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## Criminal Defamation and the Evolution of the Doctrine of Freedom of Expression in International Law

Jo M. Pasqualucci

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# Criminal Defamation and the Evolution of the Doctrine of Freedom of Expression in International Law: Comparative Jurisprudence of the Inter-American Court of Human Rights

Jo M. Pasqualucci\*

## ABSTRACT

*Restrictions on freedom of expression may take direct and indirect forms. A state may censor speech, criminalize defamation, harass the media or individual journalists, fail to investigate crimes against the media, require the compulsory licensing of journalists, or fail to enact freedom of information laws or laws that prohibit monopoly ownership of the media. A victim of a restriction on freedom of expression that violates international law may have no recourse in domestic courts, either because state law offers no remedy or because judges are too intimidated to enforce the laws as written. In such instances, victims need recourse to an international forum to protect and enforce their rights. In the Western hemisphere individual allegations of violations of freedom of expression may be brought before the Inter-American Commission on Human Rights and, dependent on jurisdiction, tried by the Inter-American Court of Human Rights. These organs have developed a progressive case law on the right of freedom of expression. The Author critiques the contributions made by the Inter-American Court of Human Rights to the growing international jurisprudence on freedom of expression. Whenever possible, the Author analyzes the Inter-American Court's case holdings in light of the jurisprudence of the European Court of Human Rights and the U.N. Human Rights Committee. The Article also addresses issues that have not yet been presented to*

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*the Inter-American Court and analyzes potential issues in light of the American Convention.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	381
II.	THE INTER-AMERICAN HUMAN RIGHTS SYSTEM.....	384
III.	FREEDOM OF EXPRESSION UNDER THE AMERICAN CONVENTION.....	386
IV.	PRIOR CENSORSHIP BARRED.....	389
V.	RESTRICTIONS ON FREEDOM OF EXPRESSION .....	392
	A. <i>Restriction to Protect Reputation:</i> <i>Defamatory Statements</i> .....	394
	1. The Inter-American Court's Jurisprudence on Defamation .....	396
	2. Higher Level of Protection for Statements about Persons Engaged in Activities of Public Interest.....	399
	3. Alternate Remedy for Defamation: Civil Suits .....	403
	4. Alternate Remedy: Right to Reply .....	405
	5. Burden of Proof and Defenses in Defamation Actions.....	406
	6. No Defamation for Value Judgments .....	410
	B. <i>Restrictions for the Protection of National         Security</i> .....	410
	C. <i>Indirect Restrictions on the Media not         Permissible</i> .....	414
	D. <i>Propaganda for War and Hate Speech         Punishable</i> .....	415
VI.	FREEDOM OF THE PRESS IN THE INTER-AMERICAN SYSTEM.....	416
	A. <i>Harassment, Imprisonment, and Murder         of Journalists</i> .....	417
	B. <i>Mandatory State Licensing of Journalists</i> .....	423
	C. <i>Contempt Laws for Refusal to Reveal         Sources</i> .....	425
VII.	FAILURE TO PROMULGATE LAWS TO PROTECT FREEDOM OF EXPRESSION .....	427
	A. <i>Access to Information Laws</i> .....	428
	B. <i>Monopolization of Ownership of the Media</i> .....	430
VIII.	ACCESS TO THE MEDIA .....	431
IX.	CORRESPONDING DUTIES AND RESPONSIBILITIES.....	432
X.	CONCLUSION.....	432

“Real democracy exists only when individuals are free to say what they think, and to receive and impart information.”<sup>1</sup>

## I. INTRODUCTION

In a landmark international case on freedom of expression, the Inter-American Court of Human Rights held that the Costa Rican government had violated the right to freedom of expression of a Costa Rican journalist as a result of his criminal conviction in national courts for defamation.<sup>2</sup> The journalist had written a series of articles for the well-known Costa Rican newspaper, *La Nación*, concerning Costa Rica’s honorary representative to the International Atomic Energy Commission in Europe. The articles quoted or reproduced parts of several articles from Belgian newspapers which alleged that the Costa Rican representative had engaged in illegal activities such as drug trafficking and tax fraud.<sup>3</sup> The journalist presented both sides of the story and even printed a letter from the diplomat disputing the allegations.<sup>4</sup> Nevertheless, the diplomat brought both criminal and civil suits for defamation in Costa Rican courts.<sup>5</sup> Under Costa Rican law the defendant journalist bore the burden of proving the truth of the statements that he had quoted from and attributed to the foreign press. The burden was not, as would be expected, on the plaintiff to prove the falsehood of the statements. The journalist could not meet this burden and, therefore, was convicted of a crime. Both the journalist and the newspaper, who were jointly and severally liable, were ordered to pay large fines, and the name of the journalist was inscribed in the criminal register.<sup>6</sup> The journalist subsequently filed a complaint with the Inter-American Commission on Human Rights (Inter-American Commission or Commission) alleging that his freedom of speech was violated by the criminal conviction.<sup>7</sup> The Commission found in his favor.<sup>8</sup> When Costa Rica did not comply with the Commission’s recommendations, the Commission

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1. KAYHAN KARACA, *GUARDING THE WATCHDOG: THE COUNCIL OF EUROPE AND THE MEDIA* 11 (2003).

2. *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 135 (Jul. 2, 2004).

3. *Id.* ¶ 95(d)–(i).

4. *Id.* ¶ 95(g).

5. *Id.* ¶ 95(p).

6. *Id.* ¶ 95(t).

7. *Id.* ¶ 6.

8. *Id.* ¶ 11.

filed an application with the Inter-American Court of Human Rights (Inter-American Court or Court).<sup>9</sup>

Laws criminalizing defamation are not uncommon throughout the world. Even some U.S. states still have criminal defamation laws.<sup>10</sup> Public officials and other powerful individuals can use these laws as a weapon to intimidate the media from revealing corrupt practices or publicizing incriminating information. Journalists and the media may be pressured not to write or broadcast news because its publication could result in a criminal law suit. This self-censorship of the media negatively affects the public's right to information.

Criminal defamation laws are one manner of repressing freedom of expression. Other forms of repression may be direct, as in the form of censorship, or may be indirect, by a means intended to exert control over the media or to have a chilling effect on one journalist or the profession as a whole. Repression may take the forms of physical harassment, imprisonment, or murder of journalists; failure to diligently investigate or prosecute crimes against the media; compulsory government licensing of journalists; or the requirement that a journalist reveal anonymous sources. Alternately, a State may fail to promulgate or enforce laws that will protect freedom of expression, such as access to information laws or laws prohibiting a monopoly of the media.

Often the person whose freedom of expression is threatened has no recourse in domestic courts, either because the law favors the powerful or because judges are too intimidated to enforce the laws as written. In such instances victims need recourse to an international forum to protect and secure their human rights. In the Western Hemisphere individual allegations of violations of freedom of expression may be brought before the Inter-American Commission on Human Rights and, dependent on jurisdiction, before the Inter-American Court of Human Rights. In European States, alleged victims can bring a case before the European Court of Human Rights. For victims throughout the world, the U.N. Human Rights Committee (UNHRC) may be authorized to consider individual complaints. This Article will critique the contributions made by the Inter-American Court of Human Rights to the growing international jurisprudence on freedom of expression. Whenever possible, the Inter-American Court's response will be analyzed in light of the jurisprudence of the European Court of Human Rights and the decisions of the UNHRC. The Article also addresses issues that have not yet been presented to

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9. *Id.* ¶ 27.

10. Although they are seldom used, criminal defamation statutes remain on the books in about half of U.S. states. JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 116 (4th ed. 2004). Occasionally they are used to prosecute malicious internet postings. *Id.*

the Inter-American Court and analyzes potential issues in light of the American Convention on Human Rights (American Convention).

The Inter-American Court's jurisprudence on freedom of expression and freedom of the press has been influential in the developing democracies of the Americas. Its decisions and reasoning may also influence other international fora. While the Inter-American Court has addressed many of the pressing issues confronting journalists and the mass media internationally, the Court has not fully utilized every opportunity to influence the development of an international jurisprudence on freedom of expression. An international human rights tribunal such as the Inter-American Court should not limit itself to the most restrictive view of the issues presented in a case. Human rights issues must be decided on the international level so that subsequent victims may receive justice in national courts. The Inter-American Court sits only part-time.<sup>11</sup> Even the European Court, which is a full-time court, has a serious backlog of cases.<sup>12</sup> These courts do not have the resources to repeatedly decide cases involving the same rights. For this reason, the Court must seize each opportunity to develop an international jurisprudence in areas of controversy.

Part II of this Article briefly describes the Inter-American human rights system so as to lay a foundation for its decisions and opinions. Part III sets forth freedom of expression under the American Convention. Part IV analyzes the American Convention's limits on censorship. Part V interprets permissible restrictions on freedom of expression, including restrictions to protect reputations and national security, as well as the Convention's treatment of propaganda for war and hate speech. This Part also contains an extensive analysis of the Inter-American Court's recent decisions on criminal defamation. Part VI evaluates the juridical contributions of the Inter-American Court to freedom of the press, focusing on the effective use of interim measures to curtail harassment of journalists and jurisprudence prohibiting the mandatory State licensing of journalists. It also discusses future issues that the Court may have to confront, such as contempt laws for a journalist's refusal to reveal sources, and suggests an analysis of these issues. Part VII discusses areas in which States may inhibit freedom of expression by failing to

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11. Rules of Procedure of the Inter-American Court of Human Rights approved on Nov. 25, 2003, during Sessions 9 and 10 of the Court's LXI Ordinary Period of Sessions, held from November 20 to December 4, 2003, art. 10–11 [hereinafter Rules of Procedure Inter-Am. Ct. H.R.].

12. See e.g., Luzius Wildhaber, President of the European Court of Human Rights, Address at the High Level Seminar on the Reform of the European Human Rights System 2 (Oct. 18, 2004), transcript available at <http://www.echr.coe.int/> [hereinafter Wildhaber, Oslo Speech] (follow "Press" hyperlink; then follow "Speeches of the President of the Court" hyperlink; then follow "Oslo, 18 October 2004" hyperlink) ("Since 1998 the backlog is growing inexorably.").

promulgate or enforce access to information laws and the monopolization of ownership of the media.

## II. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

A brief description of the Inter-American human rights system is necessary for an understanding of the impact of the jurisprudence of the Inter-American Court of Human Rights and the decisions of the Inter-American Commission on Human Rights. The Inter-American system was created by the Organization of American States (OAS) to provide for human rights protection in the Americas.<sup>13</sup> The principle human rights treaty, the American Convention,<sup>14</sup> has been ratified by twenty-four of the thirty-five member States of the OAS.<sup>15</sup> State parties to the American Convention contract to observe twenty-six rights and freedoms including freedom of thought and expression, freedom from slavery, freedom of movement and residence, and the rights to life, humane treatment, privacy, property, personal liberty, a fair trial, judicial protection, equal protection, and participation in government.<sup>16</sup> The American Convention provides for two organs to ensure State compliance with the rights set forth in the treaty: the Inter-American Commission on Human Rights<sup>17</sup> and the Inter-American Court of Human Rights.<sup>18</sup> Those States that have not ratified the American Convention are still subject to the American Declaration of the Rights and Duties of Man, which provides in part that "[e]very person has the right to freedom of investigation, or opinion, and of the expression and dissemination of ideas, by any medium whatsoever."<sup>19</sup>

13. American Convention on Human Rights, Nov. 22, 1969, pmbl., 9 I.L.M. 163 [hereinafter American Convention].

14. *Id.* The American Convention and other Inter-American human rights documents can be viewed on the OAS website, <http://www.oas.org>, or on the website of the Inter-American Court of Human Rights, <http://www.corteidh.or.cr>. The annual reports and cases of the Inter-American Commission on Human Rights can be found at its website, <http://www.cidh.oas.org>.

15. OAS ratifying parties are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Trinidad and Tobago, which had ratified the American Convention denounced it in 1998. Cuba was excluded from participating in the OAS in 1962 for adopting a Marxist-Leninist form of government. The United States has not ratified the American Convention.

16. American Convention, *supra* note 13, arts. 4–25.

17. *Id.* art. 33(a).

18. *Id.* art. 33(b).

19. Ninth Int'l Conference of American States, *American Declaration of the Rights and Duties of Man*, art. IV, O.A.S. Res. XXX, (Bogota, Colombia, 1948), available at <http://www.cidh.org/Basicos/basic2.htm>.

An individual who claims that a State party to the American Convention has violated his or her rights must first exhaust all domestic remedies in the State where the violation allegedly occurred.<sup>20</sup> Only after failing to receive satisfaction in domestic courts may the alleged victim approach the Inter-American human rights system.<sup>21</sup> The petitioner initially files a complaint with the Inter-American Commission.<sup>22</sup> When the issue in the case involves freedom of expression, the OAS Special Rapporteur for Freedom of Expression will analyze the complaint and advise the Commission.<sup>23</sup> If the Commission determines that the complaint is admissible, the Special Rapporteur will participate with the Commission in any hearings and will work with the parties to achieve a friendly settlement.<sup>24</sup> The Commission sits only part-time and has a backlog of cases, so the Special Rapporteur's expertise and specialized knowledge is of particular assistance to the Commission.<sup>25</sup>

When the Commission's procedures have been completed in a contentious case, the Commission or the State may file an application with the Inter-American Court.<sup>26</sup> The individual does not have standing to bring a contentious case before the Court, although once an application has been filed, the alleged victim may proceed independently of the Commission.<sup>27</sup> The Court can only exercise its contentious jurisdiction over those States that have accepted the Court's jurisdiction, either *ipso facto* or for a particular case.<sup>28</sup> Twenty-one of the twenty-four State parties to the American Convention have accepted the compulsory jurisdiction of the Inter-American Court.<sup>29</sup> In its consideration of a case, the Inter-American Court considers written submissions, including amicus briefs, and it may hold hearings. After deliberations, it determines whether the State has violated a right protected by the American Convention and,

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20. American Convention, *supra* note 13, art. 46(1)(a).

21. *Id.*

22. *Id.* art. 61(2).

23. ANNUAL REPORT OF THE OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION 2004, at 5–7, <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=459&IID=1>, follow “See Complete Report in PDF” [hereinafter ANNUAL REPORT OF SPECIAL RAPPORTEUR].

24. *Id.* The goal of the Special Rapporteur is to “stimulate awareness of the importance of the full observance of freedom of expression and information in the Hemisphere, given the fundamental role it plays in the consolidation and advancement of the democratic system . . .” *Id.* at 6.

25. *See id.* at 5–7.

26. American Convention, *supra* note 13, art. 61.

27. Rules of Procedure of the Inter-American Court, *supra* note 11, art. 23(1).

28. American Convention, *supra* note 13, art. 62(1).

29. States accepting the contentious jurisdiction of the Inter-American Court are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.



if so, the Court determines the reparations that must be made by the State. The Inter-American Court's decisions are binding on the parties to a contentious case.<sup>30</sup>

The Court also can contribute to the conceptual evolution of freedom of expression and other rights by responding to requests for advisory opinions.<sup>31</sup> Under its advisory jurisdiction, the Court can interpret the American Convention and other human rights treaties to which American States are parties.<sup>32</sup> The Court is also authorized to give States opinions as to whether their domestic laws are compatible with the Convention or other treaties.<sup>33</sup> In addition, the Inter-American Court can order States to take provisional measures to protect persons, including journalists, who are in grave and urgent danger of irreparable injury.<sup>34</sup>

Various resolutions and principles have been adopted in the Inter-American system to assist the Commission and the Court in evaluating situations in which freedom of expression is in question. Most fundamental is the Inter-American Declaration of Principles on Freedom of Expression, which was approved by the Inter-American Commission.<sup>35</sup> Additionally, the OAS General Assembly has adopted resolutions on the "Right to Freedom of Thought and Expression and the Importance of the Media" and "Access to Public Information: Strengthening Democracy."<sup>36</sup>

### III. FREEDOM OF EXPRESSION UNDER THE AMERICAN CONVENTION

Article 13 of the American Convention provides in relevant part that "[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."<sup>37</sup> The Inter-American Court interprets the right of freedom of

30. American Convention, *supra* note 13, art. 68(1).

31. *Id.* art. 64.

