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## DEFAMATION IN THE INTERNET AGE: PROTECTING REPUTATION WITHOUT INFRINGING FREE EXPRESSION

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*This paper examines the relationship in the online context between the right to free expression and defamation law. It shows how defamation law has been used in some countries to suppress speech and limit access to information, and it suggests how international human rights principles should be applied to limit abuses of defamation law.*

The expansion of the Internet has empowered individuals worldwide to seek and share information. However, while the Internet presents unprecedented opportunities for communication and debate, it also exacerbates the tension already seen offline between freedom of expression and other interests. Among those competing interests are the rights to reputation and privacy, traditionally protected by defamation law.<sup>1</sup>

### I. The Tension between Free Expression and Defamation Laws

There is a robust body of international law protecting the right to freedom of expression. However, most of the international human rights instruments recognize that free expression may be restricted when necessary and proportionate in the interest of protecting reputation and privacy.<sup>2</sup>

#### A. Importance of free expression

International human rights law is based on the principle that “freedom of opinion and freedom of expression are indispensable conditions for the full development of the person.”<sup>3</sup> Freedom of expression includes the right to seek, receive and impart information or ideas of any kind, even those that tend to shock or offend. Freedom of expression is guaranteed regardless of frontiers and applies to every

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<sup>1</sup> We use the words “defamation” and “libel” interchangeably in this paper. In the Anglo-American tradition, broadly speaking libel is written defamation, while “slander” is oral defamation. Other legal systems use terms such as “insult” or “desacato” to cover the same concepts. See generally Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation” (“Defining Defamation”), July 2000, [www.article19.org/pdfs/standards/definingdefamation.pdf](http://www.article19.org/pdfs/standards/definingdefamation.pdf).

<sup>2</sup> See CDT, “Regardless of Frontiers: The International Right to Freedom of Expression in the Digital Age” (“Regardless of Frontiers”), p. 2, April 4, 2011, <https://www.cdt.org/report/regardless-frontiers-international-right-freedom-expression-digital-age>. See also Human Rights Education Association, “Freedom of Expression,” [http://www.hrea.org/index.php?doc\\_id=408](http://www.hrea.org/index.php?doc_id=408).

<sup>3</sup> United Nations Human Rights Committee, “General Comment No. 34 - Article 19: Freedom of opinion and expression” (“General Comment No. 34”), para. 2, CCPR/C/GC/34 (July 21, 2011), <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

form of media.<sup>4</sup> While limited restrictions of this right are allowed, “when a State party imposes restrictions on the exercise of freedom of expression, they may not put in jeopardy the right itself.”<sup>5</sup>

The Internet has unique potential to promote free expression and access to information. Compared to all previous media, the Internet is defined by its global and decentralized nature, low barriers to entry, openness, and relative affordability. Content produced by a single individual or limited means can find an immediate global audience. These unique characteristics and capabilities suggest that the laws that were once appropriate for traditional, offline media may not always be suitable for the wired world.<sup>6</sup> Among other concerns, the traditional deference given to local norms should be reconsidered when Internet censorship in one country may constitute a direct infringement on the right of persons in other countries to “impart” or “receive” information “without regard to frontiers.”<sup>7</sup>

## B. Tension between free expression and defamation

Human rights instruments do not prohibit defamation laws. To the contrary, they implicitly endorse them by recognizing the rights to reputation and privacy.<sup>8</sup> However, if not carefully applied, defamation laws can have a chilling effect on speech, hampering the free expression right of both those expressing themselves and those entitled to receive information, opinions, and ideas.<sup>9</sup> Moreover, if speakers are subject to the laws of any country in which their remarks can be accessed, local defamation laws can pose a risk to free expression globally.<sup>10</sup>

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<sup>4</sup> See, for example, Universal Declaration of Human Rights, Article 19 (1948) <http://www.un.org/en/documents/udhr/>. For an overview of human rights law and defamation, see Article 19, “Defamation ABC: A Simple Introduction to Key Concepts of Defamation Law” (“Defamation ABC”), Nov. 2006, [www.article19.org/pdfs/tools/defamation-abc.pdf](http://www.article19.org/pdfs/tools/defamation-abc.pdf).

<sup>5</sup> “General Comment No. 34,” note 3 above, para. 21, <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

<sup>6</sup> United Nations Human Rights Council, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank LaRue” (“LaRue Report”), para. 27, A/HRC/17/27, May 16, 2011, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf) (“For example, in cases of defamation of individuals’ reputation, given the ability of the individual concerned to exercise his/her right of reply instantly to restore the harm caused, the types of sanctions that are applied to offline defamation may be unnecessary or disproportionate.”).

<sup>7</sup> Quoted language taken from the Universal Declaration of Human Rights, Article 19. For more on the issues associated with the extension of defamation standards across borders, see Sandra Davidson, “International Considerations in Libel Jurisdiction,” Forum on Public Policy (Spring 2008) (“Davidson”), pp. 1-2, 24-25 <http://forumonpublicpolicy.com/archivespring08/davidson.pdf>, and Eduardo Bertoni, “Determining jurisdiction in Internet defamation cases: Insights on Latin America,” in “Towards an Internet Free of Censorship: Proposals for Latin America,” (2012) (“Bertoni”) [http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Jurisdiction\\_Eduardo%20Bertoni.pdf](http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Jurisdiction_Eduardo%20Bertoni.pdf) (EN), [http://www.palermo.edu/cele/pdf/internet\\_libre\\_de\\_censura\\_libro.pdf](http://www.palermo.edu/cele/pdf/internet_libre_de_censura_libro.pdf) (ES).

<sup>8</sup> See, for example, European Convention on Human Rights, 312 U.N.T.S. 221 (Nov. 4, 1950), Articles 8 & 10, <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>. Relevant language from other human rights instruments is quoted below in Section II.

<sup>9</sup> See Article 19, “Civil Defamation: Undermining Free Expression,” Dec. 9, 2009 (“Civil Defamation”), <http://www.article19.org/pdfs/publications/civildefamation.pdf>.

<sup>10</sup> As Judge Martens noted in the “Spycatcher” case, “in this ‘age of information’ information and ideas cannot be stopped at frontiers any longer.” *The Observer and Guardian v. the United Kingdom*, 14 EHRR 153 (1992).

