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## **The Inter-American Court of Human Rights and the European Court of Human Rights: a dialogue on freedom of expression standards.**

Eduardo Andrés Bertoni\*

### **Introduction.**

A little more than ten years ago, article 13 of the American Convention on Human Rights (ACHR)<sup>1</sup> was scarcely interpreted by the Inter-American Court of Human Rights (I.A. Court H.R.); no decisions had been rendered on individual cases and the Court had only addressed specifically the right to freedom of expression in Advisory Opinions 5 and 7 (OC-5 y OC-7). Even in the exercise of its advisory function, the Court had only engaged in an elaborate interpretation of article 13 in Advisory Opinion OC-5,<sup>2</sup> although some may argue that it was not immediately relevant to the matter that had been brought before the Court by Costa Rica. For many years, OC-5 remained as an excellent study “guide” for those conducting research on the content of the right to freedom of expression within the boundaries of the inter-American system.

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\* Executive Director of the Due Process of Law Foundation, Washington, DC, USA. Former Special Rapporteur on Freedom of Expression of the Organization of American States (OAS). Attorney, University of Buenos Aires. MIPP, George Washington University. Teaching Fellow, Human Rights Institute, Columbia University School of Law. Professor of Criminal Law and Criminal Procedure, University of Buenos Aires. Adjunct Professor, George Washington University Law School.

<sup>1</sup> Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - a. respect for the rights or reputations of others; or
  - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. 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>2</sup> I.A.Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 [hereinafter OC-5 or “*Compulsory membership*”] of November 13, 1985, Series A, No. 5.

The amendments to the Rules of Procedure of the Inter-American Court and the Inter-American Commission on Human Rights (IACHR) account in part for the increased number of Court judgments on individual cases. The issue of freedom of expression was positively affected by such increase, although the cases litigated by brought by the Office of the Special Rapporteur for Freedom of Expression (OSRFOE) of the IACHR also helped lead the Court to rule on cases involving violations of article 13.<sup>3</sup>

It was only in 2001 that the I.A.Court H.R. began to rule on cases involving specifically violations of freedom of expression.<sup>4</sup> Although little more than a decade ago the jurisprudence of the Court was virtually non-existent, today we may venture to say that the progress achieved looks very promising. Newly emerging jurisprudence within the inter-American system has certainly had local impact, as evidenced by changes in domestic legislation (even at constitutional level) as well as by judicial decisions in compliance with international standards.

In this paper I shall examine the seven decisions rendered by the I.A.Court H.R., and I will group them under four headings that are closely related to the main conclusion reached in each judgment. Namely, prior censorship and the international responsibility of all branches of government; the erosion of freedom of expression by indirect means and the importance that context plays in identifying them; the issue of criminal defamation and insult laws as unacceptable instances of subsequent imposition of liability under the inter-American system; and access to public information as one of the rights set out in article 13 of the Convention.<sup>5</sup>

To reach a decision on these issues, the Court considered two standards that had been laid down in OC-5 –the “democratic standard” and the “dual protection standard.” This reasoning has been crucial and warrants a brief review of OC-5, although the purpose of this paper is not to discuss it at length, but rather to describe how the jurisprudence of the I.A.Court H.R. was developed on the basis of those standards.

Last, I will explain how the jurisprudence of the European Court of Human Rights has influenced the decisions of its American counterpart.

## **The beginning**

By note of July 8, 1985, the Government of Costa Rica submitted to the I.A.Court H.R. an advisory opinion request regarding the interpretation of Articles 13 and 29<sup>6</sup> of the

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<sup>3</sup> The OSROFOE was created in 1997, and began to operate in 1998, while the first cases by the Court date from 2001.

<sup>4</sup> I am referring specifically to cases where violations of article 13 have been addressed to some extent by the Court.

<sup>5</sup> These ideas were further developed (in Spanish) in Eduardo Bertoni, *Freedom of Expression and the Rule of Law* (Second Edition), Editores Del Puerto, Buenos Aires, 2007

<sup>6</sup> Article 29 establishes the following rules for the interpretation of the Convention:  
Article 29. Restrictions Regarding Interpretation

ACHR as they affect compulsory licensing in an association prescribed by law for the practice of journalism.

The compulsory licensing of journalists may be justified as a way to ensure public order (Art. 13.2b) as a just demand of the general welfare in a democratic society (Art. 32.2). On the concept of public order, the Court said that:

*“It is possible to understand the meaning of public order as a reference to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles. In that sense, restrictions on the exercise of certain rights and freedoms can be justified on the ground that they assure public order.”*<sup>7</sup>

However, on the same concept, the Court also said:

*“The Court also believes, however, that that 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.”*<sup>8</sup>

With regard to the concept of general welfare, the Court stated that:

*“[i]t is possible to understand the concept of general welfare as referring to the conditions of social life that allow members of society to reach the highest level of personal development and the optimum achievement of democratic values. In that sense, it is possible to conceive of the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual as an imperative of the general welfare.”*<sup>9</sup>

In its opinion, the Court recognized that both concepts (public order and general welfare) can be used either to affirm the rights of the individual against the exercise of governmental power or to justify the imposition of limitations on the exercise of those rights in the name of collective interests. Following this rationale, the Court observed that

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No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

<sup>7</sup> I.A.Court H.R., Compulsory membership, para. 64.

<sup>8</sup> I.A.Court H.R., Compulsory membership, para. 69.

<sup>9</sup> I.A.Court H.R., Compulsory membership, para. 66.

*“[p]ublic order” or “general welfare” may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content. (See Art. 29(a) of the Convention).”<sup>10</sup>*

Then, the answer given by the Court to the questions posed at the beginning is not hard to guess:

*“The Court concludes, therefore, that reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the right to make full use of the rights that Article 13 of the Convention grants to each individual. Hence, it would violate the basic principles of a democratic public order on which the Convention itself is based.”<sup>11</sup>*

It is important to note that, in order to answer Costa Rica’s request, the Court expanded the analysis of art. 13 by highlighting the importance of freedom of expression in a democratic system, which I shall refer to as the “democratic standard”, and, on the other hand, by reaffirming the dual content of freedom of expression, which has been referred to as “the two dimensions of freedom of expression”.

Both the IACHR and the I.A.Court H.R. have recognized the connection between freedom of expression and democracy in all cases dealing with violations of article 13 of the Convention. In the Court's words: *“Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a **conditio sine qua non** for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”<sup>12</sup>*

Some years later, the democratic standard was reflected in the Inter-American Democratic Charter<sup>13</sup>. The Charter represents the commitments undertaken by the States to promote and defend democracy, as democracy is essential for the social, political, and economic development of the peoples of the Americas. The Charter highlights the connection between democracy and the exercise of freedom of expression; article 4 of the Charter provides that freedom of expression and of the press are essential components of the exercise of democracy.

The other argument developed by the Court in OC-5 concerned the two dimensions of freedom of expression. This argument claims that the components of freedom of expression shall not be associated exclusively with the individual aspect of such right but

<sup>10</sup> I.A.Court H.R., Compulsory membership, para. 67.

<sup>11</sup> I.A.Court H.R., Compulsory membership, para. 76.

<sup>12</sup> I.A.Court H.R., Compulsory membership, para. 70.

<sup>13</sup> ORGANIZATION OF AMERICAN STATES -OAS-, INTER-AMERICAN DEMOCRATIC CHARTER, adopted by the General Assembly at its XXVIII special session, held in Lima, Peru, on September 11, 2001.

that a collective dimension should also be acknowledged. This is clearly stated in Advisory Opinion OC-5 of the I.A.Court H.R.:

*“Article 13 indicates that freedom of thought and expression “includes freedom to seek, receive, and impart information and ideas of all kinds....” This language establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to “receive” information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It 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.”<sup>14</sup>*

All the above considerations of the I.A.Court H.R., expressed in 1985, were repeatedly invoked in later decisions issued by the Court in individual cases.

