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Should States Have a Legal Right to Reputation? Applying the Rationales of Defamation Law to the International Arena

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SHOULD STATES HAVE A LEGAL RIGHT TO REPUTATION? APPLYING THE RATIONALES OF DEFAMATION LAW TO THE INTERNATIONAL ARENA

*Elad Peled**

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INTRODUCTION

Various sources throughout the world, primarily the mass media and nongovernmental organizations, routinely publish reports on the conduct and circumstances of states. These reports shape states' reputations in the eyes of individuals, publics, organizations, and governments. While most reporting may be presumed accurate, disinformation inevitably finds its way into the international public domain.¹ Whether such disinformation is a product of biased agendas, interests of political actors, omissions of relevant details, or merely a matter of honest mistakes, it might do injustice to the states concerned.

Several examples show that this phenomenon does not discriminate among states on the basis of political orientation. According to false, or at least questionable, allegations voiced in the past, Bolivia had an astonishing rate of infant deaths (2007);² Iran forced non-Muslims residing in its territory to wear identification patches (2006);³ Iraq killed Kuwaiti babies in hospital incubators (1990)⁴ and held weapons of mass destruction (2003);⁵ Israel carried out a massacre in Jenin refugee camp (2002);⁶ the U.S. military employed nerve gas during the Vietnam War (a report published in 1998)⁷ and its interrogators at Guantánamo Bay flushed a Koran down a toilet (2005);⁸ and the Uzbek police tortured a person to death (2004).⁹ From this list, we may reasonably assume that

1. See Colin B. Picker, *Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions*, 30 BROOK. J. INT'L L. 67 (2004).

2. Press release, UNICEF Bolivia Office, UNICEF Bolivia Clarifies Information on Infant Mortality Published by Amnesty International (May 23, 2007).

3. Douglas Kelly, *Our Mistake: Note to Readers*, NAT'L POST, May 24, 2006, at A2, available at <http://www.nationalpost.com/news/story.html?id=6df3e493-f350-4b53-bc16-53262b49a4f7>.

4. WILLIAM KOREY, *NGOs and the Universal Declaration of Human Rights: "A Curious Grapevine"* 347, 575 (1998).

5. Michael Gordon, *Bush Enlarges Case for War by Linking Iraq with Terrorists*, N.Y. TIMES, Jan. 23, 2003, at A1.

6. See, e.g., HUM. RTS. WATCH, *JENIN: IDF MILITARY OPERATIONS 4* (2002), available at <http://hrw.org/reports/2002/israel3/israel0502.pdf>; *UN Says No Massacre in Jenin*, BBC NEWS, Aug. 1, 2002, http://news.bbc.co.uk/2/hi/middle_east/2165272.stm.

7. *CNN Retracts Tailwind Coverage*, CNN, July 2, 1998, <http://www.cnn.com/US/9807/02/tailwind.johnson/#1>.

8. Katharine Q. Seelye & Neil A. Lewis, *Newsweek Says It Is Retracting Koran Report*, N.Y. TIMES, May 17, 2005, at A1, available at http://www.nytimes.com/2005/05/17/politics/17koran.html?_r=1&pagewanted=print.

9. *Human Rights Watch Statement on the Death of Andrei Shelkavenko*, HUM. RTS. WATCH, May 31, 2004, <http://www.hrw.org/en/news/2004/05/31/human-rights-watch-statement-death-andrei-shelkavenko>.

other beliefs currently shared by the international community might actually be based on erroneous reports. The fact that in some instances the falsity of such reports was eventually revealed does not guarantee a similar result in other instances. It certainly does not ensure that inaccuracies are corrected early enough to prevent severe detriment.

Nevertheless, no effective relief is currently available to defamed states. Presumably, most states share the notion that reputation is merely an interest and not a right, hence the weak efforts to subject their reputations to international legal protection. A similar attitude prevails in the academic literature. As will be demonstrated, scholars have mostly focused on connections between reputation and both economic and political power, as well as the manners in which reputational concerns incentivize compliance with international law and treaty obligations.¹⁰ Meanwhile, barely any attention has been dedicated to states' legal abilities to protect their reputations against wrongful harm. This Article fills that void by attempting to conceptualize state reputation as a legal right and to determine what remedies states may use to enforce such a right.

Bearing in mind that general principles of law recognized by national legal systems form a source of inspiration for international law,¹¹ the observation that almost every state in the world has a civil or criminal law protecting individual and institutional reputation against defamation¹² is highly significant. Generally speaking, the core issue redressed by domestic defamation law is false allegations injurious to reputation.¹³ Although offensive expressions of opinion—which can neither be proved nor rebutted—are punishable in some jurisdictions under certain cir-

10. See *infra* Parts III, IV.

11. Statute of the I.C.J. art. 38(1)(c), June 26, 1945, 59 Stat. 1031.

12. MARK W. JANIS, RICHARD S. KAY & ANTHONY W. BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 268 (3d ed. 2008); Bonnie Docherty, *Defamation Law: Positive Jurisprudence*, 13 HARV. HUM. RTS. J. 263, 266 (2000); U.S. Agency for International Development Office of Democracy and Governance, *The Enabling Environment for Free and Independent Media: Contribution to Transparent and Accountable Governance*, OCCASIONAL PAPERS SERIES, Jan. 2002, at 38, available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm006.pdf [hereinafter *Enabling Environment*].

13. C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 IOWA L. REV. 237, 237 (1993); Shawn A. Bone, *Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by Gutnick v. Dow Jones & Co.*, 62 WASH. & LEE L. REV. 279, 325 n.250 (2005); Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT'L L. 861, 863 (2003).

cumstances, the central meaning of defamation around the world, under which most cases fall in practice, seems to concern derogatory statements of *fact*.¹⁴ The internationally agreed-upon notion that a collective of actors should employ a set of norms protecting the reputations of its individual members may be applied to states if sufficient similarities between the domestic and the international realms can be traced.

Drawing insights from the disciplines of political science, international relations, sociology, and communications studies, this Article will argue that the principal rationales of defamation law, which typically concerns natural persons and private legal entities, are indeed relevant to states as well. Given the prominence of mass media reporting and public opinion in today's international arena, false defamatory statements harm substantial interests of states, especially politically and economically weaker states. This is particularly true when states are accused of violating the laws of war or international human rights, to which immense moral significance is attributed. The harm states suffer also generates side-effects that are often felt by individual citizens domestically. Furthermore, viewed from the perspective of the international community, defamatory falsehoods reduce states' incentives to comply with international law, and render global decision-making less informed and, consequently, less

14. Under the dictates of the American Constitution, as interpreted by the United States Supreme Court, a statement of opinion is not actionable unless "it implies the allegation of undisclosed defamatory facts as the basis for the opinion." RESTATEMENT (SECOND) OF TORTS § 566 (1977). In other common law jurisdictions, the defense of "Fair Comment" (sometimes called "Honest Opinion") precludes recovery for expressions of such kind relating to matters of public interest. See William Akel & Tracey J. Walker, *New Zealand*, in INTERNATIONAL MEDIA LIABILITY 271, 280 (Christian Campbell ed., 1997); Peter L. Bartlett, *Australia*, in INTERNATIONAL MEDIA LIABILITY 3, 21–22; Roger D. McConchie, *Canada*, in INTERNATIONAL MEDIA LIABILITY 57, 74–76; Alan Williams, *England and Wales*, in INTERNATIONAL MEDIA LIABILITY 107, 114. In addition, the defamation laws of most Continental countries provide for a defense for expressions of opinion, though such defense is usually qualified. See INTERNATIONAL LIBEL AND PRIVACY HANDBOOK: A GLOBAL REFERENCE FOR JOURNALISTS, PUBLISHERS, WEBMASTERS, AND LAWYERS 378–79 (Charles J. Glasser, Jr. ed., 2006) [hereinafter INTERNATIONAL LIBEL AND PRIVACY HANDBOOK]; EMMANUEL E. PARASCHOS, MEDIA LAW AND REGULATION IN THE EUROPEAN UNION: NATIONAL, TRANSNATIONAL AND U.S. PERSPECTIVES 60 (1998). The European Court of Human Rights similarly grants what it labels "value-judgments" heightened protection. See *Lingens v. Austria*, App. No. 9815/82, 8 Eur. H.R. Rep. 407 (1986). The opinion defense is also recognized by the laws of major Asian states, namely, Hong Kong, India, Japan, Russia, South Korea, and Singapore. INTERNATIONAL LIBEL AND PRIVACY HANDBOOK, *supra*, at 378–79. For further support for the contention that defamation law focuses on factual statements, see generally Dienes & Levine, *supra* note 13, at 237; Bone, *supra* note 13, at 325 n.250.

efficient. Arguably, defamatory falsehoods also undermine individuals' rights to be properly informed and to take a meaningful part in global governance.

Hence, this Article will call for an acknowledgment of state reputational rights within international law through a novel normative framework parallel to established domestic defamation laws. The right to reputation would only protect states against inaccurate statements of fact depicting concrete events, as distinguished from unpleasing professional or ideological views about complex political situations, or critical statements of opinion. The proposed regime—the precise, detailed characterization of which exceeds the scope of this Article—would aim to vindicate unjustly defamed reputations without imposing any sanction whatsoever on publishers. Alternatively, this Article will propose the establishment of a mechanism for the effective dissemination of states' replies to defamatory accusations.

Following a review and an analysis of the current domestic and international legal landscape in Part I, this Article will apply the logic of domestic defamation law to the international realm. Part II of this Article will examine the perspective of the defamed state and its nationals, describing the political, economic, and personal harms that defamatory publications targeting states produce. Part III will demonstrate the ways in which false allegations regarding states can interfere with international efforts to establish organized, efficient, and rational global governance. Part IV will explain why defamation against states is an existing phenomenon and why such defamatory communications are internalized by their recipients (both presuppositions up to this point), thereby spotlighting the practical importance of protecting the reputations of states. Thus, Part IV will argue that contemporary trends in global politics and media jeopardize states' abilities to maintain accurate reputations in that they foster the wide circulation of false defamatory allegations, render such statements highly influential, and stymie correction of such statements. Finally, Part V will briefly touch upon the question—which merits separate research—of how to solve the posed problem. Part V will discuss several parameters for plausible courses of action, which take into account the various interests at stake, including those of publishers of defamatory content as well as the collective interest in preserving freedom of speech.

I. CURRENT PROTECTION OF STATE REPUTATION UNDER DOMESTIC AND INTERNATIONAL LAWS

The following review of the contemporary legal situation aims to illustrate two points: (1) that there is a lacuna concerning the protection of

state reputation; and (2) that this state of affairs is not grounded in any sweeping jurisprudential rationale or general policy consideration that deny altogether the theoretical justification for such protection.

A. The Domestic Level

Democracies seem to share the position that expressions portraying a state, government, or subdivision thereof in a negative light normally do not give rise to liability.¹⁵ This is so in both the civil and the criminal contexts, which will be discussed separately.

In many democratic legal systems, governmental entities may not file civil suits for defamation that targets them.¹⁶ Such an approach has been endorsed, for instance, by courts in the United States,¹⁷ the United Kingdom,¹⁸ Australia,¹⁹ India, and South Africa.²⁰ Thus, when a governmental body is criticized as such in an impersonal manner—without explicit or implicit reference to any of its individual members—no cause of action arises.²¹ While legal authorities following this approach typically handle cases in which governmental bodies file claims in their own jurisdictions, there is no reason to assume courts would treat differently suits brought

15. See sources cite *infra* note 21.

16. See Docherty, *supra* note 12, at 267.

17. E.g., *City of Chicago v. Tribune Co.*, 139 N.E. 86 (Ill. 1923); *State v. Time, Inc.*, 249 So. 2d 328, 329 (La. Ct. App. 1971), *writ denied*, 252 So. 2d 456 (La. 1971); *Johnson City v. Cowles Comm'ns, Inc.*, 477 S.W.2d 750, 753 (Tenn. 1972); see also 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2.10.1 n.554 (3d ed. 2003); 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 4:76 (2d ed. 2009).

18. *Derbyshire County Council v. Times Newspapers Ltd.*, [1993] A.C. 534, 534 (HL) (U.K.).

19. *Ballina Shire Council v. Ringland* (1994) 33 N.S.W.L.R. 680 (Austl.).

20. Docherty, *supra* note 12, at 268–69.

21. IAN LOVELAND, POLITICAL LIBELS: A COMPARATIVE STUDY 121–22 (2000); David A. Elder, *Small Town Police Forces, Other Governmental Entities and the Misapplication of the First Amendment to the Small Group Defamation Theory—A Plea for Fundamental Fairness for Mayberry*, 6 U. PA. J. CONST. L. 881, 912–13 (2004); Joseph H. King, Jr., *Reference to the Plaintiff Requirement in Defamatory Statements Directed at Groups*, 35 WAKE FOREST L. REV. 343, 352 (2000). Note that the New South Wales Court—and perhaps also the English House of Lords, according to the New South Wales court's interpretation of the *Derbyshire* decision—left open the possibility of suing for malicious or injurious falsehood. *Ballina Shire Council v. Ringland* (1994) 33 N.S.W.L.R. at 691. Yet this cause of action is probably not very useful in the context of attacks on governmental bodies, because it requires both proof of malice and quantifiable economic loss. John Fleming, *Retraction and Reply: Alternative Remedies for Defamation*, 12 U. BRIT. COLUM. L. REV. 15, 18 (1978).

by foreign states. Not only would such an approach constitute discrimination against the domestic government, but entertainment of these claims is also expected to raise serious problems, as will be explained below.²²

Two main arguments underlie the aforementioned policy, neither of which compels the conclusion that states' reputations in the international community are not to be protected.

