

## CHAPTER III

### CASE-LAW<sup>1</sup>

#### A. Introduction

1. In this chapter, the Office of the Special Rapporteur for Freedom of Expression updates the studies previously published in its annual reports concerning the case-law of the Inter-American Court of Human Rights<sup>2</sup>, the European Court of Human Rights<sup>3</sup>, and the Human Rights Committee of the United Nations<sup>4</sup> regarding the freedom of expression.

2. Through these chapters the Office of the Special Rapporteur for Freedom of Expression seeks to encourage study of the comparative case-law on compliance with the mandate of the Heads of State and Government issued conferred at the Third Summit of the Americas, held in Quebec City, Canada, in April 2001.<sup>5</sup>

#### B. Case-law of the Inter-American Court of Human Rights

3. Article 13 of the American Convention recognizes that each individual has the right to freedom of thought and expression noting that:

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..

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<sup>1</sup> Some sections of this chapter were prepared through the research done by Mr. Wayne DeFreitas, a second-year student at the George Washington University Law School who served as an intern with the Office of the Special Rapporteur for Freedom of Expression from August to November 2006.

<sup>2</sup> IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2002. Volume III. Chapter III.

<sup>3</sup> IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2003. Volume III. Chapter III.

<sup>4</sup> IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2004. Volume III. Chapter III.

<sup>5</sup> In the course of that summit meeting, the Heads of State and Government ratified the mandate of the Special Rapporteur for Freedom of Expression, noting that the States will continue "to support the work of the inter-American human rights system in the area of freedom of expression through the Special Rapporteur for Freedom of Expression of the IACHR, as well as proceed with the dissemination of comparative jurisprudence...."

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.

4. In its Annual Report on 2002, the Office of the Special Rapporteur for Freedom of Expression outlined the case-law of the Inter-American Court of Human Rights on the freedom of expression. Until then, the case-law of the Inter-American Court on freedom of expression included Advisory Opinion OC-5/85 on Compulsory Members in an Association Prescribed by Law for the Practice of Journalism<sup>6</sup> and the judgments in the cases of *The Last Temptation of Christ (Olmedo Bustos et al.)*<sup>7</sup> and *Ivcher Bronstein*.<sup>8</sup> Since then, the Inter-American Court has produced four new decisions specifically related to violations of Article 13 of the American Convention, which have made it possible to continue going forward creating important case-law on freedom of expression in the inter-American human rights system.

5. The issues addressed in this section have been sorted under the broad headings of defamation and access to information. The cases that appear under the heading of defamation refer to situations in which legal actions were taken for *desacato* or criminal defamation presumably for causing harm to persons through the exercise of the right to freedom of expression. The case examined under the heading of right of access to information has to do with the refusal of a government official to provide information without having a valid justification for doing so.

## 1. Defamation

*Case of Mauricio Herrera Ulloa ("La Nación") v. Costa Rica (July 2, 2004)*<sup>9</sup>

6. In 1995, journalist Mauricio Herrera Ulloa, of the daily newspaper *La Nación* of San José, published several articles in which he reproduced in part information that had appeared in the Belgian press raising questions about Félix Przedborski Chawa, an honorary diplomat of Costa Rica before the International Atomic Energy Agency in Austria. He brought a criminal suit against Herrera Ulloa for defamation, and publication of offenses, and a civil suit against the journalist and *La Nación*, arguing that they were jointly and severally liable for civil damages.

7. On May 29, 1998, the Criminal Court of the First Judicial Circuit of San José acquitted Herrera Ulloa for the crimes of defamation, slander, and publication of offenses. This first judgment was appealed on a motion for cassation, and vacated by resolution of May 7, 1999, which ordered a new trial. The trial was held again, and on November 12, 1999, the Criminal Court of the First Judicial Circuit of San José issued a judgment in which it found evidence of truth

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<sup>6</sup> I/A Court H.R. *The Compulsory Member of Journalists 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, November 13, 1985. Series A No. 5. Available at: [http://www.corteidh.or.cr/docs/opiniones/seriea\\_05\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_05_esp.pdf).

<sup>7</sup> I/A Court H.R. *"The Last Temptation of Christ" Case (Olmedo Bustos et al.)*. Judgment of February 5, 2001. Series C No. 73. Available at: [http://www.corteidh.or.cr/docs/casos/articulos/Seriec\\_73\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/Seriec_73_esp.pdf).

<sup>8</sup> I/A Court H.R. *Ivcher Bronstein Case*. Judgment of February 6, 2001. Series C No. 74. Available at: [http://www.corteidh.or.cr/docs/casos/articulos/Seriec\\_74\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/Seriec_74_esp.pdf).

<sup>9</sup> I/A Court H.R. *Herrera Ulloa ("La Nación") Case*. Judgment of July 2, 2004. Series C No. 107. Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_107\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_esp.pdf).

(*exceptio veritatis*) inadmissible, and convicted Herrera Ulloa as the author responsible for four criminal charges of defamation by publishing offenses. In addition, the journalist and the daily newspaper were held to be jointly and severally liable for civil damages, and ordered to pay compensation for the alleged moral harm caused. The judgment also ordered publication of the operative part of the judgment in the newspaper *La Nación*. The newspaper *La Nación* was ordered to remove the link on its website between the last name "Przedborski" and the articles that were the basis for the suit, and to establish a link between those articles and the operative part of the judgment. In addition, as a result of the judgment, the journalist's name had to be included in the judicial registry of criminals. The judgment was appealed on a motion of cassation, and upheld by the Third Chamber of the Supreme Court of Justice in a resolution of January 24, 2001.

8. On March 1, 2001, Herrera Ulloa and the representatives of *La Nación* filed a petition with the Inter-American Commission on Human Rights. On January 28, 2003, the Commission submitted an application against the Costa Rican State before the Inter-American Court, for it to decide, among other things, whether the State had violated Article 13 of the American Convention on Human Rights, vacate the conviction, and make reparation to the victims. On July 2, 2004, the Inter-American Court handed down a judgment in which it found that the State had violated the right to freedom of expression of Mauricio Herrera Ulloa, and ordered, *inter alia*, that it vacate in its entirety the judgment of liability of November 12, 1999, against the journalist.

9. In its considerations, and taking as its point of departure its case-law in the area, the Inter-American Court reiterated the essential role of the freedom of expression in a democratic society. In the words of the Court:

Without effective freedom of expression, exercised in all its forms, democracy is enervated, pluralism and tolerance start to deteriorate, the mechanisms for control and complaint by the individual become ineffectual and, above all, a fertile ground is created for authoritarian systems to take root in society.<sup>10</sup>

10. The Court also argued that those who are engaged in activities and influence situations of public interest must be more exposed to public scrutiny and to debate than all others, for that exposure is essential to the functioning of democracy:

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>11</sup>

11. The Court clarified that this did not mean that the honor of public officials must not enjoy any legal protection, but that such protection must be in keeping with the principles of democratic pluralism. The distinction in question, in the view of the Court, is based not on the nature, of the subject, but on the public interest in his or her activities or actions.

12. The Court also considered that in the criminal proceeding against Herrera Ulloa he was convicted for not having proven the truthfulness of the facts attributed by the Belgian media to the former Costa Rican diplomat. The Court determined that such a demand constituted an excessive limitation on the freedom of expression, since it produced a "deterrent, intimidating, and

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<sup>10</sup> *Id.*, para. 116.

<sup>11</sup> *Id.*, para. 129.

chilling" effect on journalists, and, accordingly, stood in the way of debate on matters of public interest.<sup>12</sup>

13. The Court's judgment includes the concurring vote of its president. In that vote, Judge García Ramírez asks whether in situations such as those raised in this case "the criminal law avenue is the one best suited to getting at the crux of the problem ... or whether some other avenue, such as administrative or civil law, for example, might be the better juridical response...." Next, he argues that "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>13</sup>

*Case of Ricardo Canese v. Paraguay (August 31, 2004)*<sup>14</sup>

14. In August 1992, in the context of the political campaign for the 1993 presidential elections, candidate Ricardo Canese made statements to the Paraguayan media that called into question the suitability of candidate Juan Carlos Wasmosy, who he accused of involvement in irregularities related to the construction of the binational hydroelectric plant of Itaipú and a relationship with the family of Alfredo Stroessner. Wasmosy had been chairman of the Board of Directors of CONEMPA, a company that had been in charge, in part, of construction of the hydroelectric plant.

15. On October 23, 1992, the directors of CONEMPA sued Canese for criminal defamation. In a judgment of March 22, 1994, the Judge of First Instance for Criminal Matters of the First Circuit convicted Canese of both offenses and imposed a penalty of four months in prison and a fine and costs. The court also found him civilly liable. The decision was appealed and on November 4, 1997, the Third Chamber of the Court of Appeals for Criminal Matters ruled that it would re-characterize the offenses attributed to Canese, reducing the prison term imposed to two months, and also reducing the fine. This decision was also appealed by the parties. On May 2, 2001, the Criminal Chamber of the Supreme Court of Justice ruled to dismiss a motion to vacate, to find inadmissible a motion for review, and with respect to a writ of appeal, it affirmed the decision of November 4, 1997. In the course of the proceeding, Ricardo Canese had been denied authorization to travel outside the country on several occasions.

