the importance of the public interest when considering whether restrictions on free speech are necessary. Public interest is treated as a factor governing the permissibility of restricting speech, as an element of defences to defamation including reasonable publication and fair comment, as a stand-alone defence or as a justification for a more onerous standard of intent for a speaker.[444]

International bodies have not clearly defined the term 'public interest', including whether this is an objective test.[445] But the European Court has held that the definition will 'depend on the circumstances of each case' and that 'the public interest relates to matters which affect the public to such an extent that it may legitimately

disclose their sources of information (2000), Principle 4. However this in principle position depends on the facts of any specific case and the corroborative evidence available.

[438] The standard is protective because the plaintiff must prove 'malicious intent' (akin to 'actual malice' which protects even against untruthful statements issued in good faith: see s. III.3.1. (Intent)).

[439] IACtHR, *Herrera-Ulloa v. Costa Rica* (Series C, no. 107), 2 July 2004, §132.

[440] IACmHR, Declaration of Principles on Freedom of Expression (2000), Principle 7 (emphasis added).

[441] See, e.g., B. Herskovitz, 'Speaking Truth to Power: Criminal Defamation Before the African Court of Human and Peoples' Rights' (2018) 50 *George Washington International Law Review* 899, 913–915.

[442] ACmHPR, Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019), Principle 21.

[443] See s. III.1. (Legality).

[444] See ss II.1.4.2. (Public interest) and III.3.1. (Intent).

[445] Cf. UK Law Commission, *Protection of Official Data Report (Law Com No. 395)* (September 2020) HC 716 §§11.76–81, which provides that there should be a public interest defence under the UK Official Secrets Act if a person 'proves, on the balance of probabilities, that: (a) it was in the public interest for the information disclosed to be known by the recipient; and (b) the manner of the disclosure was in the public interest'. However, the Law Commission decided to 'make no further recommendation beyond this in respect of the form of the defence', acknowledging that 'there are various ways such a defence could be drafted'.

take an interest in them, which attract its attention or which concern it to a significant degree … especially in that they affect the well-being of citizens or the life of the community'.[446] According to the Court, it also covers matters 'capable of giving rise to considerable controversy, which concern an important social issue … or which involve a problem that the public would have an interest in being informed about'.[447] The Court has therefore made clear that 'the press's contribution to a debate of public interest cannot be limited merely to current events or pre-existing debates', as the press can also be a vector for bringing issues to light.[448] Similarly, the Inter-American Court considers that greater protection can be applied not only to speech that relates to the official activities of public officials, but also to information that could be linked to their private lives but has 'revealed matters of public interest'.[449]

The Human Rights Committee has suggested that there should be a self-standing public interest defence in its General Comment No. 34:

> Defamation laws must be crafted with care to ensure that they … do not serve, in practice, to stifle freedom of expression … At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. *In any event, a public interest in the subject matter of the criticism should be recognized as a defence*.[450]

Stated in this way, this suggests that the Committee endorses a public interest defence in defamation cases purely based on the subject matter of the story. Accordingly, a public interest defence may be invoked regardless of the conduct or culpability of the journalist, meaning that a malicious or grossly negligent article could still qualify for protection if it was on a subject matter of public interest.[451] The reference to 'comments about public figures' does not appear intended to limit the scope of 'public interest'.[452] It appears to have been motivated by the Committee's specific concern about libel tourism and a desire that states such as the United Kingdom discourage cases being brought in

[446] ECtHR (GC), *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07), 10 November 2015, §§101–103; see also §98, citing ECtHR (GC), *Von Hannover v. Germany (No. 2)* (App. nos. 40660/08 & 60641/08), 7 February 2012, §109; ECtHR (GC), *Satakunnan Markkinapörssi Oy v. Finland* (App. no. 931/13), 27 June 2017, §171.

[447] ECtHR (GC), *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07), 10 November 2015, §§101–103; see also §98, citing ECtHR (GC), *Von Hannover v. Germany (No. 2)* (App. nos. 40660/08 & 60641/08), 7 February 2012; ECtHR (GC), *Satakunnan Markkinapörssi Oy v. Finland* (App. no. 931/13), 27 June 2017, §171.

[448] ECtHR (GC), *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07), 10 November 2015, §114. See ch. 5 (Espionage and Official Secrets Laws), s. II. 5.1. (Public interest defence).

[449] IACtHR, *Fontevecchia v. Argentina* (Series C, no. 238), 29 November 2011, §60 (holding the publication of articles revealing the existence of then-president Carlos Saul Menem's previously unacknowledged son with a congresswoman to be in the public interest due to allegations of economic and political favours and gifts granted to the son and mother).

[450] HRC, General Comment No. 34 (2011), §47 (emphasis added).

[451] However, the conduct of a speaker is relevant to an assessment of their intent and is relevant to 'reasonable publication' defences in defamation law that have developed in a number of jurisdictions around the world. See s. II.1. (Overview of laws regulating insulting speech). It is also relevant to the European Court's 'responsible journalism' doctrine. See s. III.4.3. (Reasonable publication).

[452] HRC, General Comment No. 34 (2011), §47 citing HRC, *Concluding Observations, United Kingdom* (2008) UN Doc. CCPR/C/GBR/CO/6.

local courts by foreign public figures by introducing a malice test.[453] This is consistent with the Committee's case law on defamation, which focuses on the public interest in the subject matter of the speech[454] as well as comments from the Working Group.[455]

The European Court has stated that speech about matters of public interest should get additional protection.[456] The Court has held that there is 'little scope' for restrictions on free speech 'in two fields, namely political speech and matters of public interest',[457] and has clarified that 'public interest' encompasses, and extends beyond, political speech.[458] According to the Court, 'a particularly narrow margin of appreciation' will be accorded where remarks 'concern matters of the public interest'.[459] It has also recognized that protection for such speech is particularly important in cases involving journalists since their 'task is … to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest'.[460]

Similarly, the Inter-American Court considers the public interest relevant to whether it is permissible to restrict speech in a manner compatible with article 13 of the American Convention. The Court has held that 'individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and … are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate'.[461] The Court has also observed that domestic courts should take into account when a journalist has spoken 'in the context of an electoral campaign for the presidency of the Republic and with regard to matters of public interest', which is when 'opinions and criticisms are issued in a more open, intense and dynamic way, according to the principles of democratic pluralism'.[462] In a case concerning statements by an environmental activist accusing a senator of exerting political pressure on authorities to carry out illegal logging, the Court found that 'access to information … that could have an impact on the environment is a matter of clear public interest, and therefore enjoys special protection due to its importance in a democratic society'.[463] And it has made clear that speech on

[453] HRC, *Concluding Observations, United Kingdom* (2008) UN Doc. CCPR/C/GBR/CO/6, §25.

[454] HRC, *Adonis v. The Philippines* (Comm. no. 1815/2008), 26 October 2011, §7.9; HRC, *Zhagiparov v. Kazakhstan* (Comm. no. 2441/2014), 25 October 2018, §5.3.

[455] WGAD, *Somyot Prueksakasemsuk v. Thailand* (Opinion no. 35/2012), 30 August 2012, §20 (concurring with the Special Rapporteur on the right to freedom of opinion and expression); WGAD, *Pornthip Munkong v. Thailand* (Opinion no. 43/2015), 2 December 2015, §18; WGAD, *Tri Agus Susanto Siswowihardjo v. Indonesia* (Opinion no. 42/1996), 3 December 1996, §8.

[456] See s. III.3.3.1. (Measuring harm: subject matter of speech or identity of the target).

[457] ECtHR (GC), *Bédat v. Switzerland* (App. no. 56925/08), 29 March 2016, §49. See, similarly, ECtHR (GC), *Sürek v. Turkey (No. 2)* (App. no. 24122/94), 8 July 1999, §34.

[458] See ECtHR, *Lingens v. Austria* (App. no. 9815/82), 8 July 1986, §41: 'Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on *political issues just as on those in other areas of public interest*' (emphasis added).

[459] ECtHR (GC), *Bédat v. Switzerland* (App. no. 56925/08), 29 March 2016, §49. ECtHR, Guide on Article 10 of the European Convention on Human Rights—Freedom of Expression, 31 August 2022, §488; ECtHR (GC), *Von Hannover v. Germany (No. 2)* (App. nos. 40660/08 & 60641/08), 7 February 2012, §§109–113, §119. See also ECtHR, *Magyar Helsinki Bizottság v. Hungary* (App. no. 18030/11), 8 November 2016, §§161–162.

[460] ECtHR (GC), *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07), 10 November 2015, §89.

[461] IACtHR, *Herrera-Ulloa v. Costa Rica* (Series C, no. 107), 2 July 2004, §129.

[462] IACtHR, *Canese v. Paraguay* (Series C, no. 111), 31 August 2004, §105.

[463] IACtHR, *Baraono Bray v. Chile* (Series C, no. 481), 24 November 2022, §108.

matters 'of public interest concerning a public official' cannot under any circumstances be sanctioned by criminal penalties.[464]

The European Court has also considered a speaker's status as a member of the press or a lawyer as part of its assessment of the public value of speech.[465] The Court applies its 'most careful scrutiny' to any penalties on speech that 'are capable of discouraging the participation of the press in debates over matters of legitimate public concern'[466] because the press should not be hindered in 'performing its task as purveyor of information and public watchdog'.[467] And states have a positive obligation to create a favourable environment for participation in public debate, including allowing the press to express opinions and ideas 'without fear, even if these run counter to those defended by the official authorities or by a significant part of public opinion, or even if they are irritating or shocking'.[468]

Similarly, the European Court has held that although lawyers' criticisms cannot overstep 'certain bounds' set out in their national codes of conduct,[469] lawyers have a 'specific status' that warrants a narrow margin of appreciation for interference to speech, in light of the right to a fair trial and the public interest in the functioning of the judiciary.[470] This means that, when a lawyer is representing a client, especially in a criminal case, there must be 'a free and even forceful exchange of argument between the parties'.[471] For example, the European Court found a violation of the right to freedom of speech in a case in which a lawyer, in written pleadings, accused French judges of being complicit in the torture of his client by Syrian secret services, and was issued with a five-year disqualification.[472] The Court focused on the fact that the remarks were made in a 'judicial context' and that the remarks directly contributed to the lawyer's task of defending his client.[473] Penalizing speech outside of the courtroom will be subject to less protection (or, for the Court a greater 'margin of appreciation'[474]), but even then

[464] See IACtHR, *Álvarez Ramos v. Venezuela* (Series C, no. 380), 30 August 2019, §§121–123, 129. See also IACtHR, *Baraono Bray v. Chile* (Series C, no. 481), 24 November 2022, §109 (finding that the 'use of criminal law to impose subsequent liability for statements made in the media on matters of public interest would … constitute intimidation which, ultimately, would limit freedom of expression'); IACtHR, *Palamara Iribarne v. Chile* (Series C, no. 135), 22 November 2005, §85 (finding that the question of whether restrictions are a 'necessary' and therefore a lawful restriction on speech 'will depend on whether they are designed to fulfil an overriding public interest'). Cf. IACtHR, *Palacio Urrutia v. Ecuador* (Series C, no. 446), 24 November 2021, Concurring Opinion of Judge Humberto Antonio Sierra Porto, §16 (disagreeing with 'the tendency to establish an absolute rule regarding the impossibility of establishing criminal sanctions in cases such as this one'). See also s. II.2.3.1. (Ecuador). High-Level Panel of Legal Experts on Media Freedom, Amicus Curiae Brief in the case of Palacio Urrutia v. Ecuador (2021), §73.

[465] See s. III.4.3. (Reasonable publication).

[466] ECtHR (GC), *Bladet Tromsø v. Norway* (App. no. 21980/93), 20 May 1999, §64.

[467] ECtHR, *Lingens v. Austria* (App. no. 9815/82), 8 July 1986, §44. See s. III.4.3. (Reasonable publication) and ch. 1 (Introduction), s. II.3.2.5. (Relevance of whether the speaker is a journalist).

[468] ECtHR, *Khadija Ismayilova v. Azerbaijan* (App. nos. 65286/13 & 57270/14), 10 January 2019, §158. See also IACmHR, *Inter-American Legal Framework Regarding the Right to Freedom of Expression* (2009) OEA/Ser.L/V/II, CIDH/RELE/INF. 2/09, §165.

[469] ECtHR (GC), *Morice v. France* (App. no. 29369/10), 23 April 2015, §134.

[470] Ibid., §§132–148; ECtHR, *Ottan v. France* (App. no. 41841/12), 19 April 2018, §57. See also ECtHR, *Nikula v. Finland* (App. no. 31611/96), 21 March 2002, §45.

[471] ECtHR (GC), *Morice v. France* (App. no. 29369/10), 23 April 2015, §137.

[472] ECtHR, *Bono v. France* (App. no. 29024/11), 15 December 2015.

[473] Ibid., §§48–56.

[474] See ch. 1 (Introduction), s. II.3. (Jurisprudence).

the European Court has held that lawyers cannot be penalized for everything published in an interview where the press has edited certain statements.[475]

In line with other regional human rights bodies, African jurisprudence provides that a 'higher degree of tolerance is expected' for political speech, and 'an even higher threshold is required' when such speech relates to the actions of the government and government officials.[476] The Declaration of Principles of Freedom of Expression in Africa also provides that public figures 'shall be required to tolerate a degree of criticism'.[477]

4.3. Reasonable publication

Many national systems include 'reasonable publication' as a defence to speech-related liability.[478] This provides a lower level protection for speech than the *NYT v. Sullivan* approach which requires that speech about public officials be made with 'actual malice'—as it requires negligence but not 'knowledge' of falsity or 'reckless disregard' to the truth before speech can be punishable.[479] International bodies have not specifically addressed whether such a defence is a requirement under international human rights law, although the Human Rights Committee has embraced 'actual malice' as the relevant standard for public-interest speech, and other bodies have stated that a minimum level of intent or fault should be required before speech can be penalized.[480]

The European Court has taken a unique approach among international bodies by establishing a rule that applies to certain speakers rather than certain speech.[481] According to the European Court, there should be 'increased protection' afforded to speech by 'public watchdogs' and including in particular the press.[482] The Court has also found that when freedom of the press is at stake, authorities have a limited margin of appreciation to decide that a 'pressing social need' for restrictions exist.[483] But the Court has also made clear that the press must not 'overstep certain bounds', in

[475] ECtHR (GC), *Morice v. France* (App. no. 29369/10), 23 April 2015, §§137–138. The Court has construed this distinction strictly, holding that comments made to a journalist while inside the court building after an acquittal did not form part of 'conduct in the courtroom'. See, e.g., ECtHR, *Ottan v. France* (App. no. 41841/12), 19 April 2018, §55. Cf. ECtHR, *Peruzzi v. Italy* (App. no. 39294/09), 30 June 2015, §§60–63. See also WGAD, *Maseko v. Swaziland* (Opinion no. 6/2015), 22 April 2015, §28 (finding that lawyers have 'the right to take part in public discussions on matters concerning the law and the administration of justice').