The first rationale is the proposition that governmental entities do not meet the definition of a "person," to whom the defamation cause of action generally relates.²³ Thus, a Louisiana court of appeal held in *State v. Time, Inc.* that the state, which is a creature of the people and does not exist separately from the people, is incapable of being defamed by the people.²⁴ The Court of Appeal of New South Wales based its view on quite a similar argument.²⁵ The English House of Lords elaborated this notion by observing that in the case of an elected body temporarily under the control of one political party or another, it is difficult to say that such a body has any reputation of its own. According to this view, "[R]eputation in the eyes of the public is more likely to attach itself to the controlling political party," or to the executives who carry on such body's day-to-day management.²⁶

Yet, this line of reasoning appears to be confined to domestic relations between government and citizenry. The rationale that governmental bodies do not have any independent image in the minds of the people they represent does not seem to apply in the international realm, where various actors interact in a more-or-less horizontal manner and none is elected directly by the others. A simple example demonstrates this point. While it may be true that the German Ministry of Health has no reputation among the German people distinct from that of the Ministry's senior

22. See *infra* Part VI. It should be noted that high-ranking officials who have been individually defamed are not barred *a priori* from suing for defamation abroad. As the officials' actions are often equated with those of their states, such claims could also serve the reputational interests of the states. For a famous example see *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984). However, personal reference may not always be inferred from a defamatory report pertaining to a state. Moreover, the problems inherent in handling matters of that kind in domestic courts, explained *infra* in Part II(A), also affect personal suits.

23. SMOLLA, *supra* note 17, § 4:76.

24. *State v. Time, Inc.*, 249 So. 2d 328, 329 (La. Ct. App. 1971), *writ denied*, 252 So. 2d 456 (La. 1971).

25. *Ballina Shire Council v. Ringland* (1994) 33 N.S.W.L.R. 680 (Austl.).

26. *Derbyshire County Council v. Times Newspapers Ltd.*, [1993] A.C. 534, 550 (HL) (U.K.).

officials or governing political party, the Federal Republic of Germany certainly has a reputation in the eyes of other states' leaders, foreign publics, and nongovernmental organizations. Furthermore, as we shall later see, the contention that states have reputations abroad is firmly supported by vast international relations literature.²⁷

The second policy consideration that leads courts to deny governments' standing in civil defamation suits is the importance of allowing criticism of governments.²⁸ Under U.S. law, this approach is grounded in the First Amendment of the Constitution, the primary purpose of which is to ensure the freedom to criticize the government without the threat of retaliation of any kind.²⁹ Similarly, the House of Lords has held that under English common law principles "[i]t is of the highest public importance that . . . any governmental body . . . should be open to uninhibited public criticism."³⁰ Once again, however, what these courts have in mind is the domestic defamation action familiar to them, in which the publisher of the allegedly defamatory material finds himself or herself the defendant in a judicial proceeding and faces sanctions if found liable. In contrast, if substantially different paths are adopted for vindicating states' reputations—paths that do not involve adversary litigation—such difficulty might be resolved. The final Part of this Article will propose such a solution.

The state of the law is somewhat different in the criminal context. The legislation of many states renders certain expressions against the government, usually falling under the general category of "sedition," criminally punishable.³¹ Sedition laws often cover value judgments and true statements, in addition to false allegations.³² Such laws are particularly common in regions that are relatively unstable or where democratic principles are not deeply rooted, such as Asia,³³ Africa,³⁴ and Eastern

27. See *infra* Part III.

28. Docherty, *supra* note 12, at 267.

29. E.g., *City of Chicago v. Tribune Co.*, 139 N.E. 86, 90 (Ill. 1927); *Johnson City v. Cowles Comm'ns, Inc.*, 477 S.W.2d 750, 754 (Tenn. 1972); see also SMOLLA, *supra* note 17, § 4:76.

30. *Derbyshire County Council v. Times Newspapers Ltd.*, [1993] A.C. 534, 547 (HL) (U.K.).

31. See *infra* notes 32–41 and accompanying text.

32. See *Enabling Environment*, *supra* note 12, at 34.

33. AUSTRALIAN LAW REFORM COMMISSION, REPORT NO 104, FIGHTING WORDS: A REVIEW OF SEDITION LAWS IN AUSTRALIA 134, (2006), available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/104/ALRC104.pdf> [hereinafter ALRC REPORT].

34. *Id.* at 138; H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1297 (2006).

Europe,³⁵ and they are most prevalent in authoritarian regimes.³⁶ Western countries, however, have restricted the applicability of these laws over the years to communications that endanger national security or the public order; they are normally only resorted to in rare, extreme circumstances.³⁷ When European states, in particular, attempt to utilize such statutes, they are often restrained by the European Court of Human Rights.³⁸

Two issues are particularly important for the purposes of this Article. First, it may be inferred from the above discussion that mere defamation of a state, devoid of salient security implications, seldom gives rise to indictment in democratic states. Second, sedition laws seem to prohibit only insults directed at domestic authorities. Comprehensive comparative surveys of the areas of defamation, sedition, and political speech do not mention any statute criminalizing defamation against foreign states (as opposed to contempt of their flags or symbols) or indictment brought for such expressions.³⁹ Thus, the current level of protection for states' reputations is even further reduced. Assuming⁴⁰ that states' interests in reputation reside primarily in the realm of international relations, a ruling of a

35. See Yanchukova, *supra* note 13, at 870.

36. See *id.* at 883–90.

37. See ALRC REPORT, *supra* note 33, at 120, 133–38; PARASCHOS, *supra* note 14, at 97–101; Yanchukova, *supra* note 13, at 871, 873. As these sources indicate, the scope of sedition laws has been restricted through statutory amendments, judicial interpretation, or prosecutorial policy.

38. *E.g.*, *Castells v. Spain*, 14 Eur. Ct. H.R. 445, 464 (1992) (finding that the Spanish government's attempted use of a defamation action against a politician representing Basque separatists violated the politician's right to freedom of expression under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms); *Thorgeirson v. Iceland*, App. No. 13778/88, 14 Eur. H.R. Rep. 843 (1992) (finding similarly that the Icelandic government's prosecution of a journalist for writing about alleged police brutality violated the journalist's Article 10 rights).

39. See ALRC REPORT, *supra* note 33; DAVID I. FISHER, *DEFAMATION VIA SATELLITE: A EUROPEAN LAW PERSPECTIVE* 157–80 (1998); *INTERNATIONAL LIBEL AND PRIVACY HANDBOOK*, *supra* note 14; *INTERNATIONAL MEDIA LIABILITY*, *supra* note 14; LOVELAND, *supra* note 21; PARASCHOS, *supra* note 14; PETER N. AMPONSAH, *LIBEL LAW, POLITICAL CRITICISM, AND DEFAMATION OF PUBLIC FIGURES: THE UNITED STATES, EUROPE, AND AUSTRALIA* (2004); Richard N. Winfield & Kristin Mendoza, *The Abolition Movement: Decriminalizing Defamation and Insult Laws*, 25 *COMM. LAW.* 7 (2007); Docherty, *supra* note 12; Yanchukova, *supra* note 13. It should be noted that under certain circumstances, some States prohibit insults against foreign state officials, but not against the foreign states themselves. See, e.g., *Strafgesetzbuch [StGB] [Penal Code]*, Nov. 13, 1998, *Bundesgesetzblatt, Teil I [BGBl. I]* 3322, as amended Dec. 19, 2001, § 103; PARASCHOS, *supra* note 14, at 67–69 (discussing Italian law).

40. See *infra* Part III.

domestic court in favor of its own government—which is not expected to gain much prominence and trust abroad—is arguably quite unhelpful.

Nevertheless, the absence (or scarcity) of legislation prohibiting defamation against foreign states, as well as the limited feasibility of punishing expressions against domestic democratic governments, do not in and of themselves negate the justification for protecting state reputation under international law. First, one might guess that the main reason states permit defamation that targets other states is simply the lack of sufficient practical interest to proscribe such defamation, at least on a unilateral basis. Second, the freedom of speech concerns that led to the restriction of sedition laws are arguably far less significant when the speech one seeks to regulate is false statements of fact, as opposed to true statements of fact or value judgments. The European Court of Human Rights, for instance, has refrained from holding that false allegations targeting a government may not be penalized; on the contrary, it can be inferred from the Court's decisions that they may.⁴¹

Thus, when examining the practical concerns that drive countries to leave state reputation essentially unprotected under domestic laws, it is apparent that these concerns, on the one hand, do not touch upon the theoretical dimension of the problem, and, on the other hand, are hardly applicable in the international realm.

B. The International Level

There has been only one genuine attempt during the last several decades to protect states from defamation internationally. This attempt was made within the Convention on the International Right of Correction (“CIRC”),⁴² which entered into force in 1962. The contracting states intended for the CIRC to, *inter alia*, “implement the right of their peoples to be fully and reliably informed[,] . . . to improve understanding between their peoples through the free flow of information and opinion,” and to redress the danger to the “maintenance of friendly relations between peoples . . . arising from the publication of inaccurate reports.”⁴³

Under the CIRC, when a contracting state contends that a news report published about it abroad is false or distorted, and capable of injuring its

41. See *Thorgeirson v. Iceland*, 14 Eur. H.R. Rep. at 865-66; *Sürek v. Turkey* (no. 2), App. No. 24122/94, Eur. Ct. H.R. ¶ 39 (1999), http://www.echr.coe.int/echr/Homepage_EN.

42. Convention on the International Right of Correction, 31, 1953, 435 U.N.T.S. 191 [hereinafter CIRC].

43. *Id.* Preamble.

relations with other states or its national dignity, the state may submit its version of the facts to the contracting states where the report has been disseminated.⁴⁴ The receiving states are obliged to forward the reply to the relevant media outlets.⁴⁵ If any of the receiving states fails to do so, the defamed state may then submit the reply to the United Nations Secretary-General, who is prompted by the CIRC to give the reply appropriate publicity through the information channels at his disposal.⁴⁶

The CIRC's impact is rendered insignificant by the fact that it was only joined by a small number of states,⁴⁷ none of which, except France, may be regarded as a strong player in the international community. Furthermore, parties to the CIRC have rarely made use of it.⁴⁸ This probably stems from the CIRC's ineffectiveness at protecting state reputations, since it does not require the media to publish states' replies.⁴⁹

The question is why states have refrained from devising greater protection for their reputations than that provided by the CIRC. One possible answer may be found in the Preamble of the CIRC itself. According to the Preamble, the imposition of international *penalties* for the publication of false reports is not practicable. Since the international libel law regime proposed by this Article does not mandate the imposition of sanctions, the Preamble's practicality concern does not preclude it. Under another explanation, it is the weak states whose reputations are most jeopardized and who find it the most difficult to communicate their views to foreign audiences.⁵⁰ This very weakness also prevents them from redressing their problem effectively in the international legal field. Alternatively, perhaps what is missing is merely a conceptual or a definitional shift, which would elevate the interest in reputation—undoubtedly recognized by each and every state—into a right.⁵¹

44. *Id.* art. 2.

45. *Id.* art. 3.

46. *Id.* art. 4.

47. For a list of states parties, see United Nations Treaty Collection, Convention on the International Right of Correction, http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVII-1&chapter=17&lang=en (last visited Aug. 26, 2009).

48. Kyu Ho Youm, *The Right of Reply and Freedom of the Press: An International and Comparative Perspective*, 76 GEO. WASH. L. REV. 1017, 1023 (2008).

49. Charles Danziger, *The Right of Reply in the United States and Europe*, 19 N.Y.U.J. INT'L L. & POL. 171, 194–95 (1986).

50. *See infra* Parts III, V.

51. For the sake of comparison, it may reasonably be assumed that people have always felt outraged when private information about their lives was disclosed without their permission, but it had never occurred to them that they might be entitled to a remedy for their harm until the law started to conceptualize the interest in privacy as a legal right.

II. THE STATE'S PERSPECTIVE: DEFAMATION AND THE NEED TO REDRESS ITS CONSEQUENCES

The following section will attempt to show, from the perspective of the defamed state and its nationals, how the basic principles and objectives underlying domestic defamation laws support the claim that states should be protected by a similar set of norms.

A. Drawing an Analogy from Domestic Defamation Laws

Domestic defamation laws seek to preserve a given reputation or image enjoyed by the individual in the eyes of others or society at large.⁵² Such laws are based on the premise that false derogatory statements of fact relating to a person have the capability of altering third parties' attitudes toward the person, thereby causing him or her unjust injuries.⁵³ Those injuries may manifest in various forms, such as a reduction in the subject's social status, interferences with his or her relationships and professional progress, pecuniary harm stemming from loss of employment income or business revenue, and emotional distress.⁵⁴

Significantly, not only natural persons but also juridical persons are recognized as capable of suffering damages from defamatory publications and are granted the right to sue for them. Although some jurisdictions limit recovery to certain kinds of entities, or for provable economic loss only, there is a large international consensus that business corporations may sue for defamation, or at least have a parallel cause of action

For a detailed discussion of the development of the right to privacy in American law, see Benjamin E. Bratman, *Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623 (2002).