16. On July 2, 1998, the Inter-American Commission on Human Rights received the complaint in this case. On June 12, 2002, the Commission submitted the application against the Paraguayan State to the Court, so that it might decide whether the State had violated, *inter alia*, Article 13 of the American Convention on Human Rights.

17. In the meantime, 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 found the motion for reconsideration admissible,

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<sup>12</sup> *Id.*, para. 133.

<sup>13</sup> *Id.*, concurring vote of Sergio García Ramírez, paras. 14-5.

<sup>14</sup> I/A Court H.R. *Ricardo Canese Case*. Judgment of August 31, 2004. Series C No. 111. Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_111\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_esp.pdf).

vacated the judgments of March 22, 1994, and November 4, 1997, acquitted Mr. Canese of guilt and lifted the penalty imposed, and ordered that all records related to the case be expunged. As part of its reasoning, the judicial body noted that the new Criminal Code— in force since February 1999—contained grounds for exemption from criminal liability in cases of public interest.

18. On August 31, 2004, the Inter-American Court of Human Rights handed down a judgment attributing responsibility to the Paraguayan State, among other things, for violating the right to freedom of thought and expression to the detriment of Ricardo Canese.

19. The Court's judgment reiterated the concept that in the case of assertions and value judgments voiced in the course of political debates or matters of public interest, there should be a greater margin of tolerance.

20. In its considerations on Article 13 of the American Convention, the Inter-American Court highlighted the importance of the freedom of expression in the framework of an election campaign, insofar as it constitutes:

... 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>15</sup>

21. The Court noted the need to protect the freedom of expression in the context of an electoral contest, for everyone must be able to inquire into and question the capacity and suitability of the candidates, and to take issue with and contrast their proposals so that the voting public might make a judgment with a view to exercising the right to vote.

22. In the opinion of the Court, when Canese made his statements to the media regarding a matter of public interest, and the media conveyed them to the voters, they helped the electorate have more information and "additional elements for forming an opinion and taking decisions."<sup>16</sup>

23. In this case, the Court decided that not only the guilty verdict imposed on Canese for eight years, but also the restrictions on leaving the country, and the criminal proceeding itself constituted an "unnecessary and excessive punishment for the statements that the alleged victim made in the context of the electoral campaign...; and 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."<sup>17</sup>

24. Additionally, the Court considered that the criminal sanction, trial, and prohibition on leaving the country constituted indirect means of restricting Mr. Canese's freedom of expression; after the conviction, he was dismissed from the media outlet where he had worked.<sup>18</sup>

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<sup>15</sup> Id., para. 88.

<sup>16</sup> Id., para. 94.

<sup>17</sup> Id., para. 106.

<sup>18</sup> Id., para. 107.

*Case of Humberto Palamara Iribarne v. Chile (November 22, 2005)*<sup>19</sup>

25. In March 1993, Humberto Palamara Iribarne, a retired officer of the Chilean Navy, worked as a civilian employee of the Office of the Commander-in-Chief (Comandancia en Jefe) of the 3<sup>rd</sup> Naval Zone in Punta Arenas. Before his retirement on January 1, 1993, Palamara Iribarne had written a book with the title "Ética y Servicios de Inteligencia" (Ethics and Intelligence Services), which addressed "aspects related to the need for intelligence personnel, in order to prevent human rights violations, to be governed by ethical conduct." In January and February 1993 Palamara Iribarne tried to publish and sell the book, to which end he contracted with a local press to publish 1,000 copies.

26. Palamara Iribarne had not sought any authorization from the naval authorities to publish his book. On March 1, 1993, the military authorities notified Palamara Iribarne that the publication of his book had been prohibited, considering that its content "constituted an attack on the national security and defense" ("*atentaba contra la seguridad y defensa nacionales*"). That same day the Naval Judge of Magallanes ordered Palamara Iribarne to halt the publication and to "accompany the Chief of the Department to remove all antecedents of the book that might exist at the press." Palamara Iribarne did not go to the press that day. As a result, criminal proceedings were instituted at the Naval Court of Magallanes against Palamara Iribarne for the crimes of "disobedience" and "breach of military duties." On March 1, 1993, in the context of that criminal proceeding, all the copies of "Ética y Servicios de Inteligencia" at the press and at Palamara Iribarne's home were seized, along with the galley proofs of the book. In addition, Palamara Iribarne was required to erase the full text of the book from the hard drive of his computer.

27. On June 10, 1996, the Naval Judge of Magallanes handed down a judgment against Palamara Iribarne for the crimes of disobedience and breach of military duties, sentencing him, *inter alia*, to "61 days of lesser military prison in its minimal degree for breach of military duties," to "540 days of military imprisonment for military disobedience," to "the penalty ... of the loss of military status" and "to the seizure of [several] copies of the book." The resolution was appealed and on January 2, 1997, the Military Court reduced the penalty for the crime of military disobedience to 61 days, and Palamara Iribarne was absolved with respect to the other crimes.

28. On March 26, 1993, Palamara Iribarne had been ordered to maintain the confidentiality of the judicial case against him, and to refrain from making "public or private, written or spoken criticisms that would run to the detriment of or harm the image of the Institution, the naval authority, or those who are carrying out the judicial case and administrative investigation against him." Despite this prohibition, Palamara Iribarne called a press conference criticizing the action of the Naval Prosecutor's Office in the cases against him. As a result, Palamara Iribarne was indicted and placed on trial for the crime of *desacato*. On September 7, 1994, the Naval Court of Magallanes acquitted Palamara Iribarne of the *desacato* charges. Even though that ruling was not appealed, in November 1994 the Naval Judge of Magallanes authorized the Naval Judge of Valparaíso to forward the record for "consultation" with the Military Court, which, in January 1995, overturned the judgment of the trial court, and imposed a penalty, against Palamara Iribarne, of 61 days of prison, as well as a fine of 11 times the minimum monthly wage.

29. On January 16, 1996, the Inter-American Commission on Human Rights received the complaint in this case. On April 13, 2004, the Commission submitted the application to the Inter-American Court to decide whether the State had violated, among others, Article 13 of the American Convention on Human Rights. On November 22, 2005, the Inter-American Court of

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<sup>19</sup> I/A Court H.R., *Humberto Palamara Iribarne Case*. Judgment of November 22, 2005. Series C No. 135. Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_135\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_esp.pdf).

Human Rights handed down a judgment in which it held the Chilean State responsible for violations, *inter alia*, of the right to the freedom of thought and expression to the detriment of Humberto Palamara Iribarne.

30. Among its initial considerations, the Court noted that it must determine, first, “whether the State engaged in acts of prior censorship incompatible with the American Convention on prohibiting Mr. Humberto Antonio Palamara Iribarne from publishing his book ..., and upon seizing the published copies of it, [subjecting him] to a proceeding for the crimes of disobedience and breach of military duties.” Second, the Court indicated that it had to establish “whether the imputation of the crime of *desacato* through the military criminal proceeding brought against him ... for his stations, as well as the criminal and military sanctions imposed as a result of that proceeding, and the administrative investigation that was begun and later archived unduly restricted his right to freedom of thought and expression.”<sup>20</sup>

31. The Court noted that the dissemination and expression of thought are indivisible. In this regard, the Court held that:

In the instant case, for the State to effectively guarantee Mr. Palamara Iribarne’s right to freedom of thought and expression it did not suffice for it to allow him to write his ideas and opinions, rather, that protection included the duty not to restrict their dissemination, so that he could distribute the book using whatever appropriate means to convey those ideas and opinions to the largest number of persons, and for them to be able to receive that information.<sup>21</sup>

32. In this case, the Court decided not to address the issue of the supposed duty of confidentiality that Palamara Iribarne has with respect to certain information included in his book. The Court indicated that “it was logical that Mr. Palamara Iribarne’s professional and military training and experience would help him write the book, without this implying *per se* an abuse of the exercise of his freedom of thought and expression.”<sup>22</sup> The Court added that the duty of confidentiality does not cover information regarding the institution or the functions it performs when they would have been that information would have been made public anyway.<sup>23</sup> Accordingly, the Court concluded:

... the control measures adopted by the State to impede the dissemination of the book “*Ética y Servicios de Inteligencia*” by Mr. Palamara Iribarne constituted acts of prior censorship incompatible with the standards set forth in the Convention, given that there was no element which, in light of that treaty, made it possible to negatively affect that right to openly disseminate his work, protected at Article 13 of the Convention.<sup>24</sup>

33. It should be emphasized that the Court held that “it may so happen that the employees or officers of an institution must maintain the confidentiality of certain information to which they have access in the performance of their functions, when the content of that information is covered by that duty. The duty of confidentiality does not reach information regarding the institution or the functions it performs if it has already been made public. Nonetheless, in certain

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<sup>20</sup> *Id.*, para. 70.