[476] ACmHPR, *Good v. Botswana* (Comm. no. 313/05), 26 May 2010, §198. See also ACtHPR, *Konaté v. Burkina Faso* (App. no. 4/2013), 5 December 2014, §§155–156; ACtHPR, *Umuhoza v. Rwanda* (App. no. 3/2014), 24 November 2017, §161.

[477] ACmHPR, *Good v. Botswana* (Comm. no. 313/05), 26 May 2010, §198.

[478] See s. II.1.4.3. (Reasonable publication). See also s. III.3.1. (Intent). Milo (n 47) 108–114.

[479] US Supreme Court, *New York Times v. Sullivan* 376 U.S. 254, 9 March 1964, 279–280. See s. III.3.1. (Intent). The Inter-American Court does not consider the responsible journalism standard as opposing, qualifying or modifying in any meaningful way the 'actual malice' requirement; it has invoked the responsible journalism standard as a way to develop doctrine, but on its own it has not played a meaningful role in the adjudication process.

[480] See s. III.3.1. (Intent).

[481] See ch. 1 (Introduction), s. II.3.2.5. (Relevance of whether the speaker is a journalist). See also s. III.4.3.3 (Form and manner of the speech and its presentation).

[482] ECtHR, Guide on Article 10 of the European Convention on Human Rights—Freedom of Expression, 31 August 2022, §§298–304. See also ECtHR (GC), *Fressoz v. France* (App. no. 29183/95), 21 January 1999, §45(ii); ECtHR (GC), *Pedersen & Baadsgaard v. Denmark* (App. no. 49017/99), 17 December 2004, §71; ECtHR, *Salihu v. Sweden* (App. no. 33628/15), 10 May 2016, §52.

[483] ECtHR, Guide on Article 10 of the European Convention on Human Rights—Freedom of Expression, 31 August 2022, §299.

particular the reputation and rights of others and the need to prevent the disclosure of information received in confidence.[484] The Court has made clear that being engaged in journalistic activities does not create an unfettered right to claim immunity from criminal liability.[485] The protection offered to the press is therefore '*subject to the condition that* they comply with the duties and responsibilities connected with the function of journalist, and the consequent obligation of "responsible journalism" '.[486]

The European Court has held, in a case involving a journalist, that the Court 'will examine whether the journalist … *acted in good faith in accordance with the tenets of responsible journalism*'.[487] Whether or not a journalist acted 'responsibly' is in turn assessed based on the content of the information which is collected and disseminated by journalistic means as well as the process of publication. More specifically, the Court has applied this doctrine by addressing three factors: (1) 'the lawfulness of the *conduct* of a journalist', (2) whether appropriate efforts were made to verify facts, and (3) the form and manner in which the speech was written and presented.[488]

4.3.1. Lawfulness of journalist's conduct

The European Court interprets the fact that a journalist has breached the law by publishing their speech or through 'the manner in which the information was obtained' as 'a most relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly'.[489] This analysis includes an assessment of the journalists' interaction with governmental authorities when exercising journalist functions and whether they complied with relevant laws.[490]

4.3.2. Verification of facts

Second, the European Court considers the extent to which journalists have verified information in determining whether speech constitutes 'responsible journalism'.[491] According to the Court, 'responsible journalism requires that the journalists check the

[484] ECtHR, *De Haes v. Belgium* (App. no. 19983/92), 24 February 1997, §37; ECtHR (GC), *Bladet Tromsø and Stensaas v. Norway* (App. no. 21980/93), 20 May 1999, §62.

[485] ECtHR (GC), *Stoll v. Switzerland* (App. no. 69698/01), 10 December 2007, §91.

[486] ECtHR, Guide on Article 10 of the European Convention on Human Rights—Freedom of Expression, 31 August 2022, §305 (emphasis added). See, e.g., ECtHR, *Kącki v. Poland* (App. no. 10947/11), 4 July 2017, §49.

[487] ECtHR, *Kącki v. Poland* (App. no. 10947/11), 4 July 2017, §49 (emphasis added). The Court has also asked whether the journalist 'act[ed] in good faith, respect[ed] the ethics of journalism and perform[ed] the due diligence expected in responsible journalism?': ECtHR, *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16), 4 December 2018, §77.

[488] See s. III.4.3.1 (Lawfulness of journalist's conduct), s. III.4.3.2 (Verification of facts), and s. III.4.3.3 (Form and manner of the speech and its presentation).

[489] ECtHR, *Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece* (App. no. 72562/10), 22 February 2018, §59; ECtHR (GC), *Pentikäinen v. Finland* (App. no. 11882/10), 20 October 2015, §90; ECtHR (GC), *Axel Springer AG v. Germany* (App. no. 39954/08), 7 February 2012, §93.

[490] See ch. 5 (Espionage and Official Secrets Laws), s. II.5.2.3. ('Responsible journalism'). See, e.g., ECtHR (GC), *Fressoz v. France* (App. no. 29183/95), 21 January 1999, §§52–53 (concerning a journalist who published income details obtained from a confidential tax file).

[491] ECtHR (GC), *Pedersen & Baadsgaard v. Denmark* (App. no. 49017/99), 17 December 2004, §78. See also IACtHR, *Moya Chacón v. Costa Rica* (Series C, no. 451), 6 September 2022, §76 ('for investigative journalism to exist in a democratic society, journalists must be allowed "room for error" because, without this margin of error, neither independent journalism nor the possibility of the necessary democratic scrutiny that results from this can exist').

information provided to the public to a reasonable extent'.[492] This inquiry includes the extent to which the media can reasonably regard their sources as reliable, to be assessed in light of the situation as it presented itself to the journalist at the material time, rather than with the benefit of hindsight.[493]

The Court has noted that the press 'should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the content of official reports without having to undertake independent research'.[494] The Court has also held that reporting 'based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog" '[495] and that 'a journalist cannot always be reasonably expected to check all the information provided in an interview'.[496]

But in a case in which a journalist made various offensive statements about a member of parliament, accusing him of fraud and plagiarism, the Court found that it was defensible for him to be convicted of defamation by a Romanian court and required to pay approximately 2,000 Euros in damages on the basis that he did not verify the content of the article before publication.[497] The Court noted that where a report concerns criminal allegations, 'it has to be kept in mind that the suspect has a right to be presumed innocent of any criminal offence until proven guilty and that the courts are the proper forum for the determination of a person's guilt or innocence on a criminal charge' and that the publication had not been 'responsible' in this context.[498]

4.3.3. Form and manner of the speech and its presentation

Third, the European Court considers the way in which the speech was drafted and communicated.[499] The Court considers that it is not for it, 'nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists'.[500] And it

[492] ECtHR, *Kącki v. Poland* (App. no. 10947/11), 4 July 2017, §52. See also ECtHR, *McVicar v. United Kingdom* (App. no. 46311/99), 7 May 2002, §84; ECtHR (GC), *Bladet Tromsø v. Norway* (App. no. 21980/93), 20 May 1999, §66; ECtHR (GC), *Pedersen & Baadsgaard v. Denmark* (App. no. 49017/99), 17 December 2004, §78.

[493] ECtHR, *McVicar v. United Kingdom* (App. no. 46311/99), 7 May 2002, §84; ECtHR (GC), *Bladet Tromsø v. Norway* (App. no. 21980/93), 20 May 1999, §66.

[494] ECtHR, *Colombani v. France* (App. no. 51279/99), 25 June 2002, §65. See s. III.4.4. (Accurate reporting of official documents).

[495] ECtHR (GC), *Jersild v. Denmark* (App. no. 15890/89), 23 September 1994, §35. See also ECtHR (GC), *Pedersen & Baadsgaard v. Denmark* (App. no. 49017/99), 17 December 2004, §77.

[496] ECtHR, *Kącki v. Poland* (App. no. 10947/11), 4 July 2017, §52. But in certain circumstances, a journalist can be required to systematically and formally distance themselves from the content of information that might display a conflict between public interest and an individual's right. See ch. 3 (Hate Speech).

[497] ECtHR, *Cuc Pascu v. Romania* (App. no. 36157/02), 16 September 2008, §31.

[498] ECtHR, *Verlagsgruppe Droemer Knaur GmbH & Co. KG v. Germany* (App. no. 35030/13), 19 October 2017, §54. See also ECtHR, *Eerikäinen v. Finland* (App. no. 3514/02), 10 February 2009, §60; ECtHR, *Milosavljević v. Serbia* (App. no. 57574/14), 25 May 2021, §64. See also IACtHR, *Moya Chacón v. Costa Rica* (Series C, no. 451), 6 September 2022, §76: 'for investigative journalism to exist in a democratic society, journalists must be allowed "room for error" because, without this margin of error, neither independent journalism nor the possibility of the necessary democratic scrutiny that results from this can exist'.

[499] See ECtHR, *Flux v. Moldova (No. 6)* (App. no. 22824/04), 29 July 2008, §26; ECtHR (GC), *Stoll v. Switzerland* (App. no. 69698/01), 10 December 2007, §104.

[500] T. McGonagle, *Freedom of Expression and Defamation: A study of the case law of the European Court of Human Rights* (COE 2016), 44; ECtHR (GC), *Jersild v. Denmark* (App. no. 15890/89), 23 September 1994, §31; ECtHR (GC), *Bladet Tromsø v. Norway* (App. no. 21980/93), 20 May 1999, §63.

acknowledges that 'methods of objective and balanced reporting may vary considerably, depending among other things on the media in question'.[501] The Court also recognizes that journalistic freedom allows 'recourse to a degree of exaggeration, or even provocation' or harshness.[502] But it has also held that this judicial deference is not 'unlimited'.[503]

Applying this standard, the Court has found it permissible to impose a conviction and fine on a journalist for writing articles that were 'reductive and truncated' and 'liable to mislead the reader', thereby 'considerably detract[ing] from the importance of their contribution to the public debate'.[504]

On the other hand, the Court found a violation of the right to free expression where a French weekly magazine published an interview whose 'tone … appeared to be measured and non-sensationalist' and where readers could 'easily distinguish' between the factual material and the interviewee's perception of events.[505] Although the Court noted that the interview was 'accompanied by graphic effects and headlines which were intended to attract the reader's attention and provoke a reaction', these were held to be matters of 'editorial decision' and the presentation of the material, as a whole, did 'not distort the content of the information'.[506] It was therefore held to be inappropriate for French courts to fine the magazine 50,000 Euros and order that they display text regarding the judgment in the magazine.[507]

The Inter-American Court has quoted and approved the approach of the European Court in stating that journalists 'must, when exercising their duties, abide by the principles of responsible journalism, namely to act in good faith, provide accurate and reliable information, objectively reflect the opinions of those involved in a public debate, and refrain from pure sensationalism'.[508] More specifically, the Court considers that 'journalists have an obligation to verify, reasonably although not necessarily exhaustively, the facts on which they base their opinions'[509] and that journalists should 'take a critical distance from their sources and compare them with other relevant information'.[510] However, the contours of any doctrine of 'responsible journalism' are not clear and it appears to be used by the Court as a relevant factor in assessing intent when

[501] ECtHR (GC), *Jersild v. Denmark* (App. no. 15890/89), 23 September 1994, §31.

[502] ECtHR (GC), *Bladet Tromsø v. Norway* (App. no. 21980/93), 20 May 1999, §59; ECtHR, *De Haes v. Belgium* (App. no. 19983/92), 24 February 1997, §46.

[503] ECtHR (GC), *Bladet Tromsø v. Norway* (App. no. 21980/93), 20 May 1999, §58.

[504] ECtHR (GC), *Stoll v. Switzerland* (App. no. 69698/01), 10 December 2007, §152. The Court found that there was no violation of article 10, in circumstances where the published articles had been so inaccurate and misleading that it was clearly the intention of the journalist 'not to inform the public on a topic of general interest' but to make the subject of the article 'the subject of needless scandal': §§151–152.

[505] ECtHR (GC), *Couderc v. France* (App. no. 40454/07), 10 November 2015, §141.

[506] Ibid., §144.

[507] Ibid., §152. See ch. 1 (Introduction), s. II.3.2.5. (Relevance of whether speaker is a journalist) discussing ECtHR (GC), *Pedersen & Baadsgaard v. Denmark* (App. no. 49017/99), 17 December 2004.

[508] IACtHR, *Mémoli v. Argentina* (Series C, no. 265), 22 August 2013, §122, citing at length the European Court decisions on *Novaya Gazeta v. Russia* (App. no. 14087/08), 28 March 2013 and ECtHR (GC), *Stoll v. Switzerland* (App. no. 69698/01), 10 December 2007; IACtHR, *Granier v. Venezuela* (Series C, no. 293), 22 June 2015, §139. See also IACtHR, *Kimel v. Argentina* (Series C, no. 177), 2 May 2008, §79.

[509] IACtHR, *Mémoli v. Argentina* (Series C, no. 265), 22 August 2013, §122.

[510] Ibid., §122.

weighing the necessity of restrictions on speech rather than specifically recognized as a defence.[511]

The African Commission's 2019 Declaration of Principles on Freedom of Expression directs states to ensure that in defamation cases, publishers may not be found liable for statements which are 'reasonable to make in the circumstances'.[512] The Commission has also observed (in a compulsory accreditation case) that 'while accurate reporting is the goal to which all journalists should aspire', in some circumstances 'it is sufficient if journalists have made a reasonable effort to be accurate and have not acted in bad faith'.[513]

4.4. Accurate reporting of official documents

The most detailed jurisprudence on the defence of fair and accurate reporting emanates from the European Court. In a leading case, the Court examined the civil liability of a newspaper and its editor for defamation for articles alleging that seal hunters had skinned harp seals alive.[514] The Court found a violation of article 10 because the newspaper had directly quoted from an official report drawn up by an inspector appointed by the Norwegian Ministry of Fisheries to monitor the seal hunt.[515] It concluded that 'the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research'.[516]

In other cases, the European Court has found a violation of article 10 for criminal defamation proceedings when the press had relied on reports by Romania's Fraud Squad for allegations of bribery,[517] quoted extracts from a confidential French government report alleging a foreign head of state was involved in cannabis trafficking[518] and based reporting on the alleged unprofessional conduct of a Finnish surgeon on a publicly available police pre-trial record.[519]

The extent to which different sources may be relied upon by journalists was explained by the European Court in a case in which an injunction and damages were sought against a publisher for a book that referred to a person as a presumed member of the mafia.[520] The Court held that the press was entitled to rely on the content of public official reports and official press releases without undertaking independent research.[521] However, the Court criticized reliance on '*internal* official reports' that indicated

[511] Ibid., §122–123.
[512] ACmHPR, Declaration of Principles of Freedom of Expression and Access to Information in Africa (2019), Principle 21.
[513] ACmHPR, *Scanlen & Holderness v. Zimbabwe* (Comm. no. 297/05), 3 April 2009, §120.
[514] ECtHR (GC), *Bladet Tromsø v. Norway* (App. no. 21980/93), 20 May 1999, §§12–13. The domestic court had decided that the newspaper had to pay each of the plaintiffs approximately 850 EUR (10,000 Norwegian Kroner) and the editor 85 EUR(1,000 Norwegian Kroner).
[515] ECtHR (GC), *Bladet Tromsø v. Norway* (App. no. 21980/93), 20 May 1999, §§66–68.
[516] Ibid., §68; see also §72 noting the newspaper had acted in good faith.
[517] ECtHR (GC), *Dalban v. Romania* (App. no. 28114/95), 28 September 1999, §§13–14, 17–19, 46–50.
[518] ECtHR, *Colombani v. France* (App. no. 51279/99), 25 June 2002, §§13, 65.
[519] ECtHR, *Selisto v. Finland* (App. no. 56767/00), 16 November 2004, §§60–63.
[520] ECtHR, *Verlagsgruppe Droemer Knaur Gmbh & Co KG v. Germany* (App. no. 35030/13), 19 October 2017.
[521] Ibid., §§46, 48.

only 'vague suspicious circumstances' whereas the book 'exaggerated the level of suspicion'.[522]

Other international human rights bodies have provided limited comment on the fair and accurate reporting defence but the Human Rights Committee has found that an author was exercising his right to impart information under article 19(2) of the ICCPR when he published documents that were referred to in open court, implicitly recognizing the validity—though not expressly articulating the necessity—of this defence.[523]

4.5. Opinion

The defence of opinion is also recognized in international law.[524] The Human Rights Committee has stated in its General Comment No. 34 that defamation laws 'should not be applied with regard to those forms of expression that are not, of their nature, subject to verification'.[525] This suggests that opinions should not even be caught in the net of speech-restriction laws, and not just that opinion should be a defence for the speaker to prove.