52. See generally 50 AM. JUR. 2D *Libel and Slander* §2 (1995) ("The law of defamation embodies the public policy that individuals should be free to enjoy their reputations unimpaired by false and defamatory attacks.").

53. See, e.g., RESTATEMENT (SECOND) OF TORTS § 559 (1977); Eric Barendt, *What is the Point of Libel Law?*, 52 CURRENT LEGAL PROBLEMS 110, 112–15 (1999); Clay Calvert, *Harm to Reputation: An Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations*, 26 PAC. L.J. 933, 940 (1995); David McCraw, *How Do Readers Read? Social Science and the Law of Libel*, 41 CATH. U.L. REV. 81, 84 (1991); Docherty, *supra* note 12, at 265; Maryann McMahon, *Defamation Claims in Europe: A Survey of the Legal Armory*, 19 COMM. LAW., Winter 2002, at 24, 30 (reviewing the definition of defamation in various European jurisdictions). Regarding defamation law's focus on false statements of fact, see sources cited *supra* note 13.

54. See RESTATEMENT (SECOND) OF TORTS § 559 (1977); SMOLLA, *supra* note 17, §§ 1:23, 1:24; David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 765–67 (1984); Barendt, *supra* note 53, at 116–18.

for trade libel or commercial disparagement.⁵⁵ This approach reflects the common belief that large organizations may have reputations in the minds of third parties distinct from those of the people comprising them.⁵⁶ Organizations build such reputations through hard work, talent, and, possibly, virtuous conduct.⁵⁷ Financial revenues serve as the main indicator of their reputations.⁵⁸ Defamatory utterances, including those pertaining to the quality of products or services, are capable of harming the organization's reputation, thereby depriving it, at least partially, of the fruits of its labor.⁵⁹

The notion that an artificial being with no intrinsic honor or feelings can bring suit in defamation may be applied to another entity that is legally and factually separable from the human collective comprising it, and that undoubtedly has a reputation in the minds of others—the state. Much like corporations, states have financial interests of their own. If and when these interests are jeopardized by defamation, granting states relief may be justified, similarly to the case of corporations. Furthermore, as opposed to nearly all corporations, whose ultimate objective is profit maximization, states have many nonfinancial interests in the international sphere. The question is whether, how, and to what extent states' legitimate interests are affected by defamatory publications targeting them. If such harms can be demonstrated, then the state—as the principal subject of rights and duties in international law—is arguably entitled to protection against them.⁶⁰

It is worth noting that, according to some scholars, the reputations of states are not uniform but, rather, context-specific. Under this approach,

55. This is the law, for instance, in Australia, Belgium, Canada, China, England, France, Germany, Hong Kong, India, Italy, Japan, the Netherlands, Russia, Singapore, Spain, South Korea, Switzerland, and the United States. *See* INTERNATIONAL LIBEL AND PRIVACY HANDBOOK, *supra* note 14. It should be noted that the European Court of Human Rights has deemed it legitimate to grant corporations a cause of action for defamation. *See* *Steel & Morris v. United Kingdom*, 41 Eur. Ct. H.R. 403, 435 (2005); *Markt Intern & Beermann v. Germany*, App. No. 10572/83, 12 Eur. H.R. Rep. 161, 173-75 (1989).

56. *See* SACK, *supra* note 17, § 2.10.1, and sources cited therein.

57. Barendt, *supra* note 53, at 115.

58. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693-96 (1986).

59. *See* Post, *supra* note 58, at 693-96; *see also* Barendt, *supra* note 53, at 115.

60. *See* *Trail Smelter Arbitration (U.S. v. Can.)*, 3 Rep. Int'l Arb. Awards 1905, 1965 (1941), available at http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf (finding the United States entitled to indemnification for injury, proven by clear evidence, resulting from Canada's operation of the Trail Smelter).

each state has a relatively independent reputation in the areas of trade, environment, human rights, and so forth, in addition to reputations in matters that are unrelated to legal compliance, such as financial and political stability, and military strength.⁶¹ For the purpose of the following discussion, however, it is not necessary to decide whether such a view has merit,⁶² nor is it crucial to make *a priori* distinctions between different kinds of state reputations. In order to satisfy the main goal of this Article and establish states' *conceptual* entitlement to a right of reputation, it is sufficient to prove in general that defamation targeting states exposes them to tangible harms. As the examples presented below will demonstrate, such harms do occur at least with regard to the specific areas mentioned by a given defamatory publication, and, in some cases, other areas as well. For the sake of comparison, the legal concept of reputation in private law comprises an individual's interest in being respected by society in regard to various aspects of his or her personality—morality, honesty, compliance with law (in any legal field), professional competence, and so forth—unitarily.⁶³ Moreover, as we have seen, very different types of harm related to such different interests jointly justify protecting individuals against defamation in positive law. A similar approach may therefore be taken in the context of state reputation.

B. The Value of State Reputation

Perceptions of a state's characteristics, behavior, or condition obviously impact the choices of foreign state officials and non-state actors in their dealings with that state.⁶⁴ Thus, for example, by developing and preserving a good reputation for compliance with obligations, states are able to extract greater concessions in exchange for their promises.⁶⁵ Furthermore, the level of foreign investment in any given state is immensely

61. George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S101–03 (2002).

62. *Contra* Picker, *supra* note 1, at 107.

63. *See, e.g.*, Arlen W. Langvardt, *Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework*, 78 MINN. L. REV. 309, 338–39 (1993); Post, *supra* note 59, at 693–719.

64. JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 107 (2004); Juyan Zhang & William L. Benoit, *Message Strategies of Saudi Arabia's Image Restoration Campaign after 9/11*, 30 PUB. REL. REV. 161, 161 (2004).

65. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1886 (2002).

affected by evaluations of the state's financial situation.⁶⁶ Communications scholar Jian Wang summarizes this notion by observing that

a nation's reputational capital may affect the country's ability to build coalitions and alliances to achieve international political objectives, to influence perceptions and purchase decisions regarding products from certain countries of origin, to attract foreign investment or in-bound tourism.⁶⁷

In addition, government officials' beliefs concerning another state's conduct could lead the first state to respond in a way that harms the latter's interests. For instance, information indicating that a state has breached its bilateral or multilateral obligations, such as by engaging in acts of aggression, might induce other states to resort to trade or diplomatic sanctions, or to take military actions against it.⁶⁸

The issue of state reputation is particularly acute in the modern day. Since the global phenomenon of democratization has increased governments' attention to their citizens' views regarding foreign policies,⁶⁹ mass media and public opinion have come to play major roles in international politics.⁷⁰ In a two-step process, mass media communications on international matters shape public opinion of states and events,⁷¹ which in turn, affects directly or indirectly the foreign policies of states and the actions of the international community vis-à-vis the states concerned.⁷² Naturally, this effect is mostly prominent in democracies. But even non-democratic regimes are influenced to a certain extent by domestic public

66. Evidence of which is supplied, for instance, by credit rating agencies.

67. Jian Wang, *Managing National Reputation and International Relations in the Global Era: Public Diplomacy Revisited*, 32 PUB. REL. REV. 91, 92 (2006) (internal citations omitted).

68. See Guzman, *supra* note 65, at 1846.

69. See MICHAEL KUNCZIK, IMAGES OF NATIONS AND INTERNATIONAL PUBLIC RELATIONS 20 (1997); Eytan Gilboa, *Searching for a Theory of Public Diplomacy*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 55, 56 (2008); Evan Potter, *Canada and the New Public Diplomacy*, 58 INT'L J. 43, 48-49 (2002-2003).

70. PHILIP M. TAYLOR, GLOBAL COMMUNICATIONS, INTERNATIONAL AFFAIRS AND THE MEDIA SINCE 1945 58 (1997); Gilboa, *supra* note 69, at 58.

71. For further analysis, see *infra* Part IV.

72. Einar Östgaard, *Factors Influencing the Flow of News*, 2 J. PEACE RES. 39, 54 (1965). Many studies indicate, for instance, that public opinion has been a preeminent factor in the formation of the foreign policies of recent American administrations. See John R. Worth, *Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-signing" of the Rome Statute and the Legacy of Senator Bricker*, 79 IND. L.J. 245, 263-64 (2004); Stuart N. Soroka, *Media, Public Opinion, and Foreign Policy*, HARV. INT'L J. PRESS/POL., Jan. 2003, at 27 and sources cited therein.

opinion,⁷³ though such public opinion is much more susceptible to manipulation by the governments themselves than in democracies.

Public opinion of foreign states—and the events and situations involving them—may affect foreign policy in diverse ways. First, and most directly, foreign policy platforms introduced by candidates and parties in national elections can play a factor in voters' decisions, which are thereafter expressed in the actual policies implemented by the elected government. Second, the public can exert pressure on the government to act in a particular fashion with regard to a discrete situation.⁷⁴ Real-time media reporting of dramatic news events, especially through televised images, tends to arouse an emotional response on the part of the public, who then demands that quick and often simplistic measures be taken to deal with the crisis.⁷⁵ Commentators use the phrase "CNN effect" to describe "television coverage, primarily of horrific humanitarian disasters, that forces policy makers to take actions they otherwise would not have taken, such as military intervention."⁷⁶ Third, a subtler but arguably more consistent and profound impact of public opinion on foreign policy is embedded in the general images and reputations it attributes to states. The level of popularity enjoyed by a state in public opinion abroad influences its ability to achieve concessions from foreign governments and to reach other desired policy outcomes.⁷⁷ International law, among other factors, plays an important role in this context. Alleged violations of its norms—particularly those pertaining to human rights—tend to have a strong impact on public opinion, which in turn shapes foreign policies and private actors' economic choices.⁷⁸

Thus, according to Wang:

National reputation is unquestionably an instrument of power
[F]oreign public opinion is gaining ever more significance in forming
an emerging globalized public and influencing international political

73. E.g., Moshe Hirsch, *The Future Negotiations over Jerusalem, Strategic Factors and Game Theory*, 45 CATH. U.L. REV. 699, 716 n.57 (1996); Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 7 (1993).

74. TAYLOR, *supra* note 70, at 58–59; Kristine A. Oswald, *Mass Media and the Transformation of American Politics*, MARQ. L. REV. 385, 403–04 (1994); Potter, *supra* note 69, at 48–49.

75. TAYLOR, *supra* note 70, at 94–95.

76. Gilboa, *supra* note 69, at 63.

77. See NYE, *supra* note 64, at 36–37, 129–30.

78. Henry H. Perritt, Jr., *Iraq and the Future of United States Foreign Policy: Failures of Legitimacy*, 31 SYRACUSE J. INT'L L. & COM. 149, 159–60 (2004); see also Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 333 (2004).

process and outcome [T]he role of individuals and their expressed opinions do form a climate of opinion, in which decision-makers pursue policies. When public opinion is activated, the climate of opinion can limit or broaden policy choices and actions. Therefore, the perceptions and opinions held by foreign publics regarding a given nation become critically important to decisions by nation-states.⁷⁹

And, as Professor Evan Potter further explains:

Image counts for a lot in contemporary world politics. Whether a country needs to build international coalitions against terrorism, co-operate to protect the environment, attract foreign investment, or bring in foreign students, influencing foreign public opinion is critical to national success because, in the absence of substantial military or economic weight, most countries are the image or 'words' they project abroad. Their room to maneuver is affected by their image, or soft power, so that all points of contact—whether promoting policies or exporting—will feed off this general image in both positive and negative ways.⁸⁰

Notably, a state's reputation often has concrete implications for its population. For instance, national economic recession—which, in the context of this Article, could result from the shattering of a state's international status, a reduction of its credit rating, or sanctions or boycotts imposed on it in response to its perceived behavior—tends to percolate down to the level of the ordinary citizen. In addition, the scope of tourism and foreign investment directly affects domestic businesses.⁸¹ Finally, since the state represents the collective interests of its citizens in the international arena,⁸² its negotiating power and ability to extract concessions could dictate prevailing conditions in a myriad of areas that are relevant to the citizens' lives and welfare, such as security, international trade, health, and the environment.

The high value of reputation is best evidenced by the growing understanding among states of the utility of actively enhancing and using rep-

79. Wang, *supra* note 67, at 91–92.

80. Potter, *supra* note 69, at 44.

81. See, e.g., Central Intelligence Agency, THE WORLD FACTBOOK 2009, Field Listing—Economy (2009), available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2116.html> (last visited Oct. 19, 2009) (describing tourism as a dominant or significant industry in a majority of countries, and foreign investment as a significant factor in the development of many countries' economies).