<sup>21</sup> *Id.*, para. 73.

<sup>22</sup> *Id.*, para. 76.

<sup>23</sup> *Id.*, para. 77.

<sup>24</sup> *Id.*, para. 78.

cases, the breach of the duty of confidentiality may give rise to administrative, civil, or disciplinary liability."<sup>25</sup>

34. The Court reiterated that the right to freedom of expression was not an absolute right, and that Article 13(2) provides for the possibility of establishing restrictions by way of subsequent liability. In addition, the Court reaffirmed that "the criminal law is the most restrictive and severe means of establishing responsibilities with respect to illicit conduct."<sup>26</sup>

35. The Court considered that the opinions put out by Palamara Iribarne in relation to the actions taken by the Naval Prosecutor of Magallanes in the context of the military criminal process against him "enjoy greater protection that [allows for] a margin of openness for a wide-ranging debate, which is essential to the functioning of a truly democratic system."<sup>27</sup> The Court indicated that this different threshold of protection "is not based on the quality of the subject, but on the nature of the public interest in the activities of a given person, in this case ... the actions of the prosecution in the military criminal proceeding."<sup>28</sup>

36. As for the crime of *desacato*, the Court was of the view that in this case use had been made of "criminal prosecution in a manner disproportionate and unnecessary in a democratic society, by which Mr. Palamara Iribarne was deprived of the exercise of his right to freedom of thought and expression, in relation to the critical opinions he held regarding matters that directly affected him and were directly related to the way in which the military justice authorities performed their public functions in the proceedings to which he was subjected." The Court continued explaining that "the legislation on *desacato* applied to Mr. Palamara Iribarne established disproportionate sanctions for criticizing the operation of government institutions and their members, suppressing the debate essential for the operation of a truly democratic system, and unnecessarily restricting the freedom of thought and expression."<sup>29</sup>

37. The Court recognized the forward movement represented by repeal of the *desacato* statutes from the Criminal Code in Chile. Nonetheless, it observed that the domestic order in Chile still retained provisions on *desacato* in the Code of Military Justice. Accordingly, it concluded: "On having included in its domestic law *desacato* provisions at odds with Article 13 of the Convention, some still in force, Chile has breached the general obligation to adopt provisions of domestic law that emanates from Article 2 of the Convention."<sup>30</sup>

## 2. Right to Access to Information

### *Case of Marcel Claude Reyes et al. v. Chile (September 19, 2006)*<sup>31</sup>

38. On December 24, 1991 the company *Forestal Trillium Ltda.* obtained approval from the Foreign Investment Committee of Chile to undertake a deforestation project in the zone known as "Río Córdor." On May 6, 1998 Marcel Claude Reyes, director of the *Fundación Terram*, sent a

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<sup>25</sup> Id., para. 77.

<sup>26</sup> Id., para. 79.

<sup>27</sup> Id., para. 82.

<sup>28</sup> Id., para. 84.

<sup>29</sup> Id., para. 88.

<sup>30</sup> Id., para. 95.

<sup>31</sup> I/A Court H.R. *Claude Reyes et al. Case*. Judgment of September 19, 2006. Series C No. 151. Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_esp.pdf).

letter to the executive vice president of the Foreign Investment Committee of Chile, requesting information so as to evaluate “the commercial, economic, and social factors of the Río Cónдор project, to gauge its impact on the environment ... and to activate social oversight over the government agencies that have or have had involvement in carrying out the project.”<sup>32</sup>

39. The executive vice president of the Committee invited Marcel Claude Reyes and Arturo Longton to a meeting on May 19, 1998, to discuss the details of the request for information and to exchange information. In a fax sent later on the same date, part of the information requested was provided. Fundación Terram sent letters on June 3 and July 2, 1998, reiterating its request for information. The information was never provided, nor was a formal refusal to submit it, stating the reasons, ever given.

40. On July 27, 1998, Marcel Claude, Arturo Longton, and Sebastián Cox filed a *recurso de protección* before the Court of Appeals of Santiago asking that the Foreign Investment Committee be ordered to answer the request for information, and make the information available in a reasonable time. On July 29, 1998, the action was found inadmissible due to lack of legal foundation. Subsequently, on July 31, 1998, they filed a motion for reconsideration to get the court’s decision overturned; it was denied on August 6, 1998. Finally, on July 31, 1998, they filed a complaint appeal (*recurso de queja*) before the Supreme Court. On August 18, 1998, this request was considered inadmissible.

41. On December 17, 1998, the Inter-American Commission on Human Rights received the complaint in this case. On July 8, 2005, the Commission submitted the application to the Inter-American Court to decide whether the failure to produce the information as well as the lack of an effective judicial remedy to challenge it gave rise to the international responsibility of the State for violating the rights to freedom of thought and expression, and to judicial protection, established in Articles 13 and 25 of the Convention, in relation to Articles 1(1) and 2 of that treaty. On September 19, 2006, the Inter-American Court of Human Rights issued a judgment in which it held that the Chilean State is responsible, *inter alia*, for violating the right to freedom of thought and expression to the detriment of Marcel Claude Reyes and Arturo Longton.

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<sup>32</sup> The letter from the *Fundación Terram* requested the following information from the Committee:

1. The contracts entered into by the Chilean State and the foreign investor with respect to the Río Cónдор project, indicating the date and notarial office in which these were entered into, and a copy of those documents, since they were instruments.
2. The identities of the investors in the project, foreigners and/or nationals.
3. The information that the Foreign Investment Committee considered, in Chile and abroad, to ensure the seriousness and appropriateness of the investors and the agreements of that Committee in which this record was accepted as sufficient.
4. The total amount of the investment authorized for the Río Cónдор project, the means and dates of the capital transfers, and the existence of loans associated with the project.
5. The capital that actually entered the country to date, both real and in related loans.
6. Information in the hands of the Committee and/or that has been required by other public or private entities and that refers to the control of the obligations entailed in the securities of the foreign investment or the companies that participate in it, and whether the committee has taken note of any infraction or offense.
7. Information on whether the executive vice-president of this Committee has exercised the authority granted him by Article 15 of Decree-Law 600 to request, of all the public and private services or enterprises the reports and information required for attaining the Committee’s objectives. If so, that such information be made available to this entity.

42. In its decision, the Inter-American Court held that Article 13 of the Convention, on stipulating expressly the rights to “seek” and “receive” “information,” protects the right of every person to seek access to information controlled by the state, with the conditions allowed under the regime of restrictions in the Convention. In so deciding, the Inter-American Court became the first international court to emphasize that access to information is a human rights. In the words of the Court:

[Article 13] protects the right of persons to receive that information and the positive obligation of the state to provide it, such that the person can have access to that information or receive a well-founded response when, on some grounds permitted by the Convention, the state can limit access to it in a specific case. That information must be provided, without any need to show a direct interest in obtaining it, or that it somehow affects one personally, except in those cases in which a legitimate restriction applies. The fact of it being provided to one person makes it possible, in turn, for it to circulate in society, so that it may be known, accessed, and weighed. In this way, the right to freedom of thought and expression provides for protection of the right of access to information in the control of the state, which also clearly contains the two dimensions, individual and social, of the right to freedom of thought and expression, which must be guaranteed by the state simultaneously.<sup>33</sup>

43. In addition, in the context of the right to information, the Court established that it is governed by “the principle of maximum dissemination, which establishes the presumption that all information is accessible, subject to a limited regime of exceptions.”<sup>34</sup>

44. The Court recognized that this right may be subject to restrictions; however, they “must be those previously set by law to ensure that they not be left up to the authorities.” Those laws must be issued “for reasons of general interest and with the purpose for which they have been established.”<sup>35</sup> In addition, it clarified that “the restriction established by law must answer to an objective permitted by Article 13(2) of the American Convention”. In addition, the Court established that “the restrictions imposed must be necessary in a democratic society, which depends on their being aimed at satisfying an imperative public interest,”<sup>36</sup> placing the burden of proof of the need for possible restrictions of this right on the State.<sup>37</sup>

45. In this case, the Court considered that establishing restrictions on access to information in the control of the State through the practice of its authorities, without observing the limits set by the Convention, “creates fertile ground for the discretionary and arbitrary action of the state in classifying the information as secret, under seal, or confidential,” giving rise to juridical insecurity with respect to the exercise of this right and the powers of the state to restrict it. The Court considered that for this reason, on “not receiving the information requested, or a well-founded answer on the restrictions on their right of access to information in the control of the State, Messrs. Claude Reyes and Longton Guerrero were adversely affected as regards the possibility of exercising social oversight of the conduct of public affairs.”<sup>38</sup>

46. Finally, the Court viewed in a positive light that “Chile [has] made important strides forward in the terms of incorporating into its law the right of access to information in the control of

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<sup>33</sup> I/A Court H.R., *Claude Reyes et al. Case v. Chile*, para. 77.