The Working Group has similarly held that statements of opinion should not be punished because 'the right to hold an opinion and expressing it freely is the core of the right to freedom of expression. Even if the opinion of [the speaker] is erroneous, he has the right to believe in it and to express it'.[526]

International bodies also acknowledge that a truth defence cannot apply where opinions have been expressed because opinions by their very nature are not capable of verification: they are the subjective viewpoint of the speaker. And since truth is a necessary defence, this means that opinions should not be penalized through defamation or similar laws.[527]

In the words of the European Court:

> A careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof . . .[528]

The concept of a 'value judgment' is wider than a mere comment; it includes assessment and analysis of facts as well as the expression of an opinion. The Court has emphasized that where national legislation or courts make no distinction between value judgments and statements of fact, which amounts to requiring proof of the truth of a value

[522] Ibid., §§47–48 (emphasis added). The Court also noted that it 'agrees with the domestic courts that a distinction has to be made between public official reports or official press releases and internal official reports. While journalists may rely on the former without further research, the same cannot be held for the latter'.

[523] HRC, *Lovell v. Australia* (Comm. no. 920/2000), 29 March 2003, §9.2 (finding that the contempt conviction was permissible under Art. 19 for documents that were *not* read aloud in court, §9.4). See s. IV.8. (Recommendations).

[524] Many states protect opinions through 'fair comment' defences. See s. II. (State Practice).

[525] HRC, General Comment No. 34 (2011), §47.

[526] WGAD, *Tri Agus Susanto Siswowihardjo v. Indonesia* (Opinion no. 42/1996), 3 December 1996, §8; WGAD, *Duy Nguyen Huu Quoc v. Vietnam* (Opinion no. 8/2019), 25 April 2019, §55.

[527] See s. III.4.1. (Truth).

[528] ECtHR, *Lingens v. Austria* (App. no. 9815/82), 8 July 1986, §46; ECtHR, *Fedchenko v. Russia* (App. no. 33333/04), 11 February 2010, §37; ECtHR, *Otegi Mondragon v. Spain* (App. no. 2034/07), 15 March 2011, §53.

judgment as a defence to libel, this is an indiscriminate approach to the assessment of speech and is per se incompatible with freedom of opinion, a fundamental element of freedom of expression.[529]

For example, in a case that concerned the use of the term 'closet Nazi' to describe a politician, the national courts considered the term to be a statement of fact but never examined the question as to whether it could be considered a value judgment. In the European Court's view, this was instead a 'permissible value judgment', and the 'body of facts available [to the journalist] constituted sufficient factual basis for the contested factual statement'.[530] In response to the argument put forward by Austrian authorities that calling someone a 'Nazi' was a very serious reproach close to a criminal charge, the European Court noted that the 'degree of precision' for establishing criminality can 'hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern, in particular when expressing his opinion in the form of a value judgment'.[531]

When an opinion or 'value judgment' is concerned, the European Court will consider the adequacy of the factual basis for a value judgment, though the weight given to the factual basis will vary depending on the nature of the statement.[532] The Court has found that 'even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive'.[533]

In some cases, the requirement of a sufficient factual basis will be relaxed,[534] such as when the article relates to an important matter of public interest or is satirical. For instance, the Court did not require a journalist to prove the factual basis of his statements regarding police brutality when he was 'essentially reporting what was being said by others' and it was 'a matter of serious public concern'.[535]

The European Court takes a similarly protective stance towards artistic expression and satire, on the basis that satire 'by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate'.[536] Accordingly, 'any interference

[529] ECtHR, *Fedchenko v. Russia (No. 5)* (App. no. 17229/13), 2 October 2018, §37.

[530] ECtHR, *Scharsach v. Austria* (App. no. 39394/98), 13 November 2003, §41. The Court noted that 'the assessment of whether a certain statement constitutes a value judgment or a statement of fact might in many cases be difficult. However, since under the Court's case-law a value judgment must be based on sufficient facts in order to constitute a fair comment under Article 10 . . . their difference finally lies in the degree of factual proof which has to be established'.

[531] Ibid., §43.

[532] ECtHR, *Unabhängige Initiative Informationsvielfalt v. Austria* (App. no. 28525/95), 26 February 2002, §40. See also ECtHR, *Karsai v. Hungary* (App. no. 5380/07), 1 December 2009, §§32–33; ECtHR, *Feldek v. Slovakia* (App. no. 29032/95), 12 July 2001, §86.

[533] ECtHR, *Jerusalem v. Austria* (App. no. 26958/95), 27 February 2001, §43, citing ECtHR, *De Haes v. Belgium* (App. no. 19983/92), 24 February 1997, §47, and ECtHR, *Oberschlick v. Austria* (App. no. 20834/92), 1 July 1997, §33; ECtHR, *Dichand v. Austria* (App. no. 29271/95), 26 February 2002, §§42–43; ECtHR, *Scharsach v. Austria* (App. no. 39394/98), 13 November 2003, §§39–40.

[534] McGonagle (n 500) 45.

[535] ECtHR, *Thorgeirson v. Iceland* (App. no. 13778/88), 25 June 1992, §65.

[536] ECtHR, *Eon v. France* (App. no. 26118/10), 14 March 2013, §60.

with the right of an artist—or anyone else—to use this means of expression should be examined with particular care'.[537] The Court has held that the 'use of sarcasm and irony is perfectly compatible with the exercise of a journalist's freedom of expression',[538] and has found violations of article 10 in a range of instances involving satirical expression, including waving a placard during a Presidential visit stating 'Get lost, you sad prick';[539] a newspaper article describing local government officials as 'numbskulls' and 'posers';[540] and a lewd painting of Austrian politicians.[541]

The approach of the Inter-American Court is similar to that of the other international bodies: there is a clear recognition that a distinction needs to be drawn between fact and opinion, with the latter being protected from liability. The Commission stated that '*desacato*' laws violate the American Convention by failing to distinguish between facts and value judgments, requiring the speaker to prove the veracity of all his statements.[542] The Inter-American Court has also suggested that opinions should be protected speech. It held that opinions expressed by a journalist 'can neither be deemed to be true nor false. As such, an opinion cannot be subjected to sanctions, even more so where it is a value judgment on the actions of a public official in the performance of his duties'.[543]

Similarly, the African Commission requires that states ensure that laws relating to defamation do not impose liability for expressions of opinions.[544]

5. Right to a Fair Trial

International human rights bodies have recognized that criminal and civil proceedings for defamation or insult must comply with certain due process requirements. This includes requirements related to the burden and standard of proof,[545] the need for a reasoned decision by domestic courts,[546] reasonable limitation periods,[547] and respect for the equality of arms.

[537] Ibid.
[538] ECtHR, *Ziembiński v. Poland (No. 2)* (App. no. 1799/07), 5 July 2016, §44.
[539] ECtHR, *Eon v. France* (App. no. 26118/10), 14 March 2013.
[540] ECtHR, *Ziembiński v. Poland (No. 2)* (App. no. 1799/07), 5 July 2016.
[541] ECtHR, *Vereinigung Bildender Künstler v. Austria* (App. no. 68354/01), 25 January 2007.
[542] IACmHR, *The Inter-American Legal Framework regarding the Right to Freedom of Expression* (2009) OEA/Ser.L/V/II, CIDH/RELE/INF. 2/09, §138. See ss II.1.5.1. (Criminal penalties) and III.6.1. (Criminal penalties).
[543] IACtHR, *Kimel v. Argentina* (Series C, no. 177), 2 May 2008, §93.
[544] ACmHPR, Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019), Principle 2. Cf. McGonagle (n 500) 45 (suggesting limits to the defence).
[545] See, e.g., ECtHR, *Kasabova v. Bulgaria* (App. no. 22385/03), 19 April 2011; ECtHR, *McVicar v. United Kingdom* (App. no. 46311/99), 7 May 2002, §87; ECtHR, *Steel v. United Kingdom* (App. no. 68416/01), 15 February 2005, §§93, 95.
[546] See, e.g., ECtHR, *Macovei v. Romania* (App. no. 53028/14), 28 July 2020, §88 (criticizing Romanian appellate courts for the 'limited scope of their reasoning', and for not providing 'convincing reasons' for concluding that a corruption allegation against Romanian politicians was an 'untruthful statement of fact'). See also ECtHR, *Terentyev v. Russia* (App. no. 25147/09), 26 January 2017, §22.
[547] The jurisdictions considered in this chapter tend to impose limitation periods for defamation of one to three years, although there are a few outliers with periods of five to 20 years: see s. II. (State Practice).

Lengthy limitation periods may have a chilling effect on freedom of expression, with the possibility of prosecution or lawsuit hanging over the journalist for many years.[548] According to the European Court, states cannot fix a limitation period that is arbitrary or impairs 'the very essence of the applicants' right to access' to a court, and the restrictions must pursue a legitimate aim and be proportionate.[549]

6. Penalties

In international law, the analysis of whether penalties are appropriate is typically undertaken in the context of whether a particular penalty is a necessary restriction on the right to freedom of expression, which in turn triggers a proportionality test. However, international law makes clear that criminal penalties—or at least imprisonment—are *never* appropriate for some types of speech.

6.1. Criminal penalties

6.1.1. Criminalization

International human rights bodies agree that criminal law should only be used in exceptional circumstances to penalize speech and that the penalty of imprisonment should not be used under any circumstances to punish speech that is defamatory or insulting.[550] But some bodies have gone further, and consider that *all* criminal penalties are impermissible under international standards.

6.1.1.1. Applicability of criminal penalties to defamatory or insulting speech UN Special Rapporteurs on freedom of expression, the UN Working Group, the ECOWAS Court, the African Commission, the OSCE and the Council of Europe take the position that criminalization of defamation violates the right to freedom of expression. According to these sources, *any* criminal penalty—even penalties short of imprisonment such as a criminal fine—would violate international law if imposed as a penalty for such speech.

The Working Group on Arbitrary Detention has consistently held that criminal sanctions are not proportionate penalties for defamation.[551] In one case, a blogger was sentenced to one year in prison for insulting the president after blogging about sectarian riots in Egypt.[552] The Working Group found that the 'use of criminal law is particularly

[548] Defamation trials must themselves be swift: see HRC, General Comment No. 34 (2011), §47 (providing that it is 'impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously').

[549] ECtHR, *Stubbings v. United Kingdom* (App. nos. 22083/93 & 22095/93), 22 October 1996, §§55–56. Cf. ECtHR, *Times Newspapers Ltd (Nos. 1 and 2) v. United Kingdom* (App. nos. 3002/03 & 23676/03), 10 March 2009.

[550] See, e.g., HRC, General Comment No. 34 (2011), §47.

[551] See WGAD, *Maseko v. Swaziland* (Opinion no. 6/2015), 22 April 2015, §§29–30 (finding contravention of articles 14 and 19 ICCPR and articles 10 and 19 UDHR, §36); WGAD, *Amer v. Egypt* (Opinion no. 35/2008), 20 November 2008, §33; WGAD, *Sadeghi v. Iran* (Opinion no. 19/2008), 20 April 2018; WGAD, *Thammavong v. Laos* (Opinion no. 61/2017), 25 August 2017.

[552] WGAD, *Amer v. Egypt* (Opinion no. 35/2008), 20 November 2008, §§5, 15, 25.

inappropriate for alleged defamation against public officials' and 'ha[s] an inhibiting effect on the exercise of the right to freedom of opinion and expression in discussions of matters of public concern'.[553]

The UN Special Rapporteur has also commented that '[c]riminal law should be used only in very exceptional and most egregious circumstances of incitement to violence, hatred or discrimination. Criminal libel is a relic of the colonial past and should be abolished'.[554]

Africa's ECOWAS Court also considers criminalization of insulting speech inappropriate. In one case, three journalists were arrested for insulting the government and the president of the Gambia.[555] One was ordered to pay a fine of roughly $4,000 US dollars within two hours or face a four-year prison term and another was held in custody for 17 months before being acquitted.[556] The ECOWAS Court concluded that '[t]he existence of criminal defamation and insult or sedition laws are indeed inacceptable instances of gross violation of free speech and freedom of expression. It restricts the right of access to public information.'[557] It directed the Gambia to review and decriminalize its legislation on sedition, criminal libel, defamation and false news publication.[558] And in 2010, the African Commission passed resolution 169 entitled 'Repealing Criminal Defamation Law in Africa', which calls on states parties to the African Charter to 'repeal criminal defamation laws or insult laws which impede freedom of speech'.[559]

The OSCE and the Council of Europe have also called for decriminalization of laws like criminal libel or sedition that target insulting speech. The OSCE has, for example, urged states to repeal 'laws which provide criminal penalties for the defamation of public figures, or which penalize the defamation of the State, State organs or public officials as such'.[560] And in 2020 Professor David Kaye, then UN Special Rapporteur, stated that it is 'critical that States repeal any laws criminalizing journalism, including those adopted under the guise of addressing … defamation'.[561]

[553] Ibid., §33. See also UN Special Rapporteur F. La Rue, *Promotion and Protection of the Right to freedom of opinion and expression* (2012) UN Doc. A/67/357, §47 (UN Special Rapporteur referred to only 'serious and extreme instances of incitement to hatred' as offences that 'should be criminalised').

[554] OHCHR, 'Statement by Irene Khan, Special Rapporteur on the promotion and protection of freedom of expression at the 47th Session of the Human Rights Council' (2 July 2021).

[555] ECOWAS CCJ, *Federation of African Journalists v. The Gambia* (Suit no. ECW/CCJ/APP/36/15), 13 February 2018, 3.

[556] Ibid., 3–4 (the penalty was 250,000 Gambian Dalasi, equivalent to approximately 4,897 USD).