82. Daniele Archibugi, *From the United Nations to Cosmopolitan Democracy*, in COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER 121, 128–29 (Daniele Archibugi & David Held eds., 1995).

utation as a tool of foreign policy.⁸³ Since “communication, education, and persuasion have become major techniques in foreign relations,”⁸⁴ successful “image politics” translates to power in the international arena.⁸⁵ In addition, extensive academic literature is dedicated to the issue of states’ image strategies, mainly within the context of two related and frequently discussed concepts. The first is soft power: a state’s ability to achieve its objectives by highlighting the attractiveness of its culture, political ideals, and policies.⁸⁶ The second is public diplomacy: the endeavor to shape foreign public opinion, thereby inducing foreign governments to make policy decisions compatibly with the political objectives of the state taking these measures.⁸⁷ Scholars have gone so far as to say that “today half of ‘power politics’ consists of image-making. With the rising importance of publics in foreign affairs, image-making has steadily increased.”⁸⁸ Likewise, it has been contended that

[f]avorable image and reputation around the world, achieved through attraction and persuasion, have become more important than territory, access, and raw materials, traditionally acquired through military and economic measures.⁸⁹

C. The Harms of Defamation

Having examined the importance of state reputation, we must recall that information about states inevitably contains inaccuracies in some cases, and distorts others’ perceptions of those states.⁹⁰ Such erroneous perceptions are occasionally favorable to the state concerned, but on other occasions they might portray the state in a negative light. Although a state’s overall image is the product of a complex plethora of components, it must be presumed—as domestic defamation laws do—that the available factual information pertaining to an actor is a crucial factor in the formation of others’ opinions of the actor. It is therefore clear that all the reputation-related benefits states enjoy in the international arena are jeopardized when false derogatory statements of fact are published about

83. C. Anthony Giffard & Nancy K. Rivenburgh, *News Agencies, National Images, and Global Media Events*, 77 JOURNALISM & MASS COMM. Q. 8, 8 (2000).

84. Gilboa, *supra* note 69, at 60.

85. Giffard & Rivenburgh, *supra* note 83, at 8.

86. NYE, *supra* note 64, at x.

87. *See id.* at 105; TAYLOR, *supra* note 70, at 96; Gilboa, *supra* note 69, at 57, 59; Wang, *supra* note 67.

88. John H. Herz, *Political Realism Revisited*, 25 INT’L STUD. Q. 182, 187 (1981).

89. Gilboa, *supra* note 69, at 56.

90. For elaboration see Part IV *infra*.

them. The damage may be irreversible, even if the truth is finally revealed after months or years, as history is “a succession of short-run situations that may alter the course of events for good.”⁹¹ While a state’s significant political, economic, or military power may counterbalance certain reputational harms, the weaker the state, the more acute the consequences of defamation. International legal protection against the harms of defamation is thus critical.

III. THE INTERNATIONAL COMMUNITY’S PERSPECTIVE: THE COLLECTIVE INTEREST IN PROTECTING STATES FROM FALSE DEFAMATORY STATEMENTS

The justifications for establishing an international parallel to domestic defamation laws transcend particular states’ interests in maintaining their reputations. The following section will contend—by analogy to the view that private defamation law serves the society at large—that protecting state reputation can enhance organized and efficient global governance for the benefit of the entire international community.

A. Preserving Incentives for Compliance with International Law

Private reputation, so it is contended, is an efficient social mechanism that promotes cooperation within a community while relying on the self-interest of the individual.⁹² Given the social benefits that are bestowed upon those who are known to conform to public values, and are otherwise denied, reputation provides an incentive to conform to these values.⁹³ While the dissemination of true information creates transparency and serves the stated objective, false information undermines it. When it is hard to discern whether negative reports regarding individuals are true or false, the level of censure an alleged wrongdoer is subjected to decreases, and the cost associated with wrongdoing consequently lessens.

91. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 264 (Harper & Row 1975) (1942); Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 *UCLA L. REV.* 103, 124 (1992); Elad Peled, *Constitutionalizing Mandatory Retraction in Defamation Law*, 30 *HASTINGS COMM. & ENT. L.J.* 33, 56 (2007); Harry H. Wellington, *On Freedom of Expression*, 88 *YALE L.J.* 1105, 1130 (1979);

92. See, e.g., Michael Passaportis, *A Law and Norms Critique of the Constitutional Law of Defamation*, 90 *VA. L. REV.* 1985, 1986–87 (2004).

93. TRAVIS HIRSCHI, *CAUSES OF DELINQUENCY* 20–21 (1969); JOHN J. MACONIS, *SOCIOLOGY* 213 (6th ed. 1997); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 *MICH. L. REV.* 338, 433 (1997); Passaportis, *supra* note 92, at 1986–87.

On the other hand, the perceived social advantages of compliance are moderate or uncertain where compliance does not immunize one from being accused of noncompliance. Assuming that abiding by any norm involves certain personal costs, the incentives to respect the community's norms thus recede.⁹⁴ The law of defamation is designed to prevent such outcomes.

A similar analysis can be applied, *mutatis mutandis*, to the international arena. Arguably, repetitive publication of false reports accusing States of violating international norms might diminish the overall tendency of compliance. This proposition is sustainable under the two principal social science paradigms commonly used to interpret state behavior: rational choice theory and social constructivism.

According to the rational choice model, States act as "rational decision-makers [by selecting] the course of action . . . that maximizes their utility, as determined by their goals and the alternative options available to them."⁹⁵ Among the complex plethora of factors affecting the choice between compliance and defection with regard to a certain norm or regime, a prominent role is attributed to states' interests in maintaining good reputations within the international community.⁹⁶ As international relations theorists and international lawyers have long argued, States honor their commitments primarily because they fear that any evidence of unreliability will reduce the willingness of other actors to interact with them.⁹⁷ Having a good reputation for compliance allows States to enter into more profitable cooperative arrangements,⁹⁸ and, as explained above, assists them in achieving various policy goals in the international political and financial arenas. Thus, whether a state will comply with international law in any given case depends on the balance of the reputational benefits of compliance and the costs of compliance.

False defamatory publications accusing compliant States of noncompliance undercut the benefits they seek to enjoy by complying. Since this

94. See HIRSCHI, *supra* note 93, at 16–21; MACIONIS, *supra* note 93, at 213; Passaportis, *supra* note 92, at 1997–99.

95. See, e.g., Moshe Hirsch, *Compliance with International Norms in the Age of Globalization: Two Theoretical Perspectives*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* 166, 172 (Eyal Benvenisti & Moshe Hirsch eds., 2004).

96. See Guzman, *supra* note 65, at 1861, 1870.

97. Downs & Jones, *supra* note 61, at S95–S96.

98. Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT'L L.* 335, 403 (1989); Andrew T. Guzman, *Reputation and International Law*, 34 *GA. J. INT'L & COMP. L.* 379, 385 (2006).

phenomenon renders the perceived political advantages of compliance *ex ante* moderated or uncertain, States—especially those that feel routinely injured—have reduced incentives to maintain international agreements and abide by international law.⁹⁹ While the extent of the decrease is obviously speculative and unquantifiable (and constitutes only one of many factors influencing State behavior), it might become acute in borderline cases in which the costs and benefits of compliance appear to be equal. It is asserted, for instance, that when matters of national security are at stake, the scales are not easily tipped in favor of compliance with the pertinent international norms,¹⁰⁰ such as those demanding respect of human rights during the fight against terrorism. Even when states choose to comply despite opposing interests, there is necessarily a delicate balance of cost and benefit. Any minor interference with the equation, in the form of a decrease in the reputation-related advantages, might therefore increase the overall rate of noncompliance in these crucial matters.

Social constructivism may lead to similar conclusions. According to this model, compliance with international law is not the outcome of cost-benefit calculations, but rather of a process of international socialization, driven in a large extent by states' non-instrumental desires to obtain positive evaluations by their peer members in the international community.¹⁰¹ Much like individuals' tendencies, most states' reluctance to provoke negative social judgments inhibits their inclination to violate norms.¹⁰² The preservation of an appropriate incentive to comply thus requires high compatibility between the reputation a state deserves and its actual reputation.

Sociology may provide us with additional, related insights in this context. For instance, it is contended that a feeling of detachment from society causes an individual to self-alienate from society and its norms, which in turn reduces his or her willingness to comply with those

99. Picker, *supra* note 1, at 114.

100. Guzman, *supra* note 65, at 1874.

101. See ROBERT H. JACKSON & GEORG SORENSEN, INTRODUCTION TO INTERNATIONAL RELATIONS: THEORIES AND APPROACHES 162 (2007).

102. See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 903–04 (1998); Hirsch, *supra* note 95, at 181; Vaughn P. Shannon, *Norms Are What States Make of Them: The Political Psychology of Norm Violation*, 44 INT'L STUD. Q. 293, 297–99 (2000). See generally Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000); John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855 (1998).

norms.¹⁰³ Moreover, the lower the social status that the individual risks losing as a consequence of deviance, the higher the likelihood of rule-breaking.¹⁰⁴ The same could be applied, perhaps, to states that are positioned at the periphery of the international community.¹⁰⁵ Arguably, ostracism and isolation of states caused by persistent dissemination of negative information about them might undermine their tendency to comply with international law. It is, of course, particularly important to prevent *false* information from generating such an outcome.

B. Promoting Informed Global Governance

An important function that defamation law may serve in democratic societies is fostering informed self-governance, especially where false publications regarding public figures and public matters are concerned.¹⁰⁶ This notion may be applied, *mutatis mutandis*, to the international arena.

It is commonly held, particularly within American First Amendment jurisprudence, that collective decision-making is best served by the constant exchange of views and information, which enables society to make informed choices between competing courses of action.¹⁰⁷ The information whose free flow is most crucial is the information concerning the actions of the government and its people.¹⁰⁸ However, information must not only be available but also be accurate in order to sustain valuable and beneficial public debate. The political value judgments of individuals and society, which are the driving forces of self-governance, are based largely on raw data.¹⁰⁹ Since a decision-maker's "image of reality" and the information he or she possesses have significant influence on the deci-

103. HIRSCHI, *supra* note 93, at 16–21; MACIONIS, *supra* note 93, at 213; Hirsch, *supra* note 95, at 182–83.

104. HIRSCHI, *supra* note 93, at 16–21; MACIONIS, *supra* note 93, at 213; Hirsch, *supra* note 95, at 182–83.

105. Hirsch, *supra* note 95, at 182–83.

106. See George E. Frasier, *An Alternative to the General-Damage Award for Defamation*, 20 STAN. L. REV. 504, 504 (1968).

107. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 18–19 (1993); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 882 (1963); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 260 (1961).

108. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985) (White, J., concurring).

109. See William P. Marshall & Susan Gilles, *The Supreme Court, The First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 197 (1994).

sion he or she will make,¹¹⁰ the nature of the information in the public domain necessarily projects upon the quality of collective decision-making. Thus, “democratic governance requires accurate information and knowledge of public affairs, not mere opinion, and certainly not an aggregation of uninformed preferences.”¹¹¹

Clearly, if the public and its representatives deliberate while relying on false information, the decisions reached are likely to be less wise.¹¹² Dissemination of false defamatory statements pertaining to public officials and public figures is capable of producing precisely that situation. Even the U.S. Supreme Court, despite its restrictive approach to defamation law, has conceded in this context that “there is no constitutional value in false statements of fact.”¹¹³ Most resolved in this view was Justice Byron White, who declared that “First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values.”¹¹⁴

Similar to national political processes, international actions are based not so much on objective international reality as on subjective perceptions of such reality.¹¹⁵ When any of the players in the international community have in mind an image of a certain event or situation that does not coincide with reality, their response could be ill-suited to achieve the intended policy outcomes and may lead to undesirable consequences.¹¹⁶

This contention is applicable, first, to the traditional—and still relevant—realm of foreign policy decisions by state officials. Erroneous perceptions of a state’s behavior could lead other states to respond in

110. OSCAR H. GANDY, JR., BEYOND AGENDA SETTING: INFORMATION SUBSIDIES AND PUBLIC POLICY 198 (1982); Johan Galtung & Mari Holmboe Ruge, *The Structure of Foreign News: The Presentation of the Congo, Cuba and Cyprus Crises in Four Norwegian Newspapers*, 2 J. PEACE RES. 64, 64 (1965); Oswald, *supra* note 74, at 396.

111. R. Randall Rainey & William Rehg, *The Marketplace of Ideas, the Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas’ Theory of Democracy*, 69 S. CAL. L. REV. 1923, 1938 (1996).

112. See Frasier, *supra* note 106, at 507; Rodney K. Smith & Patrick A. Shea, *Religion and the Press: Keeping First Amendment Values in Balance*, 2002 UTAH L. REV. 177, 194–95 (2002).

113. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

114. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985) (White, J., concurring).

115. KUNCZIK, *supra* note 69, at 20; YAACOV Y. I. VERTZBERGER, THE WORLD IN THEIR MINDS: INFORMATION PROCESSING, COGNITION, AND PERCEPTION IN FOREIGN POLICY DECISIONMAKING 7–10, 35–36 (1990); Galtung & Ruge, *supra* note 110, at 64.

116. Vertzberger, *supra* note 115 at 22, 35–36.

manners that injure the interests of the international community as a whole. Generally speaking, undermining friendly international relations is harmful in itself, particularly with respect to international stability.¹¹⁷ More concrete examples are the imposition of sanctions on states, which hampers economically desirable free trade; the exclusion of states from institutional regimes, which weakens those regimes; and the refusal to cooperate with states, which results in a loss of the resources and endeavors they could contribute.

