

## CHAPTER VI

### “DESACATO” LAWS AND CRIMINAL DEFAMATION

#### A. Introduction

1. Since its inception, the Office of the Special Rapporteur has devoted particular attention to restrictions on the full exercise of freedom of expression occasioned by the application of laws on “*desacato*” (contempt) and criminal defamation in the Hemisphere. Every biennium,<sup>1</sup> the Office of the Rapporteur prepares an analysis of progress in implementation of recommendations from previous years, in particular as regards abolitions and legal reforms for the domestic adoption of the standards of the inter-American system in the area of freedom of expression. The Office of the Special Rapporteur intends to continue this follow-up every two years, since that is a prudent time to allow the Member States to move ahead with the necessary legislative procedures to make the recommended abolitions or adjustments of their laws.

2. In the last biennium, few countries have taken purposeful steps to abolish the crime of *desacato*. In some states, legislative reform processes have stalled or restrictive judicial interpretations have been adopted. In other countries, the interpretations of the courts have recognized the incompatibility of “*desacato*” with the due guarantees of freedom of expression; however, those decisions have not been echoed in legislative reforms. Nevertheless, while the successful abolition of *desacato* laws may not have been the norm in the Hemisphere, in those countries where it has come about, the elimination of this crime has entailed a very significant stride toward the creation of a favorable climate for the full exercise of freedom of expression.

3. It is also a source of concern for the Office of the Rapporteur that laws on broadly termed “offenses against honor” are used for the same purposes as *desacato* laws; in other words to silence criticism. This is clear from the widespread use of these mechanisms among public officials in many countries in the Hemisphere. The potential favorable impact of abolishing the crime of *desacato* could be limited, not only by the existence of laws on offenses against honor that are incompatible with the basic guarantees necessary to ensure that free discussion of ideas is not deterred by intimidation, but also by restrictive judicial interpretations.

4. In 2004, the Inter-American Court of Human Rights issued two judgments in which it found that freedom of expression had been violated in two cases that concerned prosecution for criminal defamation. In light of the foregoing, after first reviewing the theoretical arguments in favor of abolition of *desacato* laws and reform of laws on the protection of honor, the Office of the Special Rapporteur sets out the arguments of the Court in both cases. Finally, in keeping with custom, the report summarizes the progress in this area by some countries that has been brought to the attention of the Rapporteur.

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<sup>1</sup> See Annual Reports of the Office of the Special Rapporteur for Freedom of Expression of 1998, 2000, and 2002.

## B. Theoretical argument

### 1. Subsequent liability under the American Convention on Human Rights

5. Article 13 of the American Convention on Human Rights enshrines the right of freedom of expression and contains a shorter list of possible restrictions to this right than other international instruments on human rights<sup>2</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.

(...).

6. It can be determined from this Article that the imposition of subsequent liability must be based on clear, pre-existing laws, should pursue legitimate ends consistent with this Article, and be necessitated by a compelling governmental interest<sup>3</sup>.

7. Laws that determine subsequent liability must be precisely drawn so as to enable individuals to predict with reasonable certainty in advance possible liability for their expressions.<sup>4</sup> Ambiguity or lack of clarity can create a degree of uncertainty that could deter people from divulging opinions or information and actively participating in democratic discussion.

8. The notion of necessity must be interpreted in the framework of a democratic society,<sup>5</sup> which needs and is nurtured by the broad circulation of ideas and opinions. Therefore, such liability should be imposed only when no other less restrictive means exist by which to

<sup>2</sup> Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, par. 45.

<sup>3</sup> Inter-Am. Ct. H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, *supra* note 2, par. 46, and IACHR, *Annual Report 1994*, "Report on the Compability of 'Desacato' Laws with the American Convention on Human Rights", OEA/Ser.LV/II.88, Doc. 9 rev. (1995).

<sup>4</sup> Article 19, *Principles on Freedom of Expression and Protection of Reputation*, London, July 2000, in: [www.Article19.org](http://www.Article19.org), Principle 1.1.

<sup>5</sup> *Cf.* Inter-Am. Ct. H.R.. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, *cf. supra* note 2, par. 46; European Court of Human Rights, *The Sunday Times*, 26 April 1979. Series A, No. 30, par. 59; Article 19, *Principles on Freedom of Expression and Protection of Reputation*, *supra* note 4, Principle 1.3.

protect the legitimate reputation interest, and it must be in accordance with the principle of proportionality.

