In the Constitutional Court of Colombia

WRITTEN COMMENTS SUBMITTED BY THE CENTRE FOR LAW AND DEMOCRACY

INTERVENTION AS AMICUS CURIAE IN PROCEEDING D-13891 ON LEY 29 DE 1944

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Lead Lawyer:

Toby Mendel
Executive Director
Centre for Law and Democracy

39 Chartwell Lane
Halifax, N.S., B3M 3S7
Canada

Tel: +1 902 431-3688
email: toby@law-democracy.org

Supporting Lawyers:

Laura Notess
Legal Officer
Centre for Law and Democracy

Tel: +1 406 451-9115
email: laura@law-democracy.org

J.Y. Hoh
Legal Officer
Centre for Law and Democracy

+1 416 833-2918
jyhoh@law-democracy.org

1.0 Summary of Argument

[1] International law, in particular through its human rights guarantees for freedom of expression, places strict conditions on the power of States to restrict expression. While it is recognised that some restrictions designed to protect reputations are legitimate, these must conform to certain principles, in particular by offering those who are alleged to have made defamatory statements certain defences. Article 55 of Law 29 of 1944 provides for compensation for harm caused by, among other things, defamatory statements. To the extent that Article 55 does not offer the defences international law requires, and these are not found in other provisions of Colombian law, it breaches international human rights guarantees. Furthermore, pursuant to the doctrine of "bloque de constitucionalidad" (constitutional corpus), this would also represent a breach of Colombia's own domestic constitutional standards.

[2] Colombia is a State Party to both the *International Covenant on Civil and Political Rights* and the *American Convention on Human Rights*, which guarantee the right to freedom of expression, respectively in Article 19 and Article 13. These treaties, and their interpretation by both official oversight bodies (such as the UN Human Rights Committee and the Inter-American Court of Human Rights) and other authoritative bodies, make it clear that freedom of expression is one of the most cherished human rights.

[3] While restrictions on freedom of expression which conform to a three-part test setting out conditions of legality, legitimacy (of the aim) and necessity are legitimate, the standard for meeting this test is strict. This is particularly true in relation to public debate about matters of public interest or concern, which is a social value of the highest degree.

[4] One of the recognised grounds for restrictions on freedom of expression is to protect reputation, also a protected right under international law, including Article 17 of the *International Covenant on Civil and Political Rights* and Article 11(2) of the *American Convention on Human Rights*. Given the frequent conflicts between freedom of expression and protection of reputation (defamation law), international law has very developed standards on how to balance these two rights.

[5] Everyone should benefit from a defence of truth in relation to statements alleged to be defamatory, whereby they are not liable for statements which they prove to be true or accurate. No one has the right to defend a reputation they do not deserve (i.e. to sanction true statements about them which have been made) and the importance of free public debate, especially involving accurate statements, is overriding in this context. In addition, there is a trend toward recognising that, in relation to statements on matters of public concern, the onus of proof should lie on the plaintiff to prove that the statements were false, rather than on the defendant to prove they were true. At a minimum, defendants should benefit from certain substantive and procedural protections in this regard, such as

not having to prove the truth of statements which originated from third parties, as long as they were repeated in good faith, and benefiting from legal aid, at least in more complicated cases.

[6] International law accords a wide scope of protection to the expression of opinions. Unlike statements of fact, these cannot be proven to be true and any requirement to do so represents a breach of the right to freedom of expression. Some authoritative commentators call for absolute protection against defamation liability for opinions while others call for very strong protection, including for statements which others may deem to be offensive or provocative.

[7] Strict liability even for inaccurate statements on matters of public concern is not consistent with the right to freedom of expression given the impossibility, even for the most professional journalists, of never making a mistake and the importance of open public debate about such matters in society. Different international, regional and national legal systems offer different defences here, which we broadly group under the title "reasonable publication". The strongest protection takes the form of requiring the defendant to have acted with knowledge that the statements were false or with reckless disregard for their accuracy, often called the "actual malice" rule. Most jurisdictions take a more tailored approach, looking at a variety of factors – such as good faith, respecting professional ethics in the case of journalists and any efforts made to ascertain whether the statements were accurate before disseminating them – to determine whether, on balance, freedom of expression or protection of reputation prevails taking into account all of the circumstances.

[8] Traditionally, everyone who assisted in the dissemination of a defamatory statement was liable for it, subject to certain protections for those who were entirely innocent, such as newspaper boys delivering a newspaper which contained defamatory content. Modern digital communications have fundamentally altered the means of communication, with intermediaries often playing an important role in dissemination of content and yet not being analogous in any way to traditional printers or publishers. It is now clear that intermediaries should not be held liable for third party content distributed over their systems outside of certain circumstances. The first is where they engage directly with that content – for example by moderating or editing it – such that they can be said to have taken responsibility for it.

[9] The second is where an official actor which is either a court or is subject to judicial oversight calls on them to address the content (normally by taking it down). Care needs to be taken in this context not to expand too widely the scope of actors who can engage the liability of intermediaries. Some notice-and-takedown systems effectively render intermediaries liable for failing to take action in relation to any content which ultimately proves to be illegal (including under defamation law) once anyone suggests to them ("notifies" them) that the content is illegal. This effectively empowers everyone as a censor, since it is simple to claim that content one does not like is illegal, particularly given that making such a claim entails no legal

responsibility. As a result, such notice-and-takedown systems are not compliant with the right to freedom of expression.

[10] The Centre for Law and Democracy and its lawyers do not claim to be experts on either Colombian constitutional law or the entire regime of defamation in Colombia. However, we believe, perhaps absent significant reinterpretation or the support of other legal provisions, that Article 55 fails to provide the defences and protections highlighted above. If so, it represents a breach by Colombia of its international human rights obligations and, by extension, its own domestic human rights guarantees.

2.0 Statement of CLD Interest and Expertise

[11] The Centre for Law and Democracy (CLD) is a non-profit, human rights non-governmental organisation (NGO) that focuses on foundational rights for democracy. CLD believes in a world in which robust respect for human rights underpins strong participatory democracy at all levels of governance – local, national, regional and international – leading to social justice and equality. CLD works to promote, protect and develop those human rights which serve as the foundation for or underpin democracy, including the rights to freedom of expression, to vote and participate in governance, to access information and to freedom of assembly and association.

[12] To achieve this mission, CLD undertakes research and educational outreach to advance the understanding of civil society and the wider public globally about those human rights which serve as a foundation for or underpin democracy. Research and technical assistance are utilised to help governments and officials around the world to uphold international and constitutional standards regarding human rights which underpin democracy. CLD builds the understanding of inter-governmental organisations and non-governmental organisations regarding human rights which underpin democracy, so that they can better realise their goals. CLD also engages in a range of law reform efforts, whether through analysing and advocating for reform of laws, advocating for the adoption of human rights protective laws or supporting constitutional litigation. Extensive research and policy work are also part of CLD's mandate, with a view to contributing to ensuring continuous relevance and development of the key human rights which fall within its mandate.

[13] Based in Halifax, Canada, CLD is recognised as a global leader in international standard setting regarding freedom of expression, as demonstrated for example by its annual role in drafting the Joint Declarations of the four special international mandates on freedom of expression.[1] CLD has often engaged in constitutional litigation to promote respect for

[1] The special mandates – namely the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to

freedom of expression, sometimes providing its own amicus curiae briefs before courts and sometimes providing support to local lawyers arguing these cases. Over the last year, in addition to this case, CLD has supported litigation before the Constitutional Court in Indonesia challenging the government's power to block websites, before the High Court of Islamabad on interpreting the common law doctrine of "contempt of court" and before the Supreme Court of Sri Lanka in a case challenging the failure of the State to regulate broadcasting in a manner that protects the right of the public to receive diverse information and ideas.

[14] CLD is submitting this brief with a view to assisting the Constitutional Court in its task of interpreting international and constitutional guarantees of freedom of expression in Colombia. The organisation has no direct interest in the outcome of this case, other than its human rights interest.

3.0 Introduction

[15] This case involves a constitutional challenge to Article 55 of Ley 29 de 1944 (diciembre 15) (Law 29 of 1944 (15 December)).[2] CLD is not an expert in Colombian constitutional law and the substance of this amicus curiae brief does not enter into an analysis of it. Rather, we present here relevant international standards, in particular regarding the right to freedom of expression.

[16] We note that Colombia is a State Party to both the *International Covenant on Civil and Political Rights* (ICCPR)[3] and the *American Convention on Human Rights* (ACHR).[4] The main guarantees for freedom of expression in these two treaties are very similar, although the ACHR includes some additional protective language.[5] For purposes of this amicus curiae brief, the protections under both systems are largely treated as interchangeable except where a specific distinction is made.