The idea that inaccurate perceptions regarding states may lead others to take harmful action is also true in the era of globalization, in which states no longer enjoy exclusive power in the international arena.¹¹⁸ Unlike before, the direction of global politics is determined by complex interactions between a plethora of state and nonstate actors. But what has not changed is the fact that any of the actors involved can make policy mistakes when provided with inaccurate information, which can thereby negatively affect collective community interests. Special attention should be dedicated in this respect to the quality of the information available to the international public, whose effective participation in global decision-making processes is attributed great normative importance.¹¹⁹ For such participation to be beneficial—i.e., in order for it to ensure a meaningful manifestation of individual political rights, as well as to promote the

117. See CIRC, *supra* note 42, Preamble; John B. Whitton, *The Problem of Curbing International Propaganda*, 31 LAW & CONTEMP. PROBS. 601, 602 (1966).

118. Linda Weiss, *Globalization and National Governance: Antinomy or Interdependence? The Interregnum: Controversies in World Politics*, 25 REVIEW OF INTERNATIONAL STUDIES (SPECIAL ISSUE) 59, 59–60 (1999).

119. Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L L. REV. 1335, 1361 (1999); Henry Teune, *Global Democracy*, 581 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 23 (2002). Various proposals have been raised for enriching and deepening global democracy and legitimacy by increasing transparency, accountability, and participation. See, e.g., Archibugi, *supra* note 82, at 137–41; Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 202–07 (1999); Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. 763, 771–72 (2005); Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT'L L. 191 (2000); Anne-Marie Slaughter, *Building Global Democracy*, 1 CHI. J. INT'L L. 223 (2000); Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51, 74 (2006); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 531–34 (2001).

collective interest in wise and just decisions—it must be based on appropriate information.¹²⁰

IV. FACTORS IMPEDING THE MAINTENANCE OF ACCURATE STATE REPUTATIONS

The preceding analysis of the individual and collective interests in protecting state reputation is of little practical significance if one contends that states do not face substantial risks of being defamed or that they are capable of coping with them effectively. The following will attempt to demonstrate that both contentions are wrong.

A. Threats to States' Reputations

1. The Public's Dependence on Information Supply

Before identifying the information sources that actively threaten states' reputations, one should consider the background against which these sources operate. Thus, in order to facilitate comprehensive understanding of the phenomenon of state defamation, this section discusses the characteristics of the primary addressee of defamatory communications: the international public.¹²¹ These characteristics both foster the circulation of defamation in the first place and render such defamation influential.

Most individuals do not tend to dedicate significant resources to forming their opinions on political matters.¹²² There is a clear disincentive to invest individual effort in gathering and evaluating information on public affairs.¹²³ The costs in terms of time and money are far greater than the gains since each person's relative influence on the political process is negligible, and the impact of the collective decisions on his or her life

120. See CIRC, *supra* note 42, Preamble (stating that peoples have a right to be fully and reliably informed); Universal Declaration of Human Rights, G.A. Res. 217A (III), at 74-75, U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 19, *adopted and opened for signature* Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171; Alasdair Roberts, *Structural Pluralism and the Right to Information*, 51 U. TORONTO L.J. 243, 260-62 (2001).

121. KUNCZIK, *supra* note 69, at 19; *see also* sources cited *supra* notes 69-73.

122. See John G. Matsusaka, *Explaining Voter Turnout Patterns: An Information Theory*, 84 PUB. CHOICE 91, 93 (1995) (listing groups for which the expenditures of resources in obtaining information on political matters yield higher returns, including public employees, farm owners, and people who are married, highly educated, older than average, and long-time residents of a given community).

123. *Id.*

often seems remote and obscure.¹²⁴ The further decisions shift away from private concerns to issues that lack a direct and unmistakable personal link, the less motivated are individuals to command the facts and to shape wise preferences.¹²⁵ This is even truer with regard to the foreign and international domains, in which the costs of information gathering and assessment are greater¹²⁶ and the effects of political decisions on one's personal life are usually slighter. Indeed, many studies have shown that levels of knowledge about foreign affairs among publics in the developed world are very low.¹²⁷ This situation provides a fertile ground for endeavors to fashion the will of the people through the supply of biased information, and even when inaccuracies are not deliberate, they can easily mislead the public into making unsubstantiated judgments.¹²⁸

2. Superficial and Biased Media

Since the average person presumably possesses limited personal knowledge of public matters, the media significantly impacts the political positions he or she is likely to adopt.¹²⁹ For nearly all concerns on the public agenda, citizens are exposed to a secondhand reality that is structured by media reports of events and situations, especially with regard to news concerning foreign affairs. "The media are the principal means by which the vast majority of individuals receive information about [these topics,] . . . for which personal experience is unlikely to provide much useful information."¹³⁰ This situation is intensified by the revolution in

124. See Gregory G. Brunk, *The Impact of Rational Participation Models on Voting Attitudes*, 35 PUB. CHOICE 549 (1980). Brunk states that "few citizens should vote in any large-scale election since the chance is very small that any person's vote will affect an electoral outcome," and attributes the apparently contradictorily high levels of voter turnout in most elections to a common idea that voting is a civic duty and makes one a "good citizen." *Id.*

125. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 207–59 (1957); SCHUMPETER, *supra* note 91, at 258–61; see also SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* 219 (1991).

126. Benvenisti, *supra* note 119, at 174.

127. See, e.g., OLE R. HOLSTI, *PUBLIC OPINION AND AMERICAN FOREIGN POLICY* 289, 215 (rev. ed., 2004) (discussing the US public's lack of knowledge about foreign affairs).

128. See SCHUMPETER, *supra* note 91, at 263; Lyriisa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH & LEE L. REV. 1091, 1097 (2008).

129. POPKIN, *supra* note 125, at 9.

130. MAXWELL MCCOMBS, *SETTING THE AGENDA: THE MASS MEDIA AND PUBLIC OPINION* 1, 12 (2004); Soroka, *supra* note 72, at 28.

communication technologies, manifested mainly in the advent of the internet and global news networks such as CNN International, BBC World, Sky News, and Al-Jazeera, which have enabled “broadcasting . . . almost every significant development in world events to almost every place on the globe.”¹³¹

In line with the premise of domestic defamation laws—that messages influence people’s views—various studies have demonstrated that news reports, especially on television, powerfully shape public opinion,¹³² particularly with respect to foreign affairs.¹³³ Thus, clear correlations have been found between media coverage and popular perceptions of foreign nations.¹³⁴ One study revealed, for example, that in nine different Muslim countries, television news viewing has influenced anti-American attitudes more than any other examined variable.¹³⁵ Hence, mass media is said to be the strongest shaper of national images.¹³⁶ These images, in turn, often translate to public pressure on the political branches to adopt certain policies vis-à-vis the states concerned.¹³⁷ It should be noted that the “mediation” of public opinion between media reports and foreign policies is not always present or necessary; obviously, political decision-makers rely on mass media information, which shapes their own beliefs and orientations with regard to states and situations.¹³⁸

In light of the media’s overwhelming impact, it is important to examine the overall quality of the information it conveys.

Despite the noble role attributed to the press in democratic societies—enabling the citizenry to make informed political, economic, and social decisions, and serving as a check on the government—the ultimate ob-

131. Gilboa, *supra* note 69, at 56; *see also* TAYLOR, *supra* note 70, at 95.

132. SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS 112 (1987); SUNSTEIN, *supra* note 107, at 62. Communications theorists often talk about the “framing” function of the media, namely, the “selection, exclusion of, and emphasis on certain issues and approaches to promote a particular definition, interpretation, moral evaluation, or a solution.” Gilboa, *supra* note 69, at 63–64.

133. Gilboa, *supra* note 69, at 64.

134. *Id.*; Wayne Wanta, Guy Golan & Cheolhan Lee, *Agenda Setting and International News: Media Influence on Public Perceptions of Foreign Nations*, 81 JOURNALISM & MASS COMM. Q. 364, 364 (2004).

135. Erik C. Nisbet et al., *Public Diplomacy, Television News, and Muslim Opinion*, HARV. INT’L J. PRESS/POL., Apr. 2004 at 11, 31.

136. KUNCZIK, *supra* note 69, at 1, 20.

137. *Id.* at 20; *see also* Donald L. Jordan & Benjamin I. Page, *Shaping Foreign Policy Opinions: The Role of TV News*, 36 J. CONFLICT RESOL. 227, 234 (1992).

138. KUNCZIK, *supra* note 69, at 58, 86; Östgaard, *supra* note 72, at 54.

jective of modern media outlets is financial profit.¹³⁹ Thus, the press strives to maximize its circulation or rating by adapting the news flow to assumed audience preferences. This commercial orientation distorts the media's priorities by emphasizing their entertainment function at the expense of their commitment to properly informing the public.¹⁴⁰

As a result, news coverage is often characterized by two salient features. First, given the inherent pressure for speed in reporting, and the lack of patience of most readers and viewers when it comes to long or complicated argumentation, the media tend to oversimplify the news.¹⁴¹ Second, the nature of the mass media is to prefer sensationalized stories and negative events, since, compared to the "ordinary," the "exceptional" is more newsworthy, and, presumably, more interesting to the public.¹⁴² "Good news," i.e., news relating to good performances or to the non-occurrence of catastrophes, is seldom considered news at all.¹⁴³

Similar trends prevail, perhaps to an even greater extent, in foreign affairs reporting.¹⁴⁴ As the space or time given to foreign news is restricted by financial considerations,¹⁴⁵ the press often refrains from covering and explaining "sociostructural contexts or complex motives for actions."¹⁴⁶ In addition, newsworthiness considerations, favoring unusual and dramatic events over complex and prolonged situations and processes, often deprive the public consciousness of broad context and prevent genuine

139. See AL GORE, *THE ASSAULT ON REASON* 15–22 (2007). This is so because most of these firms are privately owned in the developed world.

140. See LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 32 (1991); Lili Levi, *Reporting the Official Truth: The Revival of the FCC's News Distortion Policy*, 78 WASH. U. L.Q. 1005, 1103 (2000); Östgaard, *supra* note 72, at 45; Oswald, *supra* note 74, at 387; Rainey & Rehg, *supra* note 111, at 1942; Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1551–52 (1987).

141. Östgaard, *supra* note 72, at 45; Oswald, *supra* note 74, at 394; see also SCHUMPETER, *supra* note 91, at 262.

142. Jonathan Graubart, *What's News: A Progressive Framework for Evaluating the International Debate Over the News*, 77 CAL. L. REV. 629, 648 (1989); Levi, *supra* note 140, at 1129.

143. Oswald, *supra* note 74, at 404.

144. *Global News: TV Coverage of Global Issues*, MEDIA MONITOR (Ctr. for Media and Pub. Aff.: George Mason U., D.C.), Nov.–Dec. 2002, at 1; see also Pew Research Center, *International Stories Don't Register: Public Takes Note of Swine Flu Vaccine*, PEW RES. CTR. PUB., Aug. 26, 2009, <http://www.pewresearch.org/pubs/1323/following-health-care-hearing-about-swine-flu>.

145. Östgaard, *supra* note 72, at 44–45.

146. KUNCZIK, *supra* note 69, at 21.

understanding of events.¹⁴⁷ Consequently, simplistic reports of alleged state aggression, human rights violations, and other breaches of international law are inherently prone to gain prominence.

Further harm to state reputation results from media bias. Such bias might stem from willful editorial decisions, or at least from concrete political views that shape the judgments of journalists and influence the manner in which they present supposedly hard-fact news.¹⁴⁸ In addition, the foreign news desks of major media outlets often hire local reporters and photographers residing in conflict zones, who might provide their employers with information that fits the views and interests of their respective nations.¹⁴⁹ It is also well known that totalitarian regimes seek to control the content of information reported from within their territories by censoring stories, threatening journalists and limiting their access to places and sources.¹⁵⁰ Publication of deficient or inaccurate reports in these cases might improperly influence the public's evaluation of the behavior of states that are in conflict with such regimes.

Perhaps more latent is the systematic prejudice that developing countries ascribe to the Western press, which dominates the international news channels.¹⁵¹ Developing countries complain that the coverage of their affairs is generally negative, incomplete, distorted, and ethnocentric.¹⁵² According to this perspective, since all news is filtered through

147. KUNCZIK, *supra* note 69, at 20–22; TAYLOR, *supra* note 70, at 69; Galtung & Ruge, *supra* note 110, at 67; Östgaard, *supra* note 72, at 45, 48–51.

148. Östgaard, *supra* note 72, at 44.

149. In September 2000, a Palestinian photographer working for a French television station documented the killing of a Palestinian boy by the Israeli army. The pictures he provided were published by the media across the world. A French publicist claimed that the televised report did not depict the occurrences accurately and that the Palestinian boy might not have been killed by the Israeli army. Within a libel suit filed against that publicist, a French court of appeals held his allegations to be sustainable by the facts, upon examining the unedited footage and hearing further evidence. Cour d'appel [CA] [regional court of appeal] Paris, 17e ch., May 21, 2008, Dossier No. 06/08678, available at <http://www.theaugeanstables.com/wp-content/uploads/2008/05/arret-appel-21-05-08-trebucq.PDF>. For a translation of the judgment into English, see <http://www.theaugeanstables.com/2008/06/18/the-court-of-appeals-decision-a-professional-translation-into-english> (last visited Aug. 28, 2009). I am thankful to Ben-Dror Yemini for referring me to these sources.