### **Prior censorship and international responsibility of all branches of government.**

More than fifteen years after rendering OC-5, the I.A.Court H.R. entered a judgment on the case known as “The Last Temptation of Christ”<sup>15</sup>, concerning a violation of article 13 of the Convention.

On November 29, 1988, in response to a request by “United International Pictures Ltda.”, the Chilean Cinematographic Classification Council [Consejo Nacional de Calificación Cinematográfica] rejected the showing of the film “The Last Temptation of Christ”. The company appealed the Council’s decision, which was confirmed by an appeals court in March 1989. On November 1996, in response to a new request by “United International Pictures Ltda.”, the Cinematographic Classification Council reviewed the ban on the movie “The Last Temptation of Christ” and authorized its showing to audiences over 18 years of age. In January 1997, the Santiago Court of Appeals granted a Motion for Protection filed by several people for and in the name of Jesus Christ, the Catholic Church and themselves, and annulled the administrative decision of the Cinematographic Classification Council. Such decision was appealed and confirmed in June of that year by the Supreme Court of Chile<sup>16</sup>.

The judicial decisions were grounded on the Chilean Constitution as well as on other regulatory rules. Article 19(12) of the Political Constitution of Chile -in force at the time

<sup>14</sup> I.A.Court H.R., Compulsory membership, Advisory Opinion OC-5/85, Op. Cit., para. 30.

<sup>15</sup> I.A.Court H.R., “The Last Temptation of Christ” Case (Olmedo Bustos et al vs. Chile), Judgment of February 5, 2001, Series C, No. 73.

<sup>16</sup> These were the proven facts according to the Court, as stated in the judgment.

of the lawsuit- provided, as the I.A.Court H.R. confirmed, “a system of censorship for the exhibition and publicity of cinematographic productions”. Meanwhile, Decree Law No. 679 of October 1, 1974, authorized the Cinematographic Classification Council -a part of the Ministry of Education- to supervise cinematographic exhibition in Chile and classify films. The Regulation to this law was contained in the Supreme Decree on Education No. 376 of April 30, 1975.

Before the I.A.Court H.R. issued a judgment on the case, a proposed constitutional reform to Article 19 that intended to abolish cinematographic censorship and replace it with a system of classification that contemplated the right to free artistic creation had been unsuccessfully put forward. Such reform was finally induced by the Inter-American Court’s decision.

To rule on the case, the I.A.Court H.R. analyzed the arguments presented in OC-5. The Court addressed first the two dimensions of freedom of expression and insisted on the “democratic standard”. What was new in this judgment was the interpretation of the concept of prior censorship in the ACHR. The Court held that *“Article 13(4) of the Convention establishes an exception to prior censorship, since it allows it in the case of public entertainment, but only in order to regulate access for the moral protection of children and adolescents. In all other cases, any preventive measure implies the impairment of freedom of thought and expression”*<sup>17</sup>.

The Court considered proved that, in Chile, there was a system of prior censorship for the exhibition and publicity of cinematographic films and *“that the Cinematographic Classification Council prohibited exhibition of the film “The Last Temptation of Christ” and, reclassifying it, permitted it to be exhibited to persons over 18 years of age (supra para. 60 a, c and d). Subsequently, the Court of Appeal of Santiago decided to annul the November 1996 decision of the Cinematographic Classification Council, owing to a remedy for protection filed by Sergio García Valdés, Vicente Torres Irarrázabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Jorge Reyes Zapata, Cristian Heerwagen Guzmán and Joel González Castillo, “for and in the name of [°] Jesus Christ, the Catholic Church and themselves”; a decision that was confirmed by the Supreme Court of Justice of Chile. Therefore, this Court considers that the prohibition of the exhibition of the film “The Last Temptation of Christ” constitutes prior censorship in violation of Article 13 of the Convention.*<sup>18</sup>

This judgment by the I.A.Court H.R. was also innovative in another major aspect. Prior censorship has often been deemed as emanating from the executive or legislative power. However, within the inter-American system, the decisions of the judicial branch may also be understood to violate article 13 of the Convention.

In the case at hand, the Inter-American Court held specifically that *“This Court understands that the international responsibility of the State may be engaged by acts or*

<sup>17</sup> “The Last Temptation of Christ” Case, para. 70.

<sup>18</sup> Ibidem, para. 71.

*omissions of any power or organ of the State, whatsoever its rank, that violate the American Convention. That is, any act or omission that may be attributed to the State, in violation of the norms of international human rights law engages the international responsibility of the State. In this case, it was engaged because article 19(12) of the Constitution establishes prior censorship of cinematographic films and, therefore, determines the acts of the Executive, the Legislature and the Judiciary”.*<sup>19</sup>

### **Erosion of freedom of expression by indirect means and the importance that context plays in identifying them.**

The day after the judgment in “The Last Temptation of Christ” was rendered, the I.A.Court H.R. entered a judgment on another case concerning specifically the determination of a violation of Art. 13 of the American Convention. I am referring to the “Ivcher” case.<sup>20</sup>

Unlike the Chilean case, the Court was faced with facts that led it to determine the importance, the elements and mechanisms for identifying indirect means for violating freedom of expression. The importance of the Ivcher case lies in that although the Convention does indeed prohibit restrictions to freedom of expression by indirect means, it is also true that identifying which indirect means are valid mechanisms for imposing such restriction is often not an easy task.

The I.A.Court H.R. had already provided guidelines to distinguish between direct and indirect means in OC-5. In 1985, the Court held that “*Article 13 may be violated under two different circumstances, depending on whether the violation results in the denial of freedom of expression or whether it results from the imposition of restrictions that are not authorized or legitimate.*” The Court distinguished “extreme” suppressions from the rest: “*In truth, not every breach of Article 13 of the Convention constitutes an extreme violation of the right to freedom of expression, which occurs when governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news. Examples of this type of violation are prior censorship, the seizing or barring of publications and, generally, any procedure that subjects the expression or dissemination of information to governmental control.*” With regard to suppressions that were not extreme, the Court held that “*Suppression of freedom of expression as described in the preceding paragraph, even though it constitutes the most serious violation possible of Article 13, is not the only way in which that provision can be violated. In effect, any governmental action that involves a restriction of the right to seek, receive and impart information and ideas to a greater extent or by means other than those authorized by the Convention, would also be contrary to it. This is true whether or not such restrictions benefit the government.*”<sup>21</sup>

<sup>19</sup> “The Last Temptation of Christ” Case, para. 72.

<sup>20</sup> I.A.Court H.R., *Case of Ivcher Bronstein v. Peru*, Judgment of February 6, 2001, Series C, No. 74.

<sup>21</sup> OC-5, para. 53-55.

The I.A.Court H.R., however, had never heard any specific case requiring the determination of what state actions may be described as indirect or “non-extreme” means. The Court answered this question in the “Ivcher” case.

In 1997, Peruvian law provided that owners of companies operating television channels in Peru should be Peruvian nationals. Baruch Ivcher Bronstein, an Israeli citizen, had acquired Peruvian citizenship in November 1984, after renouncing his Israeli nationality in December that year. In accordance with Peruvian laws on nationality and ownership of broadcasting media, Ivcher had been the majority shareholder in the Company which operated Peruvian television’s Channel 2. Furthermore, in 1997, Mr. Ivcher Bronstein was a Director and Chairman of the Board of the Company and was authorized to take decisions of an editorial nature with regard to Channel 2’s programming.