9. Article 13(3) also contains an important limit on imposition of subsequent liability, since it should not become an indirect mechanism tending to impede the communication and circulation of ideas and opinions.<sup>6</sup> On the contrary, free democratic discussion and plurality require a degree of tolerance for the expression of ideas, information and opinions that might be considered offensive, particularly in respect of public office and those who hold it.

10. Protection of a person's honor is subject to the foregoing considerations, which are echoed in Principle 10 of the Declaration of Principles on Freedom of Expression, prepared by the Office of the Special Rapporteur and adopted in 2000 by the Inter-American Commission on Human Rights.

10. Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The 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. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.

11. This principle clearly introduces the so-called dual system of protection of honor, according to which, public persons or private persons who have voluntarily exposed themselves to increased scrutiny on the part of society must be more tolerant of criticism, in order also to enable the social control necessary to ensure that the powers of government are exercised in an efficient and appropriate manner. The protection of a person's honor in such cases should be invoked in a civil proceeding because a criminal sanction could impede the control of public office necessary in a democratic society. This principle also adopts the standard of the "actual malice" doctrine, which considers that civil penalties should be imposed on expressions about public officials and only when information is published in the knowledge that it is false, there is express intent to cause injury, or there is gross negligence in ascertaining the truth.<sup>7</sup> Therefore, in light of this principle and the precepts on which it is based, the imposition of criminal penalties on offenses against public officials in relation to the performance of their duties would be contrary to the principles of necessity and proportionality in the framework of a democratic society.

## **2. Incompatibility of *desacato* laws with Article 13 of the American Convention on Human Rights**

12. The offense of *desacato* is recognized in several criminal codes in the Hemisphere. It consists of the criminal punishment of insults to public officials in the performance of their functions. In some cases it is even considered a publicly actionable offense; in other words, the state accusatory bodies (attorney general, state prosecutors) are responsible for pressing charges. This offense, therefore, means that the entire state law

<sup>6</sup> Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, cf. *supra* note 2, par. 47.

<sup>7</sup> Cf. IACHR, *Annual Report 2000. Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter II, App. B.

enforcement apparatus is activated to punish anyone who criticizes public officials or their performance, which patently contradicts the principle of democratic control of those who exercise the powers of government.

13. In 1995,<sup>8</sup> the Inter-American Commission on Human Rights issued a report in which it mentioned that laws that recognize the crime of *desacato* are incompatible with Article 13 of the American Convention on Human Rights, since it found that they are at odds with the principle of necessity and do not pursue legitimate ends. The IACHR concluded that such norms lend themselves to abuse as a means to silence unpopular ideas and opinions, thereby repressing the debate that is critical to the effective functioning of democratic institutions.<sup>9</sup>

14. *Desacato* laws grant a protection to public officials that is not available to the rest of society, and inverts the democratic principle whereby government –and, therefore, public officials-- are subject to public scrutiny, in order to preclude or control abuse of power. Citizens have the right to criticize and scrutinize the attitudes of officials in so far as they relate to public office. Such laws can discourage those who wish to participate in public debate for fear of lawsuits or penalties, particularly when they fail to distinguish between facts and value judgments. Proving the veracity of these statements, inasmuch as the burden of truth is on the speaker, does not lessen this effect, in particular in cases of value judgments, which are not susceptible of proof.<sup>10</sup> In the words of the Commission “(...) the threat of criminal liability for dishonoring the reputation of a public functionary even as an expression of a value judgment or an opinion, can be used as a method to suppress criticism and political adversaries.” According to the Commission, a properly functioning democracy is the greatest guarantee of public order and, therefore, invoking the concept of “public order” to defend *desacato* laws is in opposition to the logic underlying the protection of freedom of expression and thought guaranteed in the American Convention<sup>11</sup>.

15. Since its creation, the Office of the Special Rapporteur has examined the problem of *desacato* laws because of the danger that they could become a mechanism to stifle pluralistic and democratic debate on affairs of government. Principle 11 of the Declaration of Principles on Freedom of Expression addresses this problem:

11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as “*desacato* laws,” restrict freedom of expression and the right to information.

16. The concerns of the Commission and the Office of the Special Rapporteur are shared by other intergovernmental agencies and civil society organizations from all over the world, which have issued a declaration in this regard and advocated the repeal of these laws.<sup>12</sup> In spite of the foregoing, these laws persist in several states in the Americas.

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<sup>8</sup> In the framework of a friendly settlement of September 20, 1994, on a petition lodged by journalist Horacio Verbitsky against the Argentine Republic for having convicted him of the crime of *desacato*, the parties requested the Commission to present its opinion on the compatibility or incompatibility of the crime of *desacato* with the American Convention on Human Rights.