[17] This amicus curiae brief presents not only standards from those two international law systems but also standards from other regional human rights systems, including the European and African systems. We note that the guarantee for freedom of expression found at Article 10 of the *European Convention on Human Rights* (ECHR)[6] is similar but somewhat weaker than the ACHR guarantee. As a result, protection under the ACHR can be assumed to be at least as strong as the protective principles established under the ECHR. The freedom of expression guarantee found at Article 9 of the *African Charter on*

Information – adopt a Joint Declaration each year with the support of CLD and Article 19. These Declarations are available at: https://www.law-democracy.org/live/legal-work/standard-setting/.

[2] Diario Oficial. Año LXXX. N. 25729. 29, Dicienbre, 1944. Pág. 7.

[3] UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976. Colombia ratified the ICCPR on 29 October 1969.

[4] 22 November 1969, in force 18 July 1978. Colombia ratified the ACHR on 28 May 1973.

[5] For example Article 13(2) ruling out most forms of prior censorship and Article 13(3) ruling out indirect means of restricting the right.

[6] 4 November 1950, in force 3 September 1953.

Human and Peoples' Rights[7] is different in nature and again weaker than the protection under the ACHR so, once again, protective principles under the former can largely be assumed to be included within the ambit of the latter.

[18] Article 55 provides for compensation to be paid by an individual whenever content they distribute "causes harm" to another person. We understand that this provision at least covers cases where harm is done to reputation (which we will refer to generically in this amicus curiae brief as "defamation" although we are aware that it goes by different names in different legal systems, such as libel, slander, insult, calumny, desacato laws and so on).

[19] This amicus curiae brief presents a number of protections that exist under international law for statements broadly falling within the scope of defamation, such as the defence of truth and what we will call the defence of "reasonable publication". We do not focus in any detail directly on whether Article 55 of Law 29 of 1944 includes these protections; rather, we note that, to the extent that it does not, it fails to conform to international guarantees of freedom of expression (i.e. it is in breach of these international guarantees). The aim of our brief is to highlight for the Colombian Constitutional Court the key international law protections that exist, so that it can assess properly whether and to what extent Article 55 may fail to include these protections and hence breach international standards, as well as the implications of this within the Colombian legal system.

4.0 Statement of Facts and Law

[20] This amicus curiae brief is submitted in support of the constitutional petition filed against Article 55 of Law 29 of 1944 by Ana Bejarano Ricaurte, Emmanuel Vargas Penagos and Vanessa López Ochoa via the procedure for direct constitutional challenges established by Article 241(4) of the Constitution of Colombia. It is a direct constitutional challenge which does not arise from a specific legal case. As such, apart from the legal matters involved in the case, there are no facts as such.

[21] Article 55 of the Law 29 of 1944 states as follows:

> **Spanish Original**
> Independientemente de la responsabilidad penal a que se refieren los artículos anteriores, todo el que por cualquier medio eficaz para divulgar el pensamiento, por medio de la imprenta, de la radiodifusión o del cinematógrafo, cause daño a otro estará obligado a indemnizarlo, salvo que demuestre que no incurrió en culpa".
>
> **Unofficial English Translation**
> Independently of the criminal responsibility referred to in the previous articles, everyone who by any effective means disseminates thought via the press, radio broadcasting or cinema and causes harm to another will be obliged to indemnify them, unless they prove that they acted without culpability.

[7] 27 June 1981, in force 21 October 1986.

[22] The petition argues that this article violates the Colombian Constitution in a number of ways, including by breaching its guarantees of freedom of expression and of the press. It also argues that Article 55 violates Article 13 of the ACHR and Article 19 of the ICCPR. Both of these international treaties are incorporated into Colombia's "bloque de constitucionalidad" (constitutional corpus) under domestic law, meaning that they represent constitutional norms despite not being explicitly mentioned in the body of constitutional rules.[8]

5.0 Freedom of Expression Under International Law

5.1 International Guarantees

[23] The right to freedom of expression is guaranteed in all of the key general human rights instruments. The *Universal Declaration of Human Rights* (UDHR),[9] adopted in 1948 as a United Nations General Assembly resolution, is generally viewed as the flagship international statement of human rights. The right to freedom of expression is protected in Article 19 of the UDHR as follows:

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

The UDHR is not, as a General Assembly resolution, formally binding on States. However, its preeminent status and the fact that States rarely repudiate its principles means that at least parts of it, including its guarantees of freedom of expression, have very likely acquired legal force as customary international law.[10]

[24] The UDHR was given binding legal force through the adoption by the United Nations of two treaties, the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[11] There are now 173 States Parties to the ICCPR,[12] and it guarantees the right to freedom of expression in very similar terms to the UDHR, also in Article 19, as follows:

> (1) Everyone shall have the right to freedom of opinion.

[8] As argued in Part 4.2 of the original constitutional challenge, dated 21 August 2020.
[9] United Nations General Assembly Resolution 217A (III), 10 December 1948.
[10] See, for example, D'Amato, A., "Human Rights as Part of Customary International Law: A Plea for Change of Paradigms" (2010, Faculty Working Papers, 88), *https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88*; and Meron, T., *Human Rights and Humanitarian Norms as Customary Law* (1989, Oxford, Clarendon Press).
[11] UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 3 January 1976.
[12] As of February 2021.

> (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.

[25] The ACHR, for its part, guarantees freedom of expression in the following terms:

> 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.
> …
> 3. 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.

5.2 Importance of Freedom of Expression

[26] Freedom of expression is one of the most cherished and celebrated of all human rights. One of the reasons for this is that it is important both in its own right and as a means for securing respect for all other rights and, indeed, democracy itself. The UN General Assembly made this clear in Resolution 59(I), adopted at its first session in 1946:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[13]

[27] Freedom of expression lies at the heart of democracy which depends on the ability of citizens to know about, debate and assess the positions of different parties and candidates, to hold them accountable and to participate in the conduct of public affairs. Achievement of these values is possible only where citizens can both access information and discuss openly. Authoritative international bodies have repeatedly stressed that freedom of expression is essential for democracy. To provide just one of these statements, from the Inter-American Court of Human Rights in the case of *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism:*

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a **conditio sine qua non** for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.[14]

5.3 Restrictions on Freedom of Expression

[28] Under international law, the right to freedom of expression is not absolute and the legal systems of every country contain restrictions on speech. The approach taken under

[13] Adopted 14 December 1946.
[14] Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.

international law is to start from a broad presumption that all expressive activity is protected, whatever form it may take, and then to allow States to limit or restrict it, but only under certain conditions. Those conditions are set out in Article 19(3) of the ICCPR:

> 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 and reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[29] An almost identical test, albeit adding a prohibition on prior censorship, is found at Articles 13(2) and (4) of the ACHR:

> 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.
> …
> 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

[30] These provisions impose a strict three-part test for assessing the legitimacy of any restriction on freedom of expression. This test was summarised by the UN Human Rights Committee, the official body of independent experts that is charged with overseeing the ICCPR, in its 2011 General Comment No. 34 as follows:

> [Article 19(3) of the ICCPR] lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.[15]

[31] The first part of the test, which is drawn directly from the language of Article 19(3), is that restrictions must be "provided by law". A key rationale for this is that only parliament, acting collectively pursuant to its formal law-making powers and procedures, should have the ability to decide what interests, in conformity with international law, warrant overriding freedom of expression. This rules out *ad hoc* or arbitrary action by elected officials or civil servants, no matter how senior, although it does not mean that parliament cannot delegate secondary law-making power (such as in the form of regulations under a law) to other actors.

[32] It is not enough simply for there to be a law; that law must meet certain quality control standards. It must, fairly obviously, be accessible, normally meaning that it should have

[15] General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, para. 22. The Committee adopts general comments from time to time to provide a synopsis of its jurisprudence and thinking in relation to different aspects of rights. General Comment No. 34 is the most recent one on freedom of expression.

been published in the official gazette or whatever official publication serves to bring notice of laws to the general public.

[33] The law must also not be vague. When a restriction on freedom of expression is vague, it may be subject to a range of different interpretations, which may or may not reflect the proper intent of parliament in adopting the law. Put differently, vague rules effectively grant discretion to the authorities responsible for applying them – whether this is a regulatory body, the police or an administrator – to decide what they mean. This clearly undercuts the very idea that it is parliament which should decide on restrictions. The same is true where a law is clear but allocates broad discretion to the authorities in terms of how it is to be applied. An example of this might be a law which allowed the police to stop a demonstration if they deemed it not to be in the public interest.

[34] Vague provisions may also be applied in an inconsistent or unclear way. This fails to give individuals proper notice of what is and is not allowed, another key objective of the "provided by law" part of the test. In this case, especially where sanctions for breach of the rule are significant, individuals are likely to steer well clear of the potential zone of application of the rule to avoid any possibility of being censured, leading to what has been called a chilling effect on freedom of expression. In General Comment No. 34, the Human Rights Committee referred to the problem both of vagueness and granting too much discretion:

> For the purposes of [Article 19(3) of the ICCPR], a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.[16]

[35] This part of the test does not necessarily rule out subordinate legislation (such as rules or regulations under a statute) as well as other delegated powers to make laws (such as rules adopted by a regulator or even judge-made law which can be understood as being derived from the constitution in common law countries), as long as these powers derive from a primary legal rule (i.e. a law or the constitution). The European Court of Human Rights summed up its jurisprudence on this issue in *Sanoma Uitgevers B.V. v. the Netherlands*:

> [A]s regards the words "in accordance with the law" and "prescribed by law" which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both "written law", encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. "Law" must be understood to include both statutory law and judge-made "law". In sum, the "law" is the provision in force as the competent courts have interpreted it.[17]

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[16] *Ibid.*, para. 25.
[17] 14 September 2010, Application No. 38224/03, para. 83.