One of the programs aired by Channel 2 was “Contrapunto”. Since 1997, the program had broadcast several investigative reports of national interest. For instance, in April 1997, it denounced alleged tortures committed by members of the Army Intelligence Service; during the same month, the program denounced that Vladimiro Montesinos Torres, advisor to the Peruvian Intelligence Service, had allegedly obtained extremely high revenues. As a result of the investigative reports broadcast on the program, Contrapunto, Mr. Ivcher was subjected to threatening actions; the Court considered this a proven fact.<sup>22</sup>

The month after the program Contrapunto was aired, the Peruvian Executive issued a decree regulating Nationality Law No. 26574, and established the possibility of cancelling the nationality of naturalized Peruvians. Also that month, Ivcher was denounced for conducting a defamatory campaign against the Armed Forces. At the same time, the composition and attributions of several judicial tribunals were modified; later on, such tribunals would be directly involved in the court proceedings conducted in Peru.

In July 1997, Channel 2 presented an investigative report on the unlawful recording of telephone conversations involving candidates of opposition parties, judges and journalists, among others. That same day, the Director General of the National Police Force submitted the conclusions of a report by the Migration and Naturalization Directorate, according to which the file that supported Mr. Ivcher’s nationality title had not been found in the Directorate’s archives and there was no evidence that he had renounced his Israeli nationality. The Peruvian nationality title issued to Mr. Ivcher Bronstein was subsequently annulled. Now that Mr. Ivcher was not a Peruvian citizen, the other shareholders filed actions to annul Mr. Ivcher’s purchase of the Company’s shares. A request for precautionary measures to the IACHR was also filed in order to prevent Mr. Ivcher from exercising his rights as majority shareholder of the Company and to suspend his appointment as a Director and Chairman of the Company. The

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<sup>22</sup> Among other facts, the Court considered the visit to the Channel 2 offices of members of the Treasury Police Force Directorate and other persons, who recommended that he change the editorial line; flights of alleged army helicopters over the installations of his factory, Productos Paraíso del Perú; and the opening of a proceeding against him by the National Directorate of Fiscal Police on May 23, 1997.

precautionary measure was granted. All the domestic recourses pursued by Mr. Ivcher and his family were denied by the tribunals whose composition had been previously modified.

In September, other shareholders took over control of Channel 2, the journalists who worked on the program *Contrapunto* were prohibited from entering the Channel and the program's editorial line was modified<sup>23</sup>.

Before the I.A.Court H.R. ruled on the case, on November 7, 2000, the State annulled the "directorial resolution" that deprived Mr. Ivcher's nationality title of legal effect. This decision was made after former President Alberto Fujimori's government was brought down; it was during his administration that the above events had taken place.

In deciding on the violation to freedom of expression alleged in this case, the I.A.Court H.R. noted the double dimension of this right, and, in this content, recognized the importance of protecting and ensuring the independence of journalists. The Court said *"Furthermore, it is essential that the journalists who work in the media should enjoy the necessary protection and independence to exercise their functions comprehensively, because it is they who keep society informed, and this is an indispensable requirement to enable society to enjoy full freedom."*<sup>24</sup>

On these grounds, the I.A.Court H.R. provided the criteria for distinguishing which indirect means infringe freedom of expression and are contrary to article 13(3) of the Convention. The Court held that *"When evaluating an alleged restriction or limitation to freedom of expression, the Court should not restrict itself to examining the act in question, but should also examine this act in the light of the facts of the case as a whole, including the circumstances and context in which they occurred. Taking this into consideration, the Court will examine whether, in the context of the instant case, there was a violation of Mr. Ivcher Bronstein's right to freedom of expression."*<sup>25</sup>

The I.A.Court H.R. found that *"In the context of the facts indicated above, this Court observes that the resolution that annulled Mr. Ivcher's nationality title constituted an indirect means of restricting his freedom of expression, as well as that of the journalists who worked and conducted investigations for Contrapunto of Peruvian television's Channel 2"* and 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>26</sup>

It is only natural that a "resolution regarding citizenship" shall not be expressly included among the examples set out in article 13(3) of the Convention as indirect means of

<sup>23</sup> These are the facts that the I.A.Court H.R. considered proven facts, as presented in the judgment.

<sup>24</sup> I.A.Court H.R., Ivcher Bronstein Case, para. 150.

<sup>25</sup> Ibid., Ivcher Bronstein Case, para. 154.

<sup>26</sup> Ibid., Ivcher Bronstein Case, para. 162 and 163.

violating freedom of expression. Nevertheless, in view of the context of the case, it was so construed by the I.A.Court H.R. This judgment made it clear for the future that the provisions of article 13(3) are without limitation, and that not only state actions allegedly contrary to freedom of expression must be clearly proved, but also the context supporting such violations.

## **Subsequent imposition of liability: criminal defamation cases and insult laws**

### **Criminal defamation cases**

The first case decided by the I.A.Court H.R. in this topic was “Herrera Ulloa”<sup>27</sup>. As the Court explained, the case concerns the prosecution and criminal conviction of journalist Mauricio Herrera Ulloa, as well as the civil sanctions imposed on Herrera Ulloa and Mr. Fernán Vargas Rohrmoser, legal representative of the “La Nación” newspaper in Costa Rica, for publishing articles that partially reproduced reports that had appeared in the European press and that attributed certain illegal acts to Mr. Felix Przedborski. At the time the articles were published, Mr. Przedborski was Costa Rica’s honorary representative to the International Atomic Energy Agency in Austria. Mr. Przedborski brought two criminal actions on the basis of four of the articles published by “La Nación” newspaper; Herrera Ulloa was found guilty on four counts of publishing insults constituting defamation, which carried criminal and civil penalties. “La Nación” newspaper was also found jointly and severally liable and ordered to pay.<sup>28</sup>

The Court anticipated in its judgment that it would not examine whether the published articles constituted a crime pursuant to Costa Rican Law, but rather if the State had violated or restricted the right to freedom of thought and expression set out in Article 13 by its criminal conviction of Mauricio Herrera Ulloa (with all the attendant

<sup>27</sup> I.A.Court H.R., *Case of Herrera Ulloa vs. Costa Rica*. Judgment of July 2, 2004. Series C No. 107.

<sup>28</sup> The journalist reported that Belgian newspapers *De Morgen*, *La Libre Belgique*, *Le Soir Illustré* y *Financieel-Ekonomische Tijd*, and German newspaper *Der Spiegel*, had published various reports that claimed that Mr. Przedborski had allegedly received illegal commissions from the sale of Italian combat helicopters to the Belgian State, which he had apparently used to invest millions in touristic developments in Costa Rica. Herrera Ulloa claimed that such newspapers had published information obtained from anonymous diplomatic and police sources indicating that Mr. Przedborski had a lengthy criminal record in Belgium and with INTERPOL and that, due to this, Przedborski had used his Costa Rican diplomatic status to continue his illegal activities, involving from trafficking coins, cigarettes, weapons and narcotic drugs to executing fraudulent agreements in detriment of German airline Lufthansa. The journalist also held that the newspapers, based on western intelligence reports, alleged that Przedborski had infiltrated spies in certain Eastern Europe countries during the Cold War and had furnished several Polish secret agents with fake passports. Herrera Ulloa informed that the Belgian press questioned the origin of his extraordinary fortune and properties in Miami, the Côte d’Azur, France and Tervueren, Belgium, noting that once, in 1981, Przedborski faced criminal charges for tax evasion in Belgium. Furthermore, Herrera Ulloa indicated that a French Ministry had rejected Costa Rica’s Government request to appoint Przedborski at UNESCO headquarters in Paris, because of his controversial actions. The above issues were published by Costa Rican newspaper “*La Nación*” as separate news articles (see article from May 25, 1995, “Nexo Tico en Escándalo Belga”, *La Nación* Online newspaper and article from December 13, 1995, “Polémico Diplomático en la Mira”, *La Nación* Online newspaper).

consequences, including civil liabilities). The Court answered affirmatively to this question.