<sup>9</sup> *Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights*, *supra* note 3.

<sup>10</sup> IACHR, *Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights*, *supra* note 3. *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> In 1999, the UN Special Rapporteur on Freedom of Opinion and Expression, together with his counterpart from the OSCE, the Representative on Freedom of the Media, and the Office of the Special Rapporteur for Freedom of Expression of the  
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### 3. Criminal defamation offenses (slander, libel, etc.)

17. In its previous reports the Office of the Special Rapporteur has mentioned its concern over the use of laws on criminal defamation, including slander and libel, for the same purpose as *desacato* laws. Generally speaking, these criminal classifications refer to the false imputation of criminal offences or of expressions that damage the honor of a person. In the Hemisphere, practice has shown that many public officials resort to the use of such norms as a mechanism to deter criticism. As the Office of the Special Rapporteur has said in previous reports, “the possibility of abuse of such laws by public officials to silence critical opinions is as great with this type of law as with *desacato* laws.”<sup>13</sup>

18. The protection of honor, in abstract, may be considered a legitimate interest. However, when a state’s law enforcement apparatus seeks the criminal punishment of statements on regarding matters of public interest, the legitimacy of the criminal penalty is weakened, either because there is no pressing social interest to justify it, or because it becomes a disproportionate response, or it constitutes an indirect restriction.<sup>14</sup>

19. From the point of view of criminal dogma, *desacato* is simply a type of libel or slander in which the victim is a public official. This special condition does not arise in the case of other offenses against honor, although these can be applied in cases where public officials, public figures, or, in general, matters of public interest are concerned.<sup>15</sup> It is clear that consideration of the possible effects of criminal pivotal in the decisions of the organs of the inter-American system, inasmuch as it can discourage the exchange of opinion and free democratic debate. Hence there is a need to decriminalize speech that criticizes state officials, public figures, or, in general, matters of public interest.<sup>16</sup> In this connection the Commission has said:

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IACHR, issued a joint declaration recommending the review of these laws by the states. In 2001, the UN Special Rapporteur on Freedom of Opinion and Expression issued a declaration on this issue, as did the World Bank in its World Development Report 2002. Other organizations have also made clear their position, such as the Inter-American Press Association in the Declaration of Chapultepec, and Article 19 in its Principles on Freedom of Expression and Protection of Reputation. Furthermore, in 2002, a group of organizations signed a declaration inviting states to abolish laws that restrict criticism or provide greater protection for the honor of public officials. These organizations included the Alliance of Independent Journalists of Indonesia, *Association de Journalistes du Burkina*; Canadian Journalists for Free Expression, Canada; Center for Human Rights and Democratic Studies, Nepal; Center for Media Freedom and Responsibility, Philippines, *Centro Nacional de Comunicación Social*, Mexico; Committee to Protect Journalists, United States; Ethiopian Free Press Journalists Association, Ethiopia; *Fédération professionnelle des journalistes du Québec*, Canada; Free Media Movement, Sri Lanka; Freedom House, United States; Freedom of Expression Institute, South Africa; Independent Journalism Center, Moldova and Nigeria; Index on Censorship, United Kingdom; *Instituto Prensa y Sociedad*, Peru; International Federation of Journalists, Belgium; International Federation of Library Associations and Institutions (IFLA)-Free Access to Information and Freedom of Expression (FAIFE); International Press Institute; *Journalistes en danger*, Democratic Republic of the Congo; Media Institute of Southern Africa, Namibia; Pacific Islands News Association, Fiji Islands; *Asociación para la Defensa del Periodismo Independiente* (PERIODISTAS), Argentina; Press Union de Liberia; Thai Journalists Association, Thailand; *Timor Lorosa’e Journalists Association*, West African Journalists Association, Senegal; and World Press Freedom Committee of the United States.

<sup>13</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights 2002. Vol. III. Report of the Office of the Special Rapporteur for Freedom of Expression*. OEA/Ser.LV/II.117 Doc. 5 rev. 1, March 7, 2003. (Hereinafter, Annual Report 2002) Chapter V, par. 17.

<sup>14</sup> IACHR, *Annual Report 2002*, *supra* note 13, Chapter V, par. 23.

<sup>15</sup> IACHR, *Annual Report 2002*, *supra* note 13, Chapter V, par. 21.

<sup>16</sup> IACHR, *Annual Report 2002*, *supra* note 13, Chapter V, par. 22.

[C]onsidering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances when there is an obvious and direct threat of lawless violence. (...)