[36] The second part of the test is that the restriction must serve or protect one of the grounds or aims listed in Article 19(3). That article makes it quite clear that the list is exclusive and the UN Human Rights Committee has reinforced that point:

> Restrictions are not allowed on grounds not specified in [Article 19(3) of the ICCPR], even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[18]

[37] Restrictions which do not serve one of the listed grounds are not legitimate. At the same time, it may be noted that the list of grounds – namely "respect of the rights and reputations of others" or "the protection of national security or of public order (ordre public), or of public health or morals" – is very broad. Furthermore, courts have tended to interpret it widely. For example, the European Court of Human Rights has interpreted the scope of "public order" quite broadly:

> The concept of 'order' refers not only to public order or 'ordre public' … [I]t also covers the order that must prevail within the confines of a specific special group. This is so, for example, when, as in the case of armed forces, disorder in that group can have repercussions on order in society as a whole.[19]

[38] In practice, international courts rarely decide freedom of expression cases on the basis that the underlying rules did not serve a legitimate ground.

[39] The third part of the test is that the restriction must be "necessary" to secure the ground or interest. Most international cases are decided on the basis of this part of the test, which is extremely complex. A few key features can be drawn from these statements (see below), namely:

- restrictions should not be overbroad in the sense that they should not affect speech beyond that which is harmful to the relevant ground or interest;
- restrictions should be rationally connected to the ground they aim to protect in the sense of having been carefully designed to protect it and representing the option for protecting it that impairs freedom of expression the least; and
- restrictions should be proportionate in the sense that the benefits outweigh the harm to freedom of expression.

[40] Some key statements by international bodies on the necessity part of the test are as follows:

> **The UN Human Rights Committee**
> Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be

[18] Note 15, para. 22. See also *Mukong v. Cameroon*, 21 July 1994, Communication No.458/1991, para.9.7 (UN Human Rights Committee).

[19] *Engel and others v. the Netherlands*, 8 June 1976, Application Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, para. 98.

protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law". The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[20]

Inter-American Court of Human Rights:
Lastly, the restrictions imposed must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest. If there are various options to achieve this objective, that which least restricts the right protected must be selected. In other words, the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right.[21]

European Court of Human Rights:
In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were 'relevant and sufficient' and whether the measure taken was ‘proportionate to the legitimate aims pursued’.... In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10.[22]

[41] It is clear that, under international law, the necessity test, and in particular the proportionality element of that, also applies to sanctions so that an unduly heavy sanction can render a restriction illegitimate even if some sanction for the speech in question is appropriate. In the case of *Tolstoy Miloslavsky v. the United Kingdom*, before the European Court of Human Rights, the applicant had been ordered to pay £1,500,000 in damages for having published a very seriously defamatory statement. The Court accepted that the statement warranted a harsh sanction. However, the damages in this case were three times as large as the highest previous award in the history of defamation law in the United Kingdom and vastly more than one could expect to get even for the most serious bodily injury caused by negligence. The Court held that sanctions, along with other aspects of a restriction, had to bear a “reasonable relationship of proportionality to the injury to reputation suffered”. The Court held that this standard was not met in that case due both to the enormous damages award itself and the fact that the British legal system had no effective means to limit the size of damage awards.[23]

6.0 International Limitations on and Defences to Defamation

[20] General Comment No. 34, note 15, paras. 34 and 35.
[21] *Claude Reyes and Others v. Chile,* 19 September 2006, Series C, No. 151, para. 91.
[22] *Cumpănă and Mazăre v. Romania*, 17 December 2004, Application No. 33348/96, para. 90.
[23] *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 49.

[42] This part of the amicus curiae brief sets out various limitations on and defences to a claim of defamation which have been established under international law. International courts have almost never held that a defamation provision fails the "provided by law" or first part of the test while defamation laws almost automatically serve the legitimate aim of protecting reputations, explicitly recognised in Article 19(3) of the ICCPR and Article 13(2) of the ACHR. As a result, the standards set out below are essentially based on the third part of the three-part test for restrictions on freedom of expression, namely that a restriction must be "necessary".

6.1 Defence of Truth

[43] This section reviews the importance of truth as a defence in all defamation cases, whether civil or criminal. Defamation provisions that penalise true statements and do not offer truth as a defence violate the right to freedom of expression as protected under international human rights law and incorporated into Colombian law via the "bloque de constitucionalidad" (constitutional corpus).

[44] In addition, this section discusses how, in cases involving public figures or matters of public concern, placing the burden of proving truth on the defendant may also violate his or her freedom of expression. In many jurisdictions, the burden of proving the truthfulness of statements in defamation cases normally lies with the defendant. Because the veracity of the statements is often a key point of issue in defamation cases, this effectively places the primary evidentiary burden on the defendant. International human rights standards increasingly recognise that this may inappropriately constrain the right to freedom of expression.[24]

[45] International human rights law and standards make it very clear that defamation laws should either only penalise false statements or that truth should always be available as a defence. If a statement is accurate, any reputational harm arises from the actions of the person the statement is about and not the statement itself. Put differently, you cannot defend a reputation you do not deserve. For example, if someone is in fact a liar, individuals have the right to point that fact out to others. As such, restricting speech about someone's actions is not necessary to protect the legitimate reputation of that person, even though reputation is recognised as a legitimate ground, subject to the necessity test, for restricting speech. Accordingly, laws which penalise true statements do not meet the necessity part of the three-part test for restrictions on freedom of expression.

[46] In addition, there is a high public interest in the truth which outweighs any reputational concerns at stake.

[24] It should be stressed that these issues surrounding the burden of proof are unique to defamation cases, and arise due to the traditional approach of allocating the burden of showing truth to civil defendants. The analysis in this section is not relevant to other forms of civil liability that may apply to journalists in the course of their work.

[47] Numerous international authorities have affirmed this principle. The UN Human Rights Committee has affirmed that a defence of truth should always be available in defamation cases in its General Comment No. 34, stating: "All such laws, in particular penal defamation laws, should include such defences as the defence of truth".[25] The special international mandates on freedom of expression stated in their 2017 Joint Declaration: "Civil law rules on liability for false and defamatory statements are legitimate only if defendants are given a full opportunity and fail to prove the truth of those statements and also benefit from other defences, such as fair comment."[26] And in the *Declaration of Principles on Freedom of Expression and Access to Information in Africa*, the African Commission on Human and Peoples' Rights stated, in relation to defamation laws: "No one should be liable for true statements".[27]

[48] The UN Human Rights Committee, Inter-American Court of Human Rights and the European Court of Human Rights have all decided far more individual cases involving criminal than civil defamation. However, their jurisprudence also strongly underscores the importance of protecting speech that is true, even if it harms reputation. The Human Rights Committee, for example, has noted that the lack of a truth defence was an "aggravating factor" in finding that a conviction on defamation charges was not necessary and proportionate under the third part of the test for restrictions on freedom of expression.[28] The Inter-American Court of Human Rights, in considering criminal defamation charges brought by a public figure, explained that "a true statement regarding a fact in a case involving a public official in relation to a matter of public interest is an expression protected under the American Convention", distinguishing such statements from those where an inaccurate statement damages a person's honour.[29]

[49] Similarly, the European Court of Human Rights, in *Columbani and Others v. France*, found a violation of the right to freedom of expression in a case where no defence of truth was available. The defendant had been fined under a French law prohibiting defamation of heads of State; unlike other French defamation laws, no defence of truth was available under that provision. The Court found that, without this defence, the restriction could not meet the necessity requirement of the test for restricting freedom of expression, as the denial of the defence "was a measure that went beyond what was required to protect a person's reputation"[30]

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[25] Note 15, para. 47.

[26] Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, 3 March 2017, para. 2(b), https://www.law-democracy.org/live/legal-work/standard-setting/.

[27] Adopted by the African Commission on Human and People's Rights on 10 November 2019, Principle 21(1), https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf.

[28] *Rafael Marques de Morais v Angola*, 18 April 2005, Communication No. 1128/2002, para. 6.8.

[29] *Tristán Donoso v. Panamá*, 27 January 2009, Series C, No. 193, para. 124.

[30] *Colombani and Ors v France*, 25 June 2002, Application No. 51279/99, para. 66. See also *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para. 48 (European Court of Human Rights), stating that the Court "attaches decisive importance" to the fact that the defendant was not allowed to present evidence of the truth of the alleged defamatory statements in a criminal defamation case.