The central purpose of defamation law is the protection of reputation.<sup>11</sup> A defamation law should be limited to protecting people against “false statements of fact that cause damage to their reputation.”<sup>12</sup> The elements of a defamation claim should be (1) a false statement of a (2) factual nature that does (3) damage to (4) a person’s reputation through (5) publication to a third party. Defamation laws should be found to violate free expression rights if they seek to protect feelings rather than reputation or to protect public order rather than private reputation, if they fail to provide for adequate defenses, and if they are applied with disproportionate damage awards.<sup>13</sup>

The tension between defamation law and free expression predates the Internet. As freedom of expression includes the right to share “views and opinions that offend, shock, or disturb,”<sup>14</sup> crafting a defamation law and applying it in a way that does not violate the principles of free expression are difficult but essential. Even if a law’s standards are reasonable, the mere threat of a defamation suit can be enough to quiet speech on controversial issues.<sup>15</sup> Defamation claims are often used by the powerful to protect political or economic interests and to silence dissenting voices.<sup>16</sup>

### C. Free expression principles should limit the application of defamation laws

International and regional human rights officials have called for caution in the application of defamation laws. The UN Human Rights Committee has stressed that defamation laws must be crafted with care to ensure that they do not stifle freedom of expression.<sup>17</sup> All such laws, the Committee has said, should include the defense of truth and should not be applied to opinion or other forms of expression that are not, by their nature, subject to verification. The law should provide that government officials and other public figures must tolerate a higher level of criticism, and “[i]n any event, a public interest in the subject matter of the criticism should be recognised as a defence.”<sup>18</sup> The United Nations Special Rapporteur on Freedom of Opinion and Expression (“UN Special Rapporteur”), along with many other human rights institutions, has called for the decriminalization of defamation.<sup>19</sup>

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<sup>11</sup> “Defamation ABC,” note 4 above, p. 8-9, [www.article19.org/pdfs/tools/defamation-abc.pdf](http://www.article19.org/pdfs/tools/defamation-abc.pdf). We do not attempt here a full description of defamation law. For more background, see “Defining Defamation,” note 1 above, [www.article19.org/pdfs/standards/definingdefamation.pdf](http://www.article19.org/pdfs/standards/definingdefamation.pdf); and Citizen Media Law Project, “Defamation,” <http://www.citmedialaw.org/legal-guide/defamation>.

<sup>12</sup> “Defamation ABC,” note 4 above, p. 1, [www.article19.org/pdfs/tools/defamation-abc.pdf](http://www.article19.org/pdfs/tools/defamation-abc.pdf).

<sup>13</sup> “Defamation ABC,” note 4 above, p. 3, [www.article19.org/pdfs/tools/defamation-abc.pdf](http://www.article19.org/pdfs/tools/defamation-abc.pdf). Defenses to a claim of defamation traditionally include truth, opinion, reasonable publication, privilege, words of others, innocent publication by an intermediary, and consent. See “Defamation ABC,” pp. 16-19.

<sup>14</sup> *Handyside v. the United Kingdom*, Series A, no. 24, 1 EHRR 737 (1979).

<sup>15</sup> “Defamation ABC,” note 4 above, p. 4, [www.article19.org/pdfs/tools/defamation-abc.pdf](http://www.article19.org/pdfs/tools/defamation-abc.pdf). As Article 19 has noted, “The cost of fighting a defamation claim and the possibility of the court awarding vast and disproportionate damages may force a defendant to settle at the start of the claim, regardless of its genuineness ....” “Civil Defamation,” note 9 above, p. 3 <http://www.article19.org/data/files/pdfs/publications/civil-defamation.pdf>. In the US, there is a specific name given to lawsuits where the plaintiff’s primary goal is not to win in the courtroom, but to use the expense of defending against the lawsuit to silence the speaker: “strategic lawsuits against public participation” (SLAPPs).

<sup>16</sup> “Civil Defamation,” note 9 above, p. 3, [www.article19.org/pdfs/publications/civil-defamation.pdf](http://www.article19.org/pdfs/publications/civil-defamation.pdf)

<sup>17</sup> “General Comment No. 34,” note 3 above, para. 47, <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

<sup>18</sup> “General Comment No. 34,” para. 38, 47, <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

<sup>19</sup> “LaRue Report,” note 6 above, para. 36.

National and regional courts have begun to respond to the threat posed by overbroad application of defamation laws, including in cases involving online speech. For example, the European Court of Human Rights in 2010 overturned a French case where a man was convicted of defaming the Mayor of Sens on an Internet site. The Court determined that punishment for criminal defamation and “insulting a citizen discharging a public mandate” was “disproportionate to the legitimate aim of protecting the reputation and rights of others.”<sup>20</sup>

## II. The International Human Rights Framework

In our report “Regardless of Frontiers,” CDT describes in detail the international and regional human rights treaties and the institutions that enforce or interpret them.<sup>21</sup> Here, we very briefly outline this framework. As the UN Special Rapporteur noted in reference to the free expression right in the International Convention on Civil and Political Rights, the provisions protecting freedom of expression were drafted “with foresight to include and to accommodate future technological developments through which individuals can exercise their right to freedom of expression.”<sup>22</sup>

### A. International

#### 1. *UN Universal Declaration of Human Rights*

The 1948, the United Nations enshrined the right to free expression in Article 19 of the Universal Declaration of Human Rights. At the same time, Article 12 of the Universal Declaration conditioned the right to freedom of expression by also providing that “no one shall be subjected to arbitrary ... attacks upon his honour or reputation.”<sup>23</sup>

#### 2. *International Covenant on Civil and Political Rights*

In the International Covenant on Civil and Political Rights, a document binding among ratifying countries, the right to freedom of expression is found in Article 19.<sup>24</sup> Article 19(3) allows a narrow restriction to the right of free expression for the protection of the reputation of others. The text defines when a restriction will be permissible:

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<sup>20</sup> Renaud v. France, No. 13290/07, Feb. 25, 2010. See European Court of Human Rights, “Factsheet - New technologies,” (“New technologies”), p. 2, May 2011, [http://www.echr.coe.int/NR/rdonlyres/CA9986C0-BF79-4E3D-9E36-DCCF1B622B62/0/FICHES\\_New\\_technologies\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/CA9986C0-BF79-4E3D-9E36-DCCF1B622B62/0/FICHES_New_technologies_EN.pdf); Dirk Verhoof, “European Court of Human Rights: Renaud v. France,” <https://biblio.ugent.be/input/download?func=downloadFile&fileOld=1029703&recordOld=1029702>.

<sup>21</sup> “Regardless of Frontiers,” note 2 above, <https://www.cdt.org/report/regardless-frontiers-international-right-freedom-expression-digital-age>.

<sup>22</sup> “LaRue Report,” note 6 above, para. 21, <http://daccess-ddsny.un.org/doc/UNDOC/GEN/G11/132/01/PDF/G1113201.pdf>.

<sup>23</sup> U.N.G.A. Res. 217 (Dec. 10, 1948), <http://www.un.org/en/documents/udhr/index.shtml>.

<sup>24</sup> ICCPR Art 19 states:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

See “General Comment No. 34,” note 3 above, para. 11, <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

These criteria should be strictly applied. The UN Human Rights Committee has spelled out various principles for applying paragraph 3 in its “General Comment No. 34.”<sup>25</sup> The requirement that a restriction on free speech must be “provided by law” means that the relevant statute or other source of defamation law must clearly define what is prohibited so that the restriction’s scope and application are foreseeable. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.<sup>26</sup> The principle of necessity includes the concept of proportionality, which means that restrictive measures must be appropriate to achieve their protective function, they must be the least intrusive instrument available to achieve that purpose, and they must be proportionate to the interest to be protected.