The Commission considers that the State's obligation to protect the rights of others is served by providing statutory protection against intentional infringement on honor and reputation through civil actions and by implementing laws that guarantee the right of reply. In this sense, the State guarantees protection of all individual's privacy without abusing its coercive powers to repress individual freedom to form opinions and express them.<sup>17</sup>

20. The intention here is not to deny that persons in public office have honor, but that its possible injury is outweighed by another right—in this case freedom of expression to which society gives precedence.<sup>18</sup> At all events, attacks on the honor and reputation of persons can be protected by means of civil sanctions, provided they are proportional and take actual malice into consideration.

### **C. Jurisprudence of the Inter-American Court of Human Rights**

21. In 2004, the Inter-American Court for the first time heard and ruled on two cases connected with possible violations of freedom of expression arising from the application of criminal defamation laws. The two judgments constitute a guiding light for states in any reform processes instituted in this area.

#### **1. General precedents of the Court prior to 2004**

22. In July 1985, the government of Costa Rica requested the Court for an advisory opinion relating to the interpretation of Article 13 of the American Convention as regards the compulsory membership in an association prescribed by law for the practice of journalism. This advisory opinion became the cornerstone of the jurisprudence,<sup>19</sup> decisions, and reports of the inter-American system in matters concerning freedom of expression. This advisory opinion, OC-5/85, developed the contents of freedom of expression and sketched out its two dimensions: individual and social. The former has to do with the right of every individual to express their opinions and circulate them by any means. The latter concerns a collective right to receive information of any kind and to know the opinions of others.<sup>20</sup> These contents have been echoed in subsequent decisions of the Court.

23. With respect to subsequent liability, OC-5/85 examines the requisites established by the American Convention, and mentions that its imposition requires the existence of previously established grounds for liability expressly and precisely defined by law, that the ends sought are legitimate in accordance with the Convention, and that they are necessary to ensure

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<sup>17</sup> IACHR, *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights*, cf. *supra* note 8

<sup>18</sup> Cf. IACHR, *Annual Report 2002*, *supra* note 13, Chapter V. par. 26.

<sup>19</sup> Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, cf. *supra* note 2.

<sup>20</sup> Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, cf. *supra* note 2, par. 30-32.

those ends.<sup>21</sup> The Court also mentioned that the imposition of such liability must be consistent with the principle of necessity in a democratic society, and, therefore, it is not sufficient simply to demonstrate its usefulness or timeliness since it should not limit the exercise of freedom of expression except to the extent strictly necessary.

24. In the judgment in the case *Baruch Ivcher Bronstein v Peru* of 2001,<sup>22</sup> the Court, invoking the jurisprudence of the European Court of Human Rights, said that “[freedom of expression] should not only be guaranteed with regard to the dissemination of information and ideas that are received favorably or considered inoffensive or indifferent, but also with regard to those that offend, are unwelcome or shock the State or any sector of the population.”<sup>23</sup> The Court was also of the opinion that freedom of expression leaves a very reduced margin to any restriction of political discussion or discussion of matters of public interest.<sup>24</sup>

#### a. Herrera Ulloa Case v Costa Rica (2004)

25. In 1995,<sup>25</sup> Mauricio Herrera Ulloa, a journalist with *La Nación* newspaper, published a series of articles in which he partially reproduced information that appeared in the Belgian media on alleged wrongdoings by Félix Przedborski Chawa, a Costa Rican honorary diplomat to the International Atomic Energy Organization in Austria. The official sued the journalist for the crime of defamation, libel and publication of offensive material, and brought a civil action holding both Herrera and *La Nación* to joint and several liability. On May 29, 1998, the Criminal Court of the First Judicial Circuit of San José acquitted the journalist for lack of the *mens rea* necessary to constitute the crimes of defamation, libel and publication of offensive material. This first judgment was appealed in cassation and overturned in a decision of May 7, 1999, which ordered a retrial. The proceeding was reopened and on November 12, 1999, the Criminal Court of the First Judicial Circuit of San José issued a judgment in which it disallowed the defense of the truth (*exceptio veritatis*),<sup>26</sup> found the journalist Herrera to be guilty on four counts of publication of offensive materials, in the modality of defamation. The reporter and the newspaper were also held jointly and severally liable in the civil action and ordered to provide compensation for the alleged injury to honor caused. The judgment also required the Herrera Ulloa to publish the operative parts of the decision in *La Nación*. The newspaper was ordered to remove the Internet link at *La Nación Digital* web site between the name Przedborski and the disputed articles, and to create a link between the disputed articles and the operative parts of the decision. As a result of this judgment and by Costa Rican law, it was required to include the name of the journalist in the Judicial Register of Criminals. The decision was appealed in cassation and upheld by the Third Chamber of the Supreme Court of Justice in a ruling of January 24, 2001.<sup>27</sup>

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<sup>21</sup> Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, cf. *supra* note 2, par. 39.