[50] Traditionally in civil defamation cases, most jurisdictions place the burden of showing that a statement was made which harmed reputation on the plaintiff but then the burden shifts to the defendant to establish any defences, including truth. Increasingly, however, international standards and human rights bodies have argued that in the context of cases involving matters of public concern, this inappropriately constrains freedom of expression.

[51] This reflects a well-established principle of human rights law of the importance of protecting speech which contributes to public debate about matters of public concern. For example, the Human Rights Committee, in General Comment No. 34, notes that in relation to public debate concerning public figures, "the value placed by the Covenant upon uninhibited expression is particularly high."[31] The Inter-American Court of Human Rights has also said that when "statements relate to issues of public interest, the judge must evaluate the need to limit freedom of expression with special care".[32] As regards defamation in particular, "a public interest in the subject matter of the criticism should be recognized as a defence", in order to ensure a proper proportionality analysis as between the reputational and freedom of expression interests at stake.[33]

[52] The special international mandates on freedom of expression have been particularly vocal in calling for placing the burden of showing truth on the plaintiff where the public interest is involved. For example, in their 2000 Joint Declaration, they noted that "the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern".[34] The UN Special Rapporteur for Freedom of Expression has also affirmed that "where truth is an issue, the burden of proof lies with the plaintiff".[35] Prominent civil society statements on international best practices and standards on defamation also maintain this principle. For example, ARTICLE 19's 2000 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, states: "In cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory."[36]

[53] At the national level, these standards are reflected is the United States Supreme Court case of *New York Times v. Sullivan* and subsequent jurisprudence. The case established a standard of "actual malice" for defamation cases involving public figures, defined to

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[31] General Comment No. 34, note 15, para. 38.

[32] *Lagos del Campo v. Peru*, 31 August 2017, Series C, No. 340, para. 109 (quoting *Memolí v. Argentina*, 22 August 23, Series C, No. 265, para. 145 (Inter-American Court of Human Rights).

[33] General Comment No. 34, note 15, para. 47.

[34] 2000 Joint Declaration on Current Challenges to Media Freedom, 30 November 2000, https://www.osce.org/files/f/documents/c/b/40190.pdf.

[35] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mission to Italy from 11 to 18 November 2013, 29 April 2014, para. 23, https://undocs.org/A/HRC/26/30/Add.3. See also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 13 February 2001, para. 47 (urging governments to "Ensure that the onus of proof is on those claiming to have been defamed and not on the defendant(s)), https://undocs.org/en/E/CN.4/2001/64.

[36] (London: Article 19, July 2000), Principle 7(b), https://www.article19.org/wp-content/uploads/2018/02/defining-defamation.pdf [footnote omitted].

mean that the plaintiff must show that the speaker knew the statement was false or acted with reckless disregard as to whether it was false.[37] The adoption of this standard altered the historical rule, placing the primary burden on the plaintiff to demonstrate that the defendant knew that the statement was false (or acted with reckless disregard for falsity), rather than on the defendant to show truth. In subsequent United States jurisprudence, this shift was formalised, and the burden of proving falsity explicitly placed on the plaintiff in cases involving speech on matters of public concern.[38]

[54] A variation of the "actual malice" standard has been embraced by the Inter-American Commission of Human Rights through Principle 10 of the *Inter-American Declaration of Principles on Freedom of Expression*[39] and by different OAS Special Rapporteurs on Freedom of Expression (see below under Reasonable Publication).

[55] In its submission to the Inter-American Court of Human Rights in the *Herrera-Ulloa v. Costa Rica* case, the Inter-American Commission argued not only for an actual malice standard but also expressly linked that standard to a shifting of the burden of truth away from the defendant. The case involved civil and criminal liability for a journalist who had published articles based on foreign media reporting containing corruption allegations against a Costa Rican consul.[40] In arguing for an application of the actual malice standard to and reversal of the burden of truth in civil defamation cases, the Commission noted:

> **Spanish Original**
> La Comisión entiende que las acciones judiciales por difamación, calumnias e injurias, interpuestas por funcionarios públicos, no deben tramitarse en la vía penal sino en la civil, aplicando el estándar, de la "real malicia". Bajo dicho estándar se revierte la carga de la prueba, recayendo en el supuesto afectado el deber de demostrar que el comunicador tuvo intención de infligir daño o actuó con pleno conocimiento de que se estaban difundiendo noticias falsas. De conformidad, al mencionado estándar, no sería el periodista Herrera Ulloa a quien le corresponda probar la veracidad de sus afirmaciones, sino que sería el cónsul honorario costarricense el que tendría la responsabilidad, de demostrar que las mismas eran falsas y que, además, Ulloa tenía pleno conocimiento de la falsedad y actuó con malicia al difundirlas.[41]
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> **Unofficial English Translation**
> The Commission understands that legal actions for defamation, calumny or injury brought by public officials should be civil, not criminal, matters, applying the standard of actual malice. Under this standard the burden of proof reverses, falling on the alleged aggrieved party who must bear the burden of proving that the communicator intended to inflict harm or acted with full knowledge that he was spreading false information. In conformity with the afore-mentioned standard, it would not be the journalist Herrera Ulloa who must prove the truth of his statements,

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[37] *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), para. 40 (Supreme Court of the United States).
[38] See, for example, *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) (Supreme Court of the United States).
[39] Adopted by the Inter-American Commission on Human Rights on 19 October 2000, https://www.cidh.oas.org/declaration.htm.
[40] The Court itself declined to address the actual malice issue and focused instead on the violation of Article 13 caused by the criminal penalties in the case. It also did not directly address the issue of the civil liability.
[41] Inter-American Commission on Human Rights, Application filed with the Inter-American Court of Human Rights against the Republic of Costa Rica, Case No. 12.367, Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser, para. 90, https://www.corteidh.or.cr/docs/casos/herrera/demanda.PDF (internal footnotes omitted). *See also* the summary of this argument by the Inter-American Court of Human Rights, *Herrera Ulloa v. Costa Rica,* 2 July 2004, Series C, No. 107, para. 101(4)(c), https://corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf.

> but rather it would be the Costa Rican consul who has the responsibility of showing that the same statements were false and, furthermore, that Ulloa had full knowledge of their falsity and acted with malice to disseminate them.

[56] As reflected in this quote, the actual malice standard is closely linked to where the burden of showing truth lies. That standard places the burden of proof of malice, often the key issue in the case instead of the question of truth, on the plaintiff. Thus, the actual malice approach, even where it is not accompanied by an explicit shift of the burden of proof regarding truth, eases the burden on the defendant to show truth and also reduces the likelihood of harassing lawsuits. Thus an actual malice standard, whether or not it is accompanied by a reversal of the burden of truth, is likely to offer significantly greater protection for speech on public interest matters than the status quo in many countries.

[57] The Inter-American Court of Human Rights itself has provided little guidance on civil defamation standards in its jurisprudence. However, it has noted that the fear of a civil penalty can be "equally or more intimidating and inhibiting for the exercise of freedom of expression than a criminal punishment", especially given the potential impacts on the personal and family life of someone who makes statements about a public official.[42]

[58] However, the Inter-American Court did establish an important principle in Herrera Ulloa. It started by affirming in general the importance of speech about public figures, noting that, "statements concerning public officials and other individuals who exercise functions of a public nature should be accorded, in the terms of Article 13(2) of the Convention, a certain latitude in the broad debate on matters of public interest" and a "different threshold of protection" should be applied to public figures.[43] Importantly, it also held that requiring a journalist to prove the truth of statements which had originally been made by third-parties (in that case, European newspapers) was "an excessive limitation on free expression" and restricted expression "in a manner incompatible with Article 13 … as it has a deterrent, chilling and inhibiting effect on all those who practice journalism", inhibiting debate on public interest issues.[44]

[59] The European Court of Human Rights has also come to the same conclusion. In a case related to speech about police brutality, the Court indicated that it was not appropriate to require proof of truth when a journalist is reporting on statements made by a third party: "[T]he applicant was essentially reporting what was being said by others about police brutality …. In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task."[45]

[60] Otherwise, in its decisions in civil defamation cases, the European Court of Human Rights has indicated that placing the burden of proving veracity on the defendant does not necessarily violate the protection for freedom of expression on Article 10 of the European Convention on Human Rights.[46] However, it has indicated that where the defendant bears

[42] *Tristán Donoso v. Panamá*, 27 January 2009, Series C, No. 193, para. 129.
[43] Note 41, paras. 128-29.
[44] *Ibid.*, paras. 132-133.
[45] *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 65.
[46] See, for example, *McVicar v. the United Kingdom,* 7 May 2002, Application No. 46311/99, para. 87.

the burden of proving truth this may, when combined with other considerations, result in a violation of Article 10.[47] Thus, in the case of *Steel and Morris v. the United Kingdom*, the defendants had been found liable for defaming MacDonald's, and obviously very well-resourced plaintiff. The European Court found that the defendants should have been provided with legal aid so as to be able to discharge the burden of proof that was on them to prove truth. Otherwise, there was an "equality of arms" problem which violated not only the right to a fair trial but also the right to freedom of expression.[48]

[61] In summary, at a minimum, civil defamation laws which punish true statements breach international human rights guarantees of freedom of expression, including Article 19 of the ICCPR and Article 13 of the ACHR. In addition, where such laws place the burden of proof of truth on the plaintiff, they risk violating the right to freedom of expression in cases which involve statements about matters of public concern. To the extent that Article 55 of Law 29 of 1944 does not conform to these standards, it is not in line with international human rights law.