## B. Europe

### 1. European Convention

The European Convention for the Protection of Human Rights and Fundamental Freedoms binds the 47 Member States of the Council of Europe.<sup>27</sup> Article 10.1 protects freedom of expression while 10.2 states that this right may be subject to such restrictions “as are prescribed by law and are necessary in a democratic society...for the protection of the reputation or rights of others.”<sup>28</sup>

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<sup>25</sup> “General Comment No. 34,” note 3 above, para. 21 - 36, <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

<sup>26</sup> Vague laws have a “chilling effect,” encouraging speakers to stay well back of the boundary between what is permitted and what is prohibited. “Defamation ABC,” note 4 above, p. 10, [www.article19.org/pdfs/tools/defamation-abc.pdf](http://www.article19.org/pdfs/tools/defamation-abc.pdf).

<sup>27</sup> Council of Europe, “European Convention for the Protection of Human Rights and Fundamental Freedoms” (“European Convention”), 312 U.N.T.S. 221, Nov. 4, 1950, <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>. See also, Council of Europe Committee of Ministers, “Declaration on freedom of communication on the Internet,” May 28, 2003, [http://www.coe.int/t/dghl/standardsetting/media/doc/CM/Dec\(2003\)FreedomCommInt\\_en.asp#TopOfPage](http://www.coe.int/t/dghl/standardsetting/media/doc/CM/Dec(2003)FreedomCommInt_en.asp#TopOfPage).

<sup>28</sup> Articles 10.1 and 10.2 read in full:

*“Freedom of expression*

*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

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

The European Convention is enforced by the European Court of Human Rights. The Court applies a three-part test in determining whether a law or action infringes on the rights provided in Article 10. To be upheld, a restriction on the freedom of expression must (1) be prescribed by law; (2) have as its aim a goal that is legitimate under paragraph 10.2; and (3) “be necessary in a democratic society” to achieve that goal.<sup>29</sup> Recognizing national differences, the Court allows states a “margin of appreciation,” which means it will consider local norms in determining whether a restriction is “necessary.”<sup>30</sup>

Generally, when the Court examines whether an imposition of liability for defamation is “necessary in a democratic society,” it will consider the subject matter of the publication, the wording used by the speaker, the position of the speaker, the position of the person against whom the statement was directed, the characterization of the contested statements by the domestic courts, and the penalty imposed by them.<sup>31</sup>

## ***2. EU Charter of Fundamental Rights***

As part of the Treaty of Lisbon in 2009, the European Union ratified the Charter of Fundamental Rights. The Charter protects persons from infringements of human rights by EU institutions or by EU Member States when they are implementing EU laws.<sup>32</sup> Article 11 recognizes the right to freedom of expression. It is noteworthy that the free expression Article of the EU Charter, unlike similar provisions in other human rights instruments, does not expressly admit of any exceptions or restrictions. However, Article 1 of the Charter protects human dignity and Article 7 recognizes the right to respect for private and family life. Article 52 sets forth general rules for any limitation on the exercise of the rights and freedoms recognized in the Charter.

The European Court of Justice has been charged with enforcing this document. The Court is only beginning to develop its substantive and procedural jurisprudence, so the ultimate effect of the Charter on human rights enforcement in Europe still remains to be seen.<sup>33</sup>

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<sup>29</sup> COE, “Freedom of Expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights” (“Article 10 Case-law”), Updated Edition March 2007, <http://www.echr.coe.int/NR/rdonlyres/BA2CB2C0-E837-4253-A1B5-5BC87D84AABE/0/DG2ENHFILES182007.pdf>; “Council of Europe Standards with Respect to Freedom of Expression and Information,” Feb. 28, 2003, <https://wcd.coe.int/ViewDoc.jsp?id=25551&Site=CM>. Key free expression cases of the European Court of Human Rights include *Castells v. Spain*, 14 EHRR 445 (1992), and *The Sunday Times v. the United Kingdom* (no. 2), 14 EHRR 229 para. 45 (1992).

<sup>30</sup> See “Article 10 Case-law,” note 29 above, p. 9 <http://www.echr.coe.int/NR/rdonlyres/BA2CB2C0-E837-4253-A1B5-5BC87D84AABE/0/DG2ENHFILES182007.pdf>.

<sup>31</sup> Romanenko and Others v. Russia, no. 11751/03, Oct. 8, 2009, <http://www.worldlii.org/eu/cases/ECHR/2009/1476.html>. In Romanenko, the applicants had published articles alleging mismanagement of public resources, and the state agency and public official in question sued for defamation. The Russian court found that the information was disseminated without verification of its truth. The European Court found that, since those criticized were officials working in their official capacity, the limits of allowed criticism were wider. The court held there was no acceptable justification for the interference with freedom of expression.

<sup>32</sup> Court of Justice of the European Communities, Press Release No. 104/09, “The Treaty of Lisbon and the Court of Justice of the European Union” (“Treaty of Lisbon”), Nov. 30, 2009, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-12/cp090104en.pdf>.

<sup>33</sup> See “Court of Justice: Presentation,” [http://curia.europa.eu/jcms/jo2\\_7024/](http://curia.europa.eu/jcms/jo2_7024/). See also “Treaty of Lisbon,” note 32 above, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-12/cp090104en.pdf>; “2010 Report on the Application of the EU Charter of Fundamental Rights,” 2011, [http://www.ec.europa.eu/justice/policies/rights/docs/com\\_2011\\_160\\_en.pdf](http://www.ec.europa.eu/justice/policies/rights/docs/com_2011_160_en.pdf).

## C. Americas

The 1978 American Convention on Human Rights protects free expression and also provides a carve-out for laws “necessary to ensure respect for the rights or reputations of others.”<sup>34</sup> The Convention requires that a restriction on free expression must: (1) be defined in a precise and clear manner; (2) serve a compelling government objective authorized by the Convention; and (3) be necessary and proportionate.<sup>35</sup> In order to satisfy the last requirement, a government must both demonstrate a pressing social need and show that the measure is the least restrictive means by which to address the problem. The Convention prohibits the restriction of freedom of expression by both direct and indirect means by government or private actors.<sup>36</sup> The Convention is enforced by the Inter-American Court of Human Rights.<sup>37</sup>

## D. Africa

The African Charter on Human and Peoples’ Rights protects freedom of expression.<sup>38</sup> It provides no explicit protection of reputation or honor, but Article 27 does provide that rights should be exercised “with due regard to the rights of others, collective security, morality and the common interest.” The Charter’s Protocol 1, which entered into force in 2004, established the African Court on Human and Peoples’ Rights, which first became ready to receive cases in 2008. The court’s decisions are binding on the 26 signatories to the protocol.<sup>39</sup>

## E. Middle East

Article 32 of the Arab Charter on Human Rights, which entered into force in 2008, “guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive

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<sup>34</sup> American Convention on Human Rights, 9 I.L.M. 673 (1970)(Nov. 22, 1969), <http://www.umn.edu/humanrts/oasinstr/zoadcon.htm>.