In its examination of the merits of the case, the Inter-American Court held that “*statements concerning public officials and other individuals who exercise functions of a public nature should be accorded, in the terms of Article 13(2) of the Convention, a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system. The foregoing considerations do not, by any means, 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. According to the Court: “A different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a specific individual. Those 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>29</sup>

Basically, the Court found that Costa Rica violated the right to freedom of expression protected under article 13 of the American Convention on Human Rights, in relation to article 1(1) thereof, to the detriment of Mr. Mauricio Herrera Ulloa, since the restriction on the journalist’s exercise of that right oversteps the boundaries set in that article.<sup>30</sup>

The second case on this issue is the “*Canese*”<sup>31</sup> case.

Ricardo Canese was prosecuted and convicted for slander resulting from statements made in August 1992, during the electoral campaign for the presidency of Paraguay. Ricardo Canese questioned the suitability and integrity of Juan Carlos Wasmosy, who was also a presidential candidate, stating that the latter “was the Stroessner family’s front man in CONEMPA”- a private company which had been doing business with the government. Criminal proceedings for slander and defamation were initiated against Canese by some of the stakeholders and directors of CONEMPA. Mr. Canese was sentenced in first instance on March 22, 1994. Canese appealed this conviction, which was confirmed on November 4, 1997, and a two-month term of imprisonment together with a fine were imposed. As a result of the criminal proceeding, he was subjected to restrictions to leave the country which applied for more than eight years. On December 11, 2002, after the claim had been filed before the I.A.Court H.R., the Supreme Court of Justice of Paraguay revoked the criminal conviction when deciding an appeal for review filed by Mr. Canese. In this regard, the I.A.Court H.R. acknowledged in its judgment the importance of the decision issued by the Supreme Court of Justice of Paraguay, but it also observed that “*the facts that gave rise to the alleged violations were committed during the criminal proceedings against the alleged victim, prior to the delivery of the acquittal on December*

<sup>29</sup> I.A.Court H.R., Herrera Ulloa Case, paras. 128 and 129.

<sup>30</sup> The concurring opinion of the President of the Court, Judge Sergio García Ramírez, enlarges upon the argument of the inadequacy of criminal sanctions in this case.

<sup>31</sup> I.A.Court H.R., Case of *Ricardo Canese vs. Paraguay*, Judgment of August 31, 2004.

11, 2002. The Court recalls that the State's international responsibility arises immediately from an internationally punishable act, although it can only be declared after the State has had the opportunity to repair such an act using its own mechanisms. The possibility of subsequent reparation under domestic law does not prevent the Commission and the Court from hearing a case concerning alleged violations of the American Convention that has already been filed, such as this one, which was brought before the Inter-American System in July 1998.<sup>32</sup> Consequently, the Court cannot consider the said decisions by the Criminal Chamber of the Supreme Court of Justice of Paraguay in August and December 2002 to be a factor that obliges it to discontinue the hearing on the alleged violations of the American Convention, which allegedly occurred before they were issued."<sup>33</sup>

In relation to article 13 of the Convention, the I.A.Court H.R. reviewed the "two dimensions" standard and further stressed what I have called the "democratic standard."

In this regard, it is worth noting the Court's innovative interpretation concerning statements made during electoral campaigns, as it held 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.*"<sup>34</sup> The I.A.Court H.R. also claimed that "*it is essential that the exercise of freedom of expression should be protected and guaranteed in the political debate that precedes the election of State authorities who will govern a State. The formation of the collective will through the exercise of individual suffrage is nourished by the different options presented by the political parties through the candidates that represent them. Democratic debate implies that the free circulation of ideas and information on the candidates and their political parties is permitted through the media, the candidates themselves, and any individual who wishes to express his opinion and provide information. Everyone 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. In this respect, the exercise of political rights and freedom of thought and expression are closely related and reinforce one another.*"<sup>35</sup>

The opinions rendered by the Court in the Canese case have undoubtedly enhanced to a great extent all prior statements regarding the connection between freedom of expression and democracy.

<sup>32</sup> Cf. Case of the Gómez-Paquiyaui brothers, supra note 2, para. 75; and Case of the "Five Pensioners". Judgment of February 28, 2003. Series C No. 98, paras. 130 to 141.

<sup>33</sup> I.A.Court H.R., Canese Case, para. 71.

<sup>34</sup> Ibid., Canese Case, para. 88

<sup>35</sup> Ibid., Canese Case, para. 90.

However, the main thrust of the judgment deals with the restrictions to the subsequent imposition of liability. The interpretation by the I.A.Court H.R. of the criminal procedure and conviction against Canese, as violating his freedom of expression, reinforced and consolidated the jurisprudence that developed from the “Herrera Ulloa” case.

First, the I.A.Court H.R. pointed to the restrictions that are tolerated in a democratic society, and resorted to “necessity” standard developed in Advisory Opinion OC-5. Second, the Court noted the greater margin of tolerance that must exist towards statements and opinions expressed in public debates or regarding public interest issues,<sup>36</sup> and, in this regard, the Court held that public officials and individuals who carry out activities subject to public scrutiny must tolerate a greater margin of acceptance of criticism. The Court consequently insisted, in line with its previous judgment, on the different threshold of protection that should be applied to certain individuals, which should not be based on their personal characteristics but rather on what the statements made about them may entail. The I.A.Court H.R. stated clearly that *“in the case of public officials, individuals who exercise functions of a public nature, and politicians, a different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a specific individual.”*

On these grounds, the I.A.Court H.R. considered that in the proceedings against Canese the courts should have taken into account that he made his statements in the context of an electoral campaign and that therefore *“the judge should have weighed 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>37</sup> In the next paragraph, the Court reached the most important conclusion:

*“The criminal proceeding, the subsequent sentence imposed on Mr. Canese for more than eight years, and the restriction to leave the country applied during almost eight years and four months, facts which are the grounds for this case, constitute an unnecessary and excessive punishment for the statements that the alleged victim made in the context of the electoral campaign concerning another candidate to the presidency of the Republic on matters of public interest. They also limited the open debate on topics of public interest or concern and restricted Mr. Canese’s exercise of freedom of thought and expression to emit his opinions for the remainder of the electoral campaign. In the circumstances of the instant case, there was no imperative social interest that justified the punitive measure, because the freedom of thought and expression of the alleged victim was restricted disproportionately, without taking into consideration that his statements referred to matters of public interest. In a democratic society, the foregoing constitutes an excessive restriction or limitation of the right to freedom of thought and expression of Ricardo Canese, incompatible with Article 13 of the American Convention [...] Furthermore, the Court considers that, in this case, the criminal proceeding, the consequent sentence imposed on Mr. Canese for more than eight years, and the*

<sup>36</sup> Ibid., Canese Case, para. 97.

<sup>37</sup> Ibid., Canese Case, para. 105.

*restrictions to leave the country during almost eight years and four months constituted indirect means of restricting his freedom of thought and expression. In this respect, after his criminal conviction, Mr. Canese was dismissed from the newspaper where he worked and, for some time, did not publish his articles in any other newspaper.”<sup>38</sup>*

These two judgments by the I.A.Court H.R. allow me to claim that the I.A.Court H.R. had begun to formulate, both in the *Herrera Ulloa* case -through the concurring vote of its President- and in the *Canese* case, the argument that questions the use of criminal law to impose subsequent liability that is compatible with the Convention.