<sup>22</sup> Inter-Am. Ct. H.R., *Ivcher Bronstein Case*. Judgment of February 6, 2001, Series C, No. 74.

<sup>23</sup> *Id.* par. 152.

<sup>24</sup> *Id.* par. 155.

<sup>25</sup> The disputed information was published on May 19, 20, and 21, and December 13, 1995.

<sup>26</sup> Judgment 1320-99 of the Criminal Court of the First Judicial Circuit of San José, Group Three, of 14:00 hours on November 12, 1999.

<sup>27</sup> Decision 2001-00084 of the Third Chamber of the Supreme Court of Justice of 14:35 on January 24, 2001.

26. In March 2001, the journalist Herrera Ulloa and representatives of *La Nación* lodged a petition with the Inter-American Commission on Human Rights.<sup>28</sup> On January 28, 2003, the Commission submitted an application to the Inter-American Court against the State of Costa Rica, in which it requested the Court to decide, *inter alia*, if the State had violated Article 13 of the American Convention on Human Rights; to quash the conviction; and order reparation for the victims.<sup>29</sup> On July 2, 2004, the Inter-American Court issued a judgment in which it found that the Costa Rican State had violated the right to freedom of expression of Mauricio Herrera Ulloa,<sup>30</sup> and ordered, *inter alia*, the nullification in all respects of the judgment of November 12, 1999, that convicted the journalist.<sup>31</sup>

27. In its considerations, based on its jurisprudence in this area, the Inter-American Court, reiterated the essential role of freedom of expression in a democratic society.

Without effective freedom of expression, materialized in every respect, democracy disappears, plurality and tolerance begin to fall apart, the mechanisms for citizen control and reporting start to become a dead letter, and, ultimately, fertile ground is created for authoritarian systems to begin to take root in society.<sup>32</sup>

28. The Court also held that those who engage in activities and influence situations of public interest are, of necessity, more exposed to public scrutiny and discussion than private individuals, as that exposure is essential for democracy to function. "Persons who influence issues of public interest have voluntarily exposed themselves to closer public scrutiny and, therefore, are at greater risk of criticism, since their activities move out of the private sphere and into the sphere of public debate."<sup>33</sup> The Court clarifies that this does not mean that the honor of public officials should not be subject to legal protection, but that such protection should be

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<sup>28</sup> While processing the petition, the Commission requested the Inter-American Court to order provisional measures on behalf of Mauricio Herrera. On September 7, 2001, the Inter-American Court adopted provisional measures in which it was resolved to:

1. Request the State Costa Rica to take without delay all necessary steps to remove the name of Mr. Mauricio Herrera Ulloa from the Judicial Register of Criminals until the organs of the inter-American system of human rights reached a final decision in the case.
2. Request the State of Costa Rica to suspend the order to publish in *La Nación* newspaper the operative part of the conviction issued by the Criminal Court of the First Judicial Circuit of San José on November 12, 1999, and to suspend the order to create a "link" at *La Nación Digital* between the disputed Articles and the operative part of this judgment."

<sup>29</sup> Several international organizations that promote and defend freedom of expression, as well as journalists' associations and media organizations submitted *amici curiae* briefs. They include the Committee to Protect Journalists, the Hearst Corporation, the Miami Herald Publishing Company, *El Nuevo Día*, *La Prensa*, the *Reforma Group*, Reuters Ltd., *El Tiempo*, Tribune Company, *Asociación para la Defensa del Periodismo Independiente* (PERIODISTAS), Inter-American Press Association, *Colegio de Periodistas de Costa Rica*, Article 19 Global Campaign for Free Expression, Center for Justice and International Law (Cejiil), World Press Freedom Committee, and Open Society Justice Initiative.

<sup>30</sup> Judge Sergio García Ramírez issued a concurring reasoned vote in the case in question.

<sup>31</sup> On August 24, 2004, the Criminal Court of the First Judicial Circuit of San José issued a ruling in compliance with the decision of the Inter-American Court, in which it ordered the cancellation of the registration of Herrera in the Judicial Register of Criminals and the other provisions contained in the judgment of November 12, 1999.

<sup>32</sup> Inter-Am. Ct. H.R., *Herrera Ulloa Case v. Costa Rica*. Judgment of June 2, 2004, Series C, No. 107, par. 116.