<sup>35</sup> Article 13 reads:

1. *Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.*
2. *The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - a. respect for the rights or reputations of others; or
  - b. the protection of national security, public order, or public health or morals.*

For a full description of cases and principles under Article 13, see Annual Report of the Inter-American Commission on Human Rights, “Report of the Special Rapporteur for Freedom of Expression” (2010) [http://www.cidh.org/annualrep/2010eng/RELATORIA\\_2010\\_ENG.pdf](http://www.cidh.org/annualrep/2010eng/RELATORIA_2010_ENG.pdf).

<sup>36</sup> Article 13.3 provides: “The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.”

<sup>37</sup> See also William M. Berenson, Freedom of Expression in the Inter-American System (2007).

<sup>38</sup> African Charter on Human and Peoples’ Rights, 21 I.L.M. 59 (signed June 27, 1981), <http://www1.umn.edu/humanrts/instree/z1afchar.htm>.

<sup>39</sup> See Institutional Background, <http://www.african-court.org/en/index.php/2-home/2-institutional-background>; External News of the Court, <http://www.african-court.org/en/index.php/2-home/1-introduction-note-from-president>.

and impart information and ideas through any medium regardless of geographical boundaries.” Article 21 protects the reputation and honor of individuals.<sup>40</sup>

## F. Asia

At this time, Asia has no human rights document.

## III. Trends, Concerns and Reform Efforts

Around the world, there are examples of defamation law being used to restrict Internet speech. In some cases, these restrictions involve the application of pre-Internet doctrines. In other instances, courts and legislatures addressing defamation online have singled out speech on the Internet. In a 2004 case, the Ontario Court of Appeal said it was awarding higher damages for a defamatory statement because it was made on the Internet. Dismissing the positive impact of the Internet on democratic participation and the ability it afforded to respond immediately to negative comments, the Court stated that the Internet is “potentially a medium of virtually limitless international defamation.”<sup>41</sup> In 2011 and again in 2012, Italy considered a law that would require websites to take down content within 48 hours after so requested, if someone deems it detrimental to their image.<sup>42</sup> In Uruguay, an appellate court determined that online publications do not fall under the definition of communications medium and therefore should not benefit from the same free expression that the press enjoys.<sup>43</sup>

Nevertheless, as we explain below, other national legislatures and courts as well as regional human rights courts have curtailed the use of defamation laws to suppress speech, and human rights officials have called for further reforms.

### A. Jurisdiction

As noted previously, the global reach of the Internet affords individuals the ability to access information from around the world. However, the global nature of the Internet, when combined with laws punishing speech, can have a perverse effect, as some countries have sought to punish speakers beyond their borders for speech available online.<sup>44</sup> The UN Special Rapporteur and his

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<sup>40</sup> League of Arab States, Arab Charter on Human Rights, May 22, 2004, entered into force March 15, 2008, <http://www1.umn.edu/humanrts/instree/loas2005.html>. See generally Mervat Rishmawi, “The Arab Charter on Human Rights,” Arab Reform Bulletin, Carnegie Endowment for International Peace (Oct. 6, 2009), <http://www.carnegieendowment.org/arb/?fa=show&article=23951>.

<sup>41</sup> *Barrick Gold Corp v Lopehandia* (2004), 71 OR (3d) 416 at para 28, 239 DLR (4th) 577 (CA), <http://www.canlii.org/en/on/onca/doc/2004/2004canlii12938/2004canlii12938.html>. See Robert Danay, “The Medium Is Not The Message: Reconciling Reputation And Free Expression In Cases Of Internet Defamation,” 56 McGill L. J. 1 (2010-2011) <http://www.erudit.org/revue/mlj/2010/v56/n1/045697ar.html>.

<sup>42</sup> See Cynthia Wong, “Case in Point: Why Wikipedia Italy Would Rather Perish than Publish,” Oct. 5, 2011, <https://www.cdt.org/blogs/cynthia-wong/510case-point-why-wikipedia-italy-would-rather-perish-publish>; “Italian ‘Blog Killer’ Law Rises From the Grave,” April 19, 2012, <http://www.techdirt.com/articles/20120418/06482518544/italian-blog-killer-law-rises-grave.shtml>.

<sup>43</sup> “Bertoni,” note 7 above, p. 302, <http://www.palermo.edu/cele/libertad-de-expresion/publicaciones.html>.

<sup>44</sup> Kurt Wimmer & Eve R. Pogoriler, “International Jurisdiction and the Internet” Covington & Burling (2006), <http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/InternationalJurisdiction.pdf>. See also “Davidson,” note 7 above, <http://forumonpublicpolicy.com/archivespring08/davidson.pdf>.

regional counterparts have expressed concern about “jurisdictional rules which allow cases, particularly defamation cases, to be pursued anywhere, leading to a lowest common denominator approach.”<sup>45</sup>

In the past, concepts of jurisdiction were limited by the physical reality of production and distribution. Under the 1976 decision of the European Court of Human Rights in the case of *Handyside v. the United Kingdom*, if a restriction was justified in a particular country then it could be applied to foreign produced material sold in that country, even if the foreign material was legal where it was originally published.<sup>46</sup> However, before the Internet, publishers could more effectively control the distribution of their material, keeping it out of jurisdictions where it might be illegal.

In contrast, the global nature of the Internet allows content to be posted in one jurisdiction but accessed in many others, each with a different defamation law. An individual posting content may not even be aware that the content has been accessed abroad, let alone aware that the content may be illegal where accessed.

Periodically over the past two decades, there have been calls to develop a treaty or other international agreement stating when a country may assert jurisdiction over Internet conduct and content. No such efforts have succeeded globally.<sup>47</sup> Moreover, such an effort is fraught with risks, as countries hostile to free speech would press for broad jurisdictional rules supporting their efforts to control speech even beyond their borders.

The better approach is founded on existing principles, as recommended by the Special Rapporteurs, who have said that “jurisdiction in legal cases relating to Internet content should be restricted to States in which the author is established or to which the content is specifically directed; jurisdiction should not be established simply because the content has been downloaded in a certain state.”<sup>48</sup> While there can be debate about what it means for content to be specifically directed into a jurisdiction, the targeting rule essentially means that a country should be able to exercise jurisdiction over a foreign-based speaker only if that speaker intentionally targeted his comments to an audience in the country at issue.

International human rights courts have only begun to grapple with issues of jurisdiction and so far the results have been inconclusive. In *Perrin v. United Kingdom*, the European Court of Human Rights upheld a UK decision against a French citizen living in the United Kingdom who was convicted of breaching UK law for a publication posted on a California website, even though the content was legal in the US. The UK argued that the author, as a UK resident, should have been aware of UK law and this law would be undermined should it not be applied just because content was published elsewhere. The European Court found that the conviction was necessary and not

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<sup>45</sup> United Nations General Assembly Human Rights Council, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Tenth anniversary joint declaration: Ten key challenges to freedom of expression in the next decade” (“2010 Joint declaration”), para. 9, A/HRC/14/23/Add.2, March 25, 2010, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.Add.2\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.Add.2_en.pdf).