32. *Id.* art. 64(1).

33. *Id.* art. 64(2).

34. *Id.* art. 63(2).

35. Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission, in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 211; see Inter-American Commission on Human Rights, *Declaration of Principles on Freedom of Expression*, <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=26&IID=1> [hereinafter *Declaration of Principles on Freedom of Expression*].

36. See ORGANIZATION OF AMERICAN STATES GENERAL ASSEMBLY, THIRTY-FIFTH REGULAR SESSION, <http://www.oas.org/juridico/english/ga05/ga05.doc>.

37. American Convention, *supra* note 13, art. 13. Freedom of expression is protected by all the major human rights treaties. Article 10(1) of the European Convention similarly provides that "[e]veryone has the right to freedom of expression.

expression to have two interdependent dimensions: an individual dimension and a social dimension.<sup>38</sup> The Court clarified that the individual dimension of freedom of expression is broader than the theoretical right to write and speak.<sup>39</sup> The individual dimension “includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible.”<sup>40</sup> According to the Court, the social dimension of freedom of expression “is a means for the interchange of ideas and information” and includes both the individual’s right to communicate views to others as well as the right to receive news and opinions from others.<sup>41</sup> In this respect, the Court reasoned that it is equally important for ordinary citizens to have access to others’ opinions as to share their own.<sup>42</sup>

The individual and social dimensions of freedom of speech must be guaranteed simultaneously.<sup>43</sup> The Inter-American Court emphasized that freedom of expression is

This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Rome, Nov. 4, 1950, art. 106. Article 19(2) of the U.N. International Covenant on Civil and Political Rights (ICCPR), which entered into force on March 23, 1976, provides, “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Article 9 of the African Charter on Human and People’s Rights, which entered into force on October 21, 1986, reads in relevant part, “1) Every individual shall have the right to receive information. 2) Every individual shall have the right to express and disseminate his opinion within the law.”

38. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, ¶¶ 31–32 (Nov. 13, 1985). The Court specifically stated that freedom of thought and expression “requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.” *Canese v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 77 (Aug. 31, 2004).

39. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, ¶¶ 31–32; *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 109 (Jul. 2, 2004); *Canese*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 77.

40. Advisory Opinion OC-5/85, ¶ 31; “The Last Temptation of Christ,” 2001 Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 65 (Feb. 5, 2001) (also known as Last Temptation of Christ case); *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 109.

41. Advisory Opinion OC-5/85, ¶ 32; *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 110; *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 79.

42. Advisory Opinion OC-5/85, ¶ 32; *Ivcher Bronstein v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 178 (Feb. 6, 2001); “The Last Temptation of Christ,” 2001 Inter-Am. Ct. H.R., ¶ 66; *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 107; *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 79.

43. Advisory Opinion OC-5/85, ¶ 33; *Ivcher Bronstein*, 2001 Inter-Am. Ct. H.R., ¶ 149; “The Last Temptation of Christ,” 2001 Inter-Am. Ct. H.R., ¶ 67; *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 111; *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 80.

indispensable for the formation of public opinion. It is also a condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.<sup>44</sup>

The Court also adopted the standard set by the European Court of Human Rights that freedom of expression must be guaranteed not only for the dissemination of the information and ideas that are favorably received or considered inoffensive or indifferent, but also for those that shock, concern or offend the State or any sector of the population.<sup>45</sup> In essence, freedom of expression is nonexistent if only statements that are acceptable to the government or the majority of citizens are allowed to be expressed. All facts and opinions must be permitted, provided that they are not specifically restricted by the governing treaty.

The Court has not held that an individual's freedom of expression is violated when that person is forced to express an untruth. In the *Maritza Urrutia* case, a woman was abducted by Guatemalan State agents and forced to film a video from a prepared script in which she renounced the opposition force of which she had been a member.<sup>46</sup> The video was then aired on Guatemalan television. The applicant argued that the victim's right to freedom of expression had been violated. The Court, however, found that the facts supported only a violation of the victim's right to humane treatment and not a violation of her right to freedom of expression.<sup>47</sup>

Despite the Court's determination, the right to freedom of expression should include freedom from forced speech.<sup>48</sup> In this vein, the Commission, arguing for the victim, contended that "[t]he individual dimension of the right to freedom of expression may be

44. Advisory Opinion OC-5/85, ¶ 70; *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 112; *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 82. The Inter-American Court has also stated that

the same concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions, as well as the widest access to information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard.

Advisory Opinion OC-5/85, ¶ 70; *Ivcher Bronstein*, 2001 Inter-Am. Ct. H.R., ¶ 151.

45. *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 113; *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 83 quoting *Scharsach and News Verlagsgesellschaft v. Austria*, 2003 Eur. Ct. H.R. 596, ¶ 29; *Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. 245, ¶ 65 (1979).

46. *Urrutia v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 99(b) (Nov. 27, 2003).

47. *Id.* ¶ 103.

48. *Id.* ¶ 99(b).

violated both when a person's right to express himself freely is restricted and when he is obliged, through unlawful acts, to express himself publicly against his will."<sup>49</sup> In this instance, the Court has been unduly limited in its approach to freedom of expression. When individuals, organizations, and the media are illegally forced to make or publish statements, the Court should rule that there has been a violation of the victim's freedom of expression. In an earlier advisory opinion, the Inter-American Court explained that "an extreme violation of the right to freedom of expression occurs when governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news."<sup>50</sup> The government is equally impeding the circulation of information and ideas when it subverts the information released to the public. A person's individual dimension of freedom of expression is violated when the person is forced to make a statement against her will, whether that statement be true or false; the social dimension of freedom of expression is similarly violated when an untrue statement is presented by force to society as the truth. Consequently, when a person or the media is illegally obligated to speak or publish a statement, the Court should hold that the Convention's provision on freedom of expression has been violated.

#### IV. PRIOR CENSORSHIP BARRED

The American Convention provides that the exercise of freedom of thought and expression "shall not be subject to prior censorship"<sup>51</sup> except in specifically limited circumstances. In this regard, the Inter-American Court has stated that "[a]buse of freedom of information thus cannot be controlled by preventive measures but only through the subsequent imposition of sanctions on those who are guilty of the abuses."<sup>52</sup> Thus, most injuries resulting from the misuse of freedom of expression or the media must be compensated through subsequent lawsuits. The only exceptions to prior censorship authorized by the American Convention are State regulation of access to public entertainment "for the moral protection of childhood and adolescence"<sup>53</sup> and State derogation from its obligations during a state of emergency.<sup>54</sup> Examples of censorship that go beyond these

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49. *Id.* ¶ 99(c).

50. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 54 (Nov. 13, 1985).

51. American Convention, *supra* note 13, art. 13(2).

52. Advisory Opinion OC-5/85, ¶ 39.

53. American Convention, *supra* note 13, art. 13(4).

54. *Id.* art. 27. Freedom of expression is a right that may be suspended or derogated from "in time of war, public danger, or other emergency that threatens the

limited exceptions include barring and confiscating publications, prohibiting the release of movies and television programs for reasons other than the protection of youth, blocking the content of websites, and halting the publication of certain newspapers or the broadcasting of particular radio or television stations.<sup>55</sup>

In its first decision dealing with media censorship, the Inter-American Court found that Chile had failed to meet its obligations under the American Convention when it refused to permit the movie *The Last Temptation of Christ* to be shown in Chile.<sup>56</sup> The Chilean National Cinematographic Classification Council had initially prohibited the exhibition of the film.<sup>57</sup> When the Council eventually approved its showing, the Chilean courts annulled that approval, thereby maintaining the censorship of the film.<sup>58</sup> The Chilean Association of Attorneys for Public Freedom [*Asociación de Abogados por las Libertades Públicas*] then filed a petition in the Inter-American human rights system.<sup>59</sup> Both the Commission and then the Inter-American Court held that Chile had violated the American Convention's protection of freedom of expression.<sup>60</sup> The Court ordered Chile to allow the exhibition and publicity for *The Last Temptation of Christ*,<sup>61</sup> and to take the appropriate measures to amend its domestic laws to eliminate prior censorship of movies so as to protect freedom of expression in accordance with the American Convention.<sup>62</sup>

independence or security of a State Party." *Id.* art. 27(1). The State may derogate from freedom of speech and other rights "to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." *Id.* The suspension of rights must be non discriminatory, and the State must inform the OAS of the suspension. *Id.*

55. Committee to Protect Journalists, "Attacks on the Press in 2004" report: *Iran*, Mar. 15, 2005, <http://www.payvand.com/news/05/mar/1127.html>.

56. "The Last Temptation of Christ," 2001 Inter-Am. Ct. H.R. (ser C) No. 73, ¶ 88 (Feb. 5, 2001); see HUMAN RIGHTS WATCH, CHILE: PROGRESS STALLED: SETBACKS IN FREEDOM OF EXPRESSION REFORM (2001), pt. VI. Film Censorship Reform, [http://www.hrw.org/reports/2001/chile/Foe05fin-05.htm#P539\\_145947](http://www.hrw.org/reports/2001/chile/Foe05fin-05.htm#P539_145947) [hereinafter Film Censorship Reform].

57. "The Last Temptation of Christ," 2001 Inter-Am. Ct. H.R., ¶ 60(c); see Film Censorship Reform, *supra* note 56.

58. "The Last Temptation of Christ," 2001 Inter-Am. Ct. H.R., ¶ 60(e), (f).

59. *Id.* ¶ 5.

60. *Id.* ¶¶ 96-97.

61. *Id.*

62. *Id.* ¶ 4. The Court reasoned that,

[i]n international law, customary law establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence. The American Convention establishes the general obligation of each State

Following the Court's ruling, the Chilean Congress commenced a reformation of the law so as to eliminate censorship and to remove military influence from the National Cinematographic Classification Council.<sup>63</sup> The reformed council consists of film critics, representatives of the film industry, education specialists, and professors.<sup>64</sup> In 2002, the Chilean Senate put an end to film censorship by enacting legislation to comply with the Court's orders.<sup>65</sup> The new law establishes a ratings system based on age that is similar to the ratings categories employed in Europe and the United States.<sup>66</sup> Thus, the Court's use of reparations to order the State to amend its laws to conform to the American Convention resulted in greater freedom of expression.

In a subsequent case also involving Chile, the Inter-American Court held that Chile's censorship of the book *Ethics and the Intelligence Services* [*Ética y Servicios de Inteligencia*] violated the author's right to freedom of expression.<sup>67</sup> The Chilean government prohibited the distribution of the book<sup>68</sup> because the author, Palamara Iribarne, a retired Chilean naval officer, did not request the prior authorization for publication required by the military.<sup>69</sup> The government seized all copies of the book, deleted it from the computer of the author, and convicted the author of disobedience and endangering public security and defense.<sup>70</sup> The government unsuccessfully argued before the Inter-American Court that because it seized the books after they were published and a small number already had been distributed, it had not exercised prior censorship of the book.<sup>71</sup> The Court explained that freedom to express thought and the dissemination of that expression are "indivisible."<sup>72</sup> In other words, a State does not effectively protect freedom of expression if it unduly restricts its dissemination.<sup>73</sup> Despite the government's

Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights that it embodies.

*Id.* ¶ 96.

63. Film Censorship Reform, *supra* note 56.

64. See Index for Free Expression, Chile: End to Film Censorship, <http://www.indexonline.org/en/indexindex/articles/2002/1/end-to-film-censorship.shtml> (last visited Feb. 18, 2006).

65. *Id.*

66. *Id.*

67. Palamara Iribarne v. Chile, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 78 (Nov. 22, 2005).

68. *Id.*

69. *Id.* ¶ 63(6). The book dealt with the need for military intelligence activities to conform to certain ethics. *Id.*

70. *Id.* ¶¶ 63(19)–(23), 74.

71. *Id.* ¶ 66(a).

72. *Id.* ¶ 72.

73. *Id.*

arguments that its actions did not violate the American Convention, the State informed the Court that a bill then before the Chilean Congress would restrict judges' authority to order the censure and seizure of publications.<sup>74</sup>

The State also argued that its actions were justified because Palarama Iribarne had violated a confidentiality agreement under which he had sworn not to reveal any secret or confidential information concerning the armed forces which he had acquired during his service in the military.<sup>75</sup> Two experts designated by the military contradicted the State by opining that the book did not jeopardize the security of the Chilean armed forces.<sup>76</sup> The experts explained that the information in the book could be obtained from public sources.<sup>77</sup> They acknowledged, however, that it was implicit that Palarama Iribarne had gained the education and training necessary to write the book through his experience as a military intelligence specialist.<sup>78</sup> The Inter-American Court did not address the State's argument, stating only that the failure to honor a confidentiality agreement can result in administrative, civil or disciplinary responsibilities but not, in a case such as that of Palarama Iribarne, when the information divulged is already in the public sphere.<sup>79</sup>

## V. RESTRICTIONS ON FREEDOM OF EXPRESSION

Freedom of expression is not absolute. It must be balanced against the rights of others and the welfare of society. The American Convention broadly provides that "[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare in a democratic society."<sup>80</sup> The American Convention also sets forth permissible restrictions on the right to freedom of expression. The Court has warned that laws restricting freedom of expression to protect the rights of others should

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74. *Id.* ¶ 63(h).

75. *Id.* ¶ 66(d), (e).

76. *Id.* ¶ 63(23).

77. *Id.* ¶ 75.

78. *Id.*

79. *Id.* ¶ 77.

80. American Convention, *supra* note 13, art. 32(2). In general, restrictions on the enjoyment or exercise of any of the rights and freedoms provided for in the Inter-American Convention, including freedom of expression, must be applied "in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been enacted." *Id.* art. 30.

in no way serve as a means of prior censorship.<sup>81</sup> Generally, the Inter-American Court is asked to determine whether particular governmental acts were undue restrictions on freedom of information. In these cases the Inter-American Court examines the alleged violation, given all the facts in the case and the context and circumstances in which the acts occurred.<sup>82</sup>

A permissible restriction on freedom of expression must be prescribed by law, satisfy a legitimate purpose specified in the American Convention, and be necessary in a democratic society.<sup>83</sup> A restriction has been prescribed by law when there is a domestic statute in effect that limits freedom of expression. The State must identify the domestic law that authorizes the restriction and show that the law has a legitimate purpose. The legitimate purposes permitted by the American Convention include ensuring “respect for the rights or reputations of others or the protection of national security, public order, or public health or morals.”<sup>84</sup>

Even though a domestic law has a legitimate purpose, it may not limit freedom of expression more than is strictly necessary in a democratic society.<sup>85</sup> The State must choose the least restrictive option available to limit a protected right.<sup>86</sup> The Inter-American Court stated in this regard that the necessity and thus the legality of restrictions “depend[s] upon showing that the restrictions are required by a compelling public interest.”<sup>87</sup> To demonstrate a compelling public interest the State has the burden to specifically show that there is a pressing social need for the restriction.<sup>88</sup> The Court clarified that it is not sufficient for the State to demonstrate

81. *Canese v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 95 (Aug. 31, 2004); Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 32 (Nov. 13, 1985).