<sup>33</sup> *Id.*, par. 129.

consistent with the principles of democratic plurality. The distinction in this instance is founded, therefore, not on the nature of the individual, but on public interest in their activities or actions.<sup>34</sup>

29. The Court further considered that *exceptio veritatis* had been disallowed in the criminal proceeding against Herrera Ulloa because the journalist had failed to show the veracity of the facts attributed by the Belgian media to the Costa Rican former diplomat. The Court determined that such a requirement constituted an excessive limitation on freedom of expression, since it had a “deterrent, intimidating and inhibitory effect” on journalists and, therefore, impeded discussion of matters of public interest.<sup>35</sup>

#### **b. Ricardo Canese Case v Paraguay (2004)**

30. In August 1992, in the framework of the political campaign for the 1993 presidential elections, the candidate Ricardo Nicolás Canese Krivoshein made statements to the Paraguayan media in which he questioned the suitability of his rival, the candidate Juan Carlos Wasmosy, to whom he attributed alleged irregularities in connection with the construction of the Itaipu binational hydroelectric plant and his alleged links to the family of former dictator Alfredo Stroessner. Part of the construction of the plant was entrusted to the company CONEMPA, whose board of directors Wasmosy had chaired. On October 23, 1992, the directors of CONEMPA filed suit against Canese for the crimes of defamation and slander. In a judgment of March 22, 1994, the First Lower Criminal Court convicted Canese, finding him guilty of both offenses, sentenced him to four months in prison, and ordered him to pay a fine and costs. The Court also imposed civil penalties on him. The decision was appealed and on November 4, 1997, the Third Chamber of the Court of Criminal Appeals decided to recategorize the crimes of which Canese was accused and, classifying them as defamation, reduced the prison term to two months and lowered the fine. This decision also prompted multiple appeals from the parties. On May 2, 2001, the Criminal Chamber of the Supreme Court of Justice dismissed a motion for annulment, refused a motion for review, and, in response to a motion for appeal, confirmed the decision and judgment of November 4, 1997. During the trial, Ricardo Canese was denied the possibility of travel outside the country on several occasions.

31. The Inter-American Commission on Human Rights received the petition in the case on July 2, 1998. After the appropriate processing, on June 12, 2002, the Commission submitted an application to the Court against the State of Paraguay,<sup>36</sup> in which it requested it to determine if the State had violated, *inter alia*, Article 13 of the American Convention on Human Rights.

32. On August 12, 2002, Ricardo Canese and his attorneys filed a motion for review with the Criminal Chamber of the Supreme Court of Justice of Paraguay. On December 11, 2002, the Criminal Chamber accepted the motion for review, annulled the judgments of March 22, 1994, and November 4, 1997, absolved Mr. Canese, and struck all the proceedings in the case from the record. As part of its reasoning, the court said that the new Criminal Code—in

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<sup>34</sup>*Id.*, par. 129.

<sup>35</sup> *Id.*, par. 132 y par. 133.

<sup>36</sup> Several international organizations that promote and defend freedom of expression, as well as journalists' associations and media organizations submitted *amici curiae* briefs. They include, *Asociación por los Derechos Civiles* (ADC), Inter-American Press Association, and *Asociación para la Defensa del Periodismo Independiente* (PERIODISTAS).

force since February 1999-contained grounds for exemption from criminal liability in cases of public interest.

33. On August 31, 2004, the Inter-American Court of Human Rights handed down a judgment in which it found the State of Paraguay guilty, *inter alia*, of violation of the right to freedom of thought and expression to the detriment of Ricardo Canese, and ordered the payment of an indemnity to Mr. Canese, as well as costs.<sup>37</sup>

34. The judgment of the Court reiterated the concept that a greater margin of tolerance should exist in the case of statements and opinions expressed in the course of public debate and on matters of public interest.<sup>38</sup>

35. In its considerations regarding Article 13 of the American Convention, the Inter-American Court underscored the importance of freedom of expression in the framework of an electoral campaign, insofar as it constitutes "(...) an essential tool for the formation of public opinion among voters, strengthens the political race among the various candidates and parties taking part in the elections, and becomes a genuine instrument for analysis of the political platforms put forward by the different candidates, which enables greater transparency and oversight of future authorities and their administration."<sup>39</sup> The Court mentioned the need to protect freedom of expression in the framework of an election because everyone should be able to investigate and question the capacity and suitability of the candidates, and to disagree and challenge their proposals, in order to form an opinion with prior to casting a vote.<sup>40</sup>