<sup>34</sup> *Id.*, para. 92.

<sup>35</sup> *Id.*, para. 89.

<sup>36</sup> *Id.*, paras. 90-1.

<sup>37</sup> *Id.*, para. 92.

<sup>38</sup> *Id.*, para. 99.

the state, that include, among others, a constitutional reform, and that a law on that right is currently before the Chilean legislature.” Nonetheless, it understood that Chile, in keeping with Article 2 of the Convention, had to “adopt the measures necessary to ensure protection of the right of access to information in the control of the State, within which it must guarantee the effectiveness of an adequate administrative procedure for processing and resolving requests for information, set deadlines for resolving and delivering the information, and that it be under the responsibility of duly trained officials.”<sup>39</sup> On this point, the Court ordered the State to carry out “the training of the public organs, authorities, and agents in charge of requests for access to information in the control of the State on the provisions that govern this right, so as to incorporate the conventional standards that must be respected as regards restrictions on the access to that information.”<sup>40</sup>

### C. Case-law of the European Court of Human Rights

47. The European Convention for the Protection of Human Rights and Fundamental Freedoms contains a specific provision on the right to freedom of expression, Article 10, which reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

48. The Inter-American Court of Human Rights has compared Article 13 of the American Convention to Article 10 of the European Convention and Article 19 of the International Covenant on Civil and Political Rights, reaching the conclusion that the guarantees of freedom of expression contained in the American Convention were designed to be the most generous and to reduce to a minimum restrictions on the free circulation of ideas.<sup>41</sup>

49. In its Annual Report on 2003, the Office of the Special Rapporteur considered part of the extensive case-law of the European Court of Human Rights on the freedom of expression, noting its usefulness as “a valuable source that can shed light on the interpretation of this right in the Inter-American system, and serve as a useful tool for legal practitioners and interested people.”<sup>42</sup>

50. The following sections refer to cases that led to decisions of the European Court of Human Rights on issues related to the right to the freedom of expression as of 2004. The decisions

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<sup>39</sup> Id., para. 163.

<sup>40</sup> Id., para. 165.

<sup>41</sup> I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights)*. Advisory Opinion OC-5/85, para. 50.

<sup>42</sup> IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2003. Volume III. Chapter III, para. 2.

of the European Court may be used as an important reference to the comparative case-law when analyzing and interpreting provisions of the American Convention and the American Declaration similar to those of the European Convention.

51. The issues addressed in this section are divided into the following categories: defamation, public order, and prior censorship. The cases under the heading of defamation refer to situations in which legal defamation actions were brought for allegedly harming the reputation of persons through the exercise of the freedom of expression. The cases examined from the standpoint of public order have to do with situations in which restrictions were imposed on the basis that they were necessary to protect public order. The third section describes situations in which there was a prior restriction on publication.

52. It should be noted, as in the previous annual reports, that the cases related here are a selection of the case-law of the European Court since 2004 related to the right to the freedom of expression. The complete text of these cases can be examined at the website of the European Court of Human Rights.<sup>43</sup>

### 1. Defamation

#### *Amihalachioaie v. Moldova (April 20, 2004)*<sup>44</sup>

53. In 2000, a group of legislators and the Ombudsman filed an application to the Constitutional Court of Moldova to have it declare the unconstitutionality of Law No. 395-XIV, which ordered that all lawyers in Moldova must join the Union of Lawyers, a national organization that brought together the local bar associations in Moldova. On February 15, 2000, the Constitutional Court of Moldova decided that Law No. 395-XIV was unconstitutional. Gheorghe Amihalachioaie, president of the Union of Lawyers de Moldova, criticized the decision of the Constitutional Court in a local magazine. Subsequently, in an article published in that magazine, reference was made to what Amihalachioaie had said in that telephone conversation. On February 18, 2000, the president of the Constitutional Court informed Amihalachioaie that his comments were considered as showing “lack of regard of the Court” according to the Code of Constitutional Procedures in force. On March 6, 2000, Amihalachioaie was held liable by the Constitutional Court of Moldova and ordered to pay a fine.

54. In its judgment the European Court found that the restriction imposed by the Constitutional Court was provided for by law and that it had a legitimate end: to uphold the authority and impartiality of the judiciary. Nonetheless, it considered that the restriction on Amihalachioaie’s freedom of expression was not “necessary in a democratic society” for his comments were made in a context of profound debate around a matter of general interest: the decision of the Constitutional Court of Moldova around the requirement to belong to an organization in order to practice law in Moldova. The Court added that there was no “pressing social need” to justify the measure, and that while the fine was not significant, as it was near the statutory maximum penalty, it had a symbolic value on showing the State’s intention to inflict severe punishment on Amihalachioaie for his comments.

<sup>43</sup> Available at: <http://www.echr.coe.int>.

<sup>44</sup> *Amihalachioaie v. Moldova*, No. 60115/00, ECHR 2004. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Amihalachioaie&sessionid=9803166&skin=hudoc-en>.

*Chauvy et al. v. France (June 29, 2004)*<sup>45</sup>

55. On February 10, 1999, Gérard Chauvy, Francis Esmenard and the publishing house *Albin Michel* were ordered to pay a fine as civil reparation for damages to the detriment of Mr. and Mrs. Aubrac, members of the movement known in France as "*La Résistance*". The proceeding was brought in the French courts upon publication of the book "*Aubrac, Lyon 1943*," which described the chronology of events around "*La Résistance*" and several of its leaders in 1943. That text stated, *inter alia*, that Raymond Aubrac had betrayed Jean Moulin, a member of "*La Résistance*," resulting in his subsequent arrest, torture, and death by members of the Gestapo during the Second World War. The French courts ordered the publication of a notice warning of the contents of the book in five daily newspapers and that it be included in each of the copies of the book published from that date on.

56. In its decision, the European Court affirmed that the search for the historical truth is protected in the context of the right to the freedom of expression. Nonetheless, it noted that it did not have jurisdiction to determine the occurrence or determination of historical matters, indicating that such an endeavor is part of a continuing debate around certain events and their interpretation by historians.

57. The Court also considered that though there is a public interest in making known the circumstance of Jean Moulin's detention, it was necessary to balance that need to protect the reputation of Mr. and Mrs. Aubrac. The Court upheld the proportionality of the pecuniary sanctions and the publication of the warnings, noting that it found convincing the evidence presented by the State, indicating that Chauvy had not applied the fundamental rules of the historical method on writing "*Aubrac, Lyon 1943*." It also indicated that the measures were proportional to the interest protected (the reputation of Mr. and Mrs. Aubrac) because the French courts did not order (as they had asked them to) the destruction of the copies of the book nor did they prohibit its circulation.

*Karhuvaara and Iltalehti v. Finland (November 16, 2004)*<sup>46</sup>

58. On October 31, 1996, the daily newspaper *Iltalehti* published an article related to the criminal proceeding against Mr. A, an attorney from the city of Seinäjoki. The article was titled: "The wife [is] the Chairman of the Parliamentary Committee for Education and Culture – Lawyer from Seinäjoki hit policeman in restaurant." This publication also reported that he was the husband of Mrs. A, a member of the Finnish legislature and chairperson of the Committee for Education and Culture. On November 21 and December 10, 1996, *Iltalehti* published new articles related to the criminal proceeding and sentence imposed on Mr. A. The criminal proceeding against Mr. A was widely publicized and debated in the local press. Mrs. A was not tied to the criminal acts described therein in any way. Nonetheless, Mrs. A was subject to political satire on a local television program.

59. Subsequently, in April 1997, Mrs. A brought a criminal proceeding against Pekka Karhuvaara, the director of *Iltalehti*, and two of its reporters, alleging infringement of privacy. On December 3, 1998, the director and the two reporters were found liable and ordered to pay a fine and reparation for damages for invading Mrs. A's privacy. On November 20, 1999, Karhuvaara and

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<sup>45</sup> *Chauvy et al. v. France*, No. 58148/00, ECHR 2004. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=chauvy&sessionid=9803209&skin=hudoc-en>.

<sup>46</sup> *Karhuvaara and Iltalehti v. Finland*, No. 53678/00, ECHR 2004. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Karhuvaara&sessionid=10184705&skin=hudoc-en>.

the company turned to the European Court alleging a violation of Article 10 of the European Convention by Finland.