6.2 Protection for Opinions

[62] International standards also strongly protect opinions, as distinguished from statements of fact, in the context of liability for defamation. This is part of the broader principle that that the right to freedom of expression provides absolute protection to opinions, as indicated in Article 19(1) of the ICCPR: "Everyone shall have the right to hold opinions without interference."[49] The ability to express critical or dissenting opinions or views on matters of public importance is considered to be central to democracy and many other important social values underpinned by freedom of expression. The special international mandates on freedom of expression have accordingly stated that "no one should be liable under defamation law for the expression of an opinion".[50] Similarly, the Human Rights Committee states that defamation laws "should not be applied with regard to those forms of expression that are not, by their nature, subject to verification."[51]

[63] Although, as previously noted, the Inter-American Court of Human Rights has primarily dealt with criminal defamation cases, in those cases it has made clear distinctions between statements of opinion and statements of fact.[52] It has repeatedly affirmed the protection of freedom of expression "in respect of opinions or information on matters in which society

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[47] (European Court of Human Rights)

[48] *Steel and Morris v. the United Kingdom*, 15 May 2005, Application No. 6846/01, paras. 71-72.

[49] See also General Comment No. 34, note 15, para. 9, stating that freedom of expression protects: "All forms of opinion…including opinions of a political, scientific, historic, moral or religious nature.

[50] 2000 Joint Declaration, note 34.

[51] General Comment No. 34, note 15, para. 47.

[52] *Tristán Donoso v. Panamá*, note 29, para. 124, noting: "While opinions cannot be declared true or false, statements of fact can."

has a legitimate interest to keep itself informed".[53] As the Inter-American Court explained in *Kimel v. Argentina:*

> The opinions expressed by Mr. Kimel 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. In principle, truthfulness or falseness may only be established in respect of facts. Hence, the evidence regarding value judgments may not be examined according to truthfulness requirements.[54]

[64] The European Court of Human Rights has also provided strong protection to value judgments, as opposed to statement of facts, when it comes to defamation. Like the Inter-American Court of Human Rights, this is partly informed by the impossibility of proving truth in relation to opinions. As the Court noted in *Dichand and Ors v. Austria*, citing other prominent cases on the subject:

> In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10.[55]

[65] This protection for opinion extends to cover a wide degree of journalistic licence, even where the statements may be offensive or shocking. In the case of *De Haes and Gijsels v. Belgium*, the European Court considered the case of an editor and journalist who had published articles criticising judges for awarding child custody to a man who considered himself to be a Nazi and had been accused of incest and child rape. The articles implied the judges were sympathetic to the man's Nazi views. The judges successfully brought a civil defamation claim. The European Court noted that the allegations amounted to an opinion and that journalist freedom "covers possible recourse to a degree of exaggeration or even provocation".[56] In this case, given the serious nature of the allegations at stake, the comments could be considered proportionate despite the fact that they were very critical in tone. The European Court accordingly found a violation of the editor and journalist's right to freedom of expression.[57]

6.3 Reasonable Publication

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[53] See, for example, *Álvarez Ramos v. Venezuela*, 30 August 2019, para. 116, citing *Tristán Donoso v. Panamá*, note 29*,* para. 121; and *Mémoli v. Argentina*, 22 August 2013, Series C, No. 265, para. 146 (Inter-American Court of Human Rights).

[54] *Kimel v. Argentina*, 2 May 2008, Series C, No. 177, para. 93.

[55] *Dichand and Ors v. Austria*, 26 February 2002, Application No. 29271/95, para. 42, citing *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 46 (European Court of Human Rights) and *Prager and Obershlick v. Austria*, 16 April 1995, Application No. 15974/90, para. 63 (European Court of Human Rights). See also *Dalban v. Romania*, 28 September 1999, Application No. 28114/95, para. 49 (European Court of Human Rights) (a criminal defamation case, but stating that it would be "unacceptable for a journalist to be barred from expressing critical value judgments unless he or she could prove their truth") and *Flux v. Moldova*, 23 October 2007, Application No. 28700/03 (European Court of Human Rights).

[56] *De Haes and Gijsels v. Belgium*, 24 February 1997, Application No. 19983/92, paras. 46-49.

[57] *Ibid.*, paras. 48-49.

[66] This section of the brief discusses a defence which will be referred to generally as the "reasonable publication" defence, noting that different courts and commentators refer to it by different names or even without giving it a name. The essence of the defence is that authors should be protected against liability in defamation law, even if they disseminated incorrect statements or were unable to prove the truth of their statements, if the statements were on a matter of public concern and, taking into account all of the circumstances, it was reasonable to disseminate the statement.

[67] It has been widely recognised that defamation laws which do not allow for any errors in relation to statements of fact, even if the author has acted in accordance with prevailing professional standards, cannot be justified. A strict liability rule of this nature is particularly untenable for media outlets, which are under a duty to satisfy the public's right to know and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably (professionally), while allowing plaintiffs to obtain damages from those who have not.

[68] The European Court of Human Rights had already noted the particular pressures on the media to disseminate information in a timely fashion long before the advent of modern digital communications, which have radically increased this sort of pressure. Thus, in discussing the need for extreme caution regarding prior restraints (prior censorship), particularly in relation to the media, the Court stated: "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest".[58]

[69] Similarly, national courts have recognised that a strict liability rule for inaccurate statements, even if defamatory, does not strike an appropriate balance between reputations and free speech. For example, the Judicial Committee of the Privy Council[59] has noted the chilling effect of a rule which penalises any statement which is inaccurate:

> [I]t was submitted that it was unobjectionable to penalise false statements made without taking due care to verify their accuracy.... [I]t would on any view be a grave impediment to the freedom of the press if those who print, or a fortiori those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based.[60]

[70] In *National Media Ltd v. Bogoshi*, the South African Supreme Court of Appeal noted in evocative terms the unacceptability of a strict liability rule for inaccurate statements,

[58] *Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88, para. 60.
[59] This is the court of final appeal for UK overseas territories and Crown dependencies. It also serves Commonwealth countries which have retained the appeal to Her Majesty in Council or, in the case of republics, to the Judicial Committee. Five judges normally sit to hear Commonwealth appeals and three for other matters, and the judges are usually drawn from the UK Supreme Court. See https://www.jcpc.uk.
[60] *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312 (PC), p. 318.

noting, “nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error.”[61]

[71] Similarly, the United States Supreme Court, in *New York Times v. Sullivan*, noted:

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far wider of the unlawful zone.”[62]

[72] Based in part on these considerations, but also more generally on the importance of protecting open public debate about matters of public concern, the European Court of Human Rights has held that the imposition of liability for otherwise defamatory factual statements about matters of public concern which had not been proven to be true was a breach of the right to freedom of expression.

[73] For example, the case of *Tromsø and Stensås v. Norway* involved articles containing some serious allegations regarding seal hunting, including of potentially illegal behaviour. The applicants had relied in part on an official but unpublished report and in part on other sources and they had failed to prove the truth or accuracy of some important allegations before the national courts. The European Court of Human Rights called for great care to be taken when limiting public debate about matters of public concern, stating:

> The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.[63]

[74] The Court went on to indicate that freedom of expression was not an absolute right, which flowed from the recognition that the exercise of the right was subject to “duties and responsibilities”. This meant that journalists needed to act in good faith and professionally:

> By reason of the “duties and responsibilities” inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.[64]

The Court accepted that some of the statements were, in fact, inaccurate and also that they contained fairly serious allegations. In considering whether there was any reason to dispense with the ordinary obligation to prove the truth of one’s statements, the Court held that there was “no reason to doubt that the newspaper acted in good faith in this respect” while also recognising that it had behaved in a professional manner in its reporting. Ultimately, the Court stated:

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[61] 1998 (4) SA 1196, p. 1210.
[62] Note 37, p. 279.
[63] *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 64.
[64] *Ibid.*, para. 65.

> On the facts of the present case, the Court cannot find that the crew members' undoubted interest in protecting their reputation was sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest.[65]

[75] A number of other bodies and authoritative sources support the need for something along the lines of a reasonableness defence. For example, in General Comment No. 34, the UN Human Rights Committee stated:

> 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.[66]

Here, the focus is on good faith or the absence of malice rather than reasonableness or professionalism, *per se*.