<sup>46</sup> *Handyside v. the United Kingdom*, Series A, no. 24, 1 EHRR 737 (1976).

<sup>47</sup> In the European Union, the so-called Brussels Regulation I addresses jurisdictional issues.

[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33054\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm). See “ECJ Ruling on Brussels Regulation and the Internet” (13/12/2010) <http://www.brickcourt.co.uk/news/13-12-2010---ecj-ruling-on-brussels-regulation-and-the-internet.asp>.

<sup>48</sup> Joint Declaration by the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur (Dec. 21, 2005) (“2005 Joint Declaration”) <http://www.osce.org/fom/66176>.

disproportionate. Narrowly read, the decision stands only for the principle that a speaker would normally be liable in the country where he resides.<sup>49</sup>

## B. Libel Tourism

Perhaps the most offensive assertion of jurisdictional authority associated with defamation law on the Internet is the practice known as “libel tourism.” In cases of libel tourism, persons offended by information in their home country—sometimes created by a fellow national—sue in another country with laws less protective of speech or more friendly to plaintiffs. Jurisdiction is claimed on the ground that the challenged material is available via the Internet in the country where the suit is filed.<sup>50</sup>

The UK has been particularly notorious as a destination for libel tourists. In *Bin Mahfouz v. Ehrenfeld*, the defendant was taken to court in the UK for a book exclusively marketed in the US. The plaintiff claimed jurisdiction on the grounds that 23 books were shipped to buyers in the UK and that the first chapter was available online. Due to a lack of resources, Ehrenfeld did not defend, lost, and was ordered to pay \$115,000 and to take the excerpt offline.<sup>51</sup> Hollywood personalities including Cameron Diaz, David Hasslehoff and Kate Winslet have won cases in the UK against US media outlets.<sup>52</sup> In the Diaz case, for example, the National Enquirer story in question never even appeared in the UK edition of the paper, but the online version was accessible via the web in the United Kingdom.<sup>53</sup> In another notorious case, a Ukrainian businessman obtained damages in UK courts against a Ukraine-based newspaper and a web site that published only in Ukrainian.<sup>54</sup>

Until several years ago, libel tourism seemed to be growing in Europe. According to one report, countries were processing on average 700 cases a year.<sup>55</sup> (Another study, without minimizing the issue, suggested the number of cases was much smaller.<sup>56</sup>) More recently, however, the practice seems to be increasingly disfavored. In the 2010 case of *The French Republic v. Weiler*, a professor living in the US was sued in French court for a book review regarding a writer living in Germany by an Israeli plaintiff claiming jurisdiction because the review was accessible online in France. The court dismissed the case and, in a move likely to discourage future libel tourism in France, awarded the defendant damages.<sup>57</sup> Argentinean courts have held that cases should be

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<sup>49</sup> See Douwe Korff and Ian Brown, “Social Media and Human Rights,” in “Media Landscape,” pp. 195-6, <http://www.coe.int/t/commissioner/Activities/themes/MediaFreedom/MediaLandscape2011.pdf>.

<sup>50</sup> “Davidson,” note 7 above, pp. 11-14, <http://forumonpublicpolicy.com/archivespring08/davidson.pdf>; 2005 Joint Declaration by International Mechanisms. See generally Trevor C. Hartley, “Libel Tourism and Conflict of Laws”, *ICLQ Vol.59*, January 2010, 29.

<sup>51</sup> *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156 (QB), <http://www.bailii.org/ew/cases/EWHC/QB/2005/1156.html>.

<sup>52</sup> “Civil Defamation,” note 9 above, p. 9, [www.article19.org/pdfs/publications/civil-defamation.pdf](http://www.article19.org/pdfs/publications/civil-defamation.pdf).

<sup>53</sup> “Civil Defamation,” note 9 above, p. 5, [www.article19.org/pdfs/publications/civil-defamation.pdf](http://www.article19.org/pdfs/publications/civil-defamation.pdf).

<sup>54</sup> See The Economist, “Libel Tourism: Writ large, Are English courts stifling free speech around the world?” Jan. 8, 2009, <http://www.economist.com/node/12903058>, and Trevor C. Hartley, “Libel Tourism and Conflict of Laws”, *ICLQ Vol. 59*, January 2010, p. 32.

<sup>55</sup> “Civil Defamation,” note 9 above, p. 8-9, [www.article19.org/pdfs/publications/civil-defamation.pdf](http://www.article19.org/pdfs/publications/civil-defamation.pdf).

<sup>56</sup> International Forum for Responsible Media Blog, “Libel Tourism- Some Facts,” March 28, 2010, <http://informr.wordpress.com/2010/03/28/libel-tourism-some-facts/>

<sup>57</sup> Jennifer Howard, “French Court Finds in Favor of Journal Editor Sued for Libel Over Book Review,” The Chronicle of Higher Education, March 2, 2011, <http://chronicle.com/article/French-Court-Finds-in-Favor-of/126599/>.

heard where the original edition was published.<sup>58</sup> Canadian courts, meanwhile, have adopted a test of foreseeability, allowing jurisdiction only when the defendant could have predicted his words would have effect in Canada.<sup>59</sup>

Even in the UK courts, the practice of libel tourism may be finding less acceptance. In a March 2011 case, a Ukrainian oligarch, Dmitry Firtash, sued a Ukrainian paper, the Kyiv Post, in the UK courts regarding events taking place in the Ukraine. The oligarch believed he could take advantage of the UK's more favorable laws, but the judge threw out his case.<sup>60</sup>

There have also been some legislative efforts to curtail the practice. In May 2012, the British government proposed legislation to revise the defamation law to address libel tourism and other issues.<sup>61</sup> Meanwhile, the US has adopted federal legislation, "The SPEECH Act," prohibiting the recognition and enforcement in the US of foreign decisions that arise from libel tourism; the law allows US defendants to counter-sue their foreign accusers.<sup>62</sup>

### C. Criminal Defamation

"People should not be put in prison for expressing their views."<sup>63</sup>

In a number of countries, defamation is a criminal offense in addition to being subject to civil action.<sup>64</sup> In Asia, there is widespread use of criminal defamation laws to suppress political speech.<sup>65</sup> In Thailand, anyone posting pictures that may impair another's reputation is subject to criminal liability.<sup>66</sup> South Korea has established the specific crime of cyber defamation.<sup>67</sup> In Latin

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<sup>58</sup> Bertoni, note 7 above, [http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Jurisdiction\\_Eduardo%20Bertoni.pdf](http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Jurisdiction_Eduardo%20Bertoni.pdf) (EN) and <http://www.palermo.edu/cele/libertad-de-expresion/publicaciones.html> (ES).

<sup>59</sup> Allison MacIissac, "Black v. Breeden: The Ontario Court of Appeals Applies New *Van Breda* Test to Find Conrad Black Victorious," The Court Blog, Aug. 18, 2010, <http://www.thecourt.ca/2010/08/18/black-v-breeden-the-ontario-court-of-appeal-applies-new-van-breda-test-to-find-conrad-black-victorious/>.