The President of the Court stated in his vote in the *Herrera Ulloa* case: *“Before settling on how best to classify these behaviors as criminal offenses, one first has to decide whether the criminal law avenue is the one best suited to getting at the crux of the problem –in a manner consistent with the conflicting rights and interests and with the implications of the alternatives available to the lawmaker- or whether some other avenue, such as administrative or civil law, for example, might be the better juridical response. Indeed most infractions are not addressed as matters of criminal law or through criminal courts, but through measures of other kinds.”*

This question was followed by a strong theoretical analysis: *“it is worth recalling that as a rule, save for some digressions into authoritarianism -all too many and unfortunately not yet on the decline, the current thinking favors the so-called minimalist approach to criminal law. In other words, moderate, restricted, marginal use of the criminal-law apparatus, reserving it instead for only those cases when less extreme solutions are either out of the question or frankly inadequate. The power to punish is the most awesome weapon that the State –and society, for that matter- has in its arsenal, deploying its monopoly over the use of force to thwart behaviors that seriously –very seriously- threaten the life of the community and the fundamental rights of its members.”<sup>39</sup>*

The suggestions included in said concurring vote are reflected, though less clearly, in the *Canese Case*: *“the Court will decide whether, in this case, the subsequent imposition of criminal liability with regard to the alleged abusive exercise of the right to freedom of thought and expression by statements on matters of public interest, may be considered to comply with the requirement of necessity in a democratic society. In this respect, it should be recalled that penal laws are the most restrictive and severest means of establishing liability for an unlawful conduct.”<sup>40</sup>* The question common to both cases (*Canese* and *Herrera Ulloa*) is identical, and the theoretical conclusion is similar: in cases like these, the use of criminal law would be inadequate.

Finally, a further conclusion may be drawn from both judgments: not only the criminal sanction may amount to an undue subsequent imposition of liability under the terms of

<sup>38</sup> Ibid., *Canese Case*, paras. 106 and 107.

<sup>39</sup> Ibid., “*Herrera Ulloa*” Case, Concurring Vote of Sergio García Ramírez, paras. 14 and 15.

<sup>40</sup> Ibid., *Canese Case*, para. 104.

article 13 of the Convention, as in cases like the ones presented, the criminal proceeding itself may be considered a violation. It is worth noting that before conducting the legal analysis of the case, the I.A.Court H.R. held that it had to determine “*whether Paraguay restricted unduly the right to freedom of thought and expression of Ricardo Canese, as a result of the criminal proceeding, the criminal and civil sanctions, and the restrictions to leaving the country to which he was subjected for almost eight years and four months*”<sup>41</sup>. And the Court considers in its judgment that “*in this case, the criminal proceeding, the consequent sentence imposed on Mr. Canese for more than eight years, and the restrictions to leave the country during almost eight years and four months constituted indirect means of restricting his freedom of thought and expression.*” Although the I.A.Court H.R. could well have mentioned only the conviction, it stressed that all procedural instances entailed violations of Ricardo Canese's freedom of expression.<sup>42</sup>

The third case on this issue (criminal defamation) was adjudicated by the Court in 2008: the Kimel case.<sup>43</sup>

In 1989, Eduardo Kimel, an Argentinean journalist and writer published the book “La Masacre de San Patricio” [The Massacre of Saint Patrick.] The book tells of the killing of five clerics that occurred in 1976 during the last dictatorship in Argentina. In one of the paragraphs of his book, Kimel criticized the role of judges during the dictatorship, specifically the actions of the judge who was entrusted with the investigation of the case.

Kimel claimed that, in general, the judges were complicit in the repression by the dictatorship and that decisive evidence related to the killings was not taken into account. He further claimed that once it became clear that the order to carry out the crimes had come from the core of the military power, the enquiry was paralyzed.

A criminal proceeding was initiated against Kimel based on a criminal complaint brought in 1989 by the judge in charge of the case, alleging that the book had injured his honor. A sentence of one year in prison and damages of 20,000 US\$ were imposed on the journalist. After a lengthy domestic litigation process, Kimel brought his case to the Inter-American Commission on Human Rights, which referred the case to the Inter-American Court of Human Rights in 2007.

Kimel found relief on May 2, 2008, almost two decades after the unjust conviction had been imposed on him, when the Inter-American Court established that criminal defamation laws in Argentina run counter to the American Convention on Human Rights.

<sup>41</sup> Ibid., Canese Case, para. 76.

<sup>42</sup> There is no jurisprudence in the inter-American system on an individual case in which the facts constituting the violation are a criminal procedure without conviction. However, it is important to note that the IACHR did once rule on the admissibility of a case under similar conditions (Report No. 71/02, “Santander Tristán Donoso v. Panama,” October 24, 2002). The IACHR considered that “the State did not indicate any circumstance to justify the adequacy or effectiveness of [the criminal proceedings for slander and libel against Mr. Tristán Donoso...to address the alleged violation of Article 13 of the Convention.]” Based on the above considerations, the Commission declared the petition admissible.

<sup>43</sup> *Kimel v. Argentina* (May 2, 2008). The complete decision of the Court is available only in Spanish.

In the *Kimel* case, the Inter-American Court analyzed the criminal defamation provisions in Argentina's Penal Code and concluded that they are contrary to Articles 9 (principle of legality) and 13(1) (freedom of expression), in relation to Articles 1(1) (duty of the States to respect human rights) and 2 (duty of the States to adopt means to bring the internal legal system in line with international standards) of the American Convention.

The Inter-American Court ordered Argentina to adjust its domestic legislation with the American Convention on Human Rights. In other words, the Court ordered Argentina to repeal or change its current criminal defamation laws. The Inter-American Court also ordered the State to revoke Kimel's criminal and civil sentences and to pay damages.

The Court expressed that "*Criminal Law is the most restrictive and severe means for establishing responsibilities with respect to illicit conduct*" and that, therefore, "*the broad definition of crimes that protect the honor of people can run against the Criminal Law principles of minimum intervention and of last resort.*"

Furthermore, the Court understood that the possibility of codifying the elements of these crimes "*must be analyzed with special caution, weighing the extreme gravity of the conduct displayed by the alleged offender, his/her intention, the characteristics of the damage unjustly caused and other information tending to show the absolute necessity of resorting, in a truly exceptional way, to measures under criminal law.*"

The Court also noted that an "*opinion cannot be subject to legal penalties, especially when it involves a value judgment regarding an official act by a public official discharging his duties.*"<sup>44</sup>

The difference between *Kimel* and its predecessors lies in that in *Kimel* the Inter-American Court ordered the state to modify its criminal defamation legislation. Since many of the criminal defamation laws in Latin America have a wording similar to that of the Argentinean law, it is expected that the Inter-American Court's decision will have an impact not only on Argentina, but also on the rest of the region.

The decision, however, reveals a split among the judges regarding the continued viability of criminal libel laws even under more protective standards. In obiter remarks in paragraph 78, the Court noted that the use of criminal law against certain expressions and opinions is not contrary to the American Convention on Human Rights. Among the safeguards that may be used to limit this potential use, the Court mentioned the introduction of the "actual malice" doctrine related to who has the burden of the proof during the trial. In any case, this "obiter dictum" is unfortunate because it could be read as contradicting the rest of the decision.

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<sup>44</sup> Unofficial translations of paragraphs of the decision in CELS, A new Decision in Favor of Free Expression: the Inter-American Court of Human Rights Compels the Argentine State to Reform its Laws Against Slander and Libel, press release issued on May 23<sup>rd</sup>, 2008.

We could interpret the obiter in the best possible light saying that the Court wanted to leave open the possibility of using criminal law against certain expressions related to hate speech and the incitement of violence, for example.

The obiter also indicates that there has been tension between different judges. Judge García Sayán, in a concurring opinion, emphasized that it is possible to use criminal law against certain expressions that could damage the honor of public officials. García Sayán's opinion should not be interpreted as indicating the opinion of the Court, but rather his own, which differs from that of other judges. The former President of the Court, Judge García Ramírez, clearly endorsed the opinion that the Court had begun to develop in its previous decisions, which is that the State should not apply criminal law in those cases.