150. See various examples at Reporters Without Borders, <http://www.rsf.org> (last visited Aug. 28, 2009).

151. *Global News: TV Coverage of Global Issues*, *supra* note 144; see also Noshina Saleem, *U.S. Media Framing of Foreign Countries' Image: An Analytical Perspective*, 2 CAN. J. MEDIA STUD., 130, 137–39 (2007).

152. Saleem, *supra* note 151, at 144.

Western moral, cultural, and political values, journalists focus on sensational events that tend to be negative while ignoring processes such as economic and health development. Additionally, they emphasize the Western angle of stories at the expense of the broader picture, and mischaracterize events by discussing them out of context.¹⁵³

Finally, the media obviously make honest mistakes occasionally. Even in *New York Times v. Sullivan*, which restricted the law of defamation probably more than any other judicial decision or piece of legislation in the world, the U.S. Supreme Court recognized that media errors are inevitable.¹⁵⁴ To make matters worse, many commentators believe that the media tends to be very reluctant to publicly admit its errors.¹⁵⁵

3. Unregulated and Unaccountable Nongovernmental Organizations

Nongovernmental organizations (“NGOs”) enjoy considerable power in global politics with respect to virtually all issues of international concern.¹⁵⁶ NGOs pursue their goals mainly through massive involvement in the activities of supranational bodies¹⁵⁷ and—even more relevant to this Article—through direct communication with publics. By disseminating information, mostly through the media, NGOs are able to mobilize domestic public opinion in various states to exert pressure on governments to implement desired policies.¹⁵⁸ As discussed in Part IV.A.1, *supra*, the

153. Graubart, *supra* note 142, at 635–37; see also KUNCZIK, *supra* note 69, at 22.

154. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 271–72 (1964).

155. DONALD M. GILLMOR, POWER, PUBLICITY, AND THE ABUSE OF LIBEL LAW 87 (1992); Shannon M. Heim, *The Role of Extra-Judicial Bodies in Vindicating Reputational Harm*, 15 COMM'LAW CONCEPTUS 401, 420 (2007); Ellen M. Smith, *Reporting the Truth and Setting the Record Straight: An Analysis of U.S. and Japanese Libel Laws*, 14 MICH. J. INT'L L. 871, 893 (1993); cf. Aaron Perzanowski, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CAL. L. REV. 833, 836 (2006) (stating that a victim of false accusations “at best . . . can ask for a correction or hope another news source will correct the [first’s] mistake.”).

156. Falk & Strauss, *supra* note 119, at 196–204; Martin Köhler, *From the National to the Cosmopolitan Public Sphere*, in RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 231, 231 (Daniele Archibugi, David Held & Martin Köhler eds., 1998); Perritt, *supra* note 78, at 160.

157. Cohen & Sabel, *supra* note 119, at 764–65.

158. RODGER A. PAYNE & NAYEF H. SAMHAT, DEMOCRATIZING GLOBAL POLITICS: DISCOURSE NORMS, INTERNATIONAL REGIMES, AND POLITICAL COMMUNITY 48 (2004); Blitt, *supra* note 78, at 290, 368; Gilboa, *supra* note 69, at 59; Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L.J. 243, 246 (2006); Perritt, *supra* note 78, at 160–61.

fact that citizenries are inadequately informed about international affairs makes them highly vulnerable to NGO influences.¹⁵⁹

Human rights NGOs are particularly powerful.¹⁶⁰ The international community increasingly relies on NGOs to investigate and report human rights violations.¹⁶¹ These NGOs now enjoy considerable influence in virtually all UN decision-making processes mainly by providing various bodies with information relevant to their activities.¹⁶² Most importantly, NGOs shape global public opinion while exploiting the moral authority inherent in human rights rhetoric, which often elicits instinctive support.¹⁶³ The prime weapon of human rights NGOs is the “mobilization of shame.”¹⁶⁴ This technique seeks to induce compliance with human rights norms by reporting the behavior of target states, which exposes these states to embarrassment, ostracism, and isolation.¹⁶⁵

Despite many NGOs' important goals and their aspiration to reflect the interests and positions of large sectors in international civil society, their activities should be looked upon with caution. NGOs are often described as self-elected elite that have limited legitimacy, advocate special causes and are unrepresentative of the general public.¹⁶⁶ Moreover, their fine organizational capabilities, stemming from their relatively small size, enable them to exercise effective lobbying that is arguably disproportional to their actual public support.¹⁶⁷ Finally, in light of the general observation that “[a]ctors [in international politics] attempt to mislead and manipulate target actors by disseminating incorrect or only partially correct facts and interpretations to create desired expectations and con-

159. See *infra* note 136 and accompanying text.

160. Blitt, *supra* note 78, at 292; Mertus, *supra* note 119, at 1369.

161. Blitt, *supra* note 78, at 263.

162. PAYNE & SAMHAT, *supra* note 158, at 69–70; Blitt, *supra* note 78 at 263, 296–317; Mertus, *supra* note 119, at 1369–72.

163. Blitt, *supra* note 78, at 262–63, 290.

164. *Id.* at 290.

165. *Id.* at 290–91; Mertus, *supra* note 119, at 1368–69.

166. E.g., John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT'L L. 229, 245 (2003); Mertus, *supra* note 119, at 1385; Jed Rubinfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2018 (2004); Stein, *supra* note 119, at 491; Andrew J. Walker, *When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees*, 106 W. VA. L. REV. 245, 295–96 (2004).

167. See, e.g., Benvenisti, *supra* note 119, at 171–72.

ceptions,” it is even possible that NGOs deliberately deceive on certain occasions.¹⁶⁸

Particularly significant, again, are human rights organizations, because of their political influence and their central role in circulating communications critical of states. Thus, the human rights NGO community is said to have a problematic record with regard to accuracy in reporting.¹⁶⁹ Several factors might support and explain this assertion.

First, no prerequisite or certification is required in order to pursue the classic activities of human rights organizations, since anyone may simply take steps to investigate and publish reports.¹⁷⁰ Additionally, no “formal checks or balances . . . regulate the quality or reliability of NGO work” once it is performed.¹⁷¹ This sometimes has apparent negative consequences. Some studies of the works of human rights organizations have demonstrated that their fact-finding missions commonly do not comport with reasonable procedural and evidentiary standards.¹⁷² For example, they often rely upon hearsay statements and documents that are not fully authenticated; the witnesses they question are not cross-examined; they do not operate for sufficient periods; they do not possess enough personnel to guarantee sufficient thoroughness; their reports rarely contain dissenting opinions; and the line between their inferences and concrete findings of fact is frequently blurred.¹⁷³ The depth, quality, and reliability of their work may also be jeopardized on many occasions by reliance on testimony of interested parties.¹⁷⁴ Furthermore, international NGOs often base their reports on the fact-finding of nationally based NGOs, which are likely to be more biased against a party to a conflict, “without meaningful guidelines for obtaining corroborative evidence or . . . [checking the] methodologies employed by the national” organization.¹⁷⁵

168. VERTZBERGER, *supra* note 115, at 27.

169. Blitt, *supra* note 78, at 263.

170. *Id.* at 288.

171. *Id.* at 292.

172. See HANS THOOLEN & BERTH VERSTAPPEN, HUMAN RIGHTS MISSIONS: A STUDY OF FACT-FINDING PRACTICE OF NON-GOVERNMENTAL ORGANIZATIONS 1, 18 (1986); David Weissbrodt, *Human Rights Implementation and Fact-finding by International Organizations*, 74 AM. SOC'Y INT'L L. PROC. 17, 18 (1980).

173. See Blitt, *supra* note 78, at 289 and the sources cited therein; INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS 203 (B.G. Ramcharan, ed., 1982).

174. *See id.*

175. *Id.* at 341–42, 360.

Second, there is ample evidence of bias and political motivation among NGOs.¹⁷⁶ Particularly, some NGOs are funded by interested governments or private donors that influence their operation,¹⁷⁷ while the public at large is often completely unaware of such influence.¹⁷⁸

And, third, the fact that many NGOs compete for scarce media coverage and limited resources from a few foundations is said to generate constant competition between them.¹⁷⁹ This competition in turn incentivizes them to devise dramatic new angles and to uncover even greater atrocities, sometimes at the expense of accuracy.¹⁸⁰

Many commentators resist such criticism and claim that informal controls to which human rights NGOs are subject—mainly their interests in maintaining their own reputations—guarantee the quality of their work.¹⁸¹ However, even assuming that most reports issued by human rights organizations—at least, by the most prominent and influential ones—are true, this does not preclude the risk of mistakes. Thus, the need to redress the harms of false reports may not be dismissed.¹⁸²

4. Interested Governments and State Officials

Governments often use propaganda to further various legitimate interests, but, for some, propaganda constitutes a weapon of distortion and

176. See, for instance, the position of the founder of Human Rights Watch. Robert L. Bernstein, *Rights Watchdog, Lost in the Mideast*, NEW YORK TIMES, Oct. 19, 2009, at A31.

177. See *Gonahasa v. U.S. Immig'n & Natural'n Serv.*, 181 F.3d 538, 542 (4th Cir. 1999); *M.A. A26851062 v. U.S. Immig'n & Natural'n Serv.*, 899 F.2d 304, 313, 331, 359 (4th Cir. 1990); Rachel Brett, *The Role and Limits of Human Rights NGOs at the United Nations*, 43 POL. STUD. 96, 98 (1995); Mertus, *supra* note 119, at 1376–77.

178. *Gonahasa*, 181 F.3d at 542; *M.A. A26851062*, 899 F.2d at 313, 331, 359; Bernstein, *supra* note 176; Brett, *supra* note 177, at 98; Mertus, *supra* note 119, at 1376–77.

179. See, e.g., Clifford Bob, *Merchants of Morality*, FOREIGN POL'Y, Mar.–Apr. 2002, 36, 37; James Ron, Howard Ramos & Kathleen Rodgers, *Transnational Information Politics: NGO Human Rights Reporting, 1986–2000*, 49 INT'L STUD. Q. 557, 575 (2005).

180. *Gonahasa*, 181 F.3d at 542; *Vaduva v. U.S. Immig'n & Natural'n Serv.*, 131 F.3d 689, 691 (7th Cir. 1997); Blitt, *supra* note 78, at 332; *see id.* at 331, 354–56.

181. See, e.g., Philip Alston, *Beyond 'Them' and 'Us': Putting Treaty Body Reform into Perspective*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 501, 509 (Philip Alston & James Crawford eds., 2000); Paul Wapner, *Defending Accountability in NGOs*, 3 CHI. J. INT'L L. 197, 203–04 (2002).

182. For the sake of comparison, even though it may be assumed that most stories published in the press—at least by the leading media outlets—are correct, and that those media have an interest in maintaining their reputations, only few question the social need for a law of defamation to address the inevitable cases in which mistakes occur.

defamation.¹⁸³ States have often disseminated misinformation in order to influence foreign governments' decision-making so as to advance national interests.¹⁸⁴ States have also used false reports initially publicized in the media for their own purposes.¹⁸⁵ Finally, there are arguably cases in which government officials deliberately deceive their counterparts, superiors, or subordinates in order to promote the policies they wish their own state to adopt.¹⁸⁶

B. The Insufficiency of Existing Mechanisms to Redress Reputational Harms

As has been demonstrated, suing for defamation in a domestic court is not an available option for a state that has been the subject of a false, derogatory report. The following analysis will indicate that such a state cannot count on mechanisms *outside* the scope of defamation law to properly protect its interests either.

1. Relying on Market Competition to Correct Erroneous Reports

Defamed states may allegedly count on competition in the press market to drive media outlets to expose each others' mistakes. This possibility, however, should be given limited weight.

First, it cannot be assumed that competing media will always be willing to bear the cost of conducting an extensive investigation in order to refute a defamatory report. This is true especially since reports refuting or contradicting allegations of outrageous conduct are not as sensational and dramatic as the accusations themselves.¹⁸⁷ As Justice William Brennan of the United States Supreme Court has contended in the context of personal defamation: "Denials, retractions, and corrections are not 'hot' news."¹⁸⁸

183. Whitton, *supra* note 117, at 601–02.

184. KUNCZIK, *supra* note 69, at 25, 51; *see also* VERTZBERGER, *supra* note 115, at 27.

185. *See* Blitt *supra* note 78, at 350–51.

186. For example, it has been asserted recently that the U.S. decision to attack Iraq in 2003 was influenced by an intercepted letter indicating a link between Saddam Hussein and Al-Qaeda, which turned out to have been faked. RON SUSKIND, *THE WAY OF THE WORLD: A STORY OF TRUTH AND HOPE IN AN AGE OF EXTREMISM* 172–74 (2008). The U.S. administration denied this report. Joby Warrick, *CIA More Fully Denies Deception About Iraq*, *THE WASHINGTON POST*, Aug. 23, 2008, at A03.

187. *See supra* Part V.A.2 for discussion of media motivations.

188. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46–47 (1971).