<sup>60</sup> Index on Censorship, "Kyiv Post Triumphs in controversial libel tourism case" (Feb. 24, 2011) <http://www.indexoncensorship.org/2011/02/kyiv-post-triumphs-in-controversial-libel-tourism-case/>.

<sup>61</sup> Committee to Protect Journalists, "UK set for historic libel reform" (May 17, 2012), <http://cpj.org/blog/2012/05/uk-set-for-historic-libel-reform.php>; Greg Jones, "Libel reform campaigners demand better public interest defence," The Guardian (June 27, 2012), <http://www.guardian.co.uk/science/2012/jun/27/libel-reform-campaigners-public-interest-defence>. The proposal would also end the "multiple publication" rule. For more on that rule and its impact in the Internet age, see UK Ministry of Justice, "Defamation and the internet: the multiple publication rule," justice.gov.uk/about/docs/defamation-consultation-paper.pdf. For updates on the UK reform process, see <http://libelreform.org/>.

<sup>62</sup> The full title of the bill is the Securing the Protection of our Enduring and Established Constitutional Heritage Act. <http://www.govtrack.us/congress/billtext.xpd?bill=h111-2765>.

<sup>63</sup> Representative on Freedom of the Media to the OSCE, "Regular Report to the Permanent Council," December 2010, <http://www.osce.org/fom/74598>.

<sup>64</sup> "2010 Joint declaration," note 45 above, para. 2 [http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A\\_HRC.14.23.Add.2\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A_HRC.14.23.Add.2_en.pdf). Article 19 has created an interactive map demonstrating where criminal defamation laws are still in place. It can be found at: <http://www.article19.org/defamation/map.html>.

<sup>65</sup> See Open Net Initiative, "Asia," ("ONI Asia") 2009, <http://opennet.net/research/regions/asia>.

<sup>66</sup> "ONI Asia," <http://opennet.net/research/regions/asia>.

<sup>67</sup> "ONI Asia," <http://opennet.net/research/regions/asia>.

America, while there has been a reform effort underway, several countries retain laws making insult (or “desacato”) a crime.<sup>68</sup> The application of criminal defamation varies across Africa. Although the African Commission on Human Rights has called for the repeal of criminal defamation laws, many African countries have criminal defamation laws in place and are among the most prolific in using the criminal defamation offense against journalists.<sup>69</sup> Other than the United Kingdom and Cyprus, every European country still had a criminal defamation law in place (as of February 15, 2012). In July 2012, Russia re-criminalized defamation just seven months after it had been de-criminalized.<sup>70</sup> Although the laws are rarely applied in most European countries,<sup>71</sup> they are used in others with some frequency. According to the Dutch government, between 2002 and 2004, over 100 people were jailed in the Netherlands for criminal defamation, libel and insult.<sup>72</sup> Journalists have also been convicted for defamation in Belgium, Denmark, Malta, Finland, Italy, Norway, and Switzerland.<sup>73</sup>

Defamation actions of any kind have a chilling effect on free expression, but the effect is particularly troublesome in the case of criminal defamation. A criminal defendant faces the power and resources of the state. If convicted of criminal defamation, a speaker faces sanctions that could include a prison sentence, fines, and a criminal record. The chilling effect is further exacerbated by the fact that powerful public figures (such as government officials and wealthy businessmen) are many times exploiting their position in bringing cases.<sup>74</sup> Civil law is adequate for protection against defamation as these claims are “arguably a private matter between two individuals, with which the State should not concern itself.”<sup>75</sup>

The UN Special Rapporteur has called for the decriminalization of defamation, stating that “the arbitrary use of criminal law to sanction legitimate expression constitutes one of the gravest forms of restriction to the right, as it not only creates a ‘chilling effect’, but also leads to other human rights violations, such as arbitrary detention and torture and other forms of cruel, inhuman or degrading treatment or punishment.”<sup>76</sup> The UN Human Rights Committee, while not expressly calling for full repeal, has specified a number of limits that should be applied in particular to penal

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<sup>68</sup> The Colombian Supreme Court ruled in 2011 that, while criminal defamation laws are allowed under international law, they should only be used in extreme cases. See Article 19, “Colombia: The Supreme Court’s Decision on Criminal Defamation Undermines Free Speech,” June 9th, 2011, <http://www.article19.org/resources.php/resource/1627/en/colombia:-the-supreme-court's-decision-on-criminal-defamation-undermines-free-speech>.

<sup>69</sup> “Civil Defamation,” note 9 above, p. 8, [www.article19.org/pdfs/publications/civil-defamation.pdf](http://www.article19.org/pdfs/publications/civil-defamation.pdf).

<sup>70</sup> IFEX, “Criminal libel law a blow to free expression” (July 17, 2012) [http://www.ifex.org/russia/2012/07/16/criminal\\_libel/](http://www.ifex.org/russia/2012/07/16/criminal_libel/).

<sup>71</sup> “Defamation ABC,” note 4 above, p. 6, [www.article19.org/pdfs/tools/defamation-abc.pdf](http://www.article19.org/pdfs/tools/defamation-abc.pdf).

<sup>72</sup> Aidan White, “Ethical journalism and human rights,” in “Media Landscape,” note 49 above, p. 58, <http://www.coe.int/t/commissioner/Activities/themes/MediaFreedom/MediaLandscape2011.pdf>

<sup>73</sup> Aidan White, “Ethical journalism and human rights,” in “Media Landscape,” note 49 above, p. 58, <http://www.coe.int/t/commissioner/Activities/themes/MediaFreedom/MediaLandscape2011.pdf>.

<sup>74</sup> “Defamation ABC,” note 4 above, p. 12, [www.article19.org/pdfs/tools/defamation-abc.pdf](http://www.article19.org/pdfs/tools/defamation-abc.pdf).

<sup>75</sup> “Defamation ABC,” note 4 above, p. 12; [www.article19.org/pdfs/tools/defamation-abc.pdf](http://www.article19.org/pdfs/tools/defamation-abc.pdf).