[76] In their 2000 Joint Declaration, which focused, among other things, on defamation, the special international mandates on freedom of expression stated:

> At a minimum, defamation laws should comply with the following standards:
> …
> - it should be a defence, in relation to a statement on a matter of public concern, to show that publication was reasonable in all the circumstances.[67]

This establishes a broad reasonableness defence which protects any statement which it was reasonable to make in all of the circumstances. What qualifies as reasonable would presumably depend on a number of factors, with considerations such as good faith and acting in accordance with professional ethics (for journalists) likely to be relied upon.

[77] Similarly, the 2019 African Declaration states:

> States shall ensure that laws relating to defamation conform with the following standards:
> a. No one shall be found liable for true statements, expressions of opinions or statements which are reasonable to make in the circumstances.[68]

Here again we see a broad statement of the need for a reasonableness defence.

[78] Principle 9 of Article 19's publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, provides for a 'reasonableness' defence as follows:

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

[65] *Ibid.*, paras. 72 and 73.
[66] Note 15, para. 47.
[67] Note 34.
[68] Note 27, Principle 21(1).

> account the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters.[69]

The Commentary to this Principle notes: "For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test." This adds a bit more detail to the substance of what such a defence should entail.

[79] National courts and legislators around the world, in recognition of the above, have developed various additional defences to supplement the proof of truth, many of which bear similar characteristics to what we are calling here the reasonableness defence, although these do vary somewhat in nature. All of these defences apply to statements of fact, even where those statements are false (or not proven to be true) and defamatory. Their effect is to absolve the defendant of any liability in defamation for the statement.

[80] In *New York Times Co. v. Sullivan*, noted above, decided by the U.S. Supreme Court, the plaintiff, a police commissioner, alleged that an advertisement in the New York Times accusing the police of excessive violence, which contained some factual errors, damaged his reputation. Given that "erroneous statement is inevitable in free debate",[70] the Court ruled that a public official could only recover damages if he or she could prove "the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard for whether it was false or not."[71] The fact that the plaintiff may have suffered "injury to official reputation" did not justify "repressing speech that would otherwise be free."[72] This case thus replaces the 'truth' standard with one of "actual malice" (and, as noted above, also reverses the burden of proof in such cases). Although Sullivan is restricted in application to public officials, subsequent cases have extended it to candidates for public office[73] and public figures who do not hold official or government positions.[74]

[81] As noted above, a variation of the "actual malice" standard has also been embraced by the Inter-American Commission of Human Rights, for example in Principle 10 of the *Inter-American Declaration of Principles on Freedom of Expression*. That Principle indicates that the following standards should apply in defamation cases involving public officials:

> In addition, in these 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 efforts to determine the truth or falsity of such news.[75]

[82] Different OAS Special Rapporteurs on Freedom of Expression have consistently called for a standard of actual malice to be applied in their annual reports, recommending that Member States: "Promote the inclusion of inter-American standards in civil legislation so

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[69] Note 36.
[70] Note 37, p. 271.
[71] *Ibid.*, pp. 279-80.
[72] *Ibid.*, p. 272.
[73] See, for example *Monitor Patriot Co. v. Roy* (1971) 401 US 265.
[74] See, for example, *Curtis Publishing Co. v. Butts* (1967) 388 US 130.
[75] Note 39.

that civil proceedings against individuals who have made statements about public officials or about matters of public interest apply the standard of actual malice, in accordance with principle 10 of the *Inter-American Declaration of Principles on Freedom of Expression*, and are proportionate and reasonable."[76] In a commentary on the *Inter-American Declaration*, the then-Special Rapporteur articulated why this higher standard is appropriate in cases relating to speech on matters of public interest:

> Thorough and effective oversight of public management as a tool to guarantee the existence of a democratic society requires a different type of protection for those responsible for public affairs than that accorded an individual not involved in matters of public interest. In this regard, the Inter-American Commission has stated that the application of laws protecting the honor of public officials acting in an official capacity unjustifiably grants them a right to protection that other members of society lack. This distinction indirectly inverts the fundamental principle of a democratic system in which the government is subject to controls, including public scrutiny, to prevent or check abuses of its coercive power.
>
> Moreover, the fact that public officials and public figures generally have easy access to the mass media allowing them to respond to attacks on their honor and personal reputation, is also a reason to provide for a lower level of legal protection of their honor.[77] [footnotes omitted]

[83] In *Rajagopal& Anor v. State of Tamil Nadu*, decided by the Indian Supreme Court, a key issue was whether public officials could prevent the publication of a biography, written by a prisoner but sought to be published by a weekly magazine, which they claimed defamed them. The Court discussed a number of leading authorities and concluded that even true statements about officials would not sustain a defamation claim unless they were published recklessly:

> In the case of public officials ... the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official established that the publication was made (by the defendant) with reckless disregard for truth.[78]

[84] In *Lange v. Australian Broadcasting Corporation*, the Australian High Court adapted the traditional common law defence of qualified privilege based on an implied constitutional guarantee of freedom of political communication.[79] This defence did not traditionally apply to statements which were disseminated to the general public and so was not available to media outlets. However, the Court held that everyone "has an interest in

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[76] See, for example, Annual Report of the Office of the Special Rapporteur for Freedom of Expression, 24 February 2020, p. 261, http://www.oas.org/en/iachr/expression/reports/ENGIA2019.pdf; Annual Report of the Office of the Special Rapporteur for Freedom of Expression, 31 December 2015, p. 379, http://www.oas.org/en/iachr/expression/docs/reports/annual/AnnualReport2015RELE.pdf; and Annual Report of the Office of the Special Rapporteur for Freedom of Expression, 31 December 2013, p. 561, http://www.oas.org/en/iachr/expression/docs/reports/annual/2014_04_22_%20IA_2013_ENG%20_FINALweb.pdf.

[77] Office of the Special Rapporteur for Freedom of Expression of the OAS, *Background and Interpretation of the Declaration of Principles on Freedom of Expression*, para. 44, http://www.oas.org/en/iachr/expression/showarticle.asp?artID=132&lID=1.

[78] *Rajagopal & Anor v. State of Tamil Nadu* [1994] 6 SCC 632 (SC), p. 650.

[79] The Australian Constitution does not include a bill of rights but the High Court, the highest court in Australia, has found a right to political communication to be implicit in the democratic system of government established by the Constitution.

disseminating and receiving information, opinions and arguments concerning government and political matters.... The duty to disseminate such information is simply the correlative of the interest in receiving it."[80] As a result, such communications were covered by the defence of qualified privilege. However, unlike traditional qualified privilege, which could be overcome only by malice, due to the large audience in that case, the Court held that the standard was one "of reasonableness ... which goes beyond mere honesty".[81] Furthermore, in Australia, the onus is on the defendant to prove reasonableness, because the information required to do so is "peculiarly within the knowledge of the defendant."[82]

[85] In *Lange v. Atkinson*,[83] the New Zealand Court of Appeal also relied on qualified privilege to protect certain categories of false and defamatory statements. The wider public had an interest in receiving information concerning the functioning of government, so statements conveying such information, even if published widely, were protected by qualified privilege. The Court rejected the Australian standard of reasonableness, holding that the traditional approach, whereby the privilege could only be defeated by malice, was more appropriate. In addition, the Court held that the plaintiff bears the onus of proving malice.

[86] The United Kingdom House of Lords adopted an analogous but slightly different approach in its 1999 decision in *Reynolds v. Times Newspapers*. The Lords rejected the idea of a general category of privilege covering statements of political information, as well as the idea of a defence of reasonable care in relation to political statements. Instead, the court elaborated 10 factors to be taken into account in determining whether, in all the circumstances, the privilege ought to be extended, including the seriousness of the allegation, the source of the information and steps taken to verify its accuracy, the urgency of the matter, whether comment was sought from the plaintiff and the tone of the article.[84]

[87] Recognition of the undue harshness of a strict liability rule in relation to truth is not restricted to common law jurisdictions. A reasonableness defence for defamation has been recognised in South Africa, which has a Roman-Dutch system of law.[85] In Germany, the Federal Constitutional Court has held that while statements must not be made in a thoughtless manner, the requirement of truth must not be so stringent as to deter persons from making statements for fear of prosecution.[86] In addition, where the public interest is involved, there is a presumption in favour of freedom of expression.[87] Similarly, in the Netherlands, the press is not required to provide conclusive evidence of the correct factual

[80] (1997) 71 ALJR 818, pp. 832-3.
[81] *Ibid.*
[82] *Theophanous v. Herald & Weekly Times Ltd* (1994) 124 ALR 1, p. 24 (High Court).
[83] [2000] 1 NZLR 257.
[84] *Reynolds v. Times Newspapers Ltd and others*, [1999] 4 All ER 609, p. 625.
[85] See *National Media Ltd v. Bogoshi*, note 61.
[86] BVerfGE 54, 208 – Böll (54 FCC 208 (1980) (*Heinrich Böll* case), 3 June 1980 (Federal Constitutional Court of Germany).
[87] BVerfGE 7, 198 – Lüth (7 FCC 198 (1958) (*Lueth* case)), 15 January 1958 (Federal Constitutional Court of Germany).

basis of its reporting.[88] Section 261(3) of the Criminal Code provides that journalists do not need to prove the truth of their accusations as long as they acted in good faith and in the public interest.[89] In Hungary as well, the simple fact that an assertion is untrue is not sufficient, at least where public officials are involved, to sustain an action in defamation.[90]

[88] These rules vary in important respects. Some place the onus of proof on the plaintiff while some place it on the defendant. Some are based on a standard of malice, or reckless disregard for the truth, while others require the defendant to have acted reasonably. They all, however, provide some form of protection against liability for defendants even where the impugned statements are false and defamatory.