Second, concentration of ownership in mass media is said to seriously diminish the competition in that market.¹⁸⁹ Scholars therefore claim that the contents and viewpoints communicated by the press are likely to become increasingly homogeneous,¹⁹⁰ and often use as an example the rather uniform position taken by the U.S. media in support of the government before and during the Second Gulf War.¹⁹¹

Some commentators add that media outlets might even demonstrate real reluctance to attack each others' publications, wishing to show professional courtesy or to receive similar treatment themselves.¹⁹² The situation in the realm of international news intensifies such concerns. Many media outlets opt for the relatively cheap method of relying on news agencies for their international affairs reports.¹⁹³ Since four major suppliers dominate the news agency market, the prisms through which most international news enters the public domain are quite uniform.¹⁹⁴ This is especially true in developing countries, where the media lacks resources and, therefore, depends on news agencies and global networks for information.¹⁹⁵ The increasing reliance of transnational news agencies on their national counterparts¹⁹⁶ further reduces the likelihood of obtaining diverse viewpoints with regard to particular events.

For similar reasons, one may not assume that inaccurate reports issued by NGOs and circulated through the media are often corrected by the media. Nor may competition in the NGO community itself be relied upon as a check. By definition, NGOs tend to promote causes that do not appeal to states and often even contradict states' interests. Few NGOs dedicate their activities to supporting particular states or enhancing gen-

189. ERIC BARENDT, *BROADCASTING LAW: A COMPARATIVE STUDY* 122 (1995); BOLLINGER, *supra* note 140, at 27, 162 n.1-2; GILLMOR, *supra* note 155, at 9; LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 272 (1991); Donald Meiklejohn, *Public Speech and Libel Litigation: Are They Compatible?*, 14 *HOFSTRA L. REV.* 547, 566-67 (1986); Perzanowski, *supra* note 155, at 850, n.116; Oswald, *supra* note 74, at 387.

190. GILLMOR, *supra* note 155, at 9; Graubart, *supra* note 142, at 658; Meiklejohn, *supra* note 189, at 567.

191. Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 *GEO. WASH. L. REV.* 845, 884 (2008).

192. James H. Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 *AM. U. L. REV.* 375, 394 n.101 (1981); Note, *Vindication of the Reputation of a Public Official*, 80 *HARV. L. REV.* 1730, 1732 (1967) [hereinafter *Vindication of Reputation*]; see also Frasier, *supra* note 106, at 505.

193. KUNCZIK, *supra* note 69, at 24.

194. TAYLOR, *supra* note 70, at 68-69.

195. KUNCZIK, *supra* note 69, at 24.

196. *Id.* at 22.

eral state interests such as national security, crime control, or public order; the ones that do are unlikely to attract much media attention.

The appearance of the internet has not changed the portrayed reality dramatically. No single internet publication can be as effective as a report in the traditional mass media, which still constitute the primary source of information in the Western world.¹⁹⁷ Though there are news websites that enjoy impressive popularity, most are subsidiaries of the major newspapers and television networks.¹⁹⁸ Furthermore, it should be remembered that “in order to retrieve information about a certain topic [on the internet], one must actively conduct a targeted search.”¹⁹⁹ However, “[f]ew people have the time or wish to expend the effort to explore the gigantic virtual world in any depth”²⁰⁰ Thus, a person researching on the internet who is not specifically looking for information about a certain state will not frequently come across any such information.²⁰¹

2. Self-Help: Disseminating the State’s Response

A course of action supposedly available to defamed states is to try to have their version of the relevant facts published in one forum or another. But this option is not very promising. First of all, in the current global reality, the state is obliged to interact not only with other states, but also with intergovernmental and supranational institutions, networks of regulators, corporations, investors, NGOs, and so forth. This means that it is much more difficult for the state to locate the relevant actors and inform them of its position on a certain issue.

Reaching global public opinion through the media is especially hard.²⁰² Here again, the fact that denials are not as exciting as the allegations preceding them is the primary obstacle to having the state’s reply published prominently in the commercial press. To the extent that governments reply to defamatory accusations against them in state-owned newspapers or on television stations, such outlets are unlikely to obtain sufficient exposure to foreign publics in order to effectively negate the impact of previous negative reports. Responding on news websites or official state websites is not generally helpful either, given the above-mentioned characteristics of the internet.

197. See Levi, *supra* note 140, at 1104–05; Perzanowski, *supra* note 155, at 850–51, 862.

198. MCOMBS, *supra* note 130, at 147–48.

199. See Peled, *supra* note 91, at 53.

200. MCOMBS, *supra* note 130, at 147–48.

201. See Magarian, *supra* note 191, at 889; Peled, *supra* note 91, at 53.

202. Saleem, *supra* note 151, at 138–39.

States do not have a right of reply vis-à-vis publishers of defamatory content. The laws of common law countries do not grant a right of reply even to natural persons.²⁰³ Though many civil law systems do recognize such a norm, it is rarely enjoyed by governments—let alone foreign ones—as they are normally not deemed to have a legal right to reputation in the first place.²⁰⁴ And as to ethical standards, which often impose a general duty to publish a reply in appropriate cases, they rarely bind the press.²⁰⁵

The assumption that self-help is effective is particularly questionable with regard to less-developed states, which lack the communication capabilities to effectively compete globally through public diplomacy and to disseminate their positions and viewpoints worldwide.²⁰⁶

Finally, even where states succeed in disseminating their versions of the facts, another crucial problem emerges: a reply has limited ability to persuade the public of the falsity of the defamatory charges and to rem-

203. See generally *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (discussing U.S. law); see also Stephen Gardbaum, *A Reply to The Right of Reply*, 76 GEO. WASH. L. REV. 1065, 1069 (2008) (discussing the laws of the U.S., the U.K., Canada, and Australia).

204. See BARENDT, *supra* note 189, at 157 (noting that “Continental legal systems usually provide individuals and organizations with right of reply to (factual) allegations in the press.”); Youm, *supra* note 48.

205. Rather they are merely guidelines. See, e.g., ROY L. MOORE, *MASS COMMUNICATION LAW AND ETHICS* 16 (2d ed. 1999) (discussing U.S. law). But see PARASCHOS, *supra* note 37, at 196 (stating that courts in various European countries consult ethical codes “to assess professional journalistic behavior”).

206. WILLIAM A. HACHTEN & JAMES F. SCOTTON, *THE WORLD NEWS PRISM: GLOBAL MEDIA IN AN ERA OF TERRORISM* 104, 173–74 (6th ed. 2002); KUNCZIK, *supra* note 69, at 26. It is worth mentioning in this context the “New World Information Order,” which is a series of documents adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO). The New World Information Order seeks to promote the right of every nation to participate in the international exchange of information, and to provide international publics with a comprehensive and balanced flow of information. Among the enumerated ways of fulfilling that goal is to ensure that states that feel injured by information published about them be heard. This is, however, a mere declaration of principles unaccompanied by recognition of a legal right to reply, let alone a device for enforcing such a right. See *Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid, and Incitement to War*, U.N. Educ., Scientific & Cultural Org. [UNESCO] Res. 4/9.3/2, art. 5 (Nov. 28, 1978), available at <http://www.unescdoc.unesco.org/images/0011/001140/114032Eb.pdf>; Thomas Cochrane, *The Law of Nations in Cyberspace: Fashioning a Cause of Action for the Suppression of Human Rights Reports on the Internet*, 4 MICH. TELECOMM. & TECH. L. REV. 157, 177–78 (1997); Graubart, *supra* note 142, at 639.

edy reputational harm,²⁰⁷ since it is necessarily perceived as biased.²⁰⁸ In particular, publics often mistrust communications by governments.²⁰⁹ As Wang notes:

The credibility and efficacy of the government, as the primary communicator, is now often suspected, because people tend to perceive communication by a foreign government as political propaganda. Without source credibility, no amount of communication and information will ever be effective and, worse, could even be counter-productive.²¹⁰

V. AN INTERNATIONAL VERSION OF DEFAMATION LAW: EVALUATING PLAUSIBLE ALTERNATIVES

As the foregoing analysis indicates, it is reasonable to assume that the “marketplace of ideas” relating to international affairs fails to guarantee the accuracy of the information disseminated worldwide about states. This Article has also shown that the potential consequences of such market failures are serious. It is therefore justified to endow states with a legal right to reputation, and to devise institutional and procedural instruments to give effect to such a right. At the same time, special care must be taken to prevent excessive harm to actors involved directly or indirectly in the international political debate, in order not to chill the invaluable exchange of information and opinions. Regulation of the crucial and sensitive realm of speech is justified only insofar as its costs do not exceed its benefits.

Designing a detailed international libel regime is a complex task that exceeds the scope of the present framework. Instead, the following Part will briefly discuss several plausible courses of action, rule out some, and call for further examination of others.

Two theoretical alternatives may be dismissed at the outset. First, establishing a cause of action for state defamation in domestic laws by virtue of a multilateral agreement is ineffective, unrealistic, and undesirable. The main problem with this approach is the difficulty of adjudicating events that took place far away from the forum of the court, especially when understanding the issues at hand requires on-site examinations, questioning of individuals located abroad, overcoming language barriers,

207. See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 798 (1986); Perzanowski, *supra* note 155, at 869.

208. See ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* 175–77 (1965); Frasier, *supra* note 106, at 510.

209. NYE, *supra* note 64, at 113.

210. Wang, *supra* note 67, at 94.

or comprehending intricate political contexts. Thus, from the perspective of the defamed state and the international community, this approach would often fail to meet the goal of declaring the true nature of situations and events. From the forum state's perspective, substantial judicial resources would be expended with no real returns, and political tensions with applicant states might arise. And from the media's perspective, evidentiary hardships would yield high litigation costs. Coupled with the questionable prospects of proving the accuracy of journalistic reports in court and the limited interest of most media consumers in foreign affairs, such hardships could produce a chilling effect and reduce the scope and depth of foreign news reporting. Finally, forum shopping may be expected. A state defamed by a report disseminated in more than one state would be tempted to sue in a country friendly to it in terms of political orientation and convenient in terms of applicable law—perhaps even on a reciprocal basis—thereby turning such a domestic-level regime into a farce.

Second, holding states responsible for defamatory communications published by private actors within their territories²¹¹—which would imply that governments should exert tough oversight over the work of the media and might actually induce them to do so—does not coincide with the modern conception of freedom of the press.

Two additional proposals will now be discussed in greater detail.

A. Option 1: Reviving and Modifying the CIRC

In the realm of private law, it is often contended that publication of a defamed individual's reply to the allegations against him or her, if it has merits and is well phrased, is capable of reducing the libel's influence on listeners.²¹² The idea that reply properly redresses reputational harm²¹³ is supported by psychological research²¹⁴ and by the fact that European defamation and media laws provide for a right of reply.²¹⁵ A right of reply

211. Cf. William V. O'Brien, *International Propaganda and Minimum World Public Order*, 31 LAW & CONTEMP. PROBS. 589, 593 (1966) (stating that it is established international law that a state is responsible for "condon[ing] or encourage[ing] warmongering, subversive, and, in some cases, defamatory propaganda against another state as to contribute bases and materiel to an aggressive invader").

212. See John Hayes, *The Right to Reply: A Conflict of Fundamental Rights*, 37 COLUM. J.L. & SOC. PROBS. 551, 576 (2004).

213. Perzanowski, *supra* note 155, at 860.

214. Calvert, *supra* note 53, at 937–38, 948–60.

215. Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union*, 36 VA. J. INT'L L. 933, 952 (1996); Christopher J. Kunke, *Rome II and*

also raises the quality of public debate by allowing media consumers to critically evaluate the reports to which they are exposed.²¹⁶

By analogy, a plausible remedy for defamation targeting states could be to enable them to present their positions in response to disparaging publications in a way that reaches the public.

The formation of a legal regime that would compel private media outlets throughout the world to provide states with a right of reply—which is a theoretically powerful device for protecting states’ reputations—is highly impractical,²¹⁷ and might pose a grave threat to the editorial autonomy of the press.²¹⁸ A more reasonable alternative is to establish mechanisms to facilitate the delivery of the defamed state’s response to relevant international audiences. This is precisely the objective of the CIRC, but as discussed in Part II, *supra*, the CIRC’s means of achieving it are deficient.²¹⁹ The CIRC could become more effective—and thus more appealing to states—if the existing procedure, which relies on the discretion and limited mass communication resources of the UN Secretary-General, were improved. For instance, state parties could create an international forum accessible worldwide through the internet and possibly by additional means, in which states’ manifestos would be published.

However, any instrument for an international right of reply would face two inherent problems, both discussed *supra*. First, given the preferences of modern media consumers, designing a forum for replies that would attract sufficient public attention is hardly an easy task. Second, the utility of states’ replies is cast in serious doubt since many would view such replies as untrustworthy political propaganda.²²⁰

B. Option 2: Establishing a Standing International Fact-Finding Commission

Many commentators believe that reputational harm can be effectively cured if an impartial, official institution enjoying public trust and respect—typically a court—were to thoroughly examine the pertinent facts

Defamation: Will the Tail Wag the Dog?, 19 EMORY INT’L L. REV. 1733, 1761 (2005); Danziger, *supra* note 49, at 183–95.