36. According to the judgment in question, Ricardo Canese was referring to a matter of public interest in his statements,<sup>41</sup> and the media, in transmitting them to the voters, helped to ensure that the electorate had more information and "different opinions on which to base decisions."<sup>42</sup>

37. In this case, the Court determined that not only the conviction imposed on Canese for eight years, but also the restrictions that prevented him from leaving the country, and the criminal trial itself constituted "an unnecessary and excessive punishment for the statements made by the alleged victim in the framework of an electoral campaign (...); as well as limiting open debate on matters of public interest and concern and restricting Mr. Canese in the exercise of freedom of thought and expression for the remainder of the electoral campaign."<sup>43</sup> It is clear from the reasoning contained in the judgment that the Court did not consider that any pressing social interest existed that might warrant criminal penalization.

38. Furthermore, the Court found that the criminal punishment, prosecution and restraint from leaving the country amounted to indirect methods of restricting the freedom of

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<sup>37</sup> Ad-hoc Judge Emilio Camacho Paredes made public his concurring reasoned vote.

<sup>38</sup> Cf. *Ricardo Canese Case v. Paraguay*. Judgment of August 31, 2004, series C, No. 111, par. 97.

<sup>39</sup> *Id.*, par. 88.

<sup>40</sup> *Id.*, par. 90.

<sup>41</sup> *Id.*, par. 93.

<sup>42</sup> *Id.*, par. 94.

<sup>43</sup> *Id.*, par. 106.

expression of Mr. Canese, who, after the conviction was handed down, had been dismissed from the media organization where he worked.

**D. Progress in reforms and judicial interpretations in light of the standards of the inter-American system for protection of human rights**

39. While the successful abolition of *desacato* laws and reform of laws on offenses against honor have not been the norm in the Hemisphere, in those countries where they have been accomplished, the foregoing has entailed a very significant stride toward the creation of a favorable climate for the full exercise of freedom of expression and consolidation of democracy. These changes are encouraging, and in some cases, reveal an emerging pattern of significant change in political culture. Particularly noteworthy are the cases of El Salvador, Panama and Peru. In other states, by contrast, legislative reform processes have stalled or restrictive judicial interpretations have been adopted.

40. On October 28, 2004, the Legislative Assembly of El Salvador adopted a reform of Article 191 of the Criminal Code, in order to exclude criminal classification of unfavorable opinions or ideas on concerns of public interest expressed or circulated by journalists and published in the media in the regular exercise of their activities. The media were also excluded from liability. The new approved Article provides:

Art. 191.- Unfavorable opinions in the form of political, literary, artistic, historical, scientific, religious, or professional criticism, or unfavorable ideas expressed by individuals via any medium in exercise of the right to freedom of expression, are not punishable provided that the way in which they are made is not intentionally libelous or slanderous intent or an attempt to attack the privacy or reputation of a person.

*Also not punishable are unfavorable opinions in the form of political, literary, artistic, historical, scientific, religious, or professional criticism, or unfavorable ideas expressed or circulated by journalists through news, reports, journalistic investigations, articles, editorials, caricatures, and, in general, any notes by journalists published in print, broadcast, and electronic media, in the exercise of their duty to inform the public by virtue of the right to information or in the exercise of their position or function.*

*In none of the situations governed by the foregoing clauses shall any type of liability to criminal prosecution be incurred by any print, broadcast and electronic media for publication of the above-mentioned opinions or ideas, or any that they publish in the legitimate exercise of their right to inform the public.”* (Italics added. The last two paragraphs were introduced by the reform in question).

41. In the case of Panama, the Office of the Special Rapporteur has mentioned its specific concern about the existence and use of defamation (libel and slander) and *desacato* laws, which had enabled a number of individuals to be prosecuted, harassed and jailed for expressing their opinions. In 2003, in a report adopted on the situation of freedom of expression in Panama, the Office of the Special Rapporteur recommended that the Panamanian State repeal all *desacato* laws<sup>44</sup>. Of particular concern was that *desacato* was recognized in Article 33 of the Panamanian Constitution, which said:

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<sup>44</sup> IACHR, *Report on the Situation of Freedom of Expression in Panama*. Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.117, Doc. 47, July 3, 2003, par. 160.

The following persons may impose summary penalties in the cases and terms strictly provided by law:

1. Government servants with command and jurisdictional powers, who may fine or have arrested any person who insults or acts offensively toward them in course of the performance of their functions or in any act that results from the performance thereof.