### **Insult (desacato) laws.**

Before the Kimel case, in 2005, the Inter-American Court handed down a judgment on the "*Palamara*"<sup>45</sup> case. The Court was called to decide two issues regarding the violation of article 13 of the Convention: 1) If the prohibition of prior censorship in article 13(2) is only limited by article 13(4); and 2) If the insult provisions are consistent with article 13. In its reasoning, the Court answers both questions.

On the first issue, the judgment of the Court avoided stating openly that prior censorship is permitted exclusively in the cases provided in article 13(4).<sup>46</sup> As noted above, this is

<sup>45</sup> I.A.Court H.R., Case of Humberto Palamara Iribarne v. Chile, Judgment of November 22, 2005. As it follows from the judgment, the facts of the case are reflected in the facts established by the IACHR when it filed an application against the Republic of Chile before the Court: "The Commission filed an application requesting the Court to decide whether the State had violated Articles 13 (Right to Freedom of Expression) and 21 (Right to Property) of the American Convention, with relation to the obligations set forth in Articles 1(1) (Obligation to Respect Rights) and 2 (Obligation to Adopt Domestic Law Measures) thereof, to the detriment of Humberto Palamara-Iribarne. The facts stated in the application refer to the alleged prohibition in March 1993 against publication of the book authored by Humberto Antonio Palamara-Iribarne, "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"), "in which he addressed issues related to military intelligence and the need to bring it into line with certain ethical standards;" the alleged seizure of copies of the book, as well as the originals, a diskette containing the full text, and the galleys of the publication, all of it carried out at the premises of the publishing company where the book was to be published; as well as the alleged deletion of the complete text of the book in question from the hard disk of the personal computer of Palamara-Iribarne, and the seizure of the books found there. As argued by the Commission, "Palamara-Iribarne, a retired Chilean Navy officer, was at the time of the events a civil servant hired as contractor by the Chilean Navy in the city of Punta Arenas." The Commission held that Palamara-Iribarne "was prosecuted for two counts of disobedience and correspondingly convicted," and "called a press conference at his residence and because of said conference, criminal charges were instituted against him for contempt of authority (desacato) and a guilty verdict was returned." (para. 2 of the judgment).

<sup>46</sup> Yet, the Court did rendered important opinions that are most likely to impact on future decisions. For instance, in paragraphs 72 and 73 the Court noted that:

72. *As asserted by this Court, "the expression and the dissemination of ideas are indivisible;"<sup>176</sup> therefore, in order to ensure the effective exercise of freedom of thought and expression, the State may not unduly restrict the right to disseminate ideas and opinions.*

the rationale in *The Last Temptation of Christ*. The facts in the *Palamara* case are far more complex when it comes to elucidating the restrictions on prior censorship. If a military official has come to know secrets that may actually compromise national security and decides to publish them, even the most basic logic would indicate that the State should have the necessary power not only to punish this disclosure but also to prevent it. For instance, if in the context of an armed conflict a military official were to publish the location of the troops or the war arsenal, it would be reasonable to prevent him from accomplishing his purpose. However, the Court's interpretation before the *Palamara* case was that prior censorship may only be admitted in the cases provided in article 13(4), which would not contemplate the case of the military official.

In the *Palamara* case, the Court stated that the duty of confidentiality was not to be examined, as it had been established that the book was of public interest and that it was not based on knowledge that Mr. Palamara-Iribarne had acquired by reason of his position in the Navy. The question to be asked is: what would have happened had the case been different? Would prior censorship have been possible? In my opinion, despite the confusion that may be caused by the Court's claim that it will not examine the duty of confidentiality (actually, if censorship is not permitted even in such cases, the reader will be confused by the Court's comment), the answer may be found in the Court's statement that the duty of confidentiality may result in the subsequent imposition of liability, without making any reference to prior restriction or censorship<sup>47</sup>.

As for insult (*desacato*) provisions, the Court also provides in *Palamara* a positive final interpretation in line with IACHR's opinions since 1994.<sup>48</sup> When reading the decision, one notices that the Court repeatedly makes reference to "the instant case" and to the "disproportionate" nature of the State's reaction. So far, the arguments justifying conviction for violation of article 13 of the Convention follow the criteria laid down in *Canese* and *Herrera Ulloa*, even regarding the different threshold that should be applied to statements in matters of public interest. Up to paragraph 88, the judgment offers no new arguments. Yet, in paragraph 89<sup>49</sup>, the Court begins to change its argument and

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*73. In the instant case, in order to ensure the effective exercise of Mr. Palamara-Iribarne's right to freedom of thought and expression, it was not enough for the State to allow him to write his ideas and opinions. The protection of such right implied the duty of the State not to restrict their dissemination, enabling him to distribute his book by any appropriate means to make his ideas and opinions reach the maximum number of people and, in turn, allowing these people to receive this information.*

<sup>47</sup> I.A.Court H.R., *Palamara Case*, para. 77: *The Court understands that the employees or officers of an institution have the duty to maintain the confidentiality of certain information to which they have access in the course of their duties, when the content of said information is involved in such duty. The duty of confidentiality is not applicable to information related to the institution or the duties performed by it that is already in the public domain. However, under certain circumstances, a breach of the duty of confidentiality may result in administrative, tort or disciplinary liability. In the instant case, the content of the duty of confidentiality will not be examined insofar as it has been established that Mr. Palamara-Iribarne used information from "open sources" (supra para. 63(23)) to write the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services").*

<sup>48</sup> See supra note 4.

<sup>49</sup> These are what I consider the most relevant paragraphs:

88. *The Court considers that in the instant case, by pressing a charge of contempt, criminal prosecution was used in a manner that is disproportionate and unnecessary in a democratic society, which led to the deprivation*

eventually requires Chile to repeal whatever insult law provisions that may remain in force. In paragraph 95, the Court concludes with the most illuminating sentence in the judgment: *“In addition, Chile has failed to comply with the general obligation to adopt domestic laws laid out in Article 2 of the Convention insofar as it included contempt provisions in its domestic legislation, some of which are still in force, which are contrary to Article 13 of the Convention (underlining added).*

### **Access to public information**

Access to public information was regarded by the IACHR as one of the rights in the catalogue of civil and political rights contained in the Convention, bearing a special relation to article 13. This interpretation by the Commission was conveyed in principle 4 of the Inter-American Declaration of Principles on Freedom of Expression as well as in the reports of the Office of the Special Rapporteur for Freedom of Expression.

In spite of this interpretation by the IACHR, the I.A.Court H.R. had never addressed this issue until September 19, 2006, in the *Marcel Claude Reyes et al. vs. Chile* case, where the Court held that *“Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that*

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*of Mr. Palamara-Iribarne’s right to freedom of thought and expression with regard to the negative opinion he had of matters that had a direct bearing on him and were closely related to the manner in which military justice authorities carried out their public duties during the proceedings instituted against him. The Court believes that the contempt laws applied to Palamara-Iribarne established sanctions that were disproportionate to the criticism leveled at government institutions and their members, thus suppressing debate, which is essential for the functioning of a truly democratic system, and unnecessarily restricting the right to freedom of thought and expression..*

[...]

*92.The Court notes with concern that, despite the valuable contribution of the legislative reform, section 264 of the Criminal Code, as amended, still includes the offense of “threat” to the same authorities that constituted, before the amendment to said Code, the passive subject of the offense of contempt. This way, the Criminal Code includes an ambiguous description and does not clearly specify the scope of the criminal conduct, thus leaving room for broad interpretation and, as a result, the conduct previously regarded as contempt may be unduly punished through the use of the criminal offense of threats.*

*Therefore, if the State decides to maintain said provision, it should specify the kind of threats concerned in order to prevent suppression of freedom of thought and expression of valid and legitimate opinions or whatever disagreement and protests against government bodies and their members.*

*93.In addition, the Court notes that the legislative reform implemented by means of Law No. 20,048 did not encompass all provisions dealing with contempt insofar as it is still an offense under the Code of Military Justice. Therefore, disproportionate sanctions are still being imposed for criticism leveled at government institutions and their members, and military institutions and their members are afforded greater protection than that afforded to civilian institutions in a democratic society, which is incompatible with Article 13 of the American Convention.*

*includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case*"<sup>50</sup>.