<sup>76</sup> “LaRue Report,” note 6 above, para. 28, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf). See also U.N. Commission on Human Rights, “Civil and Political Rights, Including the Question of Freedom of Expression, The right of freedom of opinion and expression, Report of the Special Rapporteur,” para.69, E/CN.4/2005/64, Dec. 17, 2004, available at <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx>.

defamation laws: truth should be a defense; penal sanctions should not be applied with regard to those forms of expression that are not, of their nature, subject to verification; a public interest in the subject matter of the criticism should be recognized as a defense; and, at least with regard to comments about public figures, consideration should be given to not penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. Finally, the Committee has said, “the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”<sup>77</sup>

There have been some significant steps towards repeal of criminal defamation laws. As of July 2011, thirteen OSCE States had decriminalized defamation. In particular, there has been a trend among former communist countries to repeal such laws.<sup>78</sup> Some Latin American countries have repealed their criminal defamation laws.<sup>79</sup> Besides the UN Special Rapporteur, calls for decriminalization have also come from the Council of Europe, OSCE, the African Commission on Human Rights, and the OAS.<sup>80</sup>

The European Court of Human Rights has accepted that “the use of criminal-law sanctions in defamation cases is not in itself disproportionate.”<sup>81</sup> Nevertheless, the Court has emphasized that the “nature and severity of the penalties imposed are factors to be taken into account” in assessing the proportionality of an interference with the freedom of expression, and in recent cases the Court has consistently found that a jail or prison sentence for defamation was not “necessary in a democratic society” and therefore contrary to art.10 of the European Convention.<sup>82</sup>

#### D. Abuse of Power

Defamation law is too often used by government officials and other powerful individuals to silence critics. The COE, for example, has criticized the use of defamation laws by authorities to silence criticism in Albania, Azerbaijan and the Russian Federation.<sup>83</sup> In some countries, statutes specifically make it illegal to insult high government officials. In 1997, for example, Kazakhstan adopted criminal defamation provisions for insulting the president (however, it is still legal to

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<sup>77</sup> “General Comment No. 34,” note 3 above, para. 47; <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

<sup>78</sup> Dunja Mijatovic, “Protection of journalists from Violence,” in “Media Landscape,” note 49 above, p. 35, <http://www.coe.int/t/commissioner/Activities/themes/MediaFreedom/MediaLandscape2011.pdf>

<sup>79</sup> OAS, Office of the Special Rapporteur for Freedom of Expression Inter-American Commission on Human Rights “Annual Report of the Special Rapporteur for Freedom of Expression 2004” (“Annual Report 2004”) chapter 7, <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=459&IID=1>.

<sup>80</sup> COE Parliamentary Assembly, “Towards decriminalisation of defamation”, Resolution 1577 (2007)

<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>; OSCE Representative on Freedom of the Media, “Ending the Chilling Effect: Working to Repeal Criminal Libel and Insult Laws” (2004) <http://www.osce.org/fom/13573>; African Commission on Human and Peoples’ Rights, “Resolution on Repealing Criminal Defamation Laws in Africa,” Nov. 24, 2010, [http://www.achpr.org/english/resolutions/Resolution169\\_en.htm](http://www.achpr.org/english/resolutions/Resolution169_en.htm).

<sup>81</sup> Šabanović v. Montenegro and Serbia, no. 5995/06 (2011) available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/:>

<sup>82</sup> Fatullayev vs. Azerbaijan (2010), [http://www.icj.org/img/CASE\\_OF\\_FATULLAYEV\\_v\\_AZERBAIJAN.pdf](http://www.icj.org/img/CASE_OF_FATULLAYEV_v_AZERBAIJAN.pdf); Šabanović v. Montenegro and Serbia (2011).

<sup>83</sup> Council of Europe, “Towards decriminalization of defamation,” Resolution 1577, 2007, <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>

criticize the President's policies).<sup>84</sup> Some of the Latin American *desacato* laws are specifically aimed at protecting public officials.<sup>85</sup>

Such laws or practices providing special protection to government officials violate international human rights standards, under which public officials are actually supposed to tolerate a higher degree of criticism than ordinary citizens. The European Court of Human Rights held in 1986 in *Lingens v. Austria* that the boundaries of protected speech should be broader in regards to public actors than private citizens.<sup>86</sup> Similarly, in *Herrera Ulloa v. Costa Rica*, the Inter-American Court held that those in the public arena are subject to higher levels of scrutiny.<sup>87</sup>

Human rights institutions have condemned laws providing special protection to government officials. The UN Special Rapporteur has stated that discussion of government policies and reporting on government activities and corruption in government should *never* be restricted.<sup>88</sup> The Council of Europe Commissioner for Human Rights has said that politicians and government officials have to accept a higher level of public criticism and scrutiny.<sup>89</sup> Likewise, the OAS position is that a public person (or a person involved in a public matter) is subject to a higher degree of scrutiny and thus must have a higher degree of tolerance for criticism and debate.<sup>90</sup>

Some countries have heeded these concerns and rejected the use of defamation actions by public actors seeking to quiet their detractors. In Nepal, the law clearly states that the criticism of public

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<sup>84</sup> U.N. Human Rights Committee, "Concluding Observations on Kazakhstan," N. 25, July 2011, CCPR/C/KAZ/CO/1, <http://www2.ohchr.org/english/bodies/hrc/hrcs102.htm>.

<sup>85</sup> "Annual Report 2004," note 79 above, chapter 7, <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=459&IID=1>.

<sup>86</sup> *Lingens v. Austria*, 8 EHRR 407 (1986). Available at <http://strasbourgconsortium.org/document.php?DocumentID=2105>.

<sup>87</sup> *Case of Herrera-Ulloa v Costa Rica*, Inter-American Court of Human Rights, Judgment of July 2, 2004, [www.corteidh.or.cr/docs/casos/articulos/seriec\\_107\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf).

<sup>88</sup> U.N.G.A., "Promotion and protection of the right to freedom of opinion and expression: Note by the Secretary-General" para. 42, A/66/290, Aug. 10, 2011, [www.un.org/Docs/journal/asp/ws.asp?m=A/66/290](http://www.un.org/Docs/journal/asp/ws.asp?m=A/66/290):

*"Furthermore, the Special Rapporteur stresses that, as stipulated in Human Rights Council resolution 12/16 (para 5 (p) (i)), the following types of expression should never be subject to restrictions: discussion of government policies and political debate; reporting on human rights, government activities and corruption in government engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups."*

<sup>89</sup> Thomas Hammarberg, "Forward: Media freedom in Europe," in "Media Landscape," note 49 above, p. 11, <http://www.coe.int/t/commissioner/Activities/themes/MediaFreedom/MediaLandscape2011.pdf>.

<sup>90</sup> "Annual Report 2004," note 79 above, chapter 7, <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=459&IID=1>. All public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject criticism and political opposition." "General comment No. 34," note 3 above, <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>. See also CoE, Conclusions of the Regional Conference on Defamation and Freedom of Expression (Oct. 2002) [http://www.coe.int/t/dghl/standardsetting/media/Doc/RegConfStrbgOct2002\\_en.asp](http://www.coe.int/t/dghl/standardsetting/media/Doc/RegConfStrbgOct2002_en.asp), para 12. US and Indian Courts have explicitly endorsed this principle. See "Civil Defamation," note 9 above, p. 3 <http://www.article19.org/data/files/pdfs/publications/civil-defamation.pdf>. The Special Rapporteur of the ACHPR also emphasized that public figures must tolerate a greater amount of criticism. Pansy Tlakula, "Final Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa" (28 April -12 May 2011), p. 35 [http://www.achpr.org/english/Commissioner%27s%20Activity/49th%20OS/Special%20Mechanism/Freedom\\_expression.pdf](http://www.achpr.org/english/Commissioner%27s%20Activity/49th%20OS/Special%20Mechanism/Freedom_expression.pdf).