60. In its judgment the European Court found that none of the articles published contained allegations of Mrs. A's participation in the criminal offenses committed by Mr. A. In addition, it indicated that the articles did not mention any aspect of the political participation or private life of Mrs. A, except the fact that she is married to Mr. A, both of which were generally known prior to the publication of the articles in the newspaper. Accordingly, the Court concluded that the articles did not refer to a matter of public interest in which Mrs. A was involved.

61. It is interesting to note that even though the European Court recognized that the articles in the newspaper placed special emphasis on the fact that Mr. and Mrs. A were married in order to increase the newspaper's sales, it found that this did not justify the penalty imposed. It recalled, to this end, its standard developed in previous cases to the effect that in a democratic society even information and ideas that may be offensive, shocking, or disturbing are protected by Article 10 of the European Convention. The Court also noted that the permissible limits of criticism are more lax for politicians than for private persons. To this end, it found that the sanctions imposed were not "necessary in a democratic society," and that therefore they were unlawful restrictions on the right to freedom of expression.

*Selistö v. Finland (November 16, 2004)*<sup>47</sup>

62. In January and February 1996 Seija Selistö, a journalist with the daily newspaper *Pohjalainen*, published two articles describing the alleged negligence of a surgeon (X) which was said to have caused the death of a patient in the operating room of a local hospital in December 1992. The articles were published under the titles "*If only I could get a grip on life again— How to survive all of this?*" and "*The case of Eeva did teach us something – We were concerned for the patients – post-operative complications.*" The patient's husband, Mr. Haapalainen, had filed a complaint against X and one other surgeon who had assisted during the operation. On examining the complaint, the National Medico-Legal Board of Finland found that the surgeons were not liable for the patient's death. As a result, in April 1994, the Vaasa county prosecutor decided not to press formal charges against X. Subsequently, as a result of the publications, the Vaasa county prosecutor and X filed a complaint alleging defamation against Selistö and Mr. Elenius, the editor of *Pohjalainen*. On May 26, 1999, Selistö was found liable and ordered to pay a fine for the crime of continuing defamation and Elenius was ordered to pay a fine for negligent exercise of freedom of the press.

63. In its decision, the European Court of Human Rights evaluated whether the restriction imposed was necessary in a democratic society, that is, whether the reasons given by the State for establishing liability were "relevant and sufficient" for limiting Selistö's freedom of expression. In its review the Court observed that the publications made reference to the personal experiences of Mr. Haapalainen and to issues of public interest (security in the treatment of patients in hospitals). The Court attributed a positive value to the fact that in none of the articles published in mention made of the name, age, or gender of X. It considered, moreover, that X had the opportunity to submit X's version of the facts after the publications, but that it decided not to do so to keep X's identity from being publicly revealed. It concluded for that reason that no aspect of journalistic ethics had been violated, nor had Selistö acted in bad faith. To the contrary, it held that the purpose of the notes was to discuss matters regarding patient security in hospitals, and that

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<sup>47</sup> *Selistö v. Finland*, No. 56767/00, ECHR 2004. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Selist%F6&sessionid=10184835&skin=hudoc-en>.

Mrs. Haapalainen's case was related merely as a representative sample of that issue. Accordingly, the Court found that the reasons expressed to establish the restriction and to protect the professional reputation of X were insufficient given that Selistö was informed of those matters of legitimate general interest.

*Steel and Morris v. United Kingdom (February 15, 2005)*<sup>48</sup>

64. On September 20, 1990, the transnational company *McDonald's* brought a civil defamation action against Helen Steel and David Morris, two members of the organization *London Greenpeace*, asking that they pay reparation for harm after publication of a six-page pamphlet entitled "*What's wrong with McDonald's?*" The pamphlets were part of an environmental campaign that *London Greenpeace* had waging in the United Kingdom. On March 31, 1999, Steel and Morris were held liable and ordered to pay civil reparations to *McDonald's* for having participated in the production and distribution of those pamphlets.

65. In its ruling the European Court of Human Rights concluded that the amount that Steel and Morris should pay was an improper restriction on the right to freedom of expression. On examining the issue, the Court held that the amount was not proportional to the end pursued (protecting the company's reputation) if one took into account the decisive role played by the groups in the campaign to promote the discussion of matters of public interest. The Court indicated that although the statements made in the pamphlets were not true, they contained allegations on matters of general concern that sought to encourage debate in British society on issues such as health and the environment. The Court also indicated that the amount of compensation, while it might be considered moderate compared to similar cases in the United Kingdom, was very substantial taking into account the limited incomes and resources of Steel and Morris.

66. The Court also found that the lack of proper legal assistance in the trial for defamation before the domestic courts (which is why the Court found a violation of Article 6(1) of the European Convention) created serious difficulties for the defense of Steel and Morris, also having a negative impact on their right to freedom of expression.

*Ukrainian Media Group v. Ukraine (March 29, 2005)*<sup>49</sup>

67. On August 21, 1997, the newspaper *The Day* published an article by Tetyana E. Koroba entitled: "*Is this a second Yurik for poor Yoriks, or a Ukrainian version of Lebed?*" On September 14, 1999, the newspaper published another article by Koroba entitled: "*On the Sacred Crow and the Little Sparrow: Leader of the CPU as Kuchma's Last Hope.*" Both articles made a series of critical assertions regarding Natalia Vitrenko and Petro Symonenko, leaders of the socialist and communist parties, respectively, and presidential candidates in the 1999 elections. Vitrenko and Symonenko filed actions before the judicial authorities of Ukraine alleging that the information published was false and that it had an adverse impact on their honor and reputation. On March 3, 2000, the District Court of Kiev ordered *The Day* to pay 369 euros to Natalia Vitrenko, and on June 8, 2000, to pay 184 euros to Petro Symonenko. The District Court of Kiev also ordered the publication in the daily paper of part of the judgments as well as a rectification with respect to the information published that in the view of the court was false.

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<sup>48</sup> *Steel and Morris v. the United Kingdom*, No. 68416/01, ECHR 2004. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Steel%20%7C%20y%20%7C%20Morris&sessionid=10184835&skin=hudoc-en>.

<sup>49</sup> *Ukrainian Media Group v. Ukraine*, No. 72713/01, ECHR, 2005. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=72713/01&sessionid=9985862&skin=hudoc-en>.

68. In its decision the European Court indicated that the freedom of press allows for the use of a certain degree of exaggeration and even provocation. In addition, the European Court reaffirmed its position in terms of the distinction between assertions of fact and value judgments, noting that while the existence of facts may be shown, the same cannot be said in terms of value judgments. Requiring that one prove the truth of value judgments, the European Court held, is violative of Article 10 of the European Convention.

69. Specifically, the Court emphasized that the defamation statute and case-law in the Ukraine did not distinguish between value judgments and assertion of facts, which could result in decisions incompatible with Article 10 of the European Convention. In addition, it considered that the criticisms in both articles were made with sarcastic language and polemical statements that constitute value judgments in the context of political rhetoric, which is not susceptible to proof. For this reason, the Court found that the interference imposed by the Ukrainian courts did not answer to any pressing need, hence giving rise to a violation of Article 10 of the European Convention. The Court also noted that in cases such as this the public interest in political debate in the context of an election campaign should prevail.

*I.A. v. Turkey (September 13, 2005)*<sup>50</sup>

70. In November 1993 the Berlin Press, owned by Mr. I.A., published a novel titled "*Yasak Tumceler*" ("Forgotten Phrases"), which included a literary approach to some theological matters. On December 2, 1997 Mr. I.A. was convicted of the crime of blasphemy of "God, religion, the prophet, and the holy book" for publication of that work, and was subjected to a two-year prison sentence and ordered to pay a fine. Subsequently, the prison sentence was commuted to the payment of an additional fine.

71. In its decision, the European Court held that in the context of religious beliefs there is a duty to avoid "gratuitously offensive" expressions. It further noted that those who manifest their beliefs in a given religion must tolerate criticisms of it and the dissemination of other creeds. In this case, the Court considered, however, that certain aspects of the novel could be offensive to Muslims.

72. The Court concluded that the measures adopted by the Turkish court protected certain values considered sacred to practitioners of Islam and considered that in this case the restriction was based on pressing social need. Finally, the Court indicated that to the extent that circulation of the book was not prohibited, and given the small amount of the fine imposed, the sanction imposed was proportional to the ends sought to be protected.

*Albert-Engelmann-Gesellschaft mbH v. Austria (January 19, 2006)*<sup>51</sup>

73. On November 13, 1996, the magazine "*Der 13. –Zeitung der Katholiken für Glaube und Kirche*," owned by the company *Albert-Engelmann-Gesellschaft mbH*, published several letters to the editor on a "Church Referendum Movement" organized by progressive Catholics in Austria. One of the letters made reference to Mr. Paarhammer, Vicar General of the Archdiocese of Salzburg,

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<sup>50</sup> *I.A. v. Turkey*, No. 42571/98, ECHR, 2005. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=turkey%20%7C%2010&sessionid=9787499&skin=hudoc-en>.