[89] The values that underpin these decisions rest on the ideas, at least in relation to matters of public concern, that open debate must be promoted in the interest of the public's right to know and that open debate is the best way for the truth to emerge. If a journalist cannot publish critical comments without being sure that he or she can prove that they are true, to the satisfaction of a court, taking into account the rules of evidence and the fact that he or she may have relied on confidential sources, open debate is gravely fettered and many true allegations will be suppressed.

[90] Furthermore, even where the allegations are false, the promotion of open debate is in many cases the best way for this to be exposed and for the target of those allegations to clear his or her name. Often, the allegations will be circulating in some form among at least a sector of the population and the effect of the published statements will essentially be to raise these to the level of a national debate. This is particularly true in the modern communications environment where rumours circulate easily over the Internet.

[91] We noted earlier that we are not experts in Colombian law. However, it does not seem likely that Article 55, based on its wording, could include a defence of reasonable publication. If it does not, and such a defence is not otherwise available in Colombian law, Article 55 is in breach of Colombia's international human rights obligations under Article 19 of the ICCPR and Article 13 of the ACHR.

6.4 Protection for Intermediaries

[92] International standards require intermediaries to be protected against liability for third party content, unless they interact with that content or defy content takedown orders that were issued by a court or another independent administrative body that is subject to judicial oversight. That is the approach that has been prescribed by authoritative international bodies from the global, American, African and European human rights systems. Such bodies have explicitly ruled out two other approaches to intermediary

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[88] See *Herrenberg/Het Parool* case, *Nederlandse Jurisprudentie* 1985, 437, 6 March 1985, noted in Dommering, E., "Unlawful publications under Dutch and European law - defamation, libel and advertising" (1992) 13 *Tolley's Journal of Media Law and Practice* 262, p. 264.

[89] See van Lenthe, F. and Boerefijn, I., in ARTICLE 19, *Press Law and Practice* (1993, London), p.105.

[90] See Decision 36/1994. (VI.24) AB *AB határozat* (Constitutional Court of Hungary).

liability. The first is strict liability, which directly and immediately imposes liability for third party speech on intermediaries, effectively compelling them to monitor the speech on their platforms or face liability. International standards are clear that strict liability is illegitimate, and any law which either explicitly authorises it or is so vague as to encompass it is not legitimate. The second is a notice-and-takedown regime, which grants immunity to intermediaries but only insofar as they have not received any notice to the effect that speech hosted on their platform may be illegal, where notice from any private actor, and not just the courts or bodies subject to judicial oversight, will suffice. This option does not adequately protect freedom of expression due to insufficient both substantive and due process protections.

6.4.a No Strict Liability for Intermediaries

[93] The 2011 Joint Declaration on Freedom of Expression and the Internet by the special international mandates for freedom of expression makes it clear that strict liability is not an appropriate approach under international law:

> a. No one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so ('mere conduit principle').
>
> b. Consideration should be given to insulating fully other intermediaries, including those mentioned in the preamble, from liability for content generated by others under the same conditions as in paragraph 2(a). At a minimum, intermediaries should not be required to monitor user-generated content…[91]

[94] The special mandates' 2017 Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda largely repeated and somewhat expanded their earlier statement on this point:

> d. Intermediaries should never be liable for any third party content relating to those services unless they specifically intervene in that content or refuse to obey an order adopted in accordance with due process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it and they have the technical capacity to do that.
>
> e. Consideration should be given to protecting individuals against liability for merely redistributing or promoting, through intermediaries, content of which they are not the author and which they have not modified.[92]

[95] In a 2018 report to the UN Human Rights Council, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression elaborated on how intermediary liability threatens freedom of expression by incentivising censorship from unaccountable private actors:

[91] 1 June 2011, paras. 2(a)-(b), http://www.law-democracy.org/wp-content/uploads/2010/07/11.06.Joint-Declaration.Internet.pdf.

[92] Note 26, paras. 1(d)-(e).

16. Obligations to monitor and rapidly remove user-generated content have also increased globally, establishing punitive frameworks likely to undermine freedom of expression even in democratic societies. The network enforcement law (NetzDG) in Germany requires large social media companies to remove content inconsistent with specified local laws, with substantial penalties for non-compliance within very short time frames. The European Commission has even recommended that member States establish legal obligations for active monitoring and filtering of illegal content. Guidelines adopted in 2017 in Kenya on the dissemination of social media content during elections require platforms to "pull down accounts used in disseminating undesirable political contents on their platforms" within 24 hours.

17. In the light of legitimate State concerns such as privacy and national security, the appeal of regulation is understandable. However, such rules involve risks to freedom of expression, putting significant pressure on companies such that they may remove lawful content in a broad effort to avoid liability. They also involve the delegation of regulatory functions to private actors that lack basic tools of accountability. Demands for quick, automatic removals risk new forms of prior restraint that already threaten creative endeavours in the context of copyright. Complex questions of fact and law should generally be adjudicated by public institutions, not private actors whose current processes may be inconsistent with due process standards and whose motives are principally economic.[93]

[96] Clear statements against strict liability have also been made by the Inter-American Commission on Human Rights in its 2014 report *Freedom of Expression and the Internet*:

Indeed, a system of strict liability in the sphere of electronic or digital communications is incompatible with minimum standards of freedom of expression, at least for the reasons discussed below.
…
In this respect, applying strict liability to this issue would be to radically discourage the existence of the intermediaries necessary for the Internet to retain its features of data flow circulation. To hold an intermediary liable in the context of an open, plural, universally accessible, and expansive Web would be like holding the telephone companies liable for the threats one person makes to another over the phone, thus causing uncertainty and extreme distress. Accordingly, no democratic legal system today extends strict liability to Internet intermediaries.
…
In addition, a system of strict liability like the one mentioned would run against the State's duty to favor an institutional framework that protects and guarantees the right to seek, receive, and disseminate information and opinions freely, as stipulated by Article 13 of the Inter-American Convention. Indeed, as the IACHR has stated, the right of every person to be afforded equal opportunities to receive, seek and impart information by any means of communication without discrimination for reasons of religion, language, political opinions, or any other reason is derived from Article 13... the application of strict liability to the activities of Internet intermediaries creates strong incentives for the private censorship of a wide range of legitimate expression.[94]

[97] The European Court of Human Rights has examined the issue of the liability of Internet intermediaries extensively. In *Delfi AS v. Estonia,* the landmark case in which the European Court first examined this issue, it established a framework for assessing liability that includes consideration of the following factors:

[93] Report of the Special Rapporteur, pursuant to Human Rights Council resolution 34/18, 6 April 2018, paras. 16-17, https://www.undocs.org/A/HRC/38/35.
[94] Inter-American Commission on Human Rights, *Freedom of Expression and the Internet*, 31 December 2013, paras. 95-98, http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_internet_eng%20_web.pdf.

> [T]he context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the applicant company's liability, and the consequences of the domestic proceedings for the applicant company.[95]

The European Court thus applies a detailed legal framework that carefully assesses intermediary liability by balancing the appropriate competing interests, which would seem to be a minimum requirement of international law (i.e. that any measure to limit freedom of expression would need to take all of the circumstances carefully into account).

[98] In Delfi, this framework led the European Court to uphold decisions by Estonian courts that found a large Estonian news site liable for defamation for user comments that were posted on one of its news articles. However, the Court arrived at the opposite decision of no intermediary liability in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*,[96] also about user comments on news articles. The Court distinguished the two cases in large part because the speech in Delfi, unlike in the Hungarian case, had been found to be highly inflammatory and hateful, and hence clearly illegal.[97]

[99] The European Court has applied that framework in a number of cases decided since Delfi, mostly ruling against intermediary liability for third party content. This includes the following cases: *Høiness v. Norway* (Internet forum not liable for forum comments),[98] *Pihl v. Sweden* (website operator not liable for a blogpost and comment)[99] and *Tamiz v. the United Kingdom* (Google not liable for comments that were posted on its blogging platform). Notably, in Tamiz the European Court cites with approval the general rule against intermediary liability for third party content:

> The approach of the national courts is entirely in keeping with the position in international law. Indeed, the Council of Europe, the European Union, the United Nations and the Organisation for Security and Co-operation in Europe have all indicated that ISSPs [Information Society Service Providers] should not be held responsible for content emanating from third parties unless they failed to act expeditiously in removing or disabling access to it once they became aware of its illegality. Indeed, the EU Directive on Electronic Commerce expressly provides that Member States shall neither impose a general obligation on ISSPs which are storing information provided by a recipient of their services to monitor the information which they store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.[100]

[100] Strict liability has also been criticised in the African context. For example, Principle 39(2) of the 2019 African Declaration rules out State imposition of the content monitoring that would be necessitated by strict liability: "States shall not require Internet intermediaries to proactively monitor content which they have not authored or otherwise modified."[101]

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[95] 16 June 2015, Application No. 64569/09, para. 142.
[96] 2 February 2016, Application No. 22947/13.
[97] *Ibid.*, paras. 63-64.
[98] 19 March 2019, Application No. 43624/14.
[99] 9 March 2017, Application No. 74742/14.
[100] 12 October 2017, Application No. 3877/14, para. 84.
[101] Note 27.