42. In 2004, through the efforts of the Ombudsman of Panama, the Legislative Assembly approved the elimination of that provision. The constitutional reform was published in the Official Gazette of November 15, 2004.<sup>45</sup> The Office of the Special Rapporteur underscores the importance of this progress on the part of the Panamanian State and urges its authorities to continue these processes, in order to derogate all provisions that recognize *desacato*. It also invites the authorities to set in motion the necessary processes to amend the laws on libel and slander with respect to expressions directed at public officials, public figures, or private persons who voluntarily become involved in affairs of public interest, with a view to moving progressively toward their decriminalization. This reform is needed in the country given the high number of defamation suits filed against journalists, social communicators and media collaborators.<sup>46</sup> On August 25, 2004, the then-President of Panama, Mireya Moscoso pardoned 87 journalists through Executive Decree 317.<sup>47</sup> The very existence of these defamation laws, combined with the precedent set by the above-mentioned lawsuits, could be profoundly intimidating and curb the full exercise of freedom of expression, given the possible uses to which such provisions lend themselves.

43. In its 2003 annual report, the Office of the Special Rapporteur mentioned that Peru had been the only country that year to abolish the crime of *desacato*. The process initiated in 2002 also led to a recommendation from the Committee on Human Rights of the Peruvian Congress, which cited the arguments of the IACHR and the recommendations of the Office of the Special Rapporteur on the need to abolish this classification.<sup>48</sup> The abolition was approved on May 1, 2003. The eliminated Article provided:

Whoever, threatens, injures or otherwise gives offense to the dignity or decorum of a public official as a result or in the course of the exercise of their functions, shall be sentenced to imprisonment for a term not to exceed three years.

If the offended party is the president of the one of the branches of government, the penalty shall not be less than two years nor more than four years.

44. The Rapporteur has also received information on judicial decisions that are consistent in some respects with its recommendations and those of the Commission,<sup>49</sup>

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<sup>45</sup> Report of the Special Delegate for Freedom of Expression and Access to Information attached to the Office of the Ombudsman of the Republic of Panama, December 14, 2004.

<sup>46</sup> In its 2002 report, the Office of the Special Rapporteur, citing a report prepared by the Special Delegate for Freedom of Expression attached to the Office of the Ombudsman of Panama, mentioned some 90 lawsuits against journalists, communicators or media collaborators.

<sup>47</sup> *La Prensa*, August 26, 2004, in *Periodistas Frente a la Corrupción* (PFC), "87 periodistas indultados", <http://portal-pfc.org/index.php?seccion=perseguidos/2004/051.html>

<sup>48</sup> Opinion of the Committee on Human Rights on bills 3573/2002-CR and 4054/2002-CR proposed for the abolition of Article 374 of the Criminal Code, Congress of Peru, November 15, 2002.

<sup>49</sup> Chapter II of this report mentions several cases in the sections on progress in the situation of freedom of expression in each country.

particularly in the area of offenses against honor. As regards the crime of *desacato*, the Office of the Special Rapporteur notes the decision of March 19, 2004, of the Supreme Court of Justice of Honduras, whose Criminal Chamber ruled in favor of the abolition of *desacato* as recognized in Article 345 of the Criminal Code of Honduras. The Honduran Court considered that the provision afforded unnecessary protection to public officials in the exercise of their functions. The Office of the Special Rapporteur urges the Honduran State to take account of the arguments and recommendation of this domestic tribunal and, in light of the jurisprudence of the inter-American system, to abolish the crime of *desacato*.

45. In contrast, the Constitutional Chamber of the Supreme Court of Justice of Venezuela, in a decision of July 15, 2003, validated the crime of *desacato* in its examination of a motion for nullity on grounds of unconstitutionality filed against several Articles of the Criminal Code that recognize this crime or permit other provisions of criminal law to be used in the same way and for the same purposes. The Commission expressed its disquiet at this decision in its Report on the Situation of Human Rights in Venezuela.<sup>50</sup>

46. The Office of the Special Rapporteur has not received information that any states other than those mentioned in this report have concluded legal reforms in the past biennium to abolish the crime of *desacato* or amend laws on offenses against honor. However, it has received information about the processing of law bills to that end in Peru, Costa Rica and Chile, as well as within some federated countries. The Office of the Special Rapporteur is worried at continuous reports of judicial proceedings in several countries in the Hemisphere instituted against journalists, communicators, or private citizens who express opinions on matters of public interest. The Office of the Special Rapporteur urges the Member States to move forward with legislative reform processes underway and to adopt all the measures necessary to ensure full exercise of freedom of expression, bearing in mind the jurisprudence of the inter-American system.

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<sup>50</sup> See: <http://www.cidh.org/Relatoria/listDocuments.asp?categoryID=10>