This was a historic decision for many organizations advocating the right to freedom of expression and access to information, as the I.A.Court H.R. became the first international court to interpret access to information as one of the fundamental rights of individuals.

The I.A.Court H.R. not only considered that the right to access to information was protected under the Convention; it also issued some guidelines that had already been followed by the IACHR and other non-governmental organizations. One of these guidelines stipulates that information *"should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied"*<sup>51</sup>. The Court also stipulated that *"in a democratic society, it is essential that the State authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a limited system of exceptions."*<sup>52</sup>

Although the Court acknowledged that the right may be subject to restrictions, *"they must have been established by law to ensure that they are not at the discretion of public authorities. Such laws should be enacted 'for reasons of general interest and in accordance with the purpose for which such restrictions have been established.'"*<sup>53</sup> The Court also claimed that *"the restriction established by law should respond to a purpose allowed by the American Convention. In this respect, Article 13(2) of the Convention permits imposing the restrictions necessary to ensure 'respect for the rights or reputations of others' or 'the protection of national security, public order, or public health or morals.'" And, finally, the I.A.Court H.R. established that "the restrictions imposed must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest."*<sup>54</sup> The Court followed criteria that had been previously laid down for the interpretation of article 13 of the Convention, specifically in

<sup>50</sup> I.A.Court H.R., Case of Marcel Claude Reyes et al. v Chile, Judgment of September 19, 2006, para. 77. The facts of the case may be summarized as follows: the victims had requested information from a public law entity, the Foreign Investment Committee, regarding "a foreign investment contract signed originally between the State and two foreign companies and a Chilean company (which would receive the investment), in order to develop a forestry exploitation project that caused considerable public debate owing to its potential environmental impact" (paragraph 66). The information requested was considered of public interest as "it related to the foreign investment contract signed originally between the State and two foreign companies and a Chilean company (which would receive the investment), in order to develop a forestry exploitation project that caused considerable public debate owing to its potential environmental impact (supra para. 57(7)). In addition, this request for information concerned verification that a State body - the Foreign Investment Committee- was acting appropriately and complying with its mandate" (paragraph 73). The requested information was organized in seven sections; three of them were not answered by the Chilean State. Such refusal gave rise to a claim in the local jurisdiction, and once the domestic remedies were exhausted, an international action could be brought.

<sup>51</sup> Ibid., Claude Reyes v. Chile Case, para. 77.

<sup>52</sup> Ibid., Claude Reyes v. Chile Case, para. 92.

<sup>53</sup> Ibid., Claude Reyes v. Chile Case, para. 89.

<sup>54</sup> Ibid., Claude Reyes v. Chile Case, paras. 90 and 91.

Advisory Opinion OC-5. It is important to stress that the I.A.Court H.R. placed the burden of proof regarding possible restrictions to this right on the State<sup>55</sup>.

Finally, notwithstanding the I.A.Court H.R. appreciated *“the significant normative progress that Chile has made concerning access to State-held information, that a draft law on access to public information is being processed, and that efforts are being made to create a special judicial recourse to protect access to public information,”* the Court considered that Chile, pursuant to article 2 of the Convention, *“must adopt the necessary measures to guarantee the protection of the right of access to State-held information, and these should include a guarantee of the effectiveness of an appropriate administrative procedure for processing and deciding requests for information, which establishes time limits for taking a decision and providing information, and which is administered by duly trained officials.”*<sup>56</sup> In this last regard, that is, the training of public agents in relevant fields, the Court ordered the Chilean state to *“provide training to public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right; this should incorporate the parameters established in the Convention concerning restrictions to access to this information that must be respected.”*<sup>57</sup>

### **The impact of the European Court of Human Rights (ECHR) case law in the arguments of the I.A.Court H.R.**

From the early stages (Advisory Opinion OC-5) to the most recent cases decided by the I.A.Court H.R., the impact of ECHR decisions has been great. Such impact is clearly noticed in the references that the Inter-American Court has made to European jurisprudence concerning questions relevant to the decision of the cases under consideration.

In OC-5, the Inter-American Court said regarding the concept of public order that:

*“In this sense, the Court adheres to the ideas expressed by the European Commission of Human Rights when, basing itself on the Preamble of the European Convention, it stated*

*that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but... to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law. (“Austria vs. Italy,” Application No. 788/60, 4 European Yearbook of Human Rights 116, at 138 (1961).)”*<sup>58</sup>

<sup>55</sup> *Ibid.*, *Claude Reyes v. Chile Case*, para. 92.

<sup>56</sup> *Ibid.*, *Claude Reyes v. Chile Case*, para. 163.

<sup>57</sup> *Ibid.*, *Claude Reyes v. Chile*, para. 165.

<sup>58</sup> I.A.Court H.R., *Compulsory membership*, para. 69.

In order to interpret the concept of “necessity” pertaining to the restrictions, the Inter-American Court turned to its European counterpart. The following paragraph has been quoted in Advisory Opinion OC-5 as well as in the “Herrera Ulloa” case:

*It is important to note that the European Court of Human Rights, in interpreting Article 10 of the European Convention, concluded that “necessary,” while not synonymous with “indispensable,” implied “the existence of a ‘pressing social need’ and that for a restriction to be “necessary” it is not enough to show that it is “useful,” “reasonable” or “desirable.” (Eur. Court H. R., **The Sunday Times Case**, judgment of 26 April 1979, Series A no. 30, para. 59, pp. 35-36.) This conclusion, which is equally applicable to the American Convention, suggests that the “necessity” and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it. (**The Sunday Times Case**, *supra*, para. 62, p. 38. See also Eur. Court H. R., **Barthold**, judgment of 25 March 1985, Series A no. 90, para. 59, p. 26.)<sup>59</sup>*

In “The Last Temptation of Christ” case, in relation to the above-mentioned “democratic standard”, the I.A.Court H.R. held in paragraph 69 that:

69. *The European Court of Human Rights has indicated that:*

*[The] supervisory function [of the Court] signifies that [it<sup>o</sup>] must pay great attention to the principles inherent in a ‘democratic society’. Freedom of expression constitutes one of the essential bases of such a society, one of the primordial conditions for its progress and for the development of man. Article 10(2) [of the European Convention on Human Rights]<sup>60</sup> is valid not only for the information or 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*

<sup>59</sup> I.A.Court H.R., Compulsory membership, para. 46.

<sup>60</sup> This article establishes that: 2. The exercise of these freedoms, which entail rights and responsibilities, may be subject to certain formalities, conditions, restrictions or sanctions, established by law, which constitute necessary measures, in a democratic society, for national security, territorial integrity or public security, defense of order and prevention of crime, protection of health or morals, protection of the reputation or the rights of third parties, in order to prevent the dissemination of confidential information or to guarantee the authority and impartiality of the Judiciary.

*population. Such are the requirements of pluralism, tolerance and the spirit of openness, without which no 'democratic society' can exist. This means that any formality, condition, restriction or sanction imposed in that respect, should be proportionate to the legitimate end sought.<sup>61</sup>*

An extended version of this paragraph was later cited in the “Ivcher”, “Herrera Ulloa” and “Canese” cases.