[557] Ibid., 40.

[558] Ibid., 48.

[559] ACmHPR, Resolution 169 (XLVIII)10 on Repealing Criminal Defamation Laws in Africa, 24 November 2010. See also ACmHPR, Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019), Principle 22(2) (calling on states to repeal laws that criminalize sedition, insult, and publication of false news).

[560] OSCE Parliamentary Assembly, Warsaw Declaration (1997), §140; OSCE Parliamentary Assembly, Bucharest Declaration (2000), §80. See also OSCE Parliamentary Assembly, Paris Declaration: Resolution on Freedom of the Media (2001), 29–31. See also M. Haraszti, 'Statement at the Fourth Winter Meeting of the OSCE Parliamentary Assembly' (OSCE, 25 February 2005).

[561] UN Special Rapporteur D. Kaye, *Disease pandemics and the freedom of opinion and expression* (2020) UN Doc. A/HRC/44/49, §40. This stance is consistent with his predecessors: UN Special Rapporteur A. Hussain, *Civil and Political Rights Including The Question of Freedom of Expression* (2000) UN Doc. E/CN.4/2000/63, §52; UN Special Rapporteur F. La Rue, *Promotion and protection of the right to freedom of opinion and expression* (2011) UN Doc. A/66/290, §40.

Some international bodies have found that criminal penalties are not appropriate specifically for defamatory or insulting speech that relates to public persons or issues of public interest.

The Human Rights Committee has called on states parties to decriminalize insult of leaders and public officials.[562] In a case in which a journalist and editor were convicted of 'criminal insult' for publishing an article on a former member of the Socialist Party of Serbia, the Human Rights Committee found a violation of freedom of expression.[563] Given that the subject of the article was a 'prominent public and political figure', the Committee did not find any unjustified infringement of his rights and reputation, 'much less one calling for the application of criminal sanction'.[564]

The Inter-American Court and Commission have reached the same conclusion.[565] The Inter-American Court has stated that 'in the case of a speech protected because it concerns matters of public interest, such as the conduct of public officials in the performance of their duties, the State's punitive response through criminal law is not conventionally appropriate, to protect the honor of an official'.[566] The Inter-American Court has recognized the punitive and exceptional nature of criminal prosecution for speech, holding that 'criminal prosecution is the most restrictive measure to freedom of expression, therefore its use in a democratic society must be exceptional and reserved for those eventualities in which it is strictly necessary to protect the fundamental legal interests from attacks that damage or endanger them, since to do otherwise would mean an abusive exercise of the punitive power of the State'.[567] The Court has therefore encouraged states to 'establish, for the protection of the honor of public officials, alternatives to the criminal process' such as 'rectification or response' and civil procedures.[568]

The Commission and the Court have also declared *desacato* laws as incompatible with freedom of expression in article 13 of the American Convention.[569] The

[562] HRC, *Concluding Observation, Tajikistan* (2019) UN Doc. CCPR/C/TJK/CO/3, §48. See also HRC, *Concluding Observations, Democratic Republic of the Congo* (2017) UN Doc. CCPR/C/COD/CO/4, §§39–40; HRC, *Concluding Observations, Bahrain* (2018) UN Doc. CCPR/C/BHR/CO/1, §54; HRC, *Concluding Observations, Lebanon* (2018) UN Doc. CCPR/C/LBN/CO/3, §46; HRC, *Concluding Observations, Venezuela* (2015) UN Doc. CCPR/C/VEN/CO/4, §19; HRC, *Concluding Observations, Thailand* (2017) UN Doc. CCPR/C/THA/CO/2, §37. See also HRC, *Concluding Observations, Monaco* (2015) UN Doc. CCPR/C/MCO/CO/3, §10. See further HRC, General Comment No. 34 (2011), §38.

[563] HRC, *Bodrožić v. Serbia and Montenegro* (Comm. no. 1180/2003), 31 October 2005, §§2.1, 2.2, 7.2.

[564] Ibid., §7.2.

[565] IACtHR, *Álvarez Ramos v. Venezuela* (Series C, no. 380), 30 August 2019, §§120–121 (criminal prosecution for the potential abusive exercise of the right to freedom of expression 'will only be appropriate in exceptional cases where it is strictly necessary to protect a pressing social need'); IACtHR, *Palacio Urrutia v. Ecuador* (Series C, no. 446), 24 November 2021, §§118–119 ('the protection of honor through criminal law, which may be legitimate in other cases, is not in accordance with the Convention' with respect to 'speech protected by public interest, such as those referring to the conduct of public officials in the exercise of their duties': High-Level Panel of Legal Experts on Media Freedom, *Amicus Curiae Brief in the case of Palacio Urrutia v. Ecuador* (2021));. See also IACtHR, *Baraona Bray v. Chile* (Series C, no. 481), 24 November 2022, §§109–110; IACmHR, *Inter-American Legal Framework regarding the Right to Freedom of Expression* (2009) OEA/Ser.L/V/II, CIDH/RELE/INF. 2/09, Chapter I, §111. See further IACmHR, *Elías Biscet v. Cuba* (Case 12.476), 21 October 2006 (violation of Art. IV American Declaration for prosecutions of journalists for, inter alia, 'defamatory campaigns intended to harm the integrity of the Cuban State', §113).

[566] IACtHR, *Álvarez Ramos v. Venezuela* (Series C, no. 380), 30 August 2019, §121.

[567] IACtHR, *Palacio Urrutia v. Ecuador* (Series C, no. 446), 24 November 2021, §117.

[568] Ibid., §96.

[569] See ss III.6.1. (Criminal penalties) and III.4.5. (Opinion). IACmHR Special Rapporteur E. Bertoni, *Annual Report of the Special Rapporteur for Freedom of Expression 2002* (2003) OEA/Ser.L/V/II.117 Doc. 1 rev. 1, Chapter

Inter-American Commission has also condemned the criminalization of sedition, which by definition relates to political speech.[570] Similarly, Principle 10 of the Inter-American Commission's Declaration, a soft law instrument which applies to OAS member states, provides that '[t]he protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest'.[571]

This has led the Inter-American Court to condemn criminal penalties, including imprisonment, in such cases. In one case, a journalist published a book criticizing how Argentinian authorities, including a judge, had investigated the murder of five clergymen.[572] The judge sued the journalist for criminal libel and the journalist was sentenced to one year imprisonment.[573] The Inter-American Court found that this violated freedom of expression and was 'overtly disproportionate in relation to the alleged impairment of the right to have one's honour respected in the instant case'.[574]

But in another case that is considered an outlier, and did not relate to speech about a matter of public interest, the Inter-American Court approved short prison terms (suspended sentences of 1–5 months) for two people who had 'publicly denounced the supposedly irregular sale of burial niches in the local cemetery by the executive officers of a mutual association' in a small Argentinian town.[575] They were convicted in relation to statements considered to be 'defamatory or derogatory to the reputation' of members of the association.[576] In the Court's view, 'the punishments … were not excessive or manifestly disproportionate in a way that affected their right to freedom of expression'[577] especially since 'the information contained in the statements' did not relate to 'public interest' issues.[578]

The African Court also considers criminal sanctions for defamation generally not to be permissible in cases concerning reporting in the public interest[579] and African

V, §5; IACmHR, *Inter-American Legal Framework Regarding the Right to Freedom of Expression* (2009) OEA/Ser.L/V/II, CIDH/RELE/INF. 2/09, Chapter I, §134. See IACmHR, Declaration of Principles on Freedom of Expression (2000), Principle 11; IACtHR, *Palamara Iribarne v. Chile* (Series C, no. 135), 22 November 2005, §88; IACtHR, *Usón Ramírez v. Venezuela* (Series C, no. 207), 20 November 2009, §§37, 67, 68.

[570] IACmHR, *Roca Antúnez v. Cuba* (Case 12.127), 24 February 2018, §§117, 122.
[571] IACmHR, Declaration of Principles on Freedom of Expression (2000), Principle 10.
[572] IACtHR, *Kimel v. Argentina* (Series C, no. 177), 2 May 2008, §§2, 42.
[573] Ibid., §2. He was also subjected to a small fine amounting to approximately 90 USD.
[574] Ibid., §94.
[575] IACtHR, *Mémoli v. Argentina* (Series C, no. 265), 22 August 2013, §§1, 84, 131, 144. The judgment has been described as a 'regression' by Catalina Botero-Marino, Special Rapporteur for Freedom of Expression for the Commission from 2008 to 2014: see C. Botero-Marino, 'The Role of the Inter-American Human Rights System in the Emergence and Development of Global Norms on Freedom of Expression', in L. Bollinger & A. Callamard (eds), *Regardless of Frontiers* (Columbia University Press 2021), 193–194. See also E. Bertoni, 'Setbacks and Tension in the Inter-American Court of Human Rights' (Media Defence, 1 December 2013) (deeming the decision a 'serious and notable setback'). See ch. 1 (Introduction), s. II.3.1.6. (Criminal penalties for speech).
[576] IACtHR, *Mémoli v. Argentina* (Series C, no. 265), 22 August 2013, §§ 74, 117.
[577] Ibid., §§144, 149.
[578] Ibid., §147. See s. III.4.2. (Public interest).
[579] ACtHPR, *Konaté v. Burkina Faso* (App. no. 004/2013), 5 December 2014, §165. See s. III.6.1.1.2 (Applicability of penalty of imprisonment for defamatory or insulting speech).

courts have condemned the criminalization of sedition, which by definition relates to political speech.[580]

The European Court's position on criminalization of defamation and insult relies on the margin of appreciation that member states enjoy within the European system, in which the Court defers to individual nations' laws in a number of respects.[581] The Court has repeatedly expressed that in view of this deference, 'a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued'.[582] It has however applied 'strict scrutiny', 'most careful scrutiny' and 'utmost caution' to criminal sanctions imposed for defamation in the context of speech on matters of public interest[583] and noted more generally that 'the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings' in matters of freedom of expression.[584]

6.1.1.2. Applicability of penalty of imprisonment for defamatory or insulting speech Even when international bodies—including the Human Rights Committee and African Court—have found that criminal penalties may be appropriate for defamatory or insulting speech in some circumstances, these bodies have been clear that imprisonment is never an appropriate penalty.[585] Although they consider that criminal penalties may apply to speech that does not concern matters of public interest, they agree that imprisonment is incompatible with international standards under any circumstances.

According to the Human Rights Committee, '[s]tates parties should consider the decriminalization of defamation and, in any case, the application of criminal law should only be countenanced in the most serious of cases and *imprisonment is never an appropriate penalty*'.[586]

In one case, a journalist published a book exposing a child exploitation ring in Mexico.[587] She was violently detained by armed men and prosecuted for 'defamation and calumny', but the case was eventually dismissed for lack of jurisdiction.[588] The Human Rights Committee found a violation of her right to freedom of expression and considered that Mexico was under an obligation to, *inter alia,* 'take all steps

[580] ECOWAS CCJ, *Federation of African Journalists v. The Gambia* (Suit no. ECW/CCJ/APP/36/15), 13 February 2018, 40–43.

[581] See ch. 1 (Introduction), s. II.3. (Jurisprudence). See, e.g., ECtHR (GC), *Zana v. Turkey* (App. no. 18954/91, 25 November 1997, §51 (holding that states 'have a certain margin of appreciation' in assessing whether a 'pressing social need' makes a speech-restriction 'necessary').

[582] ECtHR (GC), *Lindon v. France* (App. nos. 21279/02 & 36448/02), 22 October 2007, §59; ECtHR, *Radio France v. France* (App. no. 53984/00), 30 March 2004, §40; ECtHR, *Ivanova v. Bulgaria* (App. no. 36207/03), 14 February 2008, §68; ECtHR, *Ruokanen v. Finland* (App. no. 45130/06), 6 April 2010, §50; McGonagle (n 500) 18.

[583] ECtHR (GC), *Cumpănă v. Romania* (App. no. 33348/96), 17 December 2004, §118; ECtHR, *Bladet Tromsø v. Norway* (App. no. 21980/93), 20 May 1999, §64. See also McGonagle (n 500) 57.

[584] See, e.g., ECtHR, *Castells v. Spain* (App. no. 11798/85), 23 April 1992, § 46; ECtHR (GC), *Incal v. Turkey* (App. no. 22678/93), 9 June 1998, §54; ECtHR (GC) *Öztürk v. Turkey* (App. no. 22479/93), 28 September 1999, §66.

[585] See IACtHR *Memoli* case that allowed imprisonment but in very specific circumstances not involving public officials: IACtHR *Mémoli v. Argentina* (Series C, no. 265), 22 August 2013.

[586] HRC, General Comment No. 34 (2011), §47 (emphasis added), citing HRC, *Concluding Observations, Italy* (2006) UN Doc. CCPR/C/ITA/CO/5*;* HRC, *Concluding Observations, the Former Yugoslav Republic of Macedonia* (2008) UN Doc. CCPR/C/MKD/CO/2.

[587] HRC, *Cacho Ribeiro v. Mexico* (Comm. no. 2767/2016), 17 July 2018, §2.1.

[588] Ibid., §§2.7–2.8.

necessary to … ensure that all journalists and human rights defenders are able to exercise their right to freedom of expression in their activities, including by decriminalizing the offences of defamation and calumny in all the federated states'.[589] In another case the Committee found a violation of freedom of expression when a radio broadcaster in the Philippines was sentenced to a penalty ranging from five months to over four years for a report on a Filipino congressman's purported 'illicit' relationship with a married television personality and called on the Philippines to 'provide the [broadcaster] an effective remedy' and to 'take steps to prevent similar violations occurring in the future, including by reviewing the relevant libel legislation'.[590] The Committee has also expressed concern that criticism of the royal family in Thailand is punishable by 3–15 years' imprisonment and Thailand's 'extreme sentencing practices' under this provision, with UN experts concluding that such laws 'have no place in a democratic society'.[591] Similarly, in its country reports, the Committee has recommended that states parties to the ICCPR 'should consider decriminalizing defamation and, in any case, resorting to criminal law only in the most serious cases, bearing in mind that imprisonment is never an appropriate penalty for defamation'.[592]

The Working Group has similarly observed that 'criminal sanctions, in particular imprisonment, for alleged libel or defamation are not proportional to the effective exercise of the right to freedom of opinion and expression'.[593] It has also consistently found Thailand's *lèse-majesté* criminal laws to violate freedom of expression on this basis.[594]

Similarly, the African Court has noted that '[a]part from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, … the violations of the laws on freedom of speech and the press cannot be sanctioned by custodial

[589] Ibid., §11, n 3. The relevant provisions under Mexican law defined 'calumny' as an offence committed by '(i) [a]nyone who imputes to another a specific act defined as an offence under law, if such act did not occur or if the person to whom it is imputed is innocent; [or] (ii) anyone who presents false claims, accusations or complaints, such being understood as those in which the perpetrator imputes an offence to a person knowing that such person is innocent or that the offence has not been committed'. Defamation is defined as an act of speech falsely imputing to another person or entity 'an act that can cause dishonour, discredit, prejudice, or expose that person or entity to the contempt of another'. See s. I. (Introduction).