[101] The combined weight of these international statements indicates that Article 55 of Law 29 would be legitimate under international human rights law only if it clearly exempts intermediaries from liability for third party content unless those intermediaries engage with the content in a manner that makes them responsible for it (such as by editing it) or ignore an order by a court or independent administrative body which is subject to judicial oversight to take down content.

6.4.b Broad Notice-And-Takedown Rules Undermine Freedom of Expression

[102] Some 'notice-and-takedown' systems operate so as to render intermediaries liable for any content that is eventually found to be illegal as soon as they are put on notice about the potential illegality, even if that notice comes from a private citizen or any other source. Under international law, it is only when intermediaries are instructed to take down content by a court or independent administrative body which is subject to judicial oversight that they are liable for not taking it down. This is because, otherwise, notice-and-takedown systems effectively grant the power of censorship to everyone because it is not practical for most intermediaries, upon receiving notice, to assess independently whether the material is in fact illegal, due to the incredibly high volume of material that flows through their services. As a result, a notice-and-takedown system fails to offer adequate protection to freedom of expression or an appropriate balancing between it and the other social interests that may justify limits on freedom of expression. There is an exception to this, in those rare cases where the content might result in imminent harm, for example because it contains child pornography, it may be legitimate for law enforcement officials to issue notice to take the content down, although that should still be subject to judicial oversight.

[103] The problems that arise from extrajudicial systems of notice-and-takedown have been articulated clearly by the Inter-American Commission on Human Rights, which has made the following comments on those systems:

> 105. In general, save for in extraordinarily exceptional cases, this type of mechanism puts private intermediaries in the position of having to make decisions about the lawfulness or unlawfulness of the content, and for the reasons explained above, create incentives for private censorship. Indeed, extrajudicial notice and takedown mechanisms have frequently been cause for the removal of legitimate content, including specially protected content. As noted above, leaving the removal decisions to the discretion of private actors who lack the ability to weigh rights and to interpret the law in accordance with freedom of speech and other human rights standards can seriously endanger the right to freedom of expression guaranteed by the Convention. For this reason, provisions for the imposition of liability on intermediaries should have sufficient judicial safeguards so as not to cause or encourage private censorship mechanisms.
>
> 106. Indeed, provisions for conditional immunity are compatible with the framework of the Convention to the extent that they establish sufficient safeguards for the protection of the users' freedom of expression and due process, and do not impose vague or disproportionate obligations on intermediaries. Specifically, the requirement that intermediaries remove content, as a condition of exemption from liability for an unlawful expression, could be imposed only when ordered by a court or similar authority that operates with sufficient safeguards for independence, autonomy, and

> impartiality, and that has the capacity to evaluate the rights at stake and offer the necessary assurances to the user.[102]

[104] In a 2011 report to the UN Human Rights Council, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has also warned of the human rights risks created by notice-and-takedown systems:

> 42. However, while a notice-and-takedown system is one way to prevent intermediaries from actively engaging in or encouraging unlawful behaviour on their services, it is subject to abuse by both State and private actors. Users who are notified by the service provider that their content has been flagged as unlawful often have little recourse or few resources to challenge the takedown. Moreover, given that intermediaries may still be held financially or in some cases criminally liable if they do not remove content upon receipt of notification by users regarding unlawful content, they are inclined to err on the side of safety by overcensoring potentially illegal content. Lack of transparency in the intermediaries' decisionmaking process also often obscures discriminatory practices or political pressure affecting the companies' decisions. Furthermore, intermediaries, as private entities, are not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences.
>
> 43. The Special Rapporteur believes that censorship measures should never be delegated to a private entity, and that no one should be held liable for content on the Internet of which they are not the author. Indeed, no State should use or force intermediaries to undertake censorship on its behalf, as is the case in the Republic of Korea with the establishment of the Korea Communications Standards Commission, a quasi-State and quasi-private entity tasked to regulate online content (see A/HRC/17/27/Add.2). The Special Rapporteur welcomes initiatives taken in other countries to protect intermediaries, such as the bill adopted in Chile, which provides that intermediaries are not required to prevent or remove access to user-generated content that infringes copyright laws until they are notified by a court order. A similar regime has also been proposed in Brazil.[103]

[105] Similarly, Principles 39(4)-(5) of the African Declaration also make it clear that any requirement for intermediaries to take content down must be accompanied by appropriate safeguards, stating:

> 4. States shall not require the removal of online content by internet intermediaries unless such requests are:
>
> a. clear and unambiguous;
> b. imposed by an independent and impartial judicial authority, subject to sub-principle 5;
> c. subject to due process safeguards;
> d. justifiable and compatible with international human rights law and standards; and
> e. implemented through a transparent process that allows a right of appeal.
>
> 5. Law-enforcement agencies may request intermediaries for the expedited or immediate removal of online content that poses imminent danger or constitutes real risk of death or serious harm to a person or child, provided such removal is subject to review by judicial authority.[104]

[106] The 2011 Joint Declaration by the special mandates also indicates that takedown systems must provide appropriate protection for freedom of expression:

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[102] *Freedom of Expression and the Internet*, 31 December 2013, paras. 105-106, http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_internet_eng%20_web.pdf.

[103] Report of the Special Rapporteur, pursuant to Human Rights Council resolution 7/36, 16 May 2011, paras. 42-43, https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

[104] Note 27.

> At a minimum, intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied).[105]

[107] Accordingly, Article 55 of Law 29 is only consistent with international standards to the extent that it imposes similar limits on any content takedown requirements for intermediaries.

7.0 Conclusion

[108] International human rights treaties, including the ICCPR and ACHR, provide very strong protection for the right to freedom of expression, respectively in Article 19 and Article 13. This is because freedom of expression is very important both in its own right – as a core element of everyone's basic human dignity – and for the wider social benefits it supports – including democracy itself and the protection of all other human rights, among many others. At the same time, international human rights law also protects reputations, in Article 17 of the ICCPR and Article 11(2) of the ACHR. Conflicts between these two rights are common, as reflected in the large number of defamation cases before international courts and quasi-judicial bodies, as well as the often large number of defamation cases before national courts. This, along with statements on this issue by authoritative commentators, has given rise to developed international standards on how to balance the different social and personal interests that such conflicts engage.

[109] This balancing exercise needs to take into account the wider social context to which it applies and, in particular, the overriding need to ensure open public debate about matters of public interest or concern. Such open debate is essential for the values mentioned in the previous paragraph as well as accountability in public and private affairs, people's ability to participate in decision-making and development processes that affect them, and the wider challenge of ensuring sustainable development, including by combating corruption.

[110] As this amicus curiae brief makes clear, defendants in defamation cases should benefit from a number of defences if the international law balance between freedom of expression and protection of reputations is to be respected. These include the defence of truth, along with a trend towards recognising that, in cases involving statements on matters of public concern, the onus should lie on the plaintiff to prove falsity and, where this is not the case, measures may need to be put in place, such as the provision of legal aid, to ensure "equality of arms" in defamation cases.

[111] There should be at least a very strong, if not absolute, presumption against defamation liability for statements of opinion, which defendants should never be required to prove are true, which is an impossibility. Even where inaccurate statements have been disseminated,

[105] Note 91, para. 2b.

defamation defendants should benefit from some sort of "reasonable publication" defence, to the effect that it was reasonable in all of the circumstances for them to disseminate the statement, and from a defence that they were merely further disseminating statements originally made by third parties, in good faith.

[112] Digital intermediaries who merely assist in or provide platforms for the dissemination of statements should generally be protected against defamation liability. This may be defeated where they engage directly with the statements, thereby attracting direct responsibility for them, or where they have been ordered by an oversight body or actor which is either judicial in nature or is subject to judicial oversight to take action vis-à-vis the statements and fail to do so within a reasonable period of time.

[113] The law on defamation in Colombia, including relevant aspects of Article 55 of Law 29 of 1944, needs to reflect all of these defences and protections if it is to pass muster under international law as a restriction on freedom of expression. Given, the constitutional corpus doctrine, these same standards are also part of Colombia's own set of constitutional norms, even where they are not otherwise directly reflected in constitutional rules. We believe that, overall, Article 55 does not conform to these standards and thus needs either to be deemed to be unconstitutional or significantly reinterpreted so as to bring it into line with these standards.

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