82. Advisory Opinion OC-5/85, ¶ 42.

83. *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 120 (July 2, 2004). Likewise, the European Court and the UNHRC require that restrictions on the exercise of freedom of expression must be prescribed by law, have a legitimate purpose, and be necessary and justified. See *Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. 245, ¶ 59 (1979).

84. American Convention, *supra* note 13, art. 13(2).

85. *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 95.

86. *Id.* ¶ 96; *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 121; Advisory Opinion OC-5/85, ¶¶ 46, 59; see also *Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. 245, ¶ 59 (1979).

87. *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 96.

88. The Inter-American Court espoused the European Court of Human Rights’ interpretation of “necessary” to require the existence of a “pressing social need.” *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 122 (citing *Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. 245, ¶ 59 (1979); Advisory Opinion OC-5/85, ¶ 46; *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 96.)



that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to collective purposes, which, owing to their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees and do not limit the right established in this Article more than is strictly necessary.<sup>89</sup>

The Inter-American Court employs a proportionality test in determining whether a restriction is necessary. The Court explained that “the restriction must be proportionate to the interest that justifies it and closely tailored to accomplishing this legitimate objective, interfering as little as possible with the effective exercise of the right to freedom of expression.”<sup>90</sup>

#### A. Restriction to Protect Reputation: Defamatory Statements

The American Convention stipulates that freedom of expression is subject to “respect for the rights or reputations of others.”<sup>91</sup> Although freedom of expression is protected by the American Convention, it may legitimately be restricted if the content of the speech is defamatory. A defamatory statement impugns the honor or reputation of another person.<sup>92</sup> Persons who have been defamed may have a cause of action against the person who made the statement.<sup>93</sup> Some States allow a defamation suit to be filed in either civil or criminal court or in both.<sup>94</sup>

Criminal defamation suits can result in an abuse of freedom of expression.<sup>95</sup> Particularly egregious are *desacato* laws, also referred to as “insult laws” or “contempt laws,” which criminalize any

89. *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 96; *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 121; Advisory Opinion OC-5/85, ¶ 46; see also *Sunday Times*, 2 Eur. Ct. H.R. ¶ 59. Note that English translations of the above quote are not uniform in all cases, although the wording in Spanish is identical.

90. *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 96; *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 123.

91. American Convention, *supra* note 13, art. 13(2)(a). In the sense that the right to privacy includes the right of each individual to have his or her “honor respected and dignity recognized” it could be said that the right to freedom of expression must be balanced against that right. See *id.* art. 11.

92. See BLACK’S LAW DICTIONARY (7th ed. 1999). “The statement is likely to lower that person in the estimation of reasonable people and in particular to cause that person to be regarded with feelings of hatred, contempt, ridicule, fear, or dislike.” *Id.* “Libel is written or visual defamation; slander is oral or aural defamation.” *Id.*

93. *Id.*

94. See *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 95(p).

95. Press Release, Human Rights Watch: Human Rights News, Chile: Former Political Prisoner Convicted of Defamation (Apr. 28, 2004) (stating that “defamation laws must be carefully circumscribed so as not to violate freedom of expression”), <http://hrw.org/english/docs/2004/04/28/chile8509.htm> [hereinafter Chile: Former Political Prisoner Convicted of Defamation].

“expression which offends, insults, or threatens a public functionary in the performance of his or her official duties.”<sup>96</sup> Governments and other officials may employ such criminal defamation laws to “suppress criticism of official wrongdoing, maladministration and corruption, and to avoid public scrutiny.”<sup>97</sup> Even the threat of a criminal defamation suit may result in self-censorship by journalists or the media and have a chilling effect on freedom of speech. A conviction can result in incarceration and a large fine for the person who made the statement as well as a fine for any media outlet that reports it.<sup>98</sup> Although the action may be ultimately unsuccessful, the plaintiff who brought the action has exacted revenge against the party who made the statement. Such suits can cause permanent harm to the professional reputation of a reporter even if the charge is unsubstantiated, in that criminal prosecution may lead the public to believe that reliable evidence existed to support the prosecution.

International bodies and press associations have condemned criminal defamation laws, and some State courts have held that they are unconstitutional.<sup>99</sup> The U.N. Commission on Human Rights endorsed a statement by its Special Rapporteurs that “[d]etention, as a negative sanction for the peaceful expression of opinion, is one of the most reprehensible practices employed to silence people and accordingly constitutes a serious violation of human rights.”<sup>100</sup> The Inter-American Declaration on Principles of Freedom of Expression states “[l]aws that penalize offensive expressions directed at public officials, generally known as ‘desacato laws,’ restrict freedom of

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96. Press Release, Inter-American Commission on Human Rights, Satisfaction with the Repeal of “Descato” In Costa Rica, No. 19/02 (Apr. 25, 2002), <http://www.cidh.org/Comunicados/English/2002/Press19.02.htm> [hereinafter Satisfaction with the Repeal of “Descato” In Costa Rica]; see Jairo E. Lanao, *Legal Challenges to Freedom of the Press in the Americas*, 56 U. MIAMI L. REV. 347, 365 (2002).

97. ARTICLE XIX, RIGHTS VS. REPUTATIONS: CAMPAIGN AGAINST THE ABUSE OF DEFAMATION AND INSULT LAWS 1 (2003), <http://www.article19.org/pdfs/tools/defamation-campaigns-pack.pdf> [hereinafter RIGHTS VS. REPUTATIONS].

98. *Id.*

99. The International Press Institute passed the following resolution in reference to criminal defamation laws:

The world’s leading journalists represented in the International Press Institute accordingly call on parliaments to abolish such laws, on governments to refrain from using them where they exist and to call for their revocation, and on courts to refuse to invoke them and to rule that they violate the fundamental human rights of free speech and press freedom.

Press Release, International Press Institute [IPI], Resolutions Passed by the 53rd IPI General Assembly, Resolution on Criminal Defamation and “Insult Laws” (May 18, 2004), <http://www.freemedia.at/resolutions2004.htm>.

100. *Id.*

expression and the right to information.”<sup>101</sup> In 2005, the Honduran and Guatemalan Constitutional Courts declared *descato* laws to be unconstitutional,<sup>102</sup> and the Costa Rican Legislative Assembly removed *descato* laws from the Costa Rican criminal code.<sup>103</sup>

### 1. The Inter-American Court’s Jurisprudence on Defamation

The Inter-American Court positively influenced international jurisprudence in the area of criminal defamation in 2005. The Inter-American Court decided three criminal defamation cases in which the applicant had been convicted in domestic courts of defaming a public official or person who was involved in activities of public interest.<sup>104</sup> The Court ruled in each case that criminal defamation was not the least restrictive means of limiting freedom of expression so as to protect other rights and, therefore, the State had violated the rights of the person convicted domestically of criminal defamation. In *Herrera Ulloa v. Costa Rica*, also known as *La Nación Newspaper Case*, discussed in the introduction, the Court held that requiring a journalist to prove the truth of statements made by third parties was an excessive restriction on the journalist’s right to freedom of expression,<sup>105</sup> and that there is a higher standard of protection for statements made about persons whose activities are within the domain of public interest.<sup>106</sup>

In *Canese v. Paraguay*, the Inter-American Court stated that “penal laws are the most restrictive and severest means of establishing liability for an unlawful conduct.”<sup>107</sup> When combined with the Court’s statements that the least restrictive means of interference with freedom of expression must be used,<sup>108</sup> and that a

101. *Declaration of Principles on Freedom of Expression*, *supra* note 35, Principle 11.

102. Press Release, OAS, Office of the Special Rapporteur for Freedom of Expression of the IACHR, The Office of the Special Rapporteur for Freedom of Expression of the IACHR Expresses its Satisfaction with Decisions in Guatemala and Honduras Declaring Descato Laws Unconstitutional, No. 126/05 (July 1, 2005), <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=638&1ID=1>; *Honduran High Court Strikes Down Descato Provision*, CPJ 2005 NEWS ALERT, May 26, 2005, <http://www.cpj.org/news/2005/Honduras26may05na.html>.

103. Satisfaction with the Repeal of “Descato” In Costa Rica, *supra* note 96.

104. *Canese v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, (Aug. 31, 2004); *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, (Jul. 2, 2004); *Palamara Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, (Nov. 22, 2005).

105. *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶¶ 132–35.

106. *Id.* ¶¶ 127–29.

107. *Canese v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 104 (Aug. 31, 2004).

108. *Id.* ¶ 96.

criminal proceeding combined with other factors constitutes “an unnecessary and excessive punishment” for statements made in the context of a campaign for election,<sup>109</sup> one can infer that criminal sanctions for defamation are not a proportionate restriction on freedom of expression in political campaigns. Civil defamation suits must suffice to repair damage to reputations in that context. In *Canese*, a former Paraguayan presidential candidate, Richard Canese, had been convicted of criminal defamation by Paraguayan courts for statements he made about another candidate during the campaign for the presidency of the country.<sup>110</sup> During the campaign, Canese accused the rival candidate of having enriched himself with the assistance of the former dictator of Paraguay.<sup>111</sup> In one newspaper interview he stated that the opposing candidate, Wasmosy, had “passed from bankruptcy to the most spectacular wealth, thanks to the support from the dictator’s family.”<sup>112</sup> Wasmosy won the election, becoming the President of Paraguay,<sup>113</sup> and Canese was subsequently convicted in Paraguayan courts of criminal defamation, sentenced to two months in prison, fined, and permanently prohibited from leaving the country.<sup>114</sup> After Canese had lost several domestic appeals, petitioners filed a complaint in his favor with the Commission.<sup>115</sup> The Commission found that the Paraguayan criminal conviction violated the American Convention and recommended to the State that it lift the sanctions against Canese.<sup>116</sup> When the State failed to do so, the Commission referred

109. *Id.* ¶ 106. The *Canese* case was decided after the *Herrera Ulloa* case. The Court did not address the issue of the criminalization of crimes against honor in *Herrera Ulloa*. See *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R.

110. *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 69(7). Canese, an industrial engineer who had researched and written books and articles about the Itaipu hydroelectric power plant, had in earlier years been exiled to Holland for his opposition to the former Paraguayan dictator Alfredo Stroessner. *Id.* ¶ 69(1)(2). Canese had also filed reports alleging corruption and tax evasion against the company contracted to build the power plant, a company that also had been investigated for corrupt practices by the National Congress of Paraguay. *Id.* ¶ 69(3).

111. *Id.* ¶ 69(7). Canese was a candidate in the 1993 Paraguayan presidential election opposing Juan Carlos Wasmosy, the chairman of the board of the Paraguayan company that had constructed the Itaipu project. *Id.* ¶ 69(2).

112. *Id.* ¶ 69(7). Canese alleged that the Stroessner family had allowed Wasmosy to assume the chairmanship of CONEMPA, the consortium that enjoyed a Paraguayan monopoly of the principal civil works of Itaipu. *Id.* In another interview Canese alleged that “in practice, Mr. Wasmosy was the Stroessner family’s front man in CONEMPA, and the company transferred substantial dividends to the dictator.” *Id.*

113. *Id.* ¶ 69(8). Other directors of CONEMPA filed a criminal complaint against Canese for defamation. *Id.* ¶ 69(10).

114. *Id.* ¶ 2. This restriction that could be lifted only under extraordinary circumstances. *Id.*

115. *Id.* ¶ 5.

116. *Id.* ¶ 10.

the case to the Inter-American Court. While the case was pending before the Inter-American Court, the Supreme Court of Justice of Paraguay annulled the judgment against Canese and absolved him of guilt.<sup>117</sup> The Inter-American Court subsequently issued a decision holding that Canese's right to freedom of expression as protected by the American Convention had been violated.<sup>118</sup> The Inter-American Court held that criminal prosecution for defamation was unduly restrictive for statements made in the context of political campaigns.<sup>119</sup>

In *Palamara Iribarne*, a former military intelligence officer who had written a State-censored book on military intelligence, also had been convicted in a Chilean military court of criminal defamation for comments that he made to the press about the department that was prosecuting his case. Following the seizure of Palamara Iribarne's book the defendant told the press that the office of the Naval Prosecutor "had limited [Palamara Iribarne's] freedom of expression and had apparently tried to cover up the repression by accusing him of failure to follow military orders and duties."<sup>120</sup> He also stated that "there were reasons to assume that the Office of the Naval Prosecutor had forged legal documents and lied to the Court of Appeals when it was consulted with respect to who made the complaint that initiated the summary proceeding and the case number so as to avoid an unfavorable decision."<sup>121</sup> The commander of the naval zone filed a complaint against Palamara Iribarne for the crime of *desacato* stating that Palamara Iribarne had made his statements "in highly offensive terms with respect to the Naval Prosecutor."<sup>122</sup> Although Palamara Iribarne was initially absolved of the crime of defamation before a military tribunal,<sup>123</sup> he was subsequently convicted by another military tribunal and that decision was confirmed by the Chilean Supreme Court.<sup>124</sup> The case was then brought to the Commission

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117. *Id.* ¶ 69(49). In annulling the sentences against Canese and absolving him of guilt, the Criminal Chamber of the Supreme Court of Justice of Paraguay stated,

[t]he statements made by Mr. Canese—in the political context of an election campaign for the presidency—were, necessarily, important in a democratic society working towards a participative and pluralist power structure, a matter of public interest. There is nothing more important and public than the popular discussion on and subsequent election of the President of the Republic.

*Id.* ¶ 99 (quoting the Criminal Chamber of the Supreme Court of Justice of Paraguay).

118. *Id.* ¶ 108.

119. *Id.* ¶¶ 91–92.

120. *Palamara Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 63(73) (Nov. 22, 2005).

121. *Id.* ¶ 63(73).

122. *Id.* ¶ 63(74).

123. *Id.* ¶ 63(88).

124. *Id.* ¶ 63(91), (93).

which found in favor of Palamara Iribarne, and it was then referred to the Inter-American Court. Chile informed the Court that it had revised its *desacato* law in civil courts to eliminate the crime of defamation against authorities.<sup>125</sup> The State had not, however, eliminated defamation from the Chilean Code of Military Justice.<sup>126</sup> The Inter-American Court held that Chile had violated Palamara Iribarne's right to freedom of expression because the crime of *desacato* was disproportionate and unnecessary in a democratic society.<sup>127</sup> The Court stated that the law as applied to Palamara Iribarne "established disproportionate sanctions for criticizing the functioning and members of a State institution,"<sup>128</sup> in that it "suppressed the essential debate for the functioning of a truly democratic system and unnecessarily restricted the right to freedom of thought and expression."<sup>129</sup>

## 2. Higher Level of Protection for Statements about Persons Engaged in Activities of Public Interest

If governmental impunity and corruption are to be defeated, citizens must be allowed to criticize the actions of public officials without fear of criminal prosecution. The Inter-American Court specifies that domestic laws must provide a higher level of protection from defamation suits for statements made about a person whose activities are within the domain of public interest.<sup>130</sup> In this regard, the Court stated that

[t]hose individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate.<sup>131</sup>

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125. *Id.* ¶ 63(101).

126. *Id.*

127. *Id.* ¶ 88.

128. *Id.*

129. *Id.*

130. *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 129 (Jul. 2, 2004). The Inter-American Declaration of Principles on Freedom of Expression states that "[t]he protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest." *Declaration of Principles on Freedom of Expression*, *supra* note 35, Principle 10.