[590] HRC, *Adonis v. The Philippines* (Comm. no. 1815/2008), 26 October 2011, §§2.3, 7.9–7.10 (citing HRC, General Comment No. 34 (2011)), 9. See also HRC, *Cacho Ribeiro v. Mexico* (Comm. no. 2767/2016), 17 July 2018, §§10.8–10.9 on the inappropriateness of detention.

[591] OHCHR, 'Thailand: UN experts alarmed by rise in use of lèse-majesté laws' (8 February 2021); HRC, *Concluding Observations, Thailand* (2017) UN Doc. CCPR/C/THA/CO/2, §37. See also HRC, *Concluding Observations, Monaco* (2015) UN Doc. CCPR/C/MCO/CO/3, §10.

[592] See, e.g., HRC, *Concluding Observations, Portugal* (2020) UN Doc. CCPR/C/PRT/CO/5, §43; HRC, *Concluding Observations, Senegal* (2019) UN Doc. CCPR/C/SEN/CO/5, §45; HRC, *Concluding Observations, Czech Republic* (2019) UN Doc. CCPR/C/CZE/CO/4, §35; HRC, *Concluding Observations, Cabo Verde* (2019) UN Doc. CCPR/C/CPV/CO/1/Add.1, §38; HRC, *Concluding Observations, Nigeria* (2019) UN Doc. CCPR/C/NGA/CO/2, §47. Cf. Country Report on Dominica saying the state 'should continue to ensure that no one is imprisoned for defamation' but not mentioning decriminalization: HRC, *Concluding Observations, Dominica* (2020) UN Doc. CCPR/C/DMA/COAR/1, §42.

[593] WGAD, *Maseko v. Swaziland* (Opinion no. 6/2015), 22 April 2015, §27 (quoting the UN Special Rapporteur); WGAD, *Amer v. Egypt* (Opinion no. 35/2008), 20 November 2008, §§37, 41 (finding contravention of Arts 9, 10, 19 UDHR and Arts 10, 13, 19 ICCPR).

[594] WGAD, *Somyot Prueksakasemsuk v. Thailand* (Opinion no. 35/2012), 30 August 2012, §§6, 7, 21, 26; WGAD, *Sriboonpeng v. Thailand* (Opinion no. 44/2016), 21 November 2016, §§5, 25, 29.

sentences'.[595] In a case in which a journalist had been sentenced to 12 months in prison in Burkina Faso for 'defamation, public insult and contempt of Court' following an article implicating public officials in money laundering, the Court held the custodial sentence was 'a disproportionate interference in the exercise of the freedom of expression by journalists'.[596] The Court also unanimously ordered Burkina Faso to 'amend its legislation on defamation in order to make it compliant with article 9 of the Charter … by repealing custodial sentences for acts of defamation".[597]

The Inter-American and European courts have however left the door open to imprisonment as a permissible penalty in defamation and insult cases in some cases/instances.[598] Both courts, however, have emphasized the exceptional nature of imprisonment as a penalty.[599] The Inter-American Court has generally concluded that criminal sanctions (both imprisonment and fines) for defamation were disproportionate[600] and the Commission considered a Cuban law under which people had been sentenced to jail terms violated freedom of expression.[601]

Similarly, the European Court has observed that 'the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression … only in exceptional circumstances, notably where other fundamental rights have been impaired, as, for example, in the case of hate speech or incitement to violence'.[602] It found a violation when a newspaper editor was convicted of defamation of a cabinet minister and sentenced to two and a half years' imprisonment.[603] The Court noted that the sanction 'was undoubtedly very severe, especially considering that the applicant had already been sued for the exact same statements' and 'paid a substantial amount in damages'.[604]

International human rights bodies have also found a violation of freedom of expression in cases in which speakers have been arrested and detained pre-trial, whether or not a trial or conviction followed thereafter.[605] According to the Human Rights

[595] ACtHPR, *Konaté v. Burkina Faso* (App. no. 004/2013), 5 December 2014, §165.
[596] Ibid., §164.
[597] Ibid., §176 (8).
[598] See IACtHR, *Mémoli v. Argentina* (Series C, no. 265), 22 August 2013 (that allowed imprisonment but in very specific circumstance not involving public official); ECtHR (GC), *Lindon v. France* (App. nos. 21279/02 & 36448/02), 22 October 2007, §59 (noting that 'a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued'). See s. III.6.1.1.1. (Applicability of criminal penalties to defamatory or insulting speech).
[599] ACtHPR, *Konaté v. Burkina Faso* (App. no. 004/2013), 5 December 2014, §165. See s. III.6.1.1.1. (Applicability of criminal penalties to defamatory or insulting speech) discussing IACtHR and IACmHR jurisprudence on imprisonment.
[600] IACtHR, *Herrera-Ulloa v. Costa Rica* (Series C, no. 107), 2 July 2004, §135 (journalist was convicted of defamation and ordered to pay a fine, §3); IACtHR, *Canese v. Paraguay* (Series C, no. 111), 31 August 2004, §§ 2, 105–106 (journalist convicted of slander and sentenced to two months' imprisonment, restrictions on leaving the country for over eight years and a fine of 1400 USD). See s. II.6.1.1.1. (Applicability of criminal penalties to defamatory or insulting speech).
[601] IACmHR, *Roca Antúnez v. Cuba* (Case 12.127), 24 February 2018, §122; Cuban Penal Code Arts 100, 125.
[602] See, e.g., ECtHR (GC), *Cumpănă v. Romania* (App. no. 33348/96), 17 December 2004, §115; ECtHR, *Ruokanen v. Finland* (App no. 45130/06), 6 April 2010, §50; ECOWAS CCJ, *Federation of African Journalists v. The Gambia* (Suit no. ECW/CCJ/APP/36/15), 13 February 2018, 44; ACmHPR, *Ouko v. Kenya* (Comm. no. 232/99), 23 October–6 November 2000, §28.
[603] ECtHR, *Fatullayev v. Azerbaijan* (App. no. 40984/07), 22 April 2010, §§8–9, 103.
[604] Ibid., §103. 'Two further sets of criminal proceedings were brought against the defendant after his conviction': §9. Cf. ECtHR, *Atamanchuk v. Russia* (App. no. 4493/11), 11 February 2020, §72.
[605] See, e.g., HRC, *Marques de Morais v. Angola* (Comm. no. 1128/2002), 29 March 2005, §§6.8, 2.12; IACtHR, *Canese v. Paraguay* (Series C, no. 111), 31 August 2004, §128.

Committee, the 'harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1'.[606] And in the words of the European Court, '[t]he pre-trial detention of anyone expressing critical views … will inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices … [and] a chilling effect of this kind may be produced even when the detainee is subsequently acquitted'.[607]

In some cases, even modest[608] or suspended[609] sentences or fines have been found to be disproportionate by international human rights bodies.[610] The Human Rights Committee has also found a violation of the right to freedom of expression in a case in which a journalist was given a six months' suspended sentence alongside other penalties for criticism of Angola's President, noting that it was disproportionate.[611] And the European Court has considered that a prison sentence 'by its very nature, will inevitably have a chilling effect on public discussion, and the notion that the applicant's sentence was in fact suspended does not alter that conclusion particularly as the conviction itself was not expunged'.[612]

6.2. Civil penalties

The Human Rights Committee has warned that 'care should be taken by States parties to avoid excessively punitive measures and penalties' in cases involving defamatory speech.[613] And other international bodies have taken a similar approach.

6.2.1. Damages

International human rights bodies have emphasized that an award of damages as compensation for defamation or insulting speech must not be so high as to have a chilling effect on the exercise of freedom of expression. The UN Special Rapporteur has recommended that financial sanctions must be proportionate and may not be so high and disproportionate that they bankrupt small and independent media, thereby resulting in adverse consequences on media freedom.[614] The European Court has found that 'an award of damages for defamation must bear a reasonable relationship of proportionality

[606] HRC, General Comment No. 34 (2011), §9.

[607] ECtHR, *Şahin Alpay v. Turkey* (App. no. 16538/17), 20 March 2018, §182.

[608] See, e.g., ECtHR, *Radio France v. France* (App. no. 53984/00), 30 March 2004, §40; ECtHR, *Chauvy v. France* (App. no. 64915/01), 29 June 2004, §78. Cf. ECtHR, *Europapress Holding d.o.o. v. Croatia* (App. no. 25333/06), 22 October 2009. See also IACtHR, *Kimel v. Argentina* (Series C, no. 177), 2 May 2008, §85.

[609] See, e.g., ECtHR, *Eon v. France* (App. no. 26118/10), 14 March 2013, §§30, 60–61; ECtHR, *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. no. 5266/03), 22 February 2007, §§25, 27; Cf. ECtHR, *Flinkkilä v. Finland* (App. no. 25576/04), 6 April 2010, §89; ECtHR, *Kącki v. Poland* (App. no. 10947/11), 4 July 2017, §57.

[610] Cf. ECtHR, *Antunes Emídio v. Portugal* (App. nos. 75637/13 & 8114/14), 24 September 2019, §64 (referring to a 'high' fine of 18,000 EUR).

[611] HRC, *Marques de Morais v. Angola* (Comm. no. 1128/2002), 29 March 2005, §6.8.

[612] ECtHR, *Balaskas v. Greece* (App. no. 73087/17), 5 November 2020, §61. See also ECtHR, *Dickinson v. Turkey* (App. no. 25200/11), 2 February 2021, §58 (duration of the criminal proceedings over nearly four years and a five-year suspended conviction had a chilling effect on the journalist's willingness to express his views on matters of public interest).

[613] HRC, General Comment No. 34 (2011), §47.

[614] UN Special Rapporteur F. La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2012) UN Doc. A/HRC/20/17, §§85, 87.

to the injury to reputation suffered'.[615] It has also observed that 'it is not necessary to rule on whether [a] damages award had, as a matter of fact, a chilling effect on the press [in a particular case]: as a matter of principle, unpredictably large damages[] awards in libel cases are considered capable of having such an effect and therefore require the most careful scrutiny'.[616]

The Court asserted that '[t]he competent national authorities are better placed than the European Court to assess the matter [of damages] and should therefore enjoy a wide margin of appreciation' as 'perceptions as to what would be an appropriate response by society to speech which does not or is not claimed to enjoy the protection of Article 10 … of the Convention [that protects freedom of speech] may differ greatly from one Contracting State to another'.[617] However, it noted in the case of an approximately 1.7 million euros damages order made against a historian who accused a British Lord of being a war criminal that the sum 'was three times the size of the highest libel award previously made in England … and no comparable award has been made since'.[618] It found a violation of the right to freedom of expression, 'having regard to the size of the award … in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award'.[619]

In assessing damages awards, the European Court considers a number of factors including average monthly salaries,[620] the average damages award for other types of harm,[621] and the means of the defendant. In the 'McLibel' litigation, in which two environmental protesters were sued by McDonalds for defamation, the European Court held that awards of approximately 45,000 Euros were very substantial 'when compared to the modest incomes and resources' of the protesters.[622] Conversely, a damages award of nearly 8,000 Euros against the biggest newspaper publisher in Croatia was acceptable and was found to bear a reasonable relationship of proportionality to the injury to reputation suffered.[623]

The European Court has also emphasized that civil damages should not be punitive. In the case of a Turkish history professor and former politician, the Court found a

[615] ECtHR, *Tolstoy Miloslavsky v. United Kingdom* (App. no. 18139/91), 13 July 1995, §49. In this case, a jury in the United Kingdom awarded the plaintiff approximately 1,746,239 EUR in damages: §48. See also the opinion of the COE that in civil proceedings, compensation should be proportionate so as to avoid a chilling effect on freedom of expression: COE, *Defamation and Freedom of Expression Selected Documents* (2003) H/ATCM (2003) 1, 3.

[616] ECtHR, *Independent News and Media v. Ireland* (App. no. 55120/00), 16 June 2005, §114. See also ECtHR, *Ghiulfer Predescu v. Romania* (App. no. 29751/09), 27 June 2017, §62.

[617] ECtHR, *Tolstoy Miloslavsky v. United Kingdom* (App. no. 18139/91), 13 July 1995, §48.

[618] Ibid., §49. See s. II.1.5.2. (Civil penalties).

[619] Ibid., §§49–51.

[620] ECtHR, *Lepojić v. Serbia* (App. no. 13909/05), 6 November 2007, §77; ECtHR, *Kasabova v. Bulgaria* (App. no. 22385/03), 19 April 2011, §71. In *Kasabova*, the fines and damages together were equivalent of 35 monthly salaries of the journalist and almost 70 minimum monthly salaries.

[621] ECtHR, *Flinkkilä v. Finland* (App. no. 25576/04), 6 April 2010, §89.

[622] ECtHR, *Steel v. United Kingdom* (App. no. 68416/01), 15 February 2005, §96. See also ECtHR, *Timpul Info-Magazin v. Moldova* (App. no. 42864/05), 27 November 2007, §39 where the Court commented that it 'takes note of its chilling effect on the applicant newspaper … by silencing a dissenting voice altogether'. Cf. ECtHR, *Błaja News Sp. z o. o. v. Poland* (App. no. 59545/10), 26 November 2013, §71 (quantum of the damages had not been argued to threaten defendant's economic foundations).

[623] ECtHR, *Europapress Holdings d.o.o. v. Croatia* (App. no. 25333/06), 22 October 2009, §73; ECtHR (GC), *Delfi AS v. Estonia* (App. no. 64569/09), 16 June 2015, §160. Cf. ECtHR, *Błaja News Sp. z o. o.* (App. no. 59545/10), 26 November 2013, §71.

violation where the domestic court had ordered him to pay over 87,000 Euros in damages after making a speech at a press conference criticizing Turkey's President Erdoğan. The Court found that the damages awarded had been turned into a form of fine, with the domestic court impermissibly substituting itself for a criminal court.[624]

The Inter-American bodies have reached a similar position. The Inter-American Commission has held that, as a general matter, public debate is served by more speech rather than less, making the exercise of the right of reply set out in article 14 of the American Convention the favoured possibility. But the Commission acknowledges that when that is not sufficient, civil defamation suits are permissible as long as they impose proportionate penalties.[625] The Inter-American Court has similarly observed that 'the fear of a disproportionate civil sanction may clearly be as or more intimidating and inhibiting for the exercise of freedom of expression than a criminal sanction', resulting in potential self-censorship.[626] As a result, it found a violation of freedom of expression even in cases involving relatively modest amounts.[627] And the OAS Rapporteur has said that 'a climate of guarantees for the freedom to report acts of corruption' includes 'ensuring the proportionality of penalties in civil proceedings'.[628] According to the 2000 Joint Declaration, 'pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritize the use of a range of non-pecuniary remedies'.[629]

African human rights bodies also emphasize the need for proportionality of civil damages in defamation cases. In one case, the African Court held that the Burkina Faso Government had failed to show that the cumulative payment of a fine, damages, interests and costs ordered against a journalist 'does not excessively exceed the income of the [speaker]'.[630] And the African Commission stipulates that states should abolish criminal offences 'in favour of civil offences with sanctions which must themselves be necessary and proportionate'.[631] It adds that 'sanctions shall never be so severe as to inhibit the right to freedom of expression'.[632]

[624] ECtHR, *Pakdemirli v. Turkey* (App. no. 35839/97), 22 February 2005, §§51, 53, 58. See also ECtHR, *SIC - Sociedade Independente de Comunicação v. Portugal* (App. no. 29856/13), 27 July 2021, §69 (holding that it was 'difficult to accept' that injury to the reputation of a politician allegedly involved in a paedophile network 'was of such a level of seriousness as to justify' an almost 146,000 EUR award, an amount that the Court considered to be 'capable of discouraging the participation of the press in debates over matters of legitimate public concern').