In the “Ivcher” case, express mention is also made of the European Court’s arguments regarding possible restrictions to debates on public interest issues. The Inter-American Court states in paragraph 155 that:

*The European Court has emphasized that Article 10(2) of the European Convention, on freedom of expression, leaves a very reduced margin to any restriction of political discussion or discussion of matters of public interest<sup>103</sup>. According to this Court, [...] the acceptable limits to criticism are broader with regard to the Government that in relation to the private citizen or even a politician. In a democratic system, the acts or omissions of the Government should be subject to rigorous examination, not only by the legislative and judicial authorities, but also by public opinion<sup>104</sup>.*

Ruling on a similar matter, in the “Herrera Ulloa”<sup>62</sup> case (paras. 125 and 126), the Inter-American Court adheres to arguments of the European Court:

*The jurisprudence constante of the European Court of Human Rights with regard to the permissible limits on freedom of expression has been that a distinction must be made between the limits that apply when the restriction is to protect a private individual and those that apply when the restriction is to protect a public figure, such as a politician. That Court has written that:*

*the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his*

<sup>61</sup> Cf. Eur. Court H.R., Handyside case, judgment of 7 December 1976, Series A No. 24, para. 49; Eur. Court H.R., The Sunday Times case, judgment of 26 April 1979, Series A no. 30, paras. 59 and 65; Eur. Court H.R., Barthold judgment of 25 March 1985, Series A no. 90, para. 55; Eur. Court H.R., Lingens judgment of 8 July 1986, Series A no. 103, para. 41; Eur. Court H.R. Müller and Others, judgment of 24 May 1988, Series A no. 133, para. 33; and Eur. Court HR, Otto-Preminger-Institut v. Austria judgment of 20 September 1994, Series A no. 295-A, para. 49.

<sup>103</sup> Cf. Eur. Court H.R., case of Sürek and Özdemir v. Turkey, supra note 102, para. 60.

<sup>104</sup> Cf. Eur. Court H.R., Case of Sürek and Özdemir v. Turkey, supra note 102, para. 60.

<sup>62</sup> This jurisprudence was also cited in the “Canese” case.

*private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues.*<sup>63</sup>

*Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.*<sup>64</sup>

*In another judgment, the European Court ruled that:*

*[...] freedom of expression [...] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. [...] The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.*<sup>65</sup>

In the “Canese” case, concerning statements made in the context of an electoral campaign, the Inter-American Court turns once more to European jurisprudence, citing that:

“89. *In this respect, the European Court has stated that:*

*While precious to all, freedom of expression is particularly important for political parties and their active members (see, mutatis mutandis, the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, Reports 1998-I, p. 22, § 46). 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.*<sup>66</sup>”

Furthermore, also in the Canese case, the Inter-American Court notes that:

*Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system (see*

<sup>63</sup> Cf. Eur. Court H.R., Case of Dichand and others v. Austria, supra note 91, para. 39; Eur. Court H.R., Case of Lingens v. Austria, supra note 91, para. 42.

<sup>64</sup> Case of Lingens v. Austria, supra note 91, para. 42.

<sup>65</sup> Cf. Eur. Court H.R., Case of Castells v. Spain, supra note 91, paragraphs 42 and 46.

<sup>66</sup> Eur. Court H.R., Case of Incal v. Turkey, judgment of 9 June 1998, Reports 1998-IV, para. 46.

*the Mathieu-Mohin and Clerfayt v. Belgium judgment of 2 March 1987, Series A no. 113, p. 22, § 47, and the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, §§ 41–42). The two rights are inter-related and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the “conditions” necessary to “ensure the free expression of the opinion of the people in the choice of the legislature” (see the above-mentioned Mathieu-Mohin and Clerfayt judgment, p. 24, § 54). For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.<sup>67</sup>*

Finally, in the “Kimel” case, and in order to support the argument presented in paragraph 78, which I have referred to above, the Inter-American Court cites the European Court and observes that:

*“the eminent value of freedom of expression, especially in debates on subjects of general concern, cannot take precedence in all circumstances over the need to protect the honour and reputation of others, be they ordinary citizens or public officials”. Cfr. Mamère v. France, no. 12697/03, § 27, ECHR 2006.*

## **Conclusion**

It may be concluded from the jurisprudence of the I.A.Court HR that some of the matters have not been similarly analyzed -or even addressed- by the European Court.

For instance, matters concerning compulsory licensing, prior censorship and insult laws or access to public information<sup>68</sup> have not been interpreted within the meaning of art. 10 of the European Convention on Human Rights. One of the reasons for this contrast may have to do with the different historical context of Latin American countries.

On the other hand, we may draw conclusions on the value that the Inter-American Court has placed on the arguments found in European rulings when it has rendered its own judgments.

This however raises one question: do the elements of the right to freedom of expression established by the European Court set a maximum or minimum threshold for interpretation? In its answer to this question in Advisory Opinion OC-5, the I.A.Court H.R. adopted this second meaning.

<sup>67</sup>Eur. Court H.R., Case of Bowman v. The United Kingdom, judgment of 19 February 1998, Reports 1998-I, para. 42.

<sup>68</sup> The latest development by the European Court regarding access to public information offers an optimistic perspective that access to information may be regarded as one of the rights in art. 10 of the American Convention in the near future. To enlarge on this optimistic view, which I share, see Wouter Hins and Dirk Voorhoof, Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights, *European Constitutional Law Review*, 3: 114–126, 2007.

The Court first considered the language of article 13 as opposed to that of European article 10<sup>69</sup> and compared both articles concluding that the “[g]uarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.”<sup>70</sup>

Although the Inter-American Court considered that it is often useful to compare the American Convention with the provisions of other international instruments in order to stress specific aspects concerning the manner in which a certain right has been formulated, that approach should never be used to read into the Convention restrictions that are not grounded in its text. The American Court was very emphatic on this issue, saying that “[t]his is true even if these restrictions exist in another international treaty.”<sup>71</sup>

Judge Pedro Nikken, in its concurrent opinion in OC-5 explained that:

*“In this respect, I believe to be true what was mentioned in the public hearings in the sense that because the American Convention is broader than the other treaties, what is legitimate under the International Covenant of Civil and Political Rights or under the European Convention on Human Rights may not be legitimate in this hemisphere because it does not conform to the American Convention. One only has to recall the special regulation of the death penalty contained in Article 4 or the right of reply of Article 14 to find evidence of that circumstance. This is not surprising as the establishment of the international regime for the protection of human rights reveals that, frequently, the latest treaties are broader than their predecessors and that it is easier to conclude more advanced treaties where fewer cultural and political differences exist among the States that negotiate them. Nor is it surprising, then, that the American Convention, signed almost twenty years after that of Europe and covering only the American Republics, is more advanced than the latter and also than the Covenant, which aspires to be an instrument that binds all of the governments of the planet.”<sup>72</sup>*

In conclusion, if article 13 has been designed to be more “generous” than article 10, the interpretation of the latter by the European Court may provide a minimum standard for the interpretation of art. 13, but never a ceiling. The judgments of the Inter-American Court reviewed in this paper also support this contention.

<sup>69</sup> The Court held that “The form in which Article 13 of the American Convention is drafted differs very significantly from Article 10 of the European Convention, which is formulated in very general terms. Without the specific reference in the latter to “necessary in a democratic society,” it would have been extremely difficult to delimit the long list of permissible restrictions. As a matter of fact, Article 19 of the Covenant, which served, in part at least, as a model for Article 13 of the American Convention, contains a much shorter list of restrictions than does the European Convention. The Covenant, in turn, is more restrictive than the American Convention, if only because it does not expressly prohibit prior censorship.” I.A.Court H.R., *Compulsory membership*, para. 45.

<sup>70</sup> I.A.Court H.R., *Compulsory membership*, para. 50.

<sup>71</sup> I.A.Court H.R., *Compulsory membership*, para. 51.

<sup>72</sup> I.A.Court H.R., *Compulsory membership*, Declaration of Judge Pedro Nikken, para. 5.