131. *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 129; *Ivcher Bronstein v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 155 (Feb. 6, 2001). The Inter-American Court stated approvingly that the European Court of Human Rights has emphasized that "freedom of expression leaves a very reduced margin to any restriction of political discussion or discussion of matters of public interest." *Ivcher Bronstein*, 2001 Inter-

The Court explained that the differing standard of protection is not based on whether the subject is a public figure or private citizen; instead, it is based on whether a given person's activities are matters that fall within the domain of public interest.<sup>132</sup> Persons involved in such activities should have a greater tolerance and openness to criticism.<sup>133</sup> To date, the Inter-American Court has specifically acknowledged this protection for statements made about honorary diplomats,<sup>134</sup> candidates for office,<sup>135</sup> and officers and members of the military, including those serving on tribunals.<sup>136</sup>

In light of the essential function of public debate in a democracy, the Inter-American Court held that statements questioning the competence and suitability of a candidate made during an electoral campaign concerned matters of public interest.<sup>137</sup> The Court stated that a greater margin of tolerance should be shown towards statements and opinions expressed during political debates.<sup>138</sup> The Court reasoned that not only during elections but also in general

[t]he democratic oversight that society exercises through public opinion encourages transparency in the business of the State and promotes a sense of responsibility in public officials as regards their function,

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Am. Ct. H.R., ¶ 155. The European Court stated in this regard that the "acceptable limits to criticism are broader with regard to the Government than in relation to the private citizen or even a politician." *Iucher Bronstein*, 2001 Inter-Am. Ct. H.R., ¶ 155 (quoting *Sürek & Özdemir v. Turkey*, 1999 Eur. Ct. H.R. 50, ¶ 60 (1999)). In a democratic system, the acts or omissions of the Government would be subject to rigorous examination, not only by the legislative and judicial authorities, but also by public opinion." *Id.*

132. *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 129.

133. *Palamara Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 83 (Nov. 22, 2005)(citing *Canese v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 97 (Aug. 31, 2004)); *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 127.

134. *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 3.

135. *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 97.

136. *Palamara Iribarne*, 2005 Inter-Am. Ct. H.R., ¶ 83.

137. *Canese*, 2004 Inter-Am. Ct. H.R., ¶¶ 91–92. The Court specified that, "[t]he effective exercise of representative democracy" underlies the enjoyment of human rights." Advisory Opinion OC 6/86, 1986 Inter-Am. Ct. H.R. (ser. A) No. 6, ¶ 32 (May 9, 1986). The Court, moreover, rejected the view that the form of government does not affect State compliance with human rights standards. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 42 (Nov. 13, 1985). The Court also affirmed that, "[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests." *Id.*

138. *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 97 (citing *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 127); see *Iucher Bronstein*, 2001 Inter-Am. Ct. H.R.; *Feldek v. Slovakia*, 2001 Eur. Ct. H.R. 463; *Sürek & Özdemir v. Turkey*, 1999 Eur. Ct. H.R. 50, ¶ 60 (1999).

which is why there should be so little margin for any restriction of political discourse on matters of public interest.<sup>139</sup>

The public's participation in the interests of society is encouraged by allowing the exercise of democratic control through freedom of expression.<sup>140</sup> In *Canese*, the Inter-American Court stated that "[e]veryone must be allowed to question and investigate the competence and suitability of the candidates, and also to disagree with and compare proposals, ideas and opinions, so that the electorate may form its opinion in order to vote."<sup>141</sup> Likewise, the European Court of Human Rights has stated that it is "particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely."<sup>142</sup>

The Inter-American Court should establish a standard that domestic courts could apply in determining whether a restriction related to a person's public activities violates freedom of expression.

139. *Palamara Iribarne*, 2005 Inter-Am. Ct. H.R., ¶ 83; *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 97; *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 127 (citing *Iucher Bronstein*, 2001 Inter-Am. Ct. H.R., ¶ 155) [translation by Author].

140. Advisory Opinion OC-5/85, ¶ 70, *quoted in Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 112 and in *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 82. The Inter-American Democratic Charter states that, "[t]ransparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy." Inter-American Democratic Charter art. 4 quoted by the Court in *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 115. Likewise, the Council of Europe stated that, "[f]reedom to inform and to be informed is one of the cornerstones of democracy." Denis Durand de Bousingen, *Introduction to KARACA*, *supra* note 1, at 9.

141. *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 90. The Inter-American Court stated that it

considers it important to emphasize that, within the framework of an electoral campaign, the two dimensions of freedom of thought and expression are the cornerstone for the debate during the electoral process, since they become an essential instrument for the formation of public opinion among the electorate, strengthen the political contest between the different candidates and parties taking part in the elections, and are an authentic mechanism for analyzing the political platforms proposed by the different candidates. This leads to greater transparency, and better control over the future authorities and their administration.

*Id.* ¶ 88. The European Court of Human Rights has also called for latitude for freedom of expression within the context of politics, stating that

[w]hile precious to all, freedom of expression is particularly important for political parties and their active members . . . . They represent their electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with the freedom of expression of a politician who is a member of an opposition party, like the applicant, call for the closest scrutiny on the Court's part.

*Incal v. Turkey*, 1998 Eur. Ct. H.R. 48, ¶ 46).

142. *Bowman v. The United Kingdom*, 1998 Eur. Ct. H.R. 4, ¶ 42.



In *Canese*, the Inter-American Court made only a general statement that a judge should weigh “respect for the rights or reputations of others against the value for a democratic society of an open debate on topics of public interest or concern.”<sup>143</sup> In *Herrera*, the Court stated that “a certain latitude” should be allowed under the American Convention for statements made about public officials or other public figures when matters of public interest are involved.<sup>144</sup> The Court explained that this does not “signify that the honor of public officials or public figures should not be legally protected, but that it should be protected in accordance with the principles of democratic pluralism.”<sup>145</sup> The European Court of Human Rights also held that a public official who “lays himself open to close scrutiny of his every word and deed” must show “a greater degree of tolerance.”<sup>146</sup> The European Court of Human Rights has not established the elements of this threshold of protection.

It would benefit international jurisprudence on freedom of expression and assist domestic courts if the Inter-American Court were to set forth a test to be applied in defamation cases, especially when the complainant is a person engaged in public activities. The Inter-American Declaration of Principles on Freedom of Expression suggests the use of such a test.<sup>147</sup> It advocates that “it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.”<sup>148</sup> The U.S. Supreme Court and other jurisdictions throughout the world have adopted the “actual malice” test.<sup>149</sup> Supporters of a free press argue that “the ‘actual malice’ standard is necessary because stories of official corruption or wrongdoing should not be suppressed simply because a reporter who has done a sound investigation is insufficiently certain of being able

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143. *Canese*, 2004 Inter-Am. Ct. H.R., ¶ 105.

144. *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 128.

145. *Id.*

146. *Dichand et. al. v. Austria*, 2002 Eur. Ct. H.R., Application No. 29271/95, 26 February 2002, ¶ 39. The European Court of Human Rights also applies a different standard to “restrictions applicable when the object of the expression is an individual and when reference is made to a public person.” *Lingens v. Austria*, App. No. 9815/82, 8 Eur. H.R. Rep. 407, ¶ 42 (1986). In this regard, the European Court stated that “[t]he limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual.” *Id.*

147. *Declaration of Principles on Freedom of Expression*, *supra* note 35, Principle 10.

148. *Id.*

149. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *see Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 66(e) (citing Spanish Penal Code arts. 204, 207).

to prove the facts to risk criminal prosecution.”<sup>150</sup> Alternatively, the Court could have adopted the standard of lack of good faith that has been adopted by other domestic jurisdictions. Despite some resistance in Latin America to importing a foreign standard, a clearer rule would benefit freedom of expression and democracy.

### 3. Alternate Remedy for Defamation: Civil Suits

The Inter-American Court has consistently held that criminal defamation suits and the sanctions resulting from a conviction for criminal defamation are unnecessary and disproportionate, and are therefore an illegal restriction on freedom of expression when the statement concerns a person engaged in public activities.<sup>151</sup> The Court has not yet addressed the issue of whether criminal defamation suits and sanctions are necessary and proportionate when statements are made about a person whose activities are not in the public sphere.

Criminal suits for defamation to remedy damage to a person’s honor and reputation should be deemed to be unnecessary in all cases. Civil law suits for defamation combined with the right to reply can provide *restitutio integrum* (full restitution) to victims. Civil defamation suits are adjudicated between the parties in civil courts, whereas criminal defamation suits are prosecuted by the State as criminal offenses. Otherwise, the primary distinction between civil and criminal defamation is in the remedies awarded. The victim’s remedy in a civil defamation suit is compensatory damages and perhaps punitive damages.<sup>152</sup> The formal remedy in criminal libel is incarceration or the payment of a fine to the government.<sup>153</sup> Furthermore, civil defamation suits are not as problematic as criminal defamation suits. In civil suits, there is no potential for prosecutorial misconduct. As criminal prosecutors exercise considerable discretion in determining which complaints to prosecute, criminal defamation laws may be inconsistently enforced, and

150. Brief of Open Society Justice Initiative as Amicus Curiae Supporting The Inter-American Commission on Human Rights in the case *Herrera Ulloa* (on file with the Court).

151. *Palamara Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 88; *Canese v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, ¶¶ 91–92.

152. A problem that may arise in a civil defamation suit is the award of disproportionate damages. See *Stokes v. Jamaica*, Case 28/04, Inter-Am. C.H.R., Report No. 65/04, OEA/Ser.LV/II.122, doc. 5 rev. 1 at 396 (2004). A civil defamation suit is less stigmatizing, but stigma and punishment are often what the alleged victim is seeking. See Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL’Y 433, 470 (2004).

153. One advantage of criminal libel is that the state pays all the costs and expenses of the litigation, whereas the person who files a civil suit must pay attorney fees and court costs.

enforcement may be politically motivated, especially when the alleged victim of the statement is a public official or influential person.

Another problem arises when criminal defamation proceedings are instituted by private parties rather than by prosecutors, as is legal in some States. For instance, in Costa Rica, crimes against a person's honor were prosecuted by the alleged victim.<sup>154</sup> Under these statutes a person who considered himself or herself defamed could institute criminal proceedings and take the case to court without the involvement of a public prosecutor. Consequently, frivolous complaints could result in trial, because no public official reviewed the complaint or the evidence to determine if prosecution was warranted.

The Inter-American Court did not utilize the opportunities in the *Canese*, *Herrera Ulloa*, and *Palamara Iribarne* cases to further advance international jurisprudence on freedom of expression by stating unequivocally that defamation should be a civil offense in all cases, and that criminal defamation laws per se are not a proportionate restriction on freedom of expression under the American Convention. The Court has the authority under the American Convention to order a State to repeal a law that violates rights protected by the Convention.<sup>155</sup> Although States are commonly allowed a margin of appreciation in drafting laws, the laws must ultimately comply with the State's international human rights obligations. The Court could have ordered the States to repeal their criminal defamation laws. Alternately, the Court could have held that these laws lack legal effect because they contravene the American Convention, as it did in reference to Peru's amnesty laws.<sup>156</sup> Criminal penalties for defamation should be eliminated except in cases involving a "direct and immediate incitement to acts of violence, discrimination or hostility."<sup>157</sup> The result of the Court's failure to declare criminal defamation laws per se in violation of the American Convention is that persons alleging that they have been defamed may continue to bring cases in criminal court even though they will not likely win convictions.<sup>158</sup> If the Court were to rule that criminal

154. *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 66(e).

155. American Convention, *supra* note 13, arts. 2, 63(1); see JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 245-48 (2003).

156. See *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser.C) No. 75, ¶ 44 (Mar. 14, 2001).

157. Press Release, Human Rights Watch: Human Rights News, Guatemala: Acquittal of Human Rights Defender a Victory for Free Expression (Feb. 2, 2004), <http://hrw.org/english/docs/2004/02/02/guatem7210.htm> [hereinafter Guatemala: Acquittal of Human Rights Defender].

158. For example, in May 2005, a Brazilian sports commentator was convicted of defamation and ordered to spend 18 months of overnight detention in a prison

defamation statutes per se violate freedom of expression, the Court would, thereby, eliminate the egregious use of such laws.

#### 4. Alternate Remedy: Right to Reply

The reputation of a person who has been libeled can be protected through the right of reply following a victorious civil suit. The right of reply may require the publisher or broadcaster responsible for the defamatory statement to print or broadcast the reply of the victim or the court's judgment in the victim's favor. The American Convention provides that "[a]nyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communication outlet, under such conditions as the law may establish."<sup>159</sup>

The Inter-American Court stated that there is an inescapable relationship between the right of reply or correction and the right to freedom of expression; this relationship is evidenced by the placement of the right of reply immediately after the right to freedom of expression in the American Convention.<sup>160</sup> The Court further stated that "in regulating the application of the right of reply or correction, the State's Parties must respect the right of freedom of expression guaranteed by Article 13. They may not, however, interpret the right of freedom of expression so broadly as to negate the right of reply proclaimed by Article 14(1)."<sup>161</sup> Although the European Convention

dormitory far from the television station where he broadcast. See *Journalist Gets 18 Months Detention on Defamation Charge*, CPJ 2005 NEWS ALERT, May 17, 2005, <http://www.cpj.org/news/2005/Brazil17may05na.html>. The sports commentator had made a veiled allegation of corruption when he alleged that certain stations had won the right to broadcast a soccer tournament because of their relationship to the government. *Id.* The media groups filed criminal complaints against the sports broadcaster, and he was subsequently convicted. *Id.*

159. American Convention, *supra* note 13, art. 14(1). The Argentine Supreme Court has held that there is a directly enforceable right to reply in Argentina without the need for supporting domestic legislation. See Thomas Buergenthal, *International Tribunals and National Courts: The Internationalization of Domestic Adjudication*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 687, 695 (1995). The Argentine Supreme Court based the right to reply in Argentina on Article 14 of the American Convention and the Court's advisory opinion on the Enforceability of the Right to Reply. See *id.*

160. Advisory Opinion OC-7/86, 1986 Inter-Am. Ct. H.R. (ser.A) No. 7, ¶ 25 (Aug. 29, 1986).

161. *Id.* International treaties and the courts that interpret them generally allow contracting states a margin of appreciation in implementing the right to reply. See *id.* For instance, international law does not dictate the amount of space required for the reply or the time frame in which the reply must be published. See *id.* ¶ 27. The State may establish explicit provisions in its domestic laws. See *id.* When a court holds that the media must publish the entire court decision, the right of reply can be onerous

does not provide for a right of reply, the European Committee of Ministers is said to have "pioneered the concept of a right of reply in the press and on radio and television."<sup>162</sup>

Another remedy for defamation would be a reprimand by a professional body or organization of the journalist or publication that printed the defamatory statement.<sup>163</sup> Care must be taken, however, that the professional body not be a tool of the government to silence journalists. The organization should be composed of professionals in the field.