[625] IACmHR, *Inter-American Legal Framework Regarding the Right to freedom of Expression* (2009) OEA/Ser.L/V/II, CIDH/RELE/INF. 2/09, §79.

[626] IACtHR, *Fontevecchia v. Argentina* (Series C, no. 238), 29 November 2011, §74; IACtHR, *Palacio Urrutia v. Ecuador* (Series C, no. 446), 24 November 2021, §125. See also IACtHR, *Tristán Donoso v. Panama* (Series C, no. 193), 27 January 2009, §129

[627] IACtHR, *Fontevecchia v. Argentina* (Series C, no. 238), 29 November 2011, §72 (a case in which the editor and director of magazine were ordered to pay approximately 600 USD plus legal expenses for an article alleging the President of Argentina had a child out of wedlock).

[628] IACmHR Resolution 1/18 on Corruption and Human Rights, 16 March 2018, 5.

[629] UN Special Rapporteur on Freedom of Opinion and Expression & others, International Mechanisms for Promoting Freedom of Expression: Joint Declaration (2000).

[630] ACtHPR, *Konaté v. Burkina Faso* (App. no. 4/2013), 5 December 2014, §171. It also noted the amount was 'all the more excessive' because the applicant was deprived of revenue from publishing the weekly, due to its suspension for a period of six months.

[631] ACmHPR, Declaration of Principles of Freedom of Expression and Access to Information in Africa (2019), Principles 22(3), 17.

[632] Ibid., Principles 21(1)(c), 17.

6.2.2. Injunctions

Injunctions in defamation and insult cases are permissible if there is a proportionate relationship between the injunction and the aim it pursues.[633] This applies to both prior restraints on publication and injunctions designed to prevent future publication.[634]

The European Court has provided the most detailed guidance on the compatibility of injunctions with freedom of expression in defamation cases at the international level. Final injunctions granted after a full hearing are more likely to be proportionate.[635] On the other hand, the dangers inherent in prior restraints 'call for the most careful scrutiny'.[636]

For instance, a violation was found when Turkish courts granted an injunction in a defamation case against a newspaper about to report a quotation contested by a politician poised to become President. Once he became President, he withdrew the case and the interim injunction was lifted, but 10 months had passed. The Court held that although freedom of expression does not prohibit interim injunctions in all cases, they are subject to careful scrutiny 'including a close examination of the procedural safeguards embedded in the system to prevent arbitrary encroachments upon the freedom of expression'[637] and ensure that injunctions do not extend beyond a 'reasonable period'.[638] In this case, the Court found that Turkish domestic courts had violated freedom of expression by not imposing such procedural safeguards, including by failing to establish a specific time-limit for the injunction's duration, 'coupled with the lack of a periodic review as to its continuing necessity or a prompt determination on the merits'.[639] The Court also noted that the domestic court failed to 'provide any reasoning for its decision, either when granting the injunction or when refusing the ensuing request for it to be lifted', and highlighted delays in affording the applicants an opportunity to present relevant counter-arguments in a timely manner.[640]

However, the Inter-American bodies have taken a different approach to prior restraints due to the unique wording of article 13 of the American Convention, which prohibits prior restraints of speech, 'indirect government restrictions' and 'private controls' in almost all circumstances.[641] As the Inter-American Court has held, the Convention establishes 'an exception to prior censorship … to regulate access for the

[633] Except in the Inter-American system. See ACHR Arts 13(2) and 13(4). In addition, prior restraints may be available to protect the public interest in the right to free and fair elections (ICCPR Art. 25). See, e.g., UK Representation of the People Act 1983 s. 106(3).

[634] HRC, General Comment No. 34 (2011), §13 notes that a 'free press and other media [must be] able to comment on public issues without censorship or restraint and to inform public opinion'.

[635] ECtHR, *Tolstoy Miloslavsky v. United Kingdom* (App. no. 18139/91), 13 July 1995, §54. See also ECtHR, *McVicar v. United Kingdom* (App. no. 46311/99), 7 May 2002, §82; ECtHR, *Tierbefreier E.V. v. Germany* (App. no. 45192/09), 16 January 2014, §§58–59. Cf. ECtHR, *Unabhängige Initiative Informationsvielfalt v. Austria* (App. no. 28525/95), 26 February 2002, §§46, 48.

[636] ECtHR, *Yildirim v. Turkey* (App. no. 3111/10), 18 December 2012, §47.

[637] ECtHR, *Cumhuriyet Vakfi v. Turkey* (App. no. 28255/07), 8 October 2013, §61.

[638] Ibid., §66.

[639] Ibid., §64.

[640] Ibid., §66. See also ECtHR, *Sunday Times v. United Kingdom* (App. no. 6538/74), 26 April 1979, §67. Cf. (in a privacy context) ECtHR, *Éditions Plon v. France* (App. no. 58148/00), 18 May 2004, §47.

[641] See ch. 1 (Introduction), s. II.1.1.1. (Abuses by the state).

moral protection of children and adolescents' but in 'all other cases, any preventive measures implies the impairment of freedom of thought and expression'.[642]

6.2.3. Costs

Domestic courts may require defendant journalists or newspapers to bear the costs of defamation or insult proceedings as a form of sanction. But the European Court has provided clear guidance that unreasonably disproportionate monetary penalties in cases of defamatory statements violate the right to freedom of expression.[643] For instance in one case that came before the European Court, model Naomi Campbell was awarded the equivalent of over 4,000 Euros in damages against a newspaper that published a series of stories about her drug addiction therapy.[644] The UK court also held the newspaper liable for Campbell's legal fees, which included a 'success fee' that almost doubled the base legal costs to over 1.3 million Euros.[645] The European Court ruled that the success fee scheme constituted a 'disproportionate' interference with the right to freedom of expression by discouraging newspapers and other media organizations from publishing legitimate information or promoting the early settlement of defendable claims—and 'exceeded even the broad margin of appreciation accorded to the government in such matters'.[646] It has also emphasized that the cumulative effect of penalties must 'show moderation in interfering with rights'.[647] Similarly, the African Court on Human and Peoples' Rights has ruled that the cumulative effect of 'the payment of a fine, damages, interests and costs' must not 'excessively exceed the income' of the speaker.[648]

6.2.4. Deprivation of other rights

The European and African Courts have considered that deprivation of the right to practise journalism may be an impermissible restriction on freedom of expression. The European Court considered a one-year ban on working as a journalist in a defamation and insult case was 'particularly severe and could not in any circumstances have been justified by the mere risk of the applicants' reoffending'.[649] And the African Court considered in a defamation case that the suspension of a weekly newspaper for six months

[642] IACtHR, *'The Last Temptation of Christ' (Olmedo-Bustos et al.) v. Chile* (Series C, no. 73), 5 February 2001, §70 (finding a violation of article 13 where Chile had established a system of prior censorship of films and a film was censored for and in the name of Jesus Christ and the Catholic Church).

[643] ECtHR, *Tolstoy Miloslavsky v. United Kingdom* (App. no. 18139/91), 13 July 1995, §35; ECtHR, *Steel v. United Kingdom* (App. no. 68416/01), 15 February 2005, §96.

[644] ECtHR, *MGN Limited v. United Kingdom* (App. no. 39401/04), 18 January 2011, §§18–19.

[645] Ibid., §56. See s. II.1.5.2. (Civil penalties).

[646] Ibid., §§217, 219. To give effect to the *MGN Limited* decision, in April 2013 the United Kingdom reformed its domestic laws to ensure that lawyers' success fees would no longer be recoverable from losing parties in most civil litigation; in November 2018, the UK Government announced the abolishment of the recoverable success fee regime in respect of defamation and privacy claims. Lord Keen of Elie, 'Statement made on 29 November 2018' (UK Parliament, 29 November 2018).

[647] ECtHR, *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. no. 5266/03), 22 February 2007, §27.

[648] ACtHPR, *Konaté v. Burkina Faso* (App. no. 4/2013), 5 December 2014, §171.

[649] ECtHR (GC), *Cumpănă v. Romania* (App. no. 33348/96), 17 December 2004, §118. See also ECtHR, *Stomakhin v. Russia* (App. no. 52273/07), 9 May 2018, §129 (three-year ban coupled with a five-year prison term for a journalist convicted of glorifying terrorism and advocating violence and hatred 'cannot but be regarded as an extremely harsh measure warranting very convincing considerations'). See ch. 6 (Terrorism Laws).

was not necessary to protect the rights and reputation of the prosecutor who had been criticized in its articles.[650]

Deprivation of other rights, such as the right to vote or travel, have also been considered unnecessary and excessive.[651] In a defamation and insult case, the European Court held that depriving convicted journalists of certain rights including the right to vote, to practice a profession, and parental rights was 'inappropriate . . . and not justified by the nature of the offences for which the applicants had been held criminally liable'.[652] Similarly, the Human Rights Committee and Inter-American Court have found that travel bans imposed on journalists during criminal defamation proceedings constituted unnecessary and excessive punishment and contributed to a violation of freedom of expression.[653]

IV. Recommendations

The following conclusions and recommendations are based on the standards established by one or more international human rights bodies that best strike the balance between the right to freedom of expression and competing rights, in particular the right to reputation. On issues that have limited, divergent or no international practice, we have based our recommendations on best practices in domestic jurisdictions, emerging standards, and/or cogent recommendations by experts and civil society. The recommendations apply to defamation and similar laws such as insult laws, *lèse-majesté* laws, and sedition or treason laws where these laws seek to target insulting speech.[654] The recommendations are intended to be cumulative: they should all be implemented to ensure that restrictions to political speech comply with minimum international standards.

The topline recommendation is that states should decriminalize these laws and impose proportionate civil liability only. This is at odds with the current state of laws around the world, which still—in 160 countries—provide for such penalties, and many—particularly in Asia—are in regular use against opposition figures and the media.[655]

A second key recommendation is that public interest speech (including speech about public officials and public authorities) should receive greater protection from defamation liability than other speech—something that is also at odds with the laws and practices of states around the world that provide *less* instead of *more* protection for speech about political leaders and state institutions. We propose that plaintiffs suing on matters of public interest should bear the burden of showing that the allegations are false and that the speaker was at fault. Similarly, states should consider requiring that

[650] ACtHPR, *Konaté v. Burkina Faso* (App. no. 4/2013), 5 December 2014, §169.
[651] See s. II.1.5.3. (Other penalties).
[652] ECtHR (GC), *Cumpănă v. Romania* (App. no. 33348/96), 17 December 2004, §117.
[653] HRC, *Marques de Morais v. Angola* (Comm. no. 1128/2002), 29 March 2005, §6.8; IACtHR, *Canese v. Paraguay* (Series C, no. 111), 31 August 2004, §106.
[654] See ch. 1 (Introduction).
[655] See s. II (State Practice).

a plaintiff prove a higher degree of fault on the part of the speaker in matters of public interest speech. These additional burdens should apply because speech on matters of public interest lies at the heart of democracy, and is therefore deserving of the greatest protection. We also recommend that 'public interest speech' be broadly defined.

A. Overarching recommendation

1. States should decriminalize offences such as criminal defamation, insult (including *lèse-majesté* laws) and seditious libel. There should be no criminal penalties imposed for defamatory or insulting political speech, and imprisonment is never justifiable in response to such speech.

We recommend that defamation laws should be civil only, and that laws imposing criminal sanctions for harm to reputation should be abolished.[656] This recommendation is consistent with the emerging consensus among international human rights bodies, and the broad trend in certain regions, to decriminalize defamation.[657] And international human rights bodies generally agree that imprisonment is never an appropriate penalty under defamation or insult laws.[658] The OSCE Representative has suggested that 'de-prisonment' of defamation can be an intermediary step on the way to 'de-criminalisation' and 'de-harshening' of criminal and civil defamation laws; this is a possible incremental approach.[659]

The invocation of the criminal process itself for public interest speech is objectionable. When journalists face the prospect of being arrested and detained for political speech, this has a deterrent effect on the investigation and reportage of critical, investigative journalism on matters of public interest.[660] Indeed, even in jurisdictions in which prosecutors rarely make use of such laws, their mere existence has a deterrent and corrosive effect on freedom and democracy.[661]

Although our recommendation is that all states should decriminalize defamation, in states that nevertheless maintain some form of offence for insulting or defamatory language (in violation of international law), it is recommended that any prosecution of a journalist for speech related to political matters should be subject to authorization at a high-level, such as by a specially-appointed independent commissioner, the Attorney-General or an equivalent official in the domestic system, taking into account

[656] This includes for laws on *lèse-majesté, desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state or public institutions (such as the army or judiciary), the protection of the honour of public officials, and sedition.

[657] See ss III. (International Standards) and II.1.5.1. (Criminal penalties).

[658] See s. III. (International Standards).

[659] M. Haraszti, 'Preface', in A. Karlsreiter & H. Vuokko (eds), *Ending the Chilling Effect—Working to Repeal Criminal Libel and Insult Laws* (OSCE 2004), 9. OSCE, Communique by the OSCE Representative on Freedom of the Media on criminal defamation laws protecting foreign heads of state (2016) Communiqué No.5/2016; OSCE, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (2017).

[660] See e.g., ECtHR, *Şaphin Alpay v. Turkey* (App. no. 16538/17), 20 March 2018, §182; IACtHR, *Álvarez Ramos v. Venezuela* (Series C, no. 380), 30 August 2019, §§121–122. See s. III.6. (Penalties).

[661] See s. III.6.1.1.2 (Applicability of penalty of imprisonment for defamatory or insulting speech).

the public interest pre-charge.[662] This may help to reduce abuses by lower-level police or prosecutors.

Our remaining recommendations are premised on the basis that defamation laws are decriminalized and apply to statements which give rise to *civil* liability.

B. Defining elements of a civil wrong

2. Laws prohibiting defamatory, insulting or seditious speech must be public and accessible and drafted with sufficient precision such that their requirements are understandable and that the consequences of law are foreseeable to the public.

Defamation laws should:

- provide clear definitions of what constitutes a civil wrong, whether enshrined in statute, case law or legal doctrine (depending on the legal system involved);
- strictly delineate the elements of the civil wrong including by specifying the intent or fault that is required by the speaker to trigger liability, the type and degree of harm that must be proven by the plaintiff and the causal link between the speech and the harm; and
- specify that the meaning of the words used by the speaker is to be determined objectively, i.e., how the words would have been understood by reasonable members of the audience of the speech and not the subjective understanding of the audience.[663]

Vague concepts and ambiguous terms such as 'seditious intention' are unlikely to satisfy the requirement that restrictions on speech must be 'prescribed by law'.[664]

3. States should adopt an objective standard of fault equivalent to at least a negligence standard in laws that impose civil remedies for defamatory, insulting or seditious speech and a standard of at least gross negligence in cases of speech relating to matters of public interest.