<sup>51</sup> *Albert-Engelmann-Gesellschaft mbH v. Austria*, No. 46389/99, ECHR, 2006. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Caso%20%7C%20Albert-Engelmann-Gesellschaft%20%7C%20mbH&sessionid=10185010&skin=hudoc-en>.

describing him as a “rebel” and “critic of the church who should be removed.” The letter made reference to the press release of December 30, 1988, and to a radio interview of January 10, 1989, in which Mr. Paarhammer had expressed his discontent with the way in which the Holy See had chosen the ecclesiastic authorities in the area. Mr. Paarhammer brought a criminal defamation action against the company. The Austrian courts found that the assertions lacked any factual basis – the “Church Referendum Movement” was nonexistent – and that they constituted a direct attack on the priest’s reputation. As a result, the company was found liable and ordered to pay economic compensation to Paarhammer, in particular because he did not have an opportunity to exercise his right to reply in response to that letter.

74. In its decision the European Court held that the reasons given by the State, though “relevant,” were not “sufficient” to justify the restriction imposed on the newspaper’s freedom of expression. The Court began by noting that the publication was made in the context of an open debate with the editor of the magazine around the need for priests considered “critical” to be removed from any position of trust in the Church.

75. The Court attributed positive value to what was decided in the domestic courts in terms of the potential of the letter to endanger Paarhammer’s reputation as a priest loyal to the Archdiocese of Salzburg, especially before the magazine’s readership, most of whom belonged to the most conservative sector of the Catholic church in Austria. In this regard, it agreed with the Austrian courts that the magazine did not abide by the ethics of journalism on not having given Paarhammer the opportunity to reply. Nonetheless, it did not find those considerations to be “sufficient” to justify the measure, for the comments made in the letter were opinions and not assertions of fact, in the context of a debate on ecclesiastic matters. Moreover, the Court held that requiring the press to distance itself formally and systematically from a third party may cause insult to or provoke in others a harm to their reputation that cannot be reconciled with its role of providing information on events, opinions, and ideas of public interest.

*Giniewski v. France (January 31, 2006)*<sup>52</sup>

76. On January 4, 1994, Mr. Paul Giniewski published an article in the newspaper *Le quotidien de Paris* criticizing the content of the papal encyclical “Veritatis Splendor.” After receiving a complaint from the *Alliance générale contre le racisme et pour le respect de l’identité française et chrétienne (AGRIF)*, the Criminal Court of Paris found that the article defamed the members of the Christian community and on March 8, 1995, ordered Mr. Giniewski and the newspaper’s director to pay a fine. In addition, the Court ordered that the persons on trial pay the costs of publishing the judgment in a national newspaper.

77. In its decision the European Court considered that in the context of religious beliefs there is an obligation to avoid to the greatest extent possible “those gratuitously offensive expressions that do not contribute to a constructive public debate.” As for the article published by Giniewski, the Court noted that although it criticized the content of the encyclical and the position of the papal authorities, it did not contain any attack on religious beliefs, but rather a journalistic and historical perspective on issues such as the persecution and extermination of the Jews in Europe. In this regard, the Court considered that the content of the article contributed to a public debate on the matter.

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<sup>52</sup> *Giniewski v. France*, No. 30007/96, ECHR, 2005. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=giniewski%20%7C%20france&sessionid=9787377&skin=hudoc-en>.

78. Finally, the Court indicated that although Mr. Giniewski was acquitted in the criminal proceeding, the civil sanction imposed was disproportionate in view of the public debate it sought to generate and the public interest in the publication.

*Malisiewicz-Gąsior v. Poland (April 6, 2006)*<sup>53</sup>

79. On September 16, 1992, Izabela Malisiewicz-Gąsior was released after having been held in pretrial detention – along with her son and husband – accused of having participated in the kidnapping of M.K., the daughter of Mr. Kern, a government official. On August 22, 1993, Malisiewicz-Gąsior, an independent candidate in Poland’s legislative elections, published an article in the daily *Angora*. In the article reference was made, *inter alia*, to her political proposal as an independent candidate and the nature of her family’s ties with Mr. Kern’s family. At that time M.K. and Malisiewicz-Gąsior’s son had become engaged. On September 5, 1993, Malisiewicz-Gąsior published a new article on the same subject. In this second publication, however, she made reference to the fact that Mr. Kern, abusing his power as a government official, pressured the authorities to have her indicted and placed on trial for the kidnapping of M.K., indicating that on his orders she was held in a cell for the mentally ill. These same statements were reiterated on radio and television. On September 27, 1993, Mr. Kern filed a criminal complaint against Malisiewicz-Gąsior for defamation. On November 18, 1997, Malisiewicz-Gąsior was convicted of the crime of defamation and sentenced to serve one year in prison, to publish that judicial order, and to apologize to Mr. Kern in *Angora*.

80. In its decision the European Court found that the Polish authorities, on holding Malisiewicz-Gąsior criminally liable, improperly restricted her right to freedom of expression. The Court considered that the allegations made in the articles and the statements by Malisiewicz-Gąsior occurred as part of a political debate in the context of an election, with respect to the action of a government official and based on her own experience in the courts of the criminal proceeding brought against her by Mr. Kern for his daughter’s kidnapping. The Court held that although the end pursued (the protection of Mr. Kern’s reputation) was legitimate, the criminal sanction imposed in that case was not “necessary in a democratic society.”

*Raichinov v. Bulgaria (April 20, 2006)*<sup>54</sup>

81. On December 15, 1993, a meeting was held of the Supreme Judicial Council of Bulgaria attended, *inter alia*, by Hristo Peshev Raichinov – then director of the financial and logistical support division of the Ministry of Justice – and Mr. S – the deputy Prosecutor-General. At that meeting Raichinov indicated, in the context of a discussion on the State Budget Act, that in his opinion Mr. S “is not a clean person.” The Prosecutor-General asked Raichinov to leave the meeting and to clarify the meaning of his assertion. Raichinov retracted his remarks. On February 16, 1994, a criminal proceeding was begun against Raichinov alleging that Mr. S’s dignity had been harmed. On July 8, 1998, the Bulgarian courts ordered Raichinov to pay a fine and receive a public reprimand.

82. In its decision the European Court considered that the restriction imposed on Raichinov’s freedom of expression was not necessary in a democratic society. In its discussion the

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<sup>53</sup> *Malisiewicz-Gąsior v. Poland*, No. 43797/98, ECHR, 2006. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Malisiewicz-G%u0105sior&sessionid=10185010&skin=hudoc-en>.

<sup>54</sup> *Raichinov v. Bulgaria*, No. 47579/99, ECHR, 2006. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Raichinov&sessionid=10185010&skin=hudoc-en>.

Court reaffirmed that the limits on the criticism of government officials are more lax than for private persons. It also indicated that the debate at the meeting had to do with a matter of general interest, and that as the meeting had been held behind closed doors, the negative impact of the Raichinov's assertion on Mr. S's reputation –if any – was quite limited. The Court also valued, in its analysis, the fact that the debate had transpired only in an oral exchange, and that the Prosecutor-General could have turned to means other than the criminal jurisdiction to respond to the criticisms.

## 2. Public Order

*Baran v. Turkey (November 10, 2004)*<sup>55</sup>

83. On June 3, 1997, a local court in Istanbul ordered the confiscation of 200 copies of a pamphlet prepared by Zeynep Baran, president of a foundation devoted to the question of Kurdish women in Turkey. Subsequently, on June 6, 1997, the prosecutor of the Republic brought criminal proceedings against Baran alleging that the pamphlet constituted an incitement to violence, hatred, and resentment, and that, moreover, it discriminated based on membership in a given social group. It was specifically noted that the pamphlet had as its objective making separatist propaganda. On August 7, 1998, Baran was convicted, sentenced to a two-year prison term, and ordered to pay a fine.

84. On examining the matter the European Court gave special attention to the terms used in the pamphlet and the context of its publication. It thus considered that while the pamphlet described a sensitive issue – the status of Kurdish women in Turkey – at no point did it urge the use of violence, armed resistance, or insurrection, nor did it incite hate speech. In that sense, the Court considered that the conviction of Baran was disproportionate to the aim pursued (guaranteeing territorial integrity), that is, it was not necessary in a democracy society.

*Kyprianou v. Cyprus (December 15, 2005)*<sup>56</sup>

85. On February 14, 2001, attorney Michalakis Kyprianou was participated in a hearing regarding one of his clients in the Court of Assize of Limassol. While he was questioning one of the witnesses proposed by the prosecution, Kyprianou was interrupted by the judges, who questioned the manner in which he was conducting the examination. Kyprianou considered the interruption an offense and immediately asked to be removed from the case. Kyprianou and the judges then began a discussion that culminated in the interruption of the hearing and the subsequent order finding Kyprianou in "contempt of court" and sentencing him to five days in prison and a fine of 130 euros.