##### 5. Burden of Proof and Defenses in Defamation Actions

In some States a person making a defamatory statement may be punished even if the statement is true. In other States, although truth is a defense to defamation, the defendant has the burden of proving that the statement was true. Moreover, domestic law may require that the defendant prove the truth of statements cited from other printed sources or prove the truth of value judgments made about a person. These allocations of the burden of proof are in contrast to the general rule that the plaintiff in civil proceedings or the State in criminal proceedings has the burden of proving that a wrongful act has been committed.<sup>164</sup> In defamation proceedings it should be required that the plaintiff prove the defendant made a statement that was damaging to the plaintiff's reputation, the statement was false, and if it was published, that it was published intentionally or negligently.<sup>165</sup> In such cases, if the plaintiff did not prove that the statement was false, the case would fail. The burden of establishing the falsity of an allegedly defamatory statement should be on the party bringing the action for defamation, at least when the statement involves a person engaged in matters of public interest. In

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to the media. See Lanoa, *supra* note 96, at 347, 353 (citing the Criminal Code of Costa Rica, art. 155). The court decisions often cover several newspaper pages. *Id.* at 354. Some commentators argue that the victim's reply should be granted the same degree of prominence provided the original statement and should be published free of charge and within a reasonable amount of time after the right of reply is established. See John Hayes, *The Right to Reply: A Conflict of Fundamental Rights*, 37 COL. J.L. & SOC. PROBS. 551, 551 (2004).

162. KARACA, *supra* note 1, at 13.

163. RIGHTS VS. REPUTATIONS, *supra* note 97.

164. ZELEZNY, *supra* note 10, at 117. Under U.S. law, the plaintiff in a libel suit has the burden of proof as to all elements of a law suit including the falsity of the statement. *Id.* Traditionally under U.S. common law, truth had been a defense to libel, meaning that the defendant (person accused of making a defamatory statement) had the burden of proving the truth of the statement. *Id.* The U.S. Supreme Court's decisions have now generally placed the burden on the plaintiff to prove the falsehood of the statement. *Id.* at 126.

165. RIGHTS VS. REPUTATIONS, *supra* note 97.

a joint declaration, the U.N. Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression stated that “the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern.”<sup>166</sup>

A problem arises in States that place the burden on the defendant to prove that allegedly defamatory statements are true. For example, the Costa Rican law in question in the *Herrera Ulloa* case put the burden on the defendant to prove the truth of the statements at issue.<sup>167</sup> Likewise in Chile, a person who makes a statement alleged to be defamatory had to prove that the statement was true.<sup>168</sup> In a Chilean case that has not come before the Inter-American Court, a former political prisoner claimed in a television interview that she had been sexually abused by a Chilean police officer.<sup>169</sup> The woman was subsequently convicted of criminal

166. Joint Declaration by the U.N. Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, *International Mechanisms for Promoting Freedom of Expression* (2004), <http://www.cidh.org/relatoria/showarticle.asp?artID=319&IID=1>. The U.S. Supreme Court also rejected the requirement that the defendant prove the truth of allegations concerning public officials as a violation of free speech. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Supreme Court stated that “[u]nder such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.” *Id.* at 279. U.S. law requires that when an alleged defamatory statement concerns public officials, the plaintiff not only bears the burden of proving the falsity of the statements but also of proving that the statements were published in malice or with reckless disregard for the truth. *Id.* at 279–80.

167. *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 132 (Jul. 2, 2004). The Costa Rican statute in question in *Herrera Ulloa* provided that “[t]he person who dishonors another or who spreads rumors or news of a kind that will affect his reputation, shall be punished with a fine . . . .” Penal Code of Costa Rica, Title II, art. 46. The law goes on to state that

[i]nsult or defamation is not punishable if it consists of a truthful statement and has not been motivated by the pure desire to offend or by a spirit of malice. Notwithstanding, the accused may prove the truthfulness of the allegation only: 1. If the allegation is linked to the defense of a matter of current public interest; and 2. If the plaintiff demands proof of the allegation against him, provided that such proof does not affect the rights or secrets of third persons.

*Id.* The law goes on to state that “[a] defendant accused of libel or defamation may prove the truthfulness of the imputed fact or deed, unless the injured party has not lodged a complaint, where such action is required in order to prosecute.” Article 152 of the Costa Rican Penal Code states, “[a]nyone who publishes or reproduces, by any means, offences against honor by another party shall be punished as having committed those offences. (Unofficial translations from Article 19 brief to the Inter-American Court.).

168. Chile: Former Political Prisoner Convicted of Defamation, *supra* note 95.

169. *Id.*

defamation<sup>170</sup> when the police officer brought a criminal proceeding against her, and she bore the burden of proving that her allegations were true. There were no witnesses to the assault. The Chilean Court held that she had failed to satisfy the burden of proof and convicted her of libel. She was given a two-month suspended prison sentence, fined \$1000, and ordered to pay damages.<sup>171</sup> As shown by this case, the allocation of the burden of proof can significantly affect the outcome of a trial.

A defendant should never be required to prove the absolute truth of a statement. Journalists, especially, should not be held to a standard of strict liability for broadcasting or publishing a statement that turns out to be false. The media may make mistakes. If the media were liable for every error, it would undermine the right to freedom of expression and inhibit the publication of news. The NGO, "Article 19, Global Campaign for Free Expression" posits a "reasonableness" defense under which the media would be absolved of liability for defamation upon a showing that under all the circumstances of the case, it was reasonable to have published the false statements.<sup>172</sup>

The Inter-American Court did not take the opportunity to hold that the burden of proof must be on the plaintiff when the statement concerns a matter of public interest. The Court did not address the issue in the *Canese* case, and it limited itself to a narrower holding on the issue in the *Herrera Ulloa* case.<sup>173</sup> In *Herrera Ulloa*, the Court held that placing the burden on the defendant journalist to prove the truth of third party statements, facts that had initially been reported in the European press, was an excessive limitation on freedom of expression.<sup>174</sup> The Court reasoned that the effect of placing the burden of proof on the defendant in that case would have a "deterrent, chilling and inhibiting effect on all those who practice journalism," and would "obstruct public debate on issues of interest to society."<sup>175</sup> It was unclear from the Inter-American Court's decision

170. *Id.*

171. *Id.*

172. Article 19, Global Campaign for Free Expression, Amicus brief, Defamation Law as a Restriction on Freedom of Expression ¶¶ 8, 144–63 (March 2004) in the *Herrera Ulloa* case.

173. *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶¶ 132–35.

174. *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶¶ 132–35. Most of the statements were actually reproductions of portions of news articles printed in the Belgian press. *Id.* The European Court likewise has held that "punishment of a journalist for assisting in the dissemination of statements made by another person . . . would seriously hamper the contribution of the press to discussion of matters of public interest." *Thoma v. Luxemburg*, 2001 Eur. Ct. H.R. \_\_\_, ¶ 62.

175. *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 133. The European Court has also held that "freedom of expression requires that care be taken to dissociate the personal views of the writer of the commentary from the

whether any law that places the burden on the defendant to prove the truth of statements would violate the American Convention, or whether there is a violation only if the journalist must prove the truth of statements that have been quoted. Thus, due to the Court's lack of clarification, other persons must be domestically convicted of criminal defamation and fail to prove the truth of their statements before the Inter-American Court will go a step further to clarify the law in this area.

In some States even the truth of the alleged defamatory statement is not a defense. For example, the Executive Director of Casa Alianza, a home for street children in Guatemala, was convicted of criminal defamation for accusing certain Guatemalan lawyers of involvement in irregular adoptions.<sup>176</sup> One of the lawyers he had named brought a private action for criminal defamation against the director.<sup>177</sup> In Guatemala it was a criminal offense to make a statement that "dishonors, discredits, or disparages another person," even if the statement is true.<sup>178</sup> A person convicted of criminal defamation in Guatemala could receive up to five years in prison.<sup>179</sup> The Inter-American Court has to date declined to address the issue of whether truth is a valid defense in such an action. It should clarify that truth is always a defense to a charge of defamation.

The Inter-American Court did not find that requiring the defendant in a criminal case to prove the truth of news articles quoted from the foreign press violated the right to a presumption of innocence.<sup>180</sup> The Court did not provide an analysis or reasoning for its decision, finding only a violation of the defendant's right to freedom of expression.<sup>181</sup> Other sources argue that requiring the defendant to bear the burden of proof in criminal cases is a violation of the right to a presumption of innocence.<sup>182</sup>

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ideas that are being discussed or reviewed even though these ideas may be considered offensive to many or even to amount to an apologia for violence." *Halis v. Turkey*, 2005 Eur. Ct. H.R. 3, ¶ 134.

176. Guatemala: Acquittal of Human Rights Defender, *supra* note 157.

177. *Id.*

178. *Id.* Historically, "[t]ruth was not allowed as a defense in criminal libel cases, because the purpose of the prosecution of the crime was to prevent violence." Lisby, *supra* note 152, at 456.

179. Guatemala: Acquittal of Human Rights Defender, *supra* note 157.

180. *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 178 (Jul. 2, 2004). Article 8(2) of the American Convention provides in relevant part that "[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law." American Convention, *supra* note 13, art. 8(2).

181. *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶¶ 176–178.

182. Article 19, Global Campaign for Free Expression, Defamation Law as a Restriction on Freedom of Expression; Amicus Curiae Brief Supporting Applicant in *Herrera Ulloa* (on file with the Court).



## 6. No Defamation for Value Judgments

The Inter-American Court has not yet been called upon to determine whether a person has been defamed when the speaker or writer has simply published a negative value judgment or opinion about an individual. Value judgments are expressions of opinions about the subject such as "he is competent" or "she is not trustworthy." Whereas a fact is susceptible of proof, a value judgment is not and, therefore, a value judgment should not be judged defamatory. The American Convention, unlike the European Convention, does not expressly protect an individual's right to hold opinions.<sup>183</sup> Nonetheless, the right to express opinions should be considered to be subsumed within the right to express ideas, a right that is protected by the American Convention.

The European Court of Human Rights has ruled that Austrian courts violated the European Convention's provision on freedom of expression when they held that value judgments and personal opinions were defamatory under domestic law. In the *Lingens* case, an Austrian journalist had been convicted in the domestic courts for using the expressions "the basest opportunism," "immoral," and "undignified" in reference to the Chancellor of Austria.<sup>184</sup> The European Court of Human Rights found that the statements were not defamatory, reasoning that "a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, but the truth of value-judgments is not susceptible of proof."<sup>185</sup> Should the Inter-American Court be confronted by a similar issue, it should follow the jurisprudence of the European Court and hold that value judgments and opinions are protected by the American Convention's right to express ideas of all kinds. To be defamatory, a statement must state or imply assertions of facts which are capable of being proven false.

### B. *Restrictions for the Protection of National Security*

The American Convention allows freedom of expression to be subsequently restricted for "the protection of national security, public order, or public health or morals."<sup>186</sup> It must be noted that even when

183. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedom specifies that "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas." European Convention, *supra* note 37.

184. *Lingens v. Austria*, App. No. 9815/82, 8 Eur. H.R. Rep. 407, ¶¶ 22, 45 (1986).

185. *Id.*

186. American Convention, *supra* note 13, art. 13(2)(b).

publication or speech threatens these grounds the American Convention does not authorize prior censorship. The issue is only whether any of the stated grounds will justify the subsequent liability of the party making the statement. In the *Palamara Iribarne* case, Chile argued that the publication of the book in question would jeopardize national security.<sup>187</sup> However, as State experts affirmed that the information in the book was public knowledge, and the State was arguing to justify prior censorship, the Court did not address the defense.<sup>188</sup> The Inter-American Court has not had a further opportunity to develop jurisprudence related to this restriction of freedom of expression.

Other international treaties also include permissible restrictions to freedom of expression on the grounds of national security and related factors, and these restrictions have been interpreted in other international fora. The European Convention allows for restrictions "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals . . . ."<sup>189</sup> Similarly, the ICCPR permits restrictions "for the protection of national security, or of public order, or of public health or morals."<sup>190</sup> The European Court of Human Rights and the UNHRC have developed jurisprudence to determine whether interference with freedom of expression is justified on grounds concerning national security and related factors.<sup>191</sup> The jurisprudence of both bodies incorporate the same three elements set forth in the jurisprudence of the Inter-American Court when it considers the legitimacy of any restriction on freedom of expression. These elements are that the restriction be (1) prescribed by a national law, (2) made pursuant to one of the legitimate aims set forth in the applicable treaty, and (3) necessary.<sup>192</sup>

187. *Palamara Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 66(b) (Nov. 22, 2005).

188. *Id.* ¶ 75.

189. European Convention, *supra* note 37, art. 10(2).

190. ICCPR, *supra* note 37, art. 19(3)(b). The African Charter on Human and People's Rights does not set forth any explicit restrictions to the freedom of Expression. However, the Declaration of Principles of Freedom of Expression in Africa, which was adopted by the African Commission on Human and People's Rights, provides that "expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression." African Commission on Human and People's Rights, *Declaration of Principles of Freedom of Expression in Africa* (Oct. 2002), available at [http://www.kubatana.net/html/archive/resour/40303aufoe.asp?sector=RESOUR&range\\_start=1](http://www.kubatana.net/html/archive/resour/40303aufoe.asp?sector=RESOUR&range_start=1).

191. *Halis v. Turkey*, 2005 Eur. Ct. H.R. 3, ¶ 134; *Kim v. Republic of Korea*, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, 64th Sess. (Jan. 4, 1999).

192. *Sener v. Turkey*, 2000 Eur. Ct. H.R. 377, ¶ 28; *Kim v. Republic of Korea*, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, 64th Sess., ¶ 12.2 (Jan. 4,

Enforcement bodies have focused largely on the third element of the “necessity” of the restriction when holding that the restriction contravened the State’s obligations under international law.<sup>193</sup> National security laws are often drafted in broad and unspecific terms which could allow for State enforcement for any speech or activity which criticizes or can be viewed as threatening to the government in power.<sup>194</sup> These laws, when used to stifle dissent, may serve as effective tools to muffle criticism of governmental policies and to subvert democracy. The international enforcement bodies that oversee State compliance with human rights treaties must carefully scrutinize State arguments that an interference with freedom of expression is justified by such laws. When a State defends its interference with freedom of expression on national security grounds, the State should be required to “specify the precise nature of the threat allegedly posed by the author’s exercise of freedom of expression.”<sup>195</sup> The State should also be required to explain specifically why the interference is necessary to protect national security or public order.<sup>196</sup> Marks and Clapham accurately posit that the protection of national security “while incontestably significant, is absolutely vague and generally rooted in considerations that are not publicly verifiable.”<sup>197</sup> State reliance on these grounds must be carefully scrutinized.

When Turkey attempted to justify its interference with journalists’ rights to freedom of expression on national security grounds, the European Court of Human Rights resolved the journalists’ complaints against the State by applying the above-referenced test.<sup>198</sup> In *Halis v. Turkey* the Turkish government imprisoned a journalist for publishing a book review that expressed positive opinions about aspects of the Kurdish separatist movement.<sup>199</sup> The journalist was convicted domestically of violating the Turkish Prevention of Terrorism Act through the dissemination of propaganda about an illegal separatist terrorist organization.<sup>200</sup>

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1999). The European Court requires that the restriction be “necessary in a democratic society.” *Sener*, 2000 Eur. Ct. H.R. 377, ¶ 28. The U.N. Human Rights Commission requires that the restriction be “necessary to achieve a legitimate purpose.” *Kim*, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, ¶ 12.2.

193. *Halis v. Turkey*, 2005 Eur. Ct. H.R. 3, ¶¶ 9–12.

194. SUSAN MARKS & ANDREW CLAPHAM, INTERNATIONAL HUMAN RIGHTS LEXICON 243 (2005).

195. *Kim v. Republic of Korea*, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, 64th Sess., ¶ 12.5 (Jan. 4, 1999).

196. *Id.*

197. MARKS & CLAPHAM, *supra* note 194, at 243.

198. *Halis v. Turkey*, 2005 Eur. Ct. H.R. 3; *Sener v. Turkey*, 2000 Eur. Ct. H.R. 377.