216. Hayes, *supra* note 212, at 576.

217. Crucially, the United States would surely refrain from joining such a regime absent a dramatic shift in its First Amendment jurisprudence, as indicated by *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

218. *Id.*

219. See *supra* pp. 10–11.

220. NYE, *supra* note 64, at 113; Wang, *supra* note 67, at 94.

and declare that the defamatory imputations are untrue.²²¹ Declaratory relief is thus compatible both with the principal desire of defamed individuals²²² (as indicated by empirical research)²²³ in restoring their reputations, and with society's interest in correcting false information circulated in the public domain.²²⁴ Moreover, confining the remedy for defamation to a declaratory judgment removes the major chiller of press freedom, namely, publishers' risks of being subject to significant damages awards.²²⁵ Against this background, various legislative and academic proposals have been raised to institute a declaratory judgment procedure within U.S. defamation law.²²⁶

A comparable mechanism could arguably be adopted in the international sphere. As the International Court of Justice ("ICJ")²²⁷ and the

221. Geoffrey C. Cook, *Reconciling the First Amendment with the Individual's Reputation: The Declaratory Judgment as an Option for Libel Suits*, 93 DICK. L. REV. 265, 273 (1989); Epstein, *supra* note 207, at 814; *see also* IZHAK ENGLARD, *THE PHILOSOPHY OF TORT LAW* 136 (1993); Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 365 (2006).

222. *See* CHAFEE, JR., *supra* note 208, at 145; RESTATEMENT (SECOND) OF TORTS § 944 cmt. k.

223. Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 227 (1985); Roselle L. Wissler et al., *Resolving Libel Disputes out of Court: The Libel Dispute Resolution Program*, in *REFORMING LIBEL LAW* 286, 287–89 (John Soloski & Randall P. Bezanson eds., 1992).

224. *Vindication of Reputation*, *supra* note 192, at 1730.

225. *See* SACK, *supra* note 17, § 10.3.1; SUNSTEIN, *supra* note 107, at 161–62; Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809, 820 (1986); Jonathan Garret Erwin, *Can Deterrence Play a Positive Role in Defamation Law?*, 19 REV. LITIG. 675, 711 (2000); Hulme, *supra* note 192, at 393; Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 835 (1985); *Vindication of Reputation*, *supra* note 192, at 1744–45; Michael J. Polelle, *Racial and Ethnic Group Defamation: A Speech-Friendly Proposal*, 23 B. C. THIRD WORLD L.J. 213, 259 (2003); Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287, 1288–90 (1988); Douglas R. Matthews, *American Defamation Law: From Sullivan, Through Greenmoss, and Beyond*, 48 OHIO ST. L.J. 513, 530 (1987).

226. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS ch. 27 Special Note on Remedies for Defamation Other Than Damages; 2 RODNEY A. SMOLLA, *LAW OF DEFAMATION* §9:96 (2d ed. 2009) (text of Annenberg Libel Reform Act); David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847 (1986); Franklin, *supra* note 225; Hulme, *supra* note 192, at 393–94; Leval, *supra* note 225. *See generally* Cook, *supra* note 221.

227. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 35–36 (Apr. 9).

International Law Commission²²⁸ have recognized, declaration by a competent tribunal of the wrongfulness of an act is a legitimate remedy for nonmaterial harm. In addition, there is an increasing understanding that the resolution of international “disputes arising predominantly from a difference of opinion on facts [may be facilitated] by elucidating these facts.”²²⁹

The task of examining the accuracy of defamatory publications should be entrusted to an institution with such features and processes as would ensure maximum professionalism, efficiency, and fairness to all actors involved. The ICJ does not appear to be an ideal candidate for such an assignment. First, the ICJ’s jurisdiction only extends to contentious cases between states²³⁰ and advisory opinions pursuant to the request of UN organs.²³¹ Suing states for defamation published by the private media within their territories, as explained above, is not a suitable framework for resolving international defamation disputes, and UN organs cannot always be relied upon to act when appropriate. And, second, the ICJ is often criticized for having questionable fact-finding capabilities and practices.²³²

Alternatively, international bodies addressing human rights issues could potentially vindicate states’ unjustly tarnished reputations in the course of their routine work of investigating reports of human rights abuses. However, the UN human rights institutions, notably the Human Rights Council, are claimed to be heavily influenced by political considerations.²³³ In addition, such institutions are highly dependent upon information supplied by NGOs, which is not infrequently inaccurate.²³⁴

228. International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, 105-07, UN Doc. A/56/10 (Aug. 10, 2001).

229. Anne Peters, *International Dispute Settlement: A Network of Cooperational Duties*, 14 EUR. J. INT’L L. 1, 5 (2003).

230. Statute of the International Court of Justice, art. 34, June 26, 1945, 59 Stat. 1031.

231. *Id.* art. 65.

232. John R. Crook, *The 2003 Judicial Activity of the International Court of Justice*, 98 AM. J. INT’L L. 309, 310–11 (2004); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT’L L. 52, 53–54 (2005); Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?* 40 N.Y.U. J. INT’L L. & POL. 259, 302 n.190 (2007); Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT’L L. 377, 433 (2006).

233. *E.g.*, Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT’L L. 783, 791 (2006).

234. *See supra* Part VI(A)(3).

Finally, not all defamatory content pertaining to states concerns human rights issues.

As no other existing body seems suitable for administering international libel law, a plausible solution is to form a new institution designated specifically for that purpose. Such an institution probably should not be a court in the traditional sense. Any institution whose operation is largely or exclusively confined to its physical territory is bound to have serious difficulties in independently ascertaining the facts of remote conflicts.²³⁵ Instead, inspiration may be drawn from fact-finding commissions in particular regimes. Such commissions were established, for instance, by Article 90 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts,²³⁶ Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,²³⁷ Article 26 of the Framework Convention for the Protection of National Minorities,²³⁸ and Article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses.²³⁹ These commissions are authorized to engage in active information gathering and to conduct onsite visits,²⁴⁰ which significantly enhance their fact-finding capabilities. Under additional rules that apply to at least some of these

235. See the discussion concerning the ICJ, *supra* note 232. Additionally, the European Court of Human Rights had to rely heavily on NGO reports on at least one occasion, in which information about the prevailing conditions in a place outside Europe—Tunisia—was necessary for the resolution of the case. See *Saadi v. Italy*, App. No. 37201/06, Eur. Ct. H.R. ¶¶ 65–94 (2008), http://www.echr.coe.int/echr/Homepage_EN.

236. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

237. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, 27 I.L.M. 1152 [hereinafter European Torture Convention].

238. Framework Convention for the Protection of National Minorities, Feb. 1, 1995, 34 I.L.M. 351 [hereinafter European Minorities Convention].

239. Convention on the law of the Non-navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700 [hereinafter International Watercourses Convention]. The convention has not entered into force yet. International Water Law Project—Status of the Watercourse Convention, http://www.internationalwaterlaw.org/documents/intldocs/watercourse_status. (last visited Aug. 28, 2009).

240. International Watercourses Convention, *supra* note 239, art. 33(7); European Torture Convention, *supra* note 237, art. 1; Protocol I, *supra* note 236, art. 90(4); Wolfgang Benedek, *Final Status of Kosovo: The Role of Human Rights and Minority Rights*, 80 CHI.-KENT L. REV. 215, 217 (2005) (referring to the processes established in the European Torture Convention and the European Minorities Convention).

commissions, states are obliged to give them access to any site relevant to their mandate,²⁴¹ to provide them with necessary information,²⁴² to allow them to hold closed meetings with relevant parties,²⁴³ and to grant their members immunity from legal process of any kind.²⁴⁴ The commissions on torture and on minority rights fulfill their fact-finding roles and routinely issue reports in their respective fields.²⁴⁵

In this Article's context, the fact-finding commission would conduct factual investigation at the request of a state seeking to refute specific defamatory content, and would publish its findings. As the objective of the procedure would be to determine the facts rather than to punish the defamers, the latter would not be defendants, nor would they be subject to any duty or sanction even if the commission found for the applicant state. Furthermore, the commission's holding that the defamatory charges are false would not prevent anyone from insisting thereafter that the charges were nevertheless accurate. While ordinary individuals tend to attribute importance to judicial and quasi-judicial decisions and thus consider them reliable, they presumably recognize that judges and comparable fact-finders might err, and they would not be immune to persuasion that such is the case with respect to a given dispute.²⁴⁶ Thus, the commission's findings are expected to be useful in bettering the applicant state's image, but at the same time, the findings could foster subsequent global public discourse.

Though the lack of an adversarial process might look like a recipe for the commission's "capture" by the interests and resources of the applicant state, this outcome is avoidable. Any dispute involving a state necessarily involves additional actors with opposing interests and views,

241. International Watercourses Convention, *supra* note 239, art. 33(7); European Torture Convention, *supra* note 237, arts. 2, 8.

242. International Watercourses Convention, *supra* note 239, art. 33(7); European Torture Convention, *supra* note 237, arts. 8(2)(b), 8(2)(d).

243. European Torture Convention, *supra* note 237, art. 8(3); Council of Europe, *Rules Adopted by the Committee of Ministers on the Monitoring Arrangements Under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities*, Res. 97(10), ¶ 32, (Sept. 17, 1997).

244. See International Humanitarian Fact-Finding Commission, Rules of the International Humanitarian Fact-Finding Commission, Rule 27(3) (July 8, 1992), available at <http://www.ihffc.org/en/documents/rules-of-procedure.pdf>; European Torture Convention, *supra* note 237, art. 16, Annex.

245. See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, About the CPT, <http://www.cpt.coe.int/en/about.htm> (last visited Aug. 8, 2009); European Minorities Convention, *supra* note 238.

246. See Frasier, *supra* note 106, at 517; Peled, *supra* note 91, at 76–77.

be they other countries, domestic minority groups, peoples under belligerent occupation, NGOs, media outlets that previously published relevant reports about the state, and the like. These actors could provide the commission with information in support of their respective stances and should be allowed to do so. Such actors in fact compete currently to influence international public opinion, but the failures they generate in the unregulated international marketplace of ideas are likely to decrease if all the available information is processed within the confines of neutral and professionalized procedures. The relevant actors' levels of cooperation with the commission may also be mentioned in the commission's report, especially if the behavior of the actors prevents the commission from reaching conclusive findings.²⁴⁷ Such obstruction could occur, for instance, if the applicant state or another state, authority, or organization involved were to prohibit the commission's entry to certain places, limit its access to certain documents, or bar its communication with certain groups.

Within the definition of the commission's competence, as clear a line as possible must be drawn between political value judgments, which may not be adjudicated, and assertions of objective fact, which may. Though that distinction, as well as the determination of truth and falsity, is hardly an easy task, the analogy to domestic defamation laws—under which the distinctions between fact and opinion, and between truth and falsehood, are essential elements²⁴⁸—indicates that it is achievable. An equally important effort should be made to distinguish between allegations pertaining to relatively concrete events, which ought to be the sole subject of the defamation process, and publications providing professional analysis of complex political or economic situations, the evaluation of which cannot possibly lead to conclusive and unequivocal results. For similar practical reasons, it might be advisable to confine international libel law to certain kinds of reputations, relating, for instance, to law observance and moral behavior, as opposed to military or financial strength.

Many other issues will also have to be addressed. For instance, with regard to substantive law, the regime must define the nature and extent of the required link between an applicant state and the defamation complained of that would trigger the fact-finding process. Among the institutional issues that arise is the fact-finding commission's composition. The members of the commission should be elected in a way that would both

247. Rome Statute of the International Criminal Court art. 87(7), July 17, 1998, 2187 U.N.T.S. 3; Protocol I, *supra* note 236, art. 90(5)(b).

248. Epstein, *supra* note 207, at 809.

guarantee the commission's professionalism, and satisfy states' presumed desires to maintain control of the election process, thereby enhancing the commission's legitimacy and the degree of cooperation it elicits. At least some of the commission's members should be reputable journalists. Finally, with regard to procedure, the commission must be equipped with all the tools necessary to gather and evaluate materials effectively and to avoid dependence on the information supplied by interested parties. In addition, the status of the defamer in the process should be defined, and mechanisms should be formed to ensure that the commission's reports obtain adequate publicity and attention worldwide. These issues and many more will have to wait for further research.

CONCLUSION

The idea of endowing states with a legal right to reputation certainly seems odd at first glance. But upon exploring the concept of reputation and understanding the individual and collective interests that justify its protection under domestic laws, it becomes clear that reputation is as valuable to states and the international community as it is to individuals and the societies they live in. The law, which aims to regulate human affairs compatibly with the realities and needs of any given time, place, and context, should not ignore these observations. Considering that international law is essentially an endeavor to build an organized society of actors that would try to imitate, to the extent feasible, the internal order prevailing in modern states, and given the fact that the array of issues international law treats is consistently expanding, it is plausible to add yet another segment to that legal fabric and to begin thinking about an international parallel to defamation law.

This Article did not intend to present a complete account of the desirable international libel law—quite the contrary, I recognize that the suggested courses of action would be hard to implement and that the best solution may lie elsewhere. Rather, my purpose is to raise awareness of the importance of state reputation and to demonstrate that it is worthy of legal protection. If states and the international community as a whole begin to regard the interest in reputation as a right, they might be more determined to protect it.