International standards mandate that laws protecting reputation from being harmed by a false allegation must require an element of fault on the part of the speaker to qualify as a necessary restriction on freedom of expression.[665] The requirement of fault should extend to all the elements of a plaintiff's cause of action in cases involving such speech, including the falsity of the speech and the harm caused by the speech.[666]

[662] UNESCO & International Association of Prosecutors, *Guidelines for Prosecutors on Cases of Crimes Against Journalists* (2020), 8.

[663] See s. III.1 (Legality).

[664] See s. III.1. (Legality).

[665] See s. III.3.1. (Intent).

[666] We also recommend that the plaintiff bears the burden of proving falsity and fault as well as the other elements of the cause of action on the part of the defendant in public interest cases. Laws that proceed on the presumption of falsity may lead to a chilling effect on freedom of expression on matters of public interest: see Milo (n

At one end of the spectrum, there are laws that punish the speaker regardless of fault. These are commonly referred to as strict liability laws and are antithetical to freedom of expression. Laws which hold the speaker strictly liable for what is written or said on a matter of public interest are clearly incompatible with international standards.[667]

At the other end of the spectrum is the 'actual malice' rule adopted by the US Supreme Court.[668] The rule, as developed in subsequent cases, requires that in relation to claims brought by public officials and figures, the plaintiff must show that the speaker acted with knowledge of the falsity of the statement, or with 'reckless disregard' for the possibility of falsity.[669] This threshold is subjective—relating to what was in the mind of the speaker[670]—and is often very difficult to prove.[671] 'In effect, public officials and public figures must establish that publishers lied and they must do so to a standard of proof higher than the balance of probabilities'.[672]

While *Sullivan* has rightly been celebrated around the world as a landmark freedom of expression case, and the 'actual malice' standard has been recommended as the appropriate standard for public interest speech by the UN Human Rights Committee, international law recognizes that there are also other ways of providing a protective threshold for speech.[673]

Our recommendation is that states should adopt an objective standard of fault, which is at least negligence, and consider a higher objective standard of fault such as gross negligence in cases involving speech relating to matters of public interest.[674] This should be an element of the claim that the plaintiff has to establish. A higher objective *mens rea* standard—such as gross negligence—for public interest speech ensures that priority is given to such speech, consistently with international standards which emphasize its protection given its importance in a democracy.[675] This means

47) 164–183. See also Article 19, *Defining Defamation* (n 416) Principle 10; J. Rowbottom, *Media Law* (Hart 2018), 53; T. Weir, *Tort Law* (OUP 2002), 168.

[667] See s. II.3.1. (Intent). See also the rejection of strict liability for the media by the South African Supreme Court of Appeal in *National Media Ltd v. Bogoshi* [1998] ZASCA 94, 29 September 1998.

[668] US Supreme Court, *New York Times v. Sullivan* 376 U.S. 254, 9 March 1964.

[669] Moreover, 'actual malice' must be proved by the plaintiff with clear and convincing evidence (US Supreme Court, *New York Times v. Sullivan* 376 U.S. 254, 9 March 1964, 254–255). For a useful summary of the post-*Sullivan* developments and its application, see R. L. Weaver & others, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press 2006), 49–74. The 'actual malice' rule applies to the falsity element of the plaintiff's cause of action. US defamation cases not involving public figures require at least negligence as to the impact of the statement, although precise standards vary by state: See s. III.1.2. (Intent).

[670] The standard has been described as 'subjective awareness of probable falsity': US Supreme Court, *Gertz v. Robert Welch Inc* 418 U.S. 323, 25 June 1974, 335, n. 6. The speaker must have 'in fact entertained serious doubts' as to the truth of the allegations: US Supreme Court, *St. Amant v. Thompson* 390 U.S. 727, 29 April 1968, 731.

[671] C. J. Glasser Jr., *International Libel and Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters, and Lawyers* (Bloomberg 2006), 52.

[672] A. Kenyon, 'Defamation Law, *Sullivan* and the Shape of Free Speech' in A. Stone & F. Schauer (eds), *The Oxford Handbook of Freedom of Speech* (OUP 2021), 272.

[673] Milo (n 47) 188–199; see also J. Campbell, 'The law of defamation in flux: Fault and the contemporary Commonwealth accommodation of the right to reputation with the right of free expression' in A. Koltay (ed), *Media Freedom and Regulation in the New Media World* (Wolters Kluwer Ltd 2014), 260–261.

[674] Negligence is required in a number of jurisdictions, typically in the form of a reasonable publication defence: see s. III.4.3. (Reasonable publication).

[675] An example of the gross negligence approach is the standard adopted in New York state in defamation matters where private plaintiffs sue on matters of public concern: see Kenyon (n 672) 277, n. 51. It also was proposed to be the appropriate fault standard in South African law in non-media cases: *Marais v. Groenewald* 2001 (1) SA 634 (T), 646. See s. III.4.2. (Public interest).

speech concerning matters of public interest, objectively defined and regardless of whether they concern public officials, authorities, public figures or private persons.[676] For speech on matters of public interest, there is a higher value placed on 'uninhibited, robust and wide-open public debate' and a desire to avoid a chilling effect that would dampen the vigour of that debate.[677] 'Public interest' speech should be defined broadly and independent courts should determine whether the speech at issue qualifies, against the background of the broad interpretation.[678] Public interest speech includes but goes beyond political speech—speech about government bodies, any of the branches of government and concerning the conduct of public officials.[679]

This approach is an alternative to the 'actual malice' standard, which sets a high subjective bar, and the negligence standard, which sets a lower objective one. It is also an alternative to the European Court's approach to the 'responsible journalism' standard, which focuses on the identity of the speaker and has led to conflicting jurisprudence.[680] And these objective standards—negligence and gross negligence—protect freedom of expression, provided the speaker does not act negligently, but also provides some protection for reputation by encouraging the speaker to take reasonable steps to ascertain the accuracy of the allegations being published.

4. If states do not follow the recommendation that they should require negligence or gross negligence as an element of the civil wrong, they should at least provide a defence of 'reasonable publication' for statements of fact.

If states do not follow the recommendation that they should require negligence or gross negligence as an element of the civil wrong (see recommendation 3, above), states should at least provide the defence of reasonable publication for all defamation laws, pursuant to which a speaker will not be liable if she acted reasonably in publishing the allegation in all the circumstances at the time of publication.[681] This should include a review of steps

[676] See definitions of 'public interest' in ECtHR (GC), *Satakunnan Markkinapörssi Oy v. Finland* (App. no. 931/13), 27 June 2017, §171; UK House of Lords, *Jameel v. Wall Street Journal Europe (No. 2)* [2006] UKHL 44, 11 October 2006, §147; US Supreme Court, *Snyder v. Phelps* 562 U.S. 443, 2 March 2011, 6–7; Independent Press Standards Organisation, *Editor's Code of Practice* (2021), 'The Public Interest'. On the relevant of public nature of persons involved, see Brennan J in US Supreme Court, *Rosenbloom v. Metromedia* 403 U.S. 29, 7 June 1971, 43; Canadian Supreme Court, *Grant v. Torstar Corporation* 2009 SCC 61, 22 December 2009, §102; South African Supreme Court of Appeal, *National Media Ltd v. Bogoshi* [1998] ZASCA 94, 29 September 1998, 29; ECtHR (GC), *Von Hannover v. Germany (No. 2)* (App. nos. 40660/08 & 60641/08), 7 February 2012, §§108–113. See also Milo (n 47), Chapter IV.

[677] Kenyon (n 672) 269, 272. See s. IV.B.9. (Recommendations).

[678] UK House of Lords, *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127, 28 October 1999, 203 (Lord Nicholls: '[t]he court has the advantage of being impartial, independent of government, and accustomed to deciding disputed issues of fact and whether an occasion is privileged. No one has suggested that some other institution would be better suited for this task').

[679] Milo (n 47) 144.

[680] See ch. 1 (Introduction), s. II.3.2.5. (Relevance of whether the speaker is a journalist).

[681] This is akin to the responsible or reasonable journalism defences found in a number of domestic jurisdictions: see s. II.1.4.3. (Reasonable publication). England and Wales Defamation Act 2013 s. 4; Australian New South Wales Defamation Amendment Act 2020 s. 29A(1)(a)(b); New Zealand Court of Appeal, *Durie v. Gardiner* [2018] NZCA 278, 31 July 2018; Canadian Supreme Court, *Grant v. Torstar Corporation* 2009 SCC 61, 22 December 2009, §98; South African Supreme Court of Appeal, *National Media Ltd v. Bogoshi* [1998] ZASCA 94, 29 September 1998, 30. The term 'reasonable' is preferred to 'responsible' as it is arguable that 'responsible' threshold is higher: Australia's Right to Know (ARTK), Submission To The Council Of Attorneys-General Defamation Working Party Regarding The Model Defamation Amendment Provisions 2020 (Consultation Draft) (2020), 12.

taken collectively by journalists, editors and publishers in the case of a joint publication, rather than requiring that all persons separately satisfy the defence.[682] It should not be a requirement to invoke the defence that the speech is on a matter of public interest but if public interest speech is involved a court may require a lower threshold to be met.[683]

Such a defence (or its inverse—liability based on negligence as one of the elements of the claim)[684] serves to promote responsibility on the part of speakers while respecting freedom of expression. This defence is also consistent with the European Court's 'responsible journalism' principle, but avoids the Court's confusing jurisprudence which rests on the identity of the speaker, and in some cases has resulted in lower levels of protection for those acting as the 'public watchdog'.[685]

5. Only statements that are likely to or have caused direct, immediate and serious harm to reputation should be capable of giving rise to liability.

The plaintiff should be required to prove it is objectively likely that the statement will cause serious harm to reputation before it can result in legal liability. Although international human rights bodies have not settled on a consistent harm formulation, a 'serious harm' requirement reflects the UN Human Rights Committee, European Court and Inter-American bodies' existing jurisprudence.[686] This threshold is also found in the Defamation Act 2013 of England and Wales,[687] and has been followed in recent amendments to Australian defamation laws.[688] The Human Rights Committee has also made clear that states should ensure that there is a 'direct and immediate' causal link between serious harm and the speech.[689]

Lawmakers may include factors for a court to take into account when determining whether it is objectively likely that the publication will cause direct and immediate serious harm, including:

- 'seriousness of the imputation or imputations conveyed by the matter;
- extent of the publication;
- audience of the publication; and
- circumstances of the publication'.[690]

[682] See, along these lines: UK High Court of England and Wales, Queen's Bench Division, *Economou v. de Freitas* [2017] EMLR 4 (upheld by the Court of Appeal, [2019] EMLR 7); *Hays Plc v. Hartley* [2010] EWHC 1068 (QB), 17 May 2010.

[683] See s. IV.B.3. (Recommendations).

[684] Requiring negligence or a higher standard of intent is the preferred course—See s. IV.B.3. (Recommendations).

[685] See ch. 1 (Introduction), s. II.3.2.5. (Relevance of whether the speaker is a journalist); see s. III.4.3. (Reasonable publication).

[686] See s. III.3.3. (Level of harm caused by the speech). See, e.g., HRC, *Kozlov v. Belarus* (Comm. no. 1986/2010), 24 July 2014, §7.6 (finding a violation of Art. 19 of the ICCPR where harm to reputation was 'only of a limited nature'); ECtHR (GC), *Axel Springer AG v. Germany* (App. no. 39954/08), 7 February 2012, §83 (holding that an attack on reputation must 'attain a certain level of seriousness'); IACtHR, *Usón Ramírez v. Venezuela* (Series C, no. 207), 20 November 2009, §§73–75.

[687] England and Wales Defamation Act 2013 s. 1(1). See s. II. (State Practice). The statute allowed both parties to introduce evidence outside of the allegedly defamatory statement to show (or rebut) this level of harm.

[688] New South Wales Defamation Act 2005 s. 10A. Although harm to reputation is traditionally presumed to arise on publication of defamatory statement in many common law-based systems: See s. III.3.3. (Level of harm caused by the speech).

[689] HRC, General Comment No. 34 (2011), §35. See s. III.3.2. (Causal link between the speech and the harm).

[690] Law Council of Australia, Review of Model Defamation Provisions (2019) 3622, §218.

A 'serious harm' threshold 'discourages frivolous, vexatious or trivial claims'.[691] Without such a threshold, filtering of spurious claims where there is no real harm to reputation does not occur until trial—by which point significant time and costs may have been incurred.[692] The 'serious harm' threshold could be combined with pre-trial procedures to have a bifurcated process where evidence of actual or objectively likely harm should be proved before a case can proceed, in appropriate cases. This should not exclude the possibility of the question of harm being raised later in the proceedings, on the initiative of the judge or on a party's application.

Finally, defamatory or insulting speech must be published to at least one-third party (i.e., not the speaker and not the subject of the speech) to attract liability. A speaker may also be responsible for the republication of an allegation which they have caused or authorized.[693]

6. States should provide a defence of substantial truth or require that falsity be proved as an element of the claim in any law allowing civil penalties for defamatory, insulting or seditious speech.

International human rights law requires national laws should provide for a defence of truth for the publication of defamatory or insulting statements of fact or alternatively require falsity to be proved as an element of the claim.[694] States should provide that it is a defence to an action for defamation or insult for the defendant to show that 'the imputation conveyed by the statement complained of is substantially true' or alternatively require falsity to be proved as an element of the claim.[695] Errors that do not impact on the main thrust or sting of the statement should not result in liability: what is required is proof of substantial truth, namely that the thrust of the publication or its sting is true.

The truth of the statement should be assessed on all evidence that the defendant discloses at the time of the trial, and not only what was known to be true at the time of publication. Evidence of post-publication facts and events should be available to support a truth defence. The basis for this is that a plaintiff who does not deserve a good reputation should not be entitled to vindication merely because the defendant did not at the time of publication have the necessary evidence to prove truth.[696] If the defendant is able to gather that evidence after publication, the defendant should be permitted to argue that the plaintiff should not succeed because he does not deserve his good reputation.

[691] Ibid., §207.
[692] See P. Bartlett & others, 'National defamation law reform: Changes considered' (Minter Ellison, 12 August 2020).
[693] See s. III.3.3.2. (Measuring harm: the extent to which the speech is public).
[694] See s. III.4.1. (Truth). See also Article 19, *Defining Defamation* (n 416) 21; COE, *Recommendation CM/Rec(2016)4 of the Committee of Ministers to members States on the protection of journalism and safety of journalists and other media actors* (2016), 6. The burden of proving falsity should rest with the plaintiff in cases involving public interest speech: see s. III.4.1. (Truth) and s. III.4.5. (Opinion).
[695] England and Wales Defamation Act 2013 s. 2(1).
[696] Milo (n 47) 58.