199. *Halis v. Turkey*, 2005 Eur. Ct. H.R. 3, ¶¶ 9–12.

200. *Id.* ¶¶ 13–15, 17.

When the journalist filed a complaint with the European Court of Human Rights, the State defended that its restriction was necessary to protect national security.<sup>201</sup> The Court found that the restriction was made pursuant to Turkish law and that in view of the sensitive security situation and the use of violence by a separatist movement in Turkey, the measures taken by the government had the legitimate aim of protecting national security and public safety.<sup>202</sup> The Court did not find, however, that the conviction and suspended sentence of the journalist were proportionate to the interference with his freedom of expression.<sup>203</sup> Thus, the European Court of Human Rights held that the restriction was not necessary in a democratic society and that it, therefore, violated the journalist's right to freedom of expression.<sup>204</sup>

Similarly, in *Şener v. Turkey*, before the European Court of Human Rights, the owner and editor of a weekly Turkish paper was convicted of "disseminat[ing] propaganda against the State" for publishing an article that referred to the military attacks on the Kurdish population as genocide.<sup>205</sup> Turkey again defended its interference with freedom of speech on national security grounds because, in its view, merely by speaking negatively of the violence against the Kurdish population, the applicant had "incited and encouraged violence against the State."<sup>206</sup> The European Court of Human Rights held that the State had violated the applicant's right to freedom of expression.<sup>207</sup> Likewise, the UNHRC held that South Korea had contravened the ICCPR's provision on freedom of expression when it convicted and imprisoned a South Korean activist for criticizing the government of South Korea and advocating national reunification.<sup>208</sup> The government had convicted the complainant of violating its National Security Law.<sup>209</sup>

When determining whether governmental restrictions on freedom of speech for reasons such as national security or public order are legitimate, the Inter-American Court should apply similar principles to those applied in such cases by the European Court of Human Rights and the UNHRC. The Court should first look at the restriction in light of the case as a whole, including the content of the speech that was restricted within the overall context of the country at

201. *Id.*

202. *Id.* ¶¶ 26–27.

203. *Id.* ¶¶ 33, 37–39.

204. *Id.*

205. *Şener*, 2000 Eur. Ct. H.R. 377, ¶¶ 7–8.

206. *Id.* ¶ 37.

207. *Id.*

208. *Kim v. Republic of Korea*, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, 64th Sess., ¶ 2.1–2.3, 12.5 (Jan. 4, 1999).

209. *Id.* ¶ 2.3.

that time.<sup>210</sup> The Court must also specifically determine whether the interference with freedom of expression was “proportionate to the legitimate aims pursued” and whether the reasons used by the government to restrict freedom of speech were “relevant and sufficient.”<sup>211</sup> As explained by the Council of Europe, “[t]he right to information takes precedence over the political, legal and economic imperatives which are sometimes given as reasons for restricting it.”<sup>212</sup>

### C. *Indirect Restrictions on the Media not Permissible*

A State may not substitute indirect means to restrict the freedom of the media to express diverse views. The American Convention states that the

right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.<sup>213</sup>

This provision insightfully preempts more subtle means of restricting freedom of expression. Neither the European Convention nor the ICCPR contains a similar explicit provision. The Inter-American Court pointed out that the drafters intentionally located the limitation on indirect restrictions immediately following the provision on permissible restrictions to insure that the Convention’s language on permissible restrictions not be misinterpreted to limit, more than strictly necessary, the scope of freedom of expression.<sup>214</sup>

Under the American Convention, it is incompatible for the State to use public funds to favor one media competitor, to punish those who do not espouse the governmental position, or to attempt to influence the media to broadcast or print information favorable to the government. Thus, a State would violate the American Convention if it granted government loans on a discriminatory basis or used State funds to advertise only on those stations or in those newspapers that publish or broadcast information favorable to the government. Furthermore, the State could not use its power to grant concessions of radio or television frequencies, custom duties privileges, or any other

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210. *Halis v. Turkey*, 2005 Eur. Ct. H.R. 3, ¶ 33.

211. *Id.*

212. *KARACA*, *supra* note 1, at 9.

213. American Convention, *supra* note 13, art. 13(3).

214. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 47 (Nov. 13, 1985).

privileges that would result in a threat to freedom of expression.<sup>215</sup> The State's obligations in this area are not only negative; the State also must ensure that indirect restrictions on freedom of expression are not imposed by "private controls," meaning by private parties, which would "impede the communication and circulation of ideas and opinions."<sup>216</sup> The Inter-American Declaration states that "the means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the dissemination of information are incompatible with freedom of expression."<sup>217</sup>

#### D. Propaganda for War and Hate Speech Punishable

A question exists as to whether the censorship of hate speech would violate the American Convention. The American Convention provides that

any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.<sup>218</sup>

The initial draft of this provision was broader, reading "[a]ny propaganda for war shall be prohibited by law, as shall any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, crime or violence."<sup>219</sup> The U.S. delegation to the drafting convention objected to this provision, arguing that it should be deleted because it required censorship and could conflict with the U.S. protection of freedom of speech.<sup>220</sup> The Brazilian delegate, the renowned international law scholar Carlos Dunshee de Abranches, clarified that the provision even as then drafted did "not say that censorship must be established, but rather that the law shall prohibit a certain type of activity."<sup>221</sup> The U.S. delegation could not garner support to drop the provision, so, in consultation with

215. *Declaration of Principles on Freedom of Expression*, *supra* note 35, Principle 13.

216. Advisory Opinion OC-5/85, ¶ 48.

217. *Id.*

218. American Convention, *supra* note 13, art. 13(5).

219. THOMAS BUERGENTHAL & ROBERT NORRIS, *Legislative History*, in 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, booklet 12, at 89. The provision on freedom of expression was originally Article 12(5). *See id.*

220. *Id.* at 88. The U.S. delegate also stated, "[i]nsofar as propaganda for war, a series of classical works such as Homer's Iliad, a good part of the works of Shakespeare and of St. Thomas Aquinas, in which there is propaganda for war, would be prohibited by law." *Id.*

221. *Id.* at 89.

delegates of other countries, the United States put forward a proposed amendment which was accepted and resulted in the current provision. The report of the U.S. delegation commented that the wording that resulted in the final provision was guided by the U.S. Supreme Court decision, *Brandenburg v. Ohio*.<sup>222</sup> *Brandenburg* set forth the principle that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>223</sup>

The Inter-American Court has not yet been presented with the opportunity to interpret the American Convention’s restriction on hate speech. The American Convention’s provision is narrower than the provision in the ICCPR, which resembles the original draft provision of the American Convention. The ICCPR prohibits propaganda for war and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>224</sup> The ICCPR and the European Convention do not, however, include a bar on censorship similar to that of the American Convention. Therefore, the case law of these systems has only limited precedential value. The provision on hate speech in the American Convention bears greater similarity to U.S. case law. Consequently, a review of U.S. case law may be more useful in interpreting this provision than a perusal of the case law of other international systems.

## VI. FREEDOM OF THE PRESS IN THE INTER-AMERICAN SYSTEM

Freedom of expression “includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible.”<sup>225</sup>

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222. *Brandenburg vs. Ohio*, 395 U.S. 444 (1969).

223. *Id.* at 447.

224. ICCPR, *supra* note 37, at art. 20. The UNHRC, in its General Comments, has stated that this provision will not be fully effective unless States promulgate laws that prohibit propaganda for war and hate speech and provide for appropriate sanctions should the law be violated. U.N. Human Rights Committee, General Cmt. 11, art. 20, 19th Sess. (1983), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 at 12 (1994), available at <http://www1.umn.edu/humanrts/gencomm/hrcom11.htm>.

225. *Ivcher Bronstein v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 147 (Feb. 6, 2001); Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 32 (Nov. 13, 1985); *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 109 (Jul. 2, 2004).

Considering the media's essential role in a democratic society, it is vital that it be permitted to gather and disseminate diverse information and opinions.<sup>226</sup> Democracy is essential to the defense of human rights, and freedom of the press is essential to the maintenance of a democracy. States have used various means to inhibit the press from publishing commentaries or facts that the State views as negative or hostile. The Inter-American human rights system has responded to many of these threats to the freedom of the press.

#### A. Harassment, Imprisonment, and Murder of Journalists

In certain States, anyone who disseminates information that is negative of the government or derogatory of public officials may be at risk of repercussions.<sup>227</sup> Some repressive regimes harass, imprison, or murder journalists who critically report on public affairs or governmental activities. In doing so, the government is not only intimidating or eliminating the targeted journalists but also attempting to intimidate anyone who might consider investigating and reporting on governmental corruption, human rights abuses, or other wrongdoing.<sup>228</sup> The Inter-American Declaration of Principles on

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226. *Iucher Bronstein*, 2001 Inter-Am. Ct. H.R., ¶ 149; *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 117. The Inter-American Court has stated that “[t]he effective exercise of representative democracy” underlies the enjoyment of human rights. Advisory Opinion OC 6/86, 1986 Inter-Am. Ct. H.R. (ser. A) No. 6, ¶ 32 (May 9, 1986). “The media provide information which influences not only opinions and attitudes but also political choices, and this is why media freedom, pluralism and independence are essential preconditions of democracy.” KARACA, *supra* note 1, at 11.

227. See *In Imprisoning Journalists, Four Nations Stand Out*, CPJ SPECIAL REPORTS FROM AROUND THE WORLD, Feb. 3, 2005, [http://www.cpj.org/Briefings/2005/imprisoned\\_04/imprison\\_release03feb05na.html](http://www.cpj.org/Briefings/2005/imprisoned_04/imprison_release03feb05na.html) [hereinafter *Imprisoning Journalists*]. The four nations labeled as those most repressive of a free press for the imprisonment of journalists are China, Cuba, Eritrea, and Burma. *Id.*

228/ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON TERRORISM AND HUMAN RIGHTS, Inter-Am. C.H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. ¶ 297 (2002), <http://www.cidh.oas.org/Terrorism/Eng/toc.htm>. The Inter-American Commission has stated in this regard that

[t]he murder, abduction, intimidation and threatening of journalists, as well as the destruction of press materials, are most often carried out with two concrete aims. The first is to eliminate journalists who are investigating attacks, abuses, irregularities, or illegal acts of any kind committed by public officials, organizations, or non-state actors. This is done to ensure that the investigations are not completed or never receive the public debate they deserve, or simply as a form of reprisal for the investigation itself. Secondly, such acts are used as an instrument of intimidation to send an unmistakable message to all members of civil society engaged in investigating attacks, abuses, irregularities, or illicit acts of any kind. These practices seek to silence the press in its watchdog role, or render it an accomplice to individuals or institutions engaged in abusive or illegal actions. Ultimately, the goal of those



Freedom of Expression states that “[t]he murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression.”<sup>229</sup>

Harassment may take the form of interference with a journalist’s ability to practice the profession. Domestic journalists may have their licenses revoked, foreign journalists may be denied work permits or entry or exit visas, and journalists who cover wars and other conflicts may be detained or have their movements restricted.<sup>230</sup> Harassment may also involve death threats, the infliction of physical injury to either the journalist or to his or her family,<sup>231</sup> or the imprisonment of the journalists.<sup>232</sup> Generally, journalists are imprisoned for allegedly violating so-called “antistate” laws which may include “acting against the interest of the state.”<sup>233</sup> Professional journalists and other young people who are disseminating dissident news and opinions on the internet are also subject to arrest and harassment.<sup>234</sup>

For some, exercising their freedom of expression can be deadly. Journalists may be murdered for reporting on corruption, human rights abuses, or governmental incompetence. Eleven journalists were assassinated in the Western Hemisphere in 2004 due to their professional activities as social commentators.<sup>235</sup> Although no

who engage in these practices is to keep society from being informed about such occurrences, at any cost.

*Id.*

229. *Declaration of Principles on Freedom of Expression*, *supra* note 35, Principle 9.

230. Journalists who cover wars are also at risk. *See* KARACA, *supra* note 1, at 7. The Council of Europe has “urged the international community to take steps to protect journalists covering crises and conflicts.” *Id.*

231. In 2003, the Inter-American Commission noted an “alarming increase in intimidations against the media” in Guatemala. ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2003, Inter-Am. C.H.R., OEA/Ser.L/V/II/118, doc. 5 rev. 2 ¶ 41 (2003), <http://www.cidh.org/annualrep/2003eng/chap.4b.htm>.

232. One hundred twenty-two journalists were reportedly in prison worldwide at the end of 2003. *See Imprisoning Journalists*, *supra* note 227.

233. Committee to Protect Journalists, *supra* note 55.

234. *See id.* In Iran, where people have turned to the internet for news because certain newspapers have been banned and broadcasting is controlled by conservatives, the government is cracking down. *See id.* A spokesperson for the Iranian judiciary stated that “individuals operating unauthorized Web sites would be prosecuted for ‘acting against national security, disturbing the public mind, and insulting sanctities.’” *Id.*

235. ANNUAL REPORT OF SPECIAL RAPPORTEUR, *supra* note 23, ch. II, ¶ 7; *see* Serena Parker, *Threats to Press Freedom Remain in Latin America, Say Analysts*, THE EPOCH TIMES, Dec. 3, 2004 (discussing the dangers faced by journalists in Latin America)

journalists were killed in Colombia in that period of time, it was reportedly due to self-censorship of the media. Voice of America reported that “[t]he fact that no journalists were killed in Columbia this year, for the first time in at least a decade, is very good news, but the reasons for it are troubling.”<sup>236</sup> The Inter-American Rapporteur for Freedom of Expression has described the assassinations of journalists as “the most brutal means of restricting freedom of expression.”<sup>237</sup>

The intimidation can go beyond individual reporters to the owners of the media or the newspapers or television stations. After a Guatemalan newspaper published articles critical of the government, armed men entered the newspaper facilities and opened fire, forcing the president of the paper to leave Guatemala.<sup>238</sup> When a Peruvian television station broadcast exposés of the government, the owner’s Peruvian citizenship was annulled.<sup>239</sup> This had the effect under domestic law of removing him from ownership of the television station, a right which was reserved solely for Peruvian citizens.<sup>240</sup> The Inter-American Court found that within the context of the case, the government’s actions were an indirect means of restricting the owner’s freedom of expression and, thus, a violation of his human rights.<sup>241</sup> Moreover, the Court held that

[b]y separating Mr. Ivcher from the control of Channel 2 and excluding the Contrapunto journalists, the State not only restricted their right to circulate news, ideas and opinions, but also affected the right of all Peruvians to receive information, thus limiting their freedom to exercise political options and develop fully in a democratic society.<sup>242</sup>

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236. Parker, *supra* note 235. The publisher of *El Comercio*, a Brazilian newspaper stated that the “Committee Against Impunity has investigated 19 cases of murdered journalists in Brazil.” Press Release, Inter-American Press Assoc. [IAPA], IAPA Welcomes Law that Places Human Rights Crimes Under Federal Jurisdiction (Dec. 10, 2004), <http://www.ifex.org/en/content/view/full/63224/>.

237. Press Release, OAS, Office of the Special Rapporteur for Freedom of Expression of the IACHR, Office of the Special Rapporteur for Freedom of Expression Deplores Assassination of Columbian Journalist, No. 115/05 (Jan. 14, 2005), <http://www.cidh.org/relatoria/showarticle.asp?artID=353&IID=1>.

238. Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/Ser.L/V/II.118, doc. 5 rev. 2, Ch. III ¶ 42 (2003). In addition, several of the newspaper’s investigative journalists and staff received death threats. *Id.* In response to a complaint of human rights abuse filed with the Commission, the Commission ordered the government of Guatemala to take interim measures to protect the director and the technical and administrative staff of the newspaper. *Id.*

239. *Ivcher Bronstein v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 76(a), (d), (g), (i), (j), (q). (Feb. 6, 2001).

240. *Id.* ¶¶ 76 (e), (u), 160.

241. *Id.* ¶¶ 162, 191(5).

242. *Id.* ¶ 163.

In the *Carpio Nicolle* case against Guatemala, the Inter-American Court held that the right to freedom of expression of a well-known politician and newspaper owner who had reported on human rights violations was violated when he was murdered in an ambush.<sup>243</sup>

The essential role of journalists in a democracy may justify their special protection. It is often journalists who expose human rights abuses and spotlight governments engaged in gross human rights violations. It has been argued that “journalists’ solemn duties to the cause of human rights call for reciprocity from the human rights cause in the form of special protection and assistance.”<sup>244</sup> The Inter-American Court has stated in this regard that

journalists who work in the media should enjoy the necessary protection and independence to exercise their functions to the fullest, because it is they who keep society informed, [which is] an indispensable requirement to enable society to enjoy full freedom and for public discourse to become stronger.<sup>245</sup>

The Inter-American Court and Inter-American Commission have successfully ordered governments to protect the lives and physical integrity of journalists who are in grave danger of irreparable harm. The Convention authorizes the Inter-American Court to adopt provisional measures “in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons.”<sup>246</sup> The Commission also issues requests to States to take precautionary measures to protect journalists or the media in “serious and urgent cases” and “whenever necessary according to the information available.”<sup>247</sup> Interim measures are termed “precautionary measures”

243. *Carpio Nicolle v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 117, ¶¶ 76(15), (21), 155(1)(e) (Nov. 22, 2004). It was not clear whether Mr. Carpio Nicolle, a member of the governmental opposition, was killed for his political convictions or for printing them in his newspaper. *See id.*

244. Amit Mukherjee, *International Protection of Journalists: Problem, Practice, and Prospects*, 11 ARIZ. J. INT’L & COMP. L. 339, 344 (1994).

245. *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 150 (Jul. 2, 2004).

246. American Convention, *supra* note 13, art. 63(2). The American Convention authorizes the Commission in “cases of extreme gravity and urgency” to circumvent its time-consuming procedures and immediately request that the Inter-American Court adopt provisional measures. *Id.*

247. Rules of Procedure of the Inter-American Commission on Human Rights, art. 25(1)(d), approved by the Commission at its 109th special session held from December 4–8, 2000, amended at its 116th regular period of sessions, held from October 7–25, 2002 and at its 118th regular period of sessions, held from October 7–24, 2003. Neither the American Convention nor the Statute of the Commission authorizes the Commission to request that a State adopt precautionary measures. The Court has held that there is a presumption that Court-ordered provisional measures are necessary when the Commission has previously ordered precautionary measures on its own authority that were not effective and another threatening event has subsequently

when adopted by the Commission and “provisional measures” when ordered by the Inter-American Court.<sup>248</sup> An order of interim measures, for example, may require that a government provide protection to journalists who have been threatened or may order the release of a journalist from prison. Although a State Party to the American Convention has an obligation, *erga omnes*, to protect all persons subject to its jurisdiction,<sup>249</sup> the Court may use its authority to call upon the State to take special measures to protect persons who are in immediate danger. The overriding importance of provisional measures in human rights cases arises from their potential to terminate abuse rather than primarily to compensate the victim or the victim’s family after-the-fact. International proceedings, which typically are not resolved for years, are inadequate in urgent circumstances to protect persons from imminent danger or death.

The Inter-American Court issued provisional measures to protect the lives and safety of journalists who worked for the Venezuelan television station Radio Caracas Televisión after one journalist was murdered and others had been shot, beaten, or threatened.<sup>250</sup> The Commission and the Court also issued interim measures when the office of a Venezuelan newspaper was invaded and the staff was threatened.<sup>251</sup> The Court stated that those who provide social commentary must have the opportunity to do their work in conditions that are adequate to facilitate their freedom of expression.<sup>252</sup>

If a case concerns freedom of expression, the Commission will request precautionary measures on its own initiative or upon the request of the OAS Special Rapporteur for Freedom of Expression.<sup>253</sup> The Special Rapporteur has access to the most current information on abuses and threats to the media in the Americas through an informal network of journalists and news organizations, and he can, therefore, urge the Commission to act immediately, before there is irreparable damage.<sup>254</sup> For instance, the Commission ordered the Guatemalan government to take measures to protect Guatemalan journalist María

occurred. *Digna Ochoa y Plácido Case*, 1999 Inter-Am. Ct. H.R., (ser. E), No. 2, ¶ 6 (Nov. 17, 1999).

248. Rules of Procedure of the Inter-American Commission on Human Rights, *supra* note 247, arts. 25, 74.

249. *Peace Community of San Jose de Apartadó Case*, 2002 Inter-Am. Ct. of H.R., (ser. E), ¶ 7 (June 18, 2002).

250. *Ríos v. Venezuela*, 2002 Inter-Am. Ct. H.R., (ser. E), ¶¶ 1, 2 (Nov. 27, 2002).

251. *El Nacional and Así Es La Noticia Newspapers Case*, 2004 Inter-Am. Ct. H.R. (ser. E) (July 6, 2004).

252. *Id.* ¶ 10.

253. Rules of Procedure of the Inter-Am. Comm. HR, *supra* note 247, art. 25(1).

254. See Organization of American States [OAS], Functions & Objectives of the Special Rapporteur for Freedom of Expression, <http://www.cidh.org/relatoria/showarticle.asp?artID=36&IID=1>.

de los Ángeles Monzón Paredes and her family, who were threatened because of her reporting on crucial human rights issues.<sup>255</sup> The Commission likewise granted precautionary measures and ordered the government of Haiti to protect a journalist and a radio correspondent who had been subjected to death threats.<sup>256</sup> Freedom of the press is essential to the protection of human rights, and interim measures are invaluable to protect the lives of journalists who put themselves at risk to publish accounts of human rights abuse.

When States have not been successful in protecting journalists, they must investigate human rights violations against journalists and prosecute the perpetrators of the violations. The Inter-American Principles on Freedom of Expression address this issue, stating, “[i]t is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation.”<sup>257</sup> The Inter-American Court has repeatedly ordered States to thoroughly investigate violations and to identify, prosecute and punish the violators.<sup>258</sup> Moreover, a State’s obligation to investigate human rights violations must be undertaken “in a serious manner and not as a mere formality preordained to be ineffective.”<sup>259</sup> The State must punish the “intellectual authors” or “masterminds” of the violation as well as the individuals who carried it out, whether or not the perpetrators of the threats or violence are state agents. Punishment will operate as a force against impunity by acting as both a specific and a general deterrent. The Court has ordered that States must use all legal means to combat impunity, which if unchecked “fosters chronic recidivism of human rights violations and total defenselessness of victims and their relatives.”<sup>260</sup> Impunity for those who violate the rights of journalists and the media encourages others who may commit similar abuses. Recognizing this problem, the Declaration of Chapultepec states that violent acts against journalists

255. *María de los Ángeles Monzón Paredes v. Guatemala*, Inter-Am. Comm. H.R. (Mar. 18, 2003).

256. *Liliane Pierre-Paul v. Haiti*, Inter-Am. Comm. H.R. (May 29, 2003).

257. *Declaration of Principles on Freedom of Expression*, *supra* note 35, Principle 9.

258. See *Cantoral Benavides Case*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 12 (Aug. 18, 2000); *Villagran Morales Case*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 8 (Nov. 19, 1999); *Velásquez Rodríguez Case*, 1989 Inter-Am. Ct. H.R., (ser. C) No. 4, ¶ 33 (July 21, 1989).

259. *Villagran Morales Case*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 226 (Nov. 19, 1999).

260. *Paniagua Morales Case*, 1998 Inter-Am. Ct. H.R., (ser. C) No. 37, ¶ 173 (Mar. 8, 1998). The Inter-American Court defines “impunity” as “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the Inter-American Convention.” *Constitutional Court Case*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 27, ¶ 123 (Jan. 31, 2001).

and the media “must be investigated promptly and punished harshly.”<sup>261</sup>

In serious cases, the OAS Special Rapporteur for Freedom of Expression may personally contact State authorities to express concern or make recommendations on steps to be taken to protect freedom of expression. If necessary, the Rapporteur will issue a press release setting forth the violation, such as press releases in 2005 that condemned death threats against three journalists in Colombia who had received funeral wreaths.<sup>262</sup> Adverse international publicity has often proven to be an effective tool in curtailing human rights violations,<sup>263</sup> and even the threat of negative publicity may compel the government to take corrective action. The Special Rapporteur is not adverse to using the press to protect journalists and freedom of expression.

### B. Mandatory State Licensing of Journalists

Governments may attempt to limit journalistic freedom by imposing restraints on the practice of journalism. The Inter-American Declaration of the Principles on Freedom of Expression provides that “[c]ompulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression. Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State.”<sup>264</sup> The Inter-American Court has declared that the compulsory licensing of journalists violates the American Convention’s right to freedom of expression.<sup>265</sup> In its advisory opinion *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, the Court was asked whether a Costa Rican law that required that journalists be members of an association limited to graduates of the

261. Declaration of Chapultepec, Hemisphere Conference on Free Speech, Mar. 11, 1994, Principle 4.

262. Functions & Objectives of the OAS Special Rapporteur for Freedom of Expression, *supra* note 254; see Press Release, OAS, Office of the Special Rapporteur for Freedom of Expression of the IACHR, Office of the Special Rapporteur for Freedom of Expression Expresses Serious Concern about Threats to Three Columbian Journalists, No. 123/05 (May 18, 2005), <http://www.cidh.org/relatoria/showarticle.asp?artID=576&IID=1>.

263. Tom J. Farer, *The OAS at the Crossroads: Human Rights*, 72 IOWA L. REV. 401, 403 (1987).

264. *Declaration of Principles on Freedom of Expression*, *supra* note 35, Principle 6. Also, the Declaration of Chapultepec specifies that “[t]he membership of journalists in guilds, their affiliation to professional and trade associations and the affiliation of the media with business groups must be strictly voluntary.” Declaration of Chapultepec, *supra* note 261, Principle 8.

265. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, ¶¶ 76 (Nov. 13, 1985).

University of Costa Rica's journalism school violated freedom of expression as protected by the American Convention.<sup>266</sup> Under the law, it was an offense to be a reporter or otherwise practice journalism in Costa Rica if one was not a member of the Costa Rican Journalism Association.<sup>267</sup> The Inter-American Court advised Costa Rica that the law was incompatible with the American Convention, because it denied "any person access to the full use of the news media as a means of expressing opinions or imparting information."<sup>268</sup> As a result of the Inter-American Court's advisory opinion, the Costa Rican Supreme Court's Constitutional Chamber nullified the domestic law.<sup>269</sup> Subsequently, Chile's Supreme Court also struck down a national requirement that journalists be members of a similar type of organization.<sup>270</sup>

Other States, however, continue to license journalists. The Brazilian executive branch recently proposed to create a "federal journalism council to guide and oversee the journalism profession."<sup>271</sup> The council would "orient, discipline and monitor" journalists, who would have to register with the government agency to practice journalism.<sup>272</sup> The council could impose penalties and could even banish reporters from the profession.<sup>273</sup> Brazil's President revealed that the goal of the organization was to regulate the content of the media, stating that the council would encourage media to adopt a "positive agenda" when covering governmental affairs.<sup>274</sup> A similar law in Bolivia has been condemned by the Inter-American Commission.<sup>275</sup>

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266. The Court did not hold that the organization of the practice of professions, such as law, into associations, or *colegios*, was per se a violation of the Convention. *Id.* ¶ 68.

267. For a discussion of the facts underlying this request, see Thomas Buergenthal, *Remembering the Early Years of the Inter-American Court of Human Rights*, 37 N.Y.U. J. INT'L L. & POL. 259, 264-69 (2005).

268. Advisory Opinion OC-5/85, ¶ 85.

269. See Pedro Nikken, *La Funcion Consultiva de la Corte Interamericana de Derechos Humanos*, in EL SISTEMA INTERAMERICANO DE PROTECCION DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI: MEMORIA DEL SEMINARIO NOVIEMBRE DE 1999, at 161, 178 (2001).

270. Editorial, *For an Independent Press*, MIAMI HERALD, Sep. 9, 2004, at 24A.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. Press Release, Inter-American Commission on Human Rights, The IACHR Expresses its Concern over the Bolivarian Republic of Venezuela's Passage of the Social Responsibility in Radio and Television Bill, No. 25/04 (Nov. 30, 2004) (expressing concern about Venezuela's passage of the Social Responsibility in Radio and Television Bill), <http://www.cidh.org/Comunicados/English/2004/25.04.htm>.

### C. Contempt Laws for Refusal to Reveal Sources

The Inter-American Court has not yet addressed the issue of whether the use of contempt laws to imprison journalists who refuse to reveal anonymous sources is compatible with the American Convention. Whistle blowers and informants are more likely to come forward when they are assured that their identities will not be revealed. If a person's name may be disclosed despite the person's wish to remain anonymous, it may have a chilling effect on an individual's willingness to reveal irregularities. The Inter-American Declaration of Principles on Freedom of Expression specifies that "[e]very social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential."<sup>276</sup>

The European human rights system supports journalists' right to refuse to reveal sources except in limited circumstances. The European Court of Human Rights has ruled that a journalist has the right to protect confidential sources except in narrowly-defined circumstances.<sup>277</sup> Under Article 10 of the European Convention, a journalist must reveal a confidential source "where vital public or individual interests [are] at stake."<sup>278</sup> In *Goodwin v. United Kingdom*, a journalist refused to reveal the confidential source of damaging business information.<sup>279</sup> The company alleged that the information was stolen and that its publication could damage the company.<sup>280</sup> The domestic tribunals in the UK sided with the company, barring the publication of the information and ordering the journalist to reveal his source.<sup>281</sup> When the journalist refused he was held in contempt of court and fined.<sup>282</sup> The journalist then filed a complaint with the European human rights system, arguing that his right to freedom of expression under the European Convention on Human Rights had been violated. The European Court of Human Rights ruled that the order to reveal the journalistic source and the fine imposed on the journalist for refusing to do so were incompatible with the European Convention on Human Rights.<sup>283</sup> The Court reasoned that the "[p]rotection of journalistic sources is one of the basic conditions for

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276. *Declaration of Principles on Freedom of Expression*, *supra* note 35, Principle 8; *see also* Declaration of Chapultepec, *supra* note 261, Preamble ("Judges with limited vision order journalists to reveal sources that should remain in confidence.").

277. *Goodwin v. United Kingdom*, 22 Eur. H.R. Rep. 123 (1996).

278. *Id.* at 141.

279. *Id.* at 126–28.

280. *Id.*; *see* RICHARD S. GORDON ET AL., THE STRASBOURG CASE LAW: LEADING CASES FROM THE EUROPEAN HUMAN RIGHTS REPORTS 1186–87 (2001).

281. *Goodwin v. United Kingdom*, 22 Eur. H.R. Rep. 123, 146 (1996).

282. *Id.* at 125.