86. In its decision the European Court affirmed that attorneys play a central role in the administration of justice as intermediaries between the public and the courts. It noted, however, that the freedom of expression of an attorney in the courts is not unlimited, and may be restricted, in keeping with Article 10 of the European Convention, to protect certain interests with respect to the authority of the judiciary. The Court continued its analysis indicating that in the defense of a client before a court, the attorneys may experience delicate situations in which they must decide whether to object or question the conduct of the judges, mindful of the interests of their clients.

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<sup>55</sup> *Baran v. Turkey*, No. 48988/99, ECHR, 2004. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=baran&sessionid=9803209&skin=hudoc-en>.

<sup>56</sup> *Kyprianou v. Cyprus*, [GC] No. 73797/01, ECHR, 2005. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Kyprianou&sessionid=9787377&skin=hudoc-en>.

The European Court thus stated that in the case at hand, on imposing a criminal sanction on Kyprianou, there was a failure to properly balance the protection of the authority of the judiciary with the protection of the right to freedom of expression. The Court made this consideration taking into account that the law allowed for the imposition of less restrictive sanctions. It concluded, therefore, that the penalty applied was disproportionately severe and that it could have a chilling effect on the work of an attorney as defense counsel in a case.

87. Along the same lines, the European Court indicated that in the case, imposing a prison sentence also had an adverse impact on the right to due process, accordingly, it also found a violation of Article 6(1) of the European Convention.

*Koç and Tambaş v. Turkey (March 21, 2006)*<sup>57</sup>

88. On August 24, 1998, the Istanbul State Security Court convicted Tayfun Koç and Musa Tambaş of the crime of “disseminating propaganda against the ‘indivisible unity of the State.’” Tayfun Koç and Musa Tambaş, owner and editor of the monthly magazine “Revolution for Equality, Liberty, and Peace,” were found liable and ordered to pay a fine, the magazine was temporarily shut down, and several copies were confiscated, after publishing three articles related to the authorities of the Turkish State. Specifically, in one of the articles it was alleged that there were serious prison problems in Turkey, and the Minister of Justice was blamed for the death of two prisoners who had staged a hunger strike. On June 6, 2003, the judgments of liability were vacated.

89. In its decision, the European Court found that the restriction imposed was provided for by law and that it pursued legitimate interests: protection of the territorial integrity of the State, national unity, and protection of the state authorities so that they not be identified as targets of terrorist attacks. Nonetheless, when examining the restriction imposed in light of the standard of “necessity in a democratic society,” the Court considered that it was not proportional to the ends pursued, for even though the articles had a certain tone of hostility towards the state authorities, taken in their entirety they did not incite violence, armed resistance, or insurrection, nor did they constitute hate speech. The Court indicated that despite the suspension and eventual overturning of the convictions, the very threat of the imposition of a conviction has a chilling effect on the exercise of journalism, which leads to self-censorship.

### 3. Prior Censorship

*Editions Plon v. France (May 18, 2004)*<sup>58</sup>

90. On January 18, 1996, the president of the Tribunal de Grande Instance of Paris issued an injunction temporarily prohibiting the circulation of the book *Le Grand Secret* published by *Editions Plon*. That book, co-authored by one of President Mitterrand’s private physicians, revealed details of the cancer treatment that the former president had received since 1981, when he was diagnosed with cancer. Mitterrand died on January 8, 1996, days before the publication of *Le Grand Secret* on January 17, 1996. The request was presented by the family members of the former president, arguing that in the book the physician was violating the duty of confidentiality and

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<sup>57</sup> *Koç and Tambaş v. Turkey*, No. 50934/99, ECHR, 2006. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=6&portal=hbkm&action=html&highlight=Ko%E7&sessionid=10185225&skin=hudoc-en>.

<sup>58</sup> *Editions Plon v. France*, No. 58148/00, ECHR, 2004. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Editorial%20%7C%20Plon&sessionid=10185225&skin=hudoc-en>.

allegedly violating the privacy of the former president and his family members. Subsequently, on October 23, 1996, the same court decided on the merits, ordering the director of *Editions Plon* and the physician to pay compensation to Mitterrand's family members. The court also noted that the prohibition on circulation of the book should remain. Both judicial rulings were called into question by *Editions Plon* before the European Court of Human Rights, which proceeded to examine them separately.

91. On analyzing the temporary prohibition on the circulation of *Le Grand Secret*, the European Court considered that the book was published in a context of wide-ranging debate in France around the right of the public to be informed as to Mitterrand's health, as well as his capacity to conduct the affairs of state in that condition.

92. The European Court considered that the injunction met the requirement of "necessity in a democratic society" because it considered that there had been a violation of French statutes in force on medical confidentiality. The Court made this consideration mindful that the injunction was issued one day after the book's publication and 10 days after Mitterrand's death. It found that in that context, the "temporary" restriction of the publisher's freedom of expression was proportional to the end of protecting the rights of Mitterrand and his family members.

93. As for the measure ordered as part of the decision on the merits, the European Court found that the context was different. In the opinion of the European Court, given the permanent nature of the second measure and the debate in French society on that issue, there was no longer a pressing social need to justify it. The European Court indicated that on October 23, 1996, nearly 40,000 copies of the book had already been distributed, apart from the circulation of the text on the Internet, which meant that the information was, in fact, not confidential. Accordingly, the Court found that as of October 23, 1996, the judicial prohibition on the circulation of *Le Grand Secret* was a violation of Article 10 of the European Convention. The European Court also indicated that the measure was disproportionate, considering that *Editions Plon* had to pay reparations for damages to the former president's family.

*Goussev and Marenk v. Finland (January 17, 2006)*<sup>59</sup>

94. In November 1995, a demonstration took place right outside *Oyj Stockmann Abp*, a department store in Helsinki, to protest its sales policy on fur coats and its alleged participation in acts of cruelty to animals. At the same time, various pamphlets and posters were distributed in Helsinki criticizing the sale of fur coats and *Stockmann's* sales policy. In March 1996, *Stockmann* asked the police to investigate the distribution of the pamphlets and posters. The police carried out searches on May 31, 1996, at the home of Ms. Goussev, and on July 23, 1996, at the home of Mr. Marenk. The reason given for the measure was Goussev and Marenk's participation in a different kind of protest in May 1996. During the police action, however, 122 pamphlets related to *Stockmann* were seized. Goussev and Marenk brought judicial proceedings to have the order to seize the material lifted. Goussev and Marenk were subsequently indicted for public defamation. On May 15, 1997, the material seized was returned, and on June 18, 1997, Goussev and Marenk were acquitted by the local courts.

95. In its decision, the European Court focused on determining whether the seizure measure was "prescribed by law." It considered that Finland's legislative provisions on the matter were "problematic" for they were "not clear as to the circumstances in which the police could seize

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<sup>59</sup> *Goussev and Marenk v. Finland*, No. 35083/97, ECHR, 2006. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Goussev&sessionid=10185276&skin=hudoc-en>.

material which was potentially defamatory during a search which was being carried out for the purposes of finding evidence of another suspected crime.” The Court concluded that the seizure was “not prescribed by law” given that the relevant provisions were not formulated with sufficient precision so as to guarantee individuals the foreseeability required by Article 10 of the European Convention.

*Christian Democratic People’s Party (CDPP) v. Moldova (February 14, 2006)*<sup>60</sup>

96. In late 2001, the government of Moldova made public its intent to make studying Russian a requirement for certain levels of primary education. That initiative was harshly criticized by groups opposed to the government, sparking a public debate in the country. On December 26, 2001, a group of CDPP legislators informed the Chişinău Municipal Council of their intent to hold a meeting on June 9, 2002, with their followers on this issue at the public plaza situated in front of the Government headquarters. According to the members of the CDPP, the applicable rules did not require the legislators to seek any authorization whatsoever to hold such meetings. On January 3, 2002, however, the Municipal Council characterized the meeting as a “demonstration,” and authorized the CDPP to hold it at a different public plaza. Subsequently, on January 23, 2002, the Municipal Council informed the Ministry of Justice of the discrepancies in the domestic legislation related to the case, and consequently decided on January 26, 2002, to suspend the meeting of the CDPP until the Parliament gave an official interpretation of the applicable legislation.

97. The CDPP held the meeting on January 9, 2002, in the original location. It also held meetings in the next few days; in every case it informed the Municipal Council, without seeking its authorization. On January 14, 2002, the Ministry of Justice issued a communication warning the CDPP that the meetings were held without the necessary authorization. The president of the CDPP answered noting that the meeting was not organized by the CDPP but by a group of its legislators, which meant that no such authorization was required. On January 18, 2002, the Minister of Justice decided to impose a one-month ban on the activities of the CDPP. Even though the prohibition was later nullified, on February 22, 2002, the Supreme Court of Justice of Moldova ruled that the protests were held illegally. Finally, on May 17, 2002, the Supreme Court found that given that the meetings were illegal, the sanction imposed on the CDPP was not disproportionate.

98. In its decision the European Court examined the allegations around the right to freedom of expression in the context of Article 11 (freedoms of assembly and association) of the European Convention. The Court indicated that protecting opinions and the freedom of expression is one of the objectives of the freedom of assembly and association provided for in Article 11. In addition, it indicated that while freedom of expression is important for everyone, it is especially important for one who is elected as a representative of the people. Accordingly, interference with the freedom of expression of an opposition legislator calls for the closest scrutiny of the restriction imposed. The Court also noted that only threats to political pluralism and democratic principles justify a prohibition on the activities of a political party. Considering that the meetings held publicly were peaceful in nature, the Court concluded that the temporary prohibition on the activities of the CDPP was at odds with Articles 10 and 11 of the European Convention. Moreover, it indicated that even a temporary prohibition can reasonably be expected to have a chilling effect on the exercise of freedom of expression by a political party.

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<sup>60</sup> *Christian Democratic People’s Party v. Moldova*, No. 28793/02, ECHR, 2006. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=28793/02&sessionid=10185276&skin=hudoc-en>.

*Dammann v. Switzerland (April 25, 2006)*<sup>61</sup>

99. On September 1, 1997, a building in Zurich was robbed in an incident widely reported in the Swiss media. On September 10, 1997, Victor Ferdinand Dammann, a journalist with the daily newspaper *Blick*, informed the administrative assistant to the Public Prosecutor's Office of the Canton of Zurich that he had a list with the names of persons detained because of the robbery. In addition, he asked her for information about the criminal records of those persons. Mr. Dammann received the information from the Public Ministry official and gave it to a police officer, without publishing it. The police officer informed the authorities of this, resulting in a criminal proceeding being brought against Mr. Dammann. On September 7, 1999, Mr. Dammann was found guilty of "instigating a violation of the duty of confidentiality associated with one's function" under Swiss criminal law, requiring that a 325 euro fine be paid.

100. In its decision, the European Court noted that the case did not have to do with a prohibition on a publication or the sanctions imposed subsequent to a publication, but rather to preparatory acts related to the journalist's investigation and search for information. The Court held that the restrictions on the freedom of press imposed in that phase were fully within its jurisdiction, and required of it the closest scrutiny.

101. The Court emphasized that while judicial records of persons are *a priori* worthy of protection, the information obtained by the victim was available in other media, such as the records of judicial decisions and press articles. The Court considered that the information request was of public interest and found that the finding of liability against Mr. Dammann was disproportionate and unnecessary in a democratic society. In this connection, it noted that the sanction imposed discouraged journalists from contributing to the discussion of matters of interest to society and therefore that it violated Article 10 of the European Convention.

#### **D. Case-law of the Human Rights Committee of the United Nations**

102. The International Covenant on Civil and Political Rights contains, at Articles 19 and 20, specific provisions related to the right to freedom of expression. They state as follows:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[...]

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<sup>61</sup> *Dammann v. Switzerland*, No 77551/01, ECHR, 2006. Available at: <http://cmiskp.echr.coe.int/portal.asp?sessionSimilar=9985862&skin=hudoc-en&action=similar&portal=hbkm&Item=1&similar=frenchjudgement>.

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

103. The Inter-American Court of Human Rights has compared Article 13 of the American Convention to Article 10 of the European Convention and Article 19 of the International Covenant on Civil and Political Rights, and has concluded that the guarantees of freedom of expression contained in the American Convention were designed to be the most generous and to reduce to the minimum restrictions on the free circulation of ideas.<sup>62</sup>

104. In its Annual Report on 2004, the Office of the Special Rapporteur considered some of the communications resolved by the Human Rights Committee on freedom of expression, noting their usefulness as “a valuable source that can shed light on the interpretation of this right in the Inter-American system, and serve as a useful tool for legal practitioners and interested people.”<sup>63</sup>

105. The following sections refer to cases that gave rise to decisions of the Human Rights Committee of the United Nations on issues related to the right to the freedom of expression from 2005.

106. The issues addressed in this section are discussed under the headings of defamation and public order. Those cases under “defamation” refer to situations in which legal actions were brought for *desacato* or defamation for allegedly harming the reputation of other persons through the exercise of the freedom of expression. The cases examined under the heading “public order” refer to situations in which the restrictions questioned have been imposed based on necessity for protecting public order.

## 1. Defamation

*Communication No. 1128/2002: Angola (April 18, 2005)*  
*Rafael Marques de Morais*<sup>64</sup>

107. On July 3, August 28, and October 13, 1999, Rafael Marques de Morais published several articles in the daily newspaper the *Ágora* in which he noted that the president of Angola was responsible “for the destruction of the country and the calamitous situation of State institutions” and “for the promotion of incompetence, embezzlement and corruption as political and social values.” On October 13, 1999, Marques de Morais, in a radio interview, reiterated the terms of the publications. On October 16, 1999, Marques de Morais was arrested at his home and taken to a police unit. Subsequently, on October 29, 1999, he was taken to the Viana prison in Luanda. On November 25, 1999, he was released on bail and was informed that he had been charged with “materially and continuously commit[ting] the crimes characteristic of defamation and slander against His Excellency the President of the Republic and the Attorney General of the Republic.” On March 31, 2000, Marques de Morais was found guilty of aggravated defamation and abuse of the

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<sup>62</sup> I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, Series A No. 5, Judgment of November 13, 1985, para. 50.

<sup>63</sup> IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2004. Volume III, Chapter III, para. 2.

<sup>64</sup> Communication No. 1128/2002: Angola. Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.83.D.1128.2002.Sp?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.83.D.1128.2002.Sp?Opendocument).

press to cause injury, and sentenced to six months in prison, a fine to “discourage” similar behavior, and the payment of compensation to the president of Angola. On October 26, 2000, the verdict in respect of the crime of defamation was vacated, but the verdict in respect of abusive use of the press on the basis of injury was upheld; and the penalty of six months in prison was upheld, but its execution was suspended. Subsequently, on February 2, 2001, Marques de Morais was amnestied.

108. In the pertinent part of its decision, the Human Rights Committee examined whether the arrest, detention, and conviction of Marques de Morais “unlawfully restricted his right to freedom of expression, in violation of article 19 of the Covenant.” The Committee began its analysis reiterating that “the right to freedom of expression ... includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.” The Committee then considered that “even if it were assumed that his arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President’s rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims.... the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect.” The Committee thus indicated that Article 19 of the Covenant was violated as “the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition.”

*Communication No. 1180/2003: Serbia and Montenegro (January 23, 2006)*  
Zeljo Bodrožić<sup>65</sup>

109. On January 11, 2002, Zeljo Bodrožić published a magazine article entitled “*Born for Reforms*” in which he criticized the political ties of several persons, among them Mr. Segrt, manager of a factory, member of the Socialist Party of Serbia, and leader, in 2001, of the party’s parliamentary group in the federal Yugoslav Parliament. On January 21, 2002, Segrt filed a criminal complaint for libel and insult against Bodrožić because of the text that was published. On May 14, 2002, Bodrožić was held liable and ordered to pay a fine and costs as perpetrator of criminal insult to the extent that the words used in the text were “not the expressions that would be used in serious criticism; on the contrary, these are generally accepted words that cause derision and belittling by the social environment,” rather than being a “literary language that would be appropriate for such a criticism.”

110. In its decision, the Human Rights Committee observed that it had to determine “whether the author’s conviction for criminal insult for the article published by him ... amounts to a breach of the right to freedom of expression.” The Committee observed that Serbia had not presented any justification showing that the prosecution and conviction of the author were “necessary for the protection of the rights and reputation of Mr. Segrt.” In this regard, the Committee concluded that the conviction and sentence imposed amounted to a violation of Article 19(2) of the Covenant, to the extent that “in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high.” The Committee considered that Serbia was under an obligation to “to provide the author with an effective remedy, including quashing of the conviction, restitution of the fine ... as well as restitution of court expenses ..., and compensation.”

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<sup>65</sup> Communication No. 1180/2003: Serbia. Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.85.D.1180.2003.Sp?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.85.D.1180.2003.Sp?Opendocument).

## 2. Public Order

*Communication No. 1022/2001: Belarus (November 23, 2005)*  
*Vladimir Velichkin*<sup>66</sup>

111. On November 23, 2000, Vladimir Velichkin requested authorization from the Executive Committee of the City of Brest to organize a gathering outside a public library to celebrate, on December 10, 2000, the anniversary of the signing of the Universal Declaration of Human Rights. On December 4, 2000, its request to hold the gathering in downtown Brest was rejected, but it was authorized to be held at a stadium, which in an earlier decision of the Executive Committee had been declared the "permanent place" for organizing gatherings and assemblies