The defence of truth (or failure to prove falsity as an element of the claim) should be a complete bar to liability for the publication of defamatory statements of fact, and questions such as whether the publication was in the public interest should not be relevant to this defence. A truth defence should also be available to a defendant even if they acted with malice (i.e., spite/ill-will or recklessly as to whether the statement was true or false).[697]

7. States should exempt opinions from liability in any law allowing civil penalties for defamatory, insulting or seditious speech; this can be done by requiring that a statement be 'factual' to be actionable; or at least be providing a defence of opinion.

The defence of opinion, referred to in a number of jurisdictions as 'fair comment',[698] is recognized in international law[699] and in multiple jurisdictions.[700]

It is best practice to include this defence in national laws so that defamation and similar laws do not penalize speech that is an expression of opinion and not a factual statement.[701] The purpose is 'to give the widest scope possible for the freedom of expression in relation to opinions and to allow for comment on a wide range of public as opposed to private matters'.[702] As the UN Human Rights Committee has framed it, defamation laws 'should not be applied with regard to those forms of expression that are not, of their nature, subject to verification'.[703]

The opinion defence (or a requirement to show that a statement is factual) should be available to a speaker who is at least able to show that the relevant statement is an opinion rather than a statement of fact. This assessment is based on the understanding of the reasonable person.[704]

[697] M. Socha, 'Double Standard: A Comparison of British and American Defamation Law' (2004) 23 *Penn State International Law Review* 471, 476.

[698] McGonagle (n 500) 45; IACmHR Special Rapporteur E. Lanza, *Annual Report of the Office of the Special Rapporteur for Freedom of Expression: Volume II* (2015) OEA/Ser.L/V/II, Doc. 48/15, §289 (noting similarity of the Canadian fair comment defence with the opinion defence). Some jurisdictions have a related good faith defence or good faith element: see, e.g., Indian Penal Code 1860 Chapter XXI s. 499 (Defamation); Israeli Defamation Law 5725-1965 Art. 15 (1964–1965) (Isr.), ss 4, 10.

[699] UDHR Art. 19; ECHR Art. 10 includes freedom to hold opinions in the right to freedom of expression; ECtHR, *Dichand v. Austria* (App. no. 29271/95), 26 February 2002, §42. The Inter-American Court has held that an 'opinion cannot be the object of any sanction': IACtHR, *Usón Ramírez v. Venezuela* (Series C, no. 207), 20 November 2009, §86, citing IACtHR, *Kimel v. Argentina* (Series C, no. 177), 2 May 2008, §93.

[700] See s. II. (State Practice). It is more accurate to refer to the defence as 'opinion' and not 'fair comment'. As the South African Constitutional Court has put it, 'the defence "fair comment" is misleading … Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly held opinion, without malice, on a matter of public interest on facts that are true'. South African Constitutional Court, *The Citizen 1978 (Pty) Ltd v. McBride* [2011] ZACC 11, 8 April 2011, §§82–83.

[701] UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACmHPR Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda* (2017) FOM.GAL/3/17, §2b; COE, *Recommendation CM/Rec(2016)4 of the Committee of Ministers to members States on the protection of journalism and safety of journalists and other media actors* (2016), 6; Article 19, *Defining Defamation* (n 416) Principle 13.

[702] McGonagle (n 500) 45.

[703] HRC, General Comment No. 34 (2011), §47.

[704] England and Wales Defamation Act 2013 Explanatory Notes s. 3, §21; UK High Court of England and Wales, Queen's Bench Division, *Koutsogiannis v. The Random House Group Ltd* [2020] 4 WLR 25, §16(iii).

Many common law jurisdictions require, in addition, that to be protected, the opinion must relate to a matter of public interest; and must be based on proper material or foundation.[705] But these two elements of the defence should not necessarily be absolute requirements for the defence to apply; in the European Court of Human Rights, for instance, the requirement that a proper foundation must exist for the opinion is sometimes relaxed.[706] Mixed statements of fact and opinion may give rise to defences of opinion and substantial truth or fair and accurate reporting.

When an opinion or 'value judgment' is concerned, international standards recognize that a court can consider the adequacy of the factual basis for a value judgment, though the weight given to the factual basis will vary depending on the nature of the statement.[707] For instance, statements that are satirical or relate to matters of public interest should be given additional protection.[708]

8. States should exempt accurate reports of official proceedings from any liability.

International human rights law recognizes that reports of official proceedings such as parliamentary or judicial proceedings should generally constitute protected speech.[709] There should also be protection for reports of parliamentary and judicial proceedings and similar proceedings. Some states also recognize a defence of 'neutral reportage' in cases 'where the publisher has neutrally and disinterestedly reported in an even-handed way attributed allegations which are of legitimate and topical interest to the readers of the publication but has not adopted those allegations as being true or otherwise embellished them'.[710] This mirrors the European court's helpful decision in the leading *Jersild v. Denmark* case and reflects the principles set out in these recommendations.[711]

9. In order to be legally actionable, the impugned statement must refer to the person who seeks to sue.

In accordance with international standards, in order to be an action in defamation, insult, seditious libel or similar laws, the statement must refer to a particular person, whether a corporate person or an individual.[712]

10. There should be no special protection for public officials or authorities—on the contrary, speech should benefit from greater protection when it is on a matter of public interest.

Laws that afford greater protection from defamation or insult for any public official or authority to protect their reputation (or 'honour') are not consistent with international

[705] C. J. Glasser Jr., *International Libel and Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters, and Lawyers* (LexisNexis 2020), 7.01[9].
[706] See s. III. (International Standards).
[707] See s. III.4.5. (Opinion).
[708] See s. II.4.5. (Opinion).
[709] See s. III.4.4. (Accurate reporting of official documents). See also Glasser Jr. (n 705), 7.01 [7].
[710] See s. II.1.4.4. (Fair and accurate reporting of official documents). UK Court of Appeal, *Charman v. Orion Books* [2008] 1 All ER 750, 11 October 2007, §43; Defamation Act 2013 s. 4(3).
[711] ECtHR (GC), *Jersild v. Denmark* (App. no. 15890/89), 23 September 1994.
[712] See s. III.3.3.1. (Measuring harm: subject matter of speech or identity of the target).

law.[713] Instead, the general rule is that such officials and authorities must have a high tolerance of criticism, and no special protections for their reputations should apply under the law.

C. Procedural Recommendations

11. Claims seeking civil remedies for defamation, insult and seditious libel should have a strong link with the jurisdiction of the forum in which the plaintiff sues in order to proceed.

'Libel tourism' can create unpredictability and risk journalists being drawn into costly legal proceedings abroad, particularly in a world of electronic communications and online media. It is exacerbated if the 'single publication rule' does not apply.[714] As the Council of Europe has recommended, claims should only be brought where there is a strong link between the jurisdiction (or jurisdictions) where the plaintiff sues and the plaintiff's reputation.[715] A strong link exists if the plaintiff has a meaningful reputation in the jurisdiction and the plaintiff's reputation has suffered substantial harm in that jurisdiction.[716] Personal jurisdiction over the defendant also needs to be established according to the laws of the relevant state.

12. Defamation claims should have a limitation period of no longer than one year from the date of publication, unless the plaintiff can show that they were not in fact aware of the publication and a reasonable person would not have been aware of it. The single publication rule should apply.

Limitation periods vary considerably among states, from three months to as long as 20 years.[717] It is recommended that a 12-month limitation period should be a maximum to strike a balance between allowing plaintiffs enough time to prepare a claim while not creating a chilling effect on speech.[718]

To be effective and avoid uncertainty, this limitation period should be combined with the single publication rule. The rule—which is a feature of US law—provides that 'the publication of a book, periodical or newspaper containing defamatory matter gives rise to but one cause of action for libel, which accrues at the time of the original publication, and that the statute of limitations runs from that date. It is no longer the law that every sale or delivery of a copy of the publication creates a new cause of action'.[719]

[713] See s. III.4.2. (Public interest).
[714] See s. IV.C.12. (Recommendations).
[715] COE, *Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states* (2019) DGI(2019)04, 14.
[716] COE, Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, 'Libel Tourism', to ensure Freedom of Expression (2012); COE, *Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states* (2019) DGI(2019)04, 36–37; Article 19, *Defining Defamation* (n 416) 17, 26.
[717] See s. II. (State Practice) and s. III.5. (Right to a fair trial).
[718] See, e.g., ECtHR, *Steel v. United Kingdom* (App. no. 68416/01), 15 February 2005.
[719] US District Court (District of Columbia), *Ogden v. Association of the United States Army* 177 F.Supp. 498, 14 October 1959, 502. The single publication rule only applies to the original publisher, of course, and not to third

Applied to internet publication, the effect is that the cause of action accrues when the publication is first published online.

13. States should enact anti-SLAPP legislation to allow speakers to strike out defamation/insult claims brought to silence speech relating to matters of public interest. This legislation should include provisions on early dismissal, allowing speakers to file an application to strike out unsubstantiated claims.

Speakers should be able to ask a court to dismiss claims that are clearly unsubstantiated, frivolous and are brought with a view to silencing public debate at an early stage.[720] Best practices in anti-SLAPP legislation include dismissal of a SLAPP as early as possible in the pre-trial process, such as allowing a speaker to file an application to strike out the complaint within 30 days of service,[721] and access to legal representation, ideally pro bono or via legal aid.

D. Permissible Civil Penalties

14. Proportionate civil sanctions in defamation, insult and seditious libel cases requires that damages should not be excessively high, relative to the means of the defendant, and any form of punitive or exemplary damages should be abolished.

Excessive civil penalties for defamatory or insulting speech are inconsistent with the right to freedom of expression and should be modified.[722] According to international instruments, 'pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritize the use of a range of non-pecuniary remedies'.[723] And there should never be higher penalties for speech about public officials or

parties who repeat the publication. Although the single publication rule is state-specific, the majority of US states follow it: see, e.g., US Court of Appeals Seventh Circuit, *Pippen v. NBCUniversal Media, LLC* 724 F.3d 610, 21 August 2013, 615.

[720] States should also allow for case management mechanisms, such as offer of amends procedures, to assist in resolving cases before they reach a substantive trial or other hearing in the courts, thus avoiding expensive and time-consuming litigation. Such pre-trial procedures are consistent with states' positive freedom of expression obligations and will assist in reducing the chilling effect of litigation on media freedom. See, e.g., US California Civil Code Div 1 Part 2 s. 48a; Canadian Nova Scotia Defamation Act RSNS 1989 c 122; UK Court of Appeal, *Warren v. Random House Group Ltd* (Nos 1–3) [2009] QB 600, 16 July 2008; UK High Court of England and Wales, Queen's Bench Division, *Tesco Stores Ltd v. Guardian News & Media Ltd* and Rusbridger [2009] EMLR 5, 29 July 2008. See, e.g., the offer of amends procedure reduced damages from £85,000 to £49,000 (approximately 107,000 USD to 62,000 USD) in UK High Court of England and Wales, *Gilham v. MGN Limited* [2020] EWHC 2217 (QB), 12 August 2020.

[721] US California Code of Civil Procedure s. 425.16.

[722] See s. III.6.2 (Civil penalties). See, e.g., HRC, General Comment No. 34 (2011), §47; IACtHR, *Tristán Donoso v. Panama* (Series C, no. 193), 27 January 2009, §129.

[723] UN Special Rapporteur on Freedom of Opinion and Expression & others, International Mechanisms for Promoting Freedom of Expression: Joint Declaration (2000).

authorities: such speech should receive additional protection, not penalties.[724] States should also consider providing for a maximum amount of damages (both compensatory and aggravated) for non-economic loss in laws on defamation, insult and seditious libel.[725] In determining quantum, courts should take into account the means of the speaker and, in the case of a journalist, whether the damages would bankrupt small and independent media.[726]

15. States should adopt measures to prohibit prior restraints on publication to protect public interest speech. Interim injunctions pending the hearing of the case should only be granted exceptionally. Final injunctions imposed after hearings on the merits should be narrowly tailored to prevent the harm caused by the publication.

With the exception of the Inter-American human rights system, international human rights bodies do not generally categorically prohibit prior restraints, but they acknowledge they are unlikely to be proportionate and call for the most careful scrutiny,[727] particularly in cases of public interest speech.[728] Interim injunctions imposed after publication while hearings on the merits are pending should only be available on an exceptional basis and provided the hearing takes place within a reasonable period after the injunction is granted.[729] Final injunctions after a full and fair hearing on the merits 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 for the defendant to decide how to prevent further publication, for example by removing … particular statements from a book';[730] and the injunctions should be proportionate in their timeframe.

[724] See s. III. (International Standards).

[725] Australian New South Wales Defamation Amendment Act 2020 s. 33 (however, there is no cap on awards for aggravated damages, which must be awarded separately to the amount of damages for non-economic loss: s. 35(2B). See also Article 19, *Defining Defamation* (n 416) 38.

[726] UN Special Rapporteur F. La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2012) UN Doc. A/HRC/20/17, §85. See also UN Special Rapporteur A. Hussain, *Civil and Political Rights Including The Question of Freedom of Expression* (2000) UN Doc. E/CN.4/2000/63, §52.

[727] But see ACHR Art. 13(2); see s. III.6.2.2. (Injunctions).

[728] See s. III. (International Standards).

[729] Article 19, *Defining Defamation* (n 416), Principle 20, providing that interim injunctions should only be applied where: (i) 'the plaintiff can show they would suffer irreparable damage—which could not be compensated—should further publication take place'; (ii) 'can demonstrate virtual certainty of success'; (iii) 'the statement was unarguably defamatory; and (iv) any potential defences are manifestly unfounded'.

[730] Ibid., Principle 21.

16. States should permit courts to grant other non-pecuniary remedies in appropriate cases such as, for example, alternatives to damages awards.

The law should allow courts to consider remedies that are non-pecuniary.[731] In appropriate cases, corrections, retractions, declarations of falsity and orders requiring rights of reply,[732] and publication of summaries of rulings, may be considered by courts—provided they are not disproportionate.[733] It would generally not be appropriate to ban someone from the practice of journalism.[734]

[731] UN Special Rapporteur F. La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2010) UN Doc. A/HRC/14/23, §83. See s. III.6.2.1 (Damages).

[732] The right of reply should apply only when publishing a correction is not sufficient to redress the damage suffered to the plaintiff's reputation. The reply should receive 'similar, but not necessarily identical, prominence to the original article' and it should not be used to introduce new issues or to comment on correct facts. Article 19, *Defining Defamation* (n 416), Principle 18.

[733] Milo (n 47) 267–278; cf. R. Carroll, 'Apologies and Corrections as Remedies for Serious Invasions of Privacy', in J.N.E. Varuhas & N.A. Moreham (eds), *Remedies for Breach of Privacy* (1st edn, Hart Publishing 2018), 224–231.

[734] A penalty involving a deprivation of the right to practice journalism is an inappropriate restriction on freedom of expression. ECtHR (GC), *Cumpănă v. Romania* (App. no. 33348/96), 17 December 2004, §§117–118; ACtHPR, *Konaté v. Burkina Faso* (App. no. 4/2013), 5 December 2014, §169. See s. III.6. (Penalties).

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