283. *Id.* at 146.



press freedom.”<sup>284</sup> The Court further clarified that “[w]ithout such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.”<sup>285</sup>

Repressive countries look towards U.S. domestic law in support of their treatment of journalists who fail to reveal journalistic sources and who are then held in criminal contempt.<sup>286</sup> U.S. federal law provides that a journalist who refuses to reveal his confidential sources in certain circumstances can be punished for criminal contempt. The U.S. Supreme Court does not permit a journalist to maintain source confidentiality at all times. In *Branzburg v. Hayes*, the Supreme Court held that no First Amendment privilege exists “to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation.”<sup>287</sup> More recently the Court rejected any notion of a “general-purpose reporter’s privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege.”<sup>288</sup> Although thirty-one U.S. states have passed shield laws to provide journalists with some means of protecting their sources during grand jury investigations,<sup>289</sup> the U.S. federal government does not have a shield law. According to the Committee to Protect Journalists, “[U.S. law] makes it easier for governments around the world, repressive governments, to justify

284. *Id.* at 143.

285. *Id.* at 143.

286. Parker, *supra* note 235.

287. *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972). Branzburg was a staff reporter for a daily Kentucky newspaper. *Id.* at 667. He reported on two stories which subsequently resulted in a case before the Supreme Court. *Id.* First, Branzburg did a story detailing his time spent with two youths selling marijuana. *Id.* at 667–71. Soon after the piece ran, Branzburg was subpoenaed before a grand jury. *Id.* However, Branzburg refused to reveal the names of the parties involved. *Id.* In the second case, Branzburg published a story, developed from interviews with drug users. *Id.* The article contained unnamed sources and once again Branzburg was subpoenaed to reveal the names of his sources. *Id.* Branzburg claimed he had a privilege as a journalist to refuse to reveal confidential sources. *Id.*

288. *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004) (citing *Branzburg*, 408 U.S. at 690–91). More recently reporters from Time Magazine and the New York Times were charged with contempt when they refused to reveal their sources to a grand jury. A special prosecutor for the Justice Department was investigating the leak of the name of a CIA operative which occurred after the operative’s husband had criticized a claim by the Bush administration that Iraq had attempted to acquire uranium from Niger. See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006) *cert. denied sub. nom. Miller v. United States*, 125 S.Ct. 2977 (2005).

289. Josh Kobrin, *A Shield for Journalists*, American Constitution Society for Law and Policy Blog, Dec. 7, 2004, <http://www.acsblog.org/criminal-law-512-a-shield-law-for-journalists.html>.

their own repressive policies, which in many cases result in the incarceration of journalist[s].”<sup>290</sup>

International law should require that States protect a journalist’s right to refuse to reveal confidential sources. International treaties and the courts that interpret them should encourage States to pass legislation that would help to insure freedom of the press by shielding reporters from revealing their confidential sources even when ordered to do so before a grand jury.<sup>291</sup> In this way, the Inter-American system could contribute to international jurisprudence which will strengthen support of freedom of expression and freedom of the press in this area.

#### VII. FAILURE TO PROMULGATE LAWS TO PROTECT FREEDOM OF EXPRESSION

Freedom of expression may be violated not only when a State promulgates laws that violate a right but also when the State fails to promulgate laws or to enforce laws that protect rights. More specifically, many States have failed to pass laws that outlaw monopoly ownership of the media. Others have antitrust laws that bar monopolization of the media, but States may not enforce the laws. Likewise, some States have failed to enact access to information laws or to enforce those laws. The OAS Special Rapporteur on Freedom of Information has a mandate from the OAS General Assembly to assist the American States to draft initiatives to protect freedom of speech, particularly in the area of freedom of information laws.<sup>292</sup>

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290. *Id.*

291. In introducing his free speech bill in the U.S. Senate, Senator Dodd stated, [t]his legislation is fundamentally about good government and the free and unfettered flow of information to the public . . . . The American people deserve access to a wide array of views so that they can make informed decisions and effectively participate in matters of public concern. When the public’s right to know is threatened, and when the rights of free speech and free press are at risk, all of the other liberties we hold dear are endangered. The legislation that I am introducing today will protect these rights, and ensure that the government remains open and accountable to its citizens.

Press Release, Christopher Dodd, Dodd Introduces the Free Speech Protection Act of 2004 (Nov. 19, 2004), <http://www.senate.gov/~dodd/press/Releases/04/1119.htm>.

292. General Assembly of the Organization of American States, AG/Res. 2121 (XXXV-0/05) Access to Public Information: Strengthening Democracy, (May 26, 2005).

## A. Access to Information Laws

Access to information laws, also called “freedom of information” laws, allow individuals or organizations to obtain information contained in public records. The accessibility of information arguably increases public awareness of salient social issues, thereby improving freedom of speech. Freer accessibility of public records also increases the transparency of government operations, making corruption less likely or at least more discernible. A major impetus for the recent legislation of public access laws is the belief that governments are more credible when the public is aware of the government’s actions.<sup>293</sup> When measures are taken to provide for a more transparent government, corruption may be reduced.<sup>294</sup> The culture of secrecy that exists in the public sector of many countries cannot withstand the exposure that comes from freedom of information laws.

Democracy relies upon citizens’ rights to seek public information. International experts on freedom of expression have emphasized the importance of this right. The U.N. Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression made a joint declaration stating that access to information is a fundamental human right.<sup>295</sup> In their declaration, they recognized “the fundamental importance of access to information to democratic participation, to holding governments accountable and to controlling corruption.”<sup>296</sup> The Inter-American Declaration of Principles on Freedom of Expression provides that

[a]ccess to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.<sup>297</sup>

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293. See Henry H. Perritt, Jr. & Christopher J. Lhulier, *Information Access Rights Based on International Human Rights Law*, 45 BUFF. L. REV. 899 (1997). The World Bank and the International Monetary Fund also have been pressuring countries to adopt a more open style of government. See *id.* These organizations are interested in legitimatizing financial systems in these countries by eliminating secrecy and corruption. See *id.*

294. DAVID BANISAR, THE FREEDOMINFO.ORG GLOBAL SURVEY: FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT RECORD LAWS AROUND THE WORLD 3 (2004).

295. Joint Declaration of the Special Rapporteurs, *supra* note 166.

296. *Id.*

297. *Declaration of Principles on Freedom of Expression*, *supra* note 35, Principle 4. The Declaration also provides that “[e]very person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.” *Id.* Principle 3.

In light of this right, more than fifty countries worldwide have adopted laws increasing the accessibility of government records.<sup>298</sup> Throughout Central and South America, Belize, Columbia, the Dominican Republic, Ecuador, Mexico, Panama, and Peru have enacted access to information laws.<sup>299</sup> Many other States, including Argentina, are considering similar legislation.<sup>300</sup> The harmonization of national access to information laws has come about as a result of States modeling newly-enacted access to information laws after the existing laws of other countries.<sup>301</sup>

Most access to information laws allow certain exemptions to the State's duty to provide information. According to the Joint Declaration by the Special Rapporteurs on Freedom of Expression, these exemptions should be carefully limited "to protect overriding public and private interests, including privacy."<sup>302</sup> Typically these exemptions protect the internal decision-making activities of the government. Despite claims of security, the threshold question "allows for information to be released even if harm is shown if the public benefit in knowing the information outweighs the harm that may be caused from disclosure."<sup>303</sup>

The Inter-American Commission recently held that Chile violated a petitioner's right to freedom of expression under the American Convention due to its failure to guarantee access to public information.<sup>304</sup> A Chilean environmental group, the Terram Foundation, had requested general and environmental information about the company managing the Condor River Project, a major logging operation in Chile. The request was ignored by the Government and subsequent appeals to Chilean courts were dismissed.<sup>305</sup> The Inter-American Commission held that the right to freedom of expression guaranteed by the American Convention includes the right to access information held by governmental authorities.<sup>306</sup> The Commission recommended that Chile bring its

298. BANISAR, *supra* note 294, at 3. At least forty of these countries enacted freedom of information legislation in the past decade. *Freedom of Expression Rapporteurs Call for more open Government*, International Freedom of Expression eXchange [IFEX], <http://www.ifex.org/en/content/view/full/63092/>.

299. BANISAR, *supra* note 294, at 1–2. Banisar provides each State's access to information laws as of May 2004. *See id.*; *see also* Parker, *supra* note 235.

300. Parker, *supra* note 235.

301. BANISAR, *supra* note 294, at 4.

302. Joint Declaration of Special Rapporteurs, *supra* note 166.

303. BANISAR, *supra* note 294, at 5.

304. Marcel Claude Reyes v. Chile Case 12.108, Report No. 60/03, Inter-Am. C.H.R., OEA/Ser. L/V/11.118, doc 70 rev. 2, at 222 (2003).

305. *See id.*; *see also* Written Comments of Open Society Justice Initiative et. al. as Amici Curiae in the *Marcel Claude Reyes v. Chile* case.

306. Marcel Claude Reyes v. Chile, Case 12.108, Report No. 60/03, Inter-Am. C.H.R., OEA/Ser. L/V/II. 118 Doc 70 rev. 2, at 222 (2003); *see also* Open Society Justice

domestic laws into conformity with the American Convention so as to guarantee that citizens have effective access to public information.<sup>307</sup> When Chile did not implement the Commission's recommendations, the Commission referred the case to the Inter-American Court, where it is pending.

### B. *Monopolization of Ownership of the Media*

The concentration of media ownership into the hands of a few individuals or companies threatens the fabric of democracy. Editorial independence, unbiased news reporting or, at least, multiple news sources providing differing views are essential to a democracy. A publication of the Council of Europe warns against concentration of the media stating, "grouping several branches of the mass media under single ownership leads to monopolization."<sup>308</sup> Only with pluralism of the media will freedom of expression and, ultimately, democracy be protected. Governments must protect against national broadcasting monopolies and media concentration. Domestic media policy and law must serve to protect a pluralistic media.

The Inter-American Court has interpreted the right to freedom of expression as barring monopolization of the media.<sup>309</sup> Although addressing one form of monopolization of the media, that of licensing journalists, the Court held that the Convention's right to freedom of expression prohibits other forms of media monopoly. In this regard, the Court stated "there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form."<sup>310</sup> In its advisory opinion on the licensing of journalists, the Court stated that "[i]t is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view."<sup>311</sup>

The Inter-American Declaration of Principles of Freedom of Expression provides that

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Initiative, *First Freedom of Information Case Reaches America's Court, Inter-American Commission Finds Chile in Violation of Human Rights Charter*, July 14, 2005.

307. Marcel Claude Reyes v. Chile, Case 12.108, Report No. 60/03, Inter-Am. C.H.R., OEA/Ser. L/V/II. 118 Doc 70 rev. 2, at 222 (2003).

308. KARACA, *supra* note 1, at 7.

309. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 33 (Nov. 13, 1985). The Inter-American Court's comments against monopolization of the media were made in the context of an advisory opinion which has no binding force. See *id.*

310. *Id.* ¶ 34.

311. *Id.* ¶ 33.

[m]onopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.<sup>312</sup>

States should pass antitrust legislation and enforce these laws when monopolization of the media is threatened.

### VIII. ACCESS TO THE MEDIA

It is difficult, especially for poorer States to insure that all people within their jurisdictions have fair access to the media. In rural, poverty-stricken areas of many Latin American countries most people have radios. Newspapers are also relatively cheap and available. The internet, however, is not accessible to many people. The Inter-American Court stated that "freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."<sup>313</sup>

A concern of the Council of Europe also has been "to ensure fair access for everyone to new information sources."<sup>314</sup> It has stated in this regard that

[a]ll people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.<sup>315</sup>

States should be under a progressive obligation to ensure access to the media to everyone, including marginalized groups such as women, refugees and minorities who do not speak the predominant language.<sup>316</sup>

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312. *Declaration of Principles on Freedom of Expression*, *supra* note 35, Principle 12.

313. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 34.

314. KARACA, *supra* note 1, at 10.

315. *Declaration of Principles on Freedom of Expression*, *supra* note 35, Principle 2.

316. See The Declaration of Principles of Freedom of Expression in Africa, African Commission on Human and People's Rights, Oct. 2002, Principle III.

## IX. CORRESPONDING DUTIES AND RESPONSIBILITIES

The American Convention does not have a specific provision that specifies that a party exercising rights to freedom of expression also incurs corresponding duties and obligations. The ICCPR stipulates that the exercise of freedom of expression “carries with it special duties and responsibilities.”<sup>317</sup> Likewise, the European Convention provides that the exercise of freedom of expression “carries with it duties and responsibilities.”<sup>318</sup> The American Convention does have a general provision balancing the rights enshrined in the American Convention with the duties of the recipients of those rights.<sup>319</sup>

Media commentators should practice professionalism and responsible journalism in exercising their right to freedom of expression. The media must self-regulate to avoid the more onerous regulations that States may impose in attempting to control the media. The International Criminal Tribunal for Rwanda observed that “[t]he power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for the consequences.”<sup>320</sup>

## X. CONCLUSION

The Inter-American human rights system has made valuable contributions to the evolution of the doctrine of freedom of expression in international law, but it can do more. The American Convention provides for broad protection of freedom of expression, allowing few restrictions. Permissible restrictions are specifically enumerated, and prior censorship is permitted only to regulate access to public entertainment for the protection of the morals of children and adolescents and when there is a state of emergency. Indirect methods of interference with freedom of expression, such as abuse of private or governmental controls on broadcasting frequencies or newsprint, are specifically barred.

The Commission and the Inter-American Court have interpreted the Convention’s provision on freedom of expression to strengthen protections in the Americas. The OAS Rapporteur on Freedom of

317. ICCPR, *supra* note 37, art. 19.3.

318. European Convention, *supra* note 37, art. 10.2.

319. American Convention, *supra* note 13, art. 32 (“Every person has responsibilities to his family, his community and mankind,” and “[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”).

320. Prosecutor v. Nahimana, Barayagwiza and Ngeza Case ICTR-99-52, Judgment and Sentence ¶ 945 (Dec. 3, 2003).

Expression assists the Commission in evaluating complaints alleging the abuse of freedom of expression and works with States to improve their compliance with the American Convention. The Court and the Commission attempt to provide immediate protection to journalists who are in imminent danger of bodily harm or death by ordering States to take interim measures to protect journalists and other social commentators. The Court has also ruled that government-imposed licensing laws which require that journalists belong to an organization that requires that journalists have particular credentials violates the American Convention.<sup>321</sup>

In 2005, the Court had three opportunities to make great strides in the area of criminal defamation. The Court provided protection of freedom of expression by clarifying that journalists are not required to prove the truth of statements quoted from third parties.<sup>322</sup> The Court also determined that criminal suits for defamation and criminal sanctions are undue restrictions on freedom of expression when the allegedly defamatory statements are made about persons whose activities are within the domain of public interest.<sup>323</sup> The Court did not further advance international jurisprudence on freedom of expression by stating unequivocally that defamation should be a civil offense in all cases and that criminal defamation laws *per se* are not a proportionate restriction on freedom of expression under the American Convention. As a lesser measure, the Court could have specified that in defamation cases, in general, truth is always a defense and that the burden of establishing the libelous nature of any statement is on the person claiming to have been defamed. Moreover, the Court could have established a test to be applied in national courts to balance the right to reputation of persons engaged in public activities with freedom of expression.

The contributions to the international protection of freedom of expression by the Commission, the Inter-American Court, and the OAS Special Rapporteur on Freedom of Expression have been impressive. In future cases, the Court will hopefully take additional steps to further protect this basic right.

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321. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, (Nov. 13, 1985).

322. Herrera Ulloa, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶¶ 132–135.

323. *Canese v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 106; *Palamara Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 88.



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