officials should not be considered defamation.<sup>91</sup> In Honduras, the Supreme Court in 2005 declared unconstitutional a law proscribing disrespect for authority.<sup>92</sup>

## E. Intermediary Liability

Europe, the US, and other countries where the Internet has flourished have long had laws specifying that ISPs, web hosts and other “intermediaries” cannot be held liable for the content created by their users.<sup>93</sup> (This protection is limited when the intermediary has adopted the content as its own or has refused a court order calling for removal.<sup>94</sup>) Protecting intermediaries from liability or gatekeeping responsibility is vital to ensuring that the Internet is a platform for free expression, economic activity, and innovation. Making intermediaries liable for their users’ actions could greatly restrict the opportunities for free expression and impede the full realization of the Internet’s economic and democratic potential. Imposing liability on intermediaries makes it difficult or impossible for them to offer free or low cost services.<sup>95</sup>

However, governments continue to try to control objectionable content by punishing the intermediaries that transmit or host it. This is a global problem and is not limited to defamation law. Various governments around the world have sought to make intermediaries liable for the content created or posted by their users. These moves are often linked to efforts to force intermediaries to filter or block objectionable content. In Vietnam and Korea, for example, the governments have sought to enlist intermediaries to regulate speech on the Internet.<sup>96</sup> In the United Kingdom, a parenting website, mumsnet.com, had to pay damages to a parenting advisor for comments posted by a third party.<sup>97</sup> In 2010, an Italian court convicted three Google executives for a video posted by a user on the Google Video service.<sup>98</sup> On the other hand, in the US, Section 230 of the Communications Decency Act offers major protection to intermediaries, and victims of defamation

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<sup>91</sup> Article 19, “An Agenda for Change: The Right to Freedom of Expression in Nepal,” p. 21-22, Sept. 2008, <http://www.article19.org/data/files/pdfs/publications/nepal-agenda-for-change.pdf>.

<sup>92</sup> U.N. Human Rights Committee, “Concluding Observations on Honduras,” N. 17, December 2006, CCPR/C/HND/CO/1, <http://www2.ohchr.org/english/bodies/hrc/hrcs88.htm>.

<sup>93</sup> The European Union provides immunity for intermediaries acting as “mere conduits,” “caching” services and “hosting” services (as long as they are not aware of illegal content, or remove such content when they become aware of it). Directive 2003/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the “E-Commerce Directive”) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031.en:NOT>.

<sup>94</sup> 2005 Joint Declaration, note 48 above, <http://www.osce.org/fom/66176>. See also CDT, “Intermediary Liability: Protecting Internet Platforms for Expression and Innovation” (“Intermediary Liability”), April 27, 2010, <https://www.cdt.org/paper/intermediary-liability-protecting-internet-platforms-expression-and-innovation>.

<sup>95</sup> “Intermediary Liability,” note 94 above, p.4, <https://www.cdt.org/paper/intermediary-liability-protecting-internet-platforms-expression-and-innovation>.

<sup>96</sup> “Asia,” <http://opennet.net/research/regions/asia>; Geoffrey Cain, “Bloggers the new rebels in Vietnam,” San Francisco Chronicle, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/12/14/MNJ814GR9H.DTL>; “Do new Internet regulations curb free speech?” Korea JoongAng Daily, Aug. 13 2008, <http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2893577>.

<sup>97</sup> “Civil Defamation,” note 9 above, p. 5, [www.article19.org/pdfs/publications/civil-defamation.pdf](http://www.article19.org/pdfs/publications/civil-defamation.pdf). Comments accused celebrity parenting advisor, Gina Ford, of “strapping babies to rockets and firing them into South Lebanon.”

<sup>98</sup> David Meyer, “Google Loses Defamation Case in Italy,” CNET April 5, 2011, [http://news.cnet.com/8301-1001\\_3-20050852-92.html](http://news.cnet.com/8301-1001_3-20050852-92.html).

have generally been unsuccessful in trying to attack them.<sup>99</sup> Europe's E-Commerce Directive offers similar protections.

Imposing liability on intermediaries can have an overbroad impact on speech, as intermediaries would be under an incentive to over-block content in order to protect themselves.<sup>100</sup> This incentive is especially strong where definitions of illegal content are vague and overbroad or where it is not easy to determine whether the disputed content is unlawful. Defamation is a type of content that is especially hard to judge. Intermediaries are in a poor position to take on this responsibility. It is the role of the courts, not ISPs, to determine when content is defamatory. When ISPs are forced to play this role, they will likely end up censoring content that is not illegal or actionable.<sup>101</sup> To ensure that the competing values and rights at stake are properly balanced, hosts should be obligated to take down allegedly defamatory content only upon court order

There have been positive developments. In the *Da Cunha* case, Google and Yahoo! were exempted from liability for including sex-related sites in their results for searches on an entertainer. The Argentine Appeals court held that a company should be liable only if it fails to respond to a request to remove clearly illegal content.<sup>102</sup> A case at the European Court of Human Rights, *Delfi v. Estonia*, pending as of March 1, 2012, is considering a court finding for the plaintiff holding a news portal responsible for the comments posted by its readers.<sup>103</sup> Several of the Special Rapporteurs have emphasized the importance of protecting intermediaries from liability for content created by others.<sup>104</sup>

#### **IV. Conclusion**

As this paper demonstrates, defamation laws are being applied in ways inconsistent with the international commitment to free expression. Human rights courts should step up their review of national defamation cases and should apply the strongest protections for free expression reading narrowly the exceptions to the principle for reputation and dignity. Additionally, free expression advocates must continue to press for changes in local law protecting the right to receive and impart ideas and beliefs.

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<sup>99</sup> See Danielle M. Conway-Jones, "Defamation In The Digital Age: Liability In Chat Rooms, On Electronic Bulletin Boards, And In The Blogosphere" (2005) <http://ssrn.com/abstract=1355217>.

<sup>100</sup> "Report of the Special Rapporteur Frank LaRue," para. 42; <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/132/01/PDF/G1113201.pdf>.

<sup>101</sup> "Defamation ABC," note 4 above, p. 19; [www.article19.org/pdfs/tools/defamation-abc.pdf](http://www.article19.org/pdfs/tools/defamation-abc.pdf).

<sup>102</sup> Vinod Sreeharsha, "Google and Yahoo Win Appeal in Argentine Case," New York Times, Aug. 19, 2010, <http://www.nytimes.com/2010/08/20/technology/internet/20google.html>.

<sup>103</sup> "New technologies", p. 3, [http://www.echr.coe.int/NR/rdonlyres/CA9986C0-BF79-4E3D-9E36-DCCF1B622B62/0/FICHES\\_New\\_technologies\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/CA9986C0-BF79-4E3D-9E36-DCCF1B622B62/0/FICHES_New_technologies_EN.pdf).

<sup>104</sup> 2005 Joint Declaration, note 48 above, <http://www.osce.org/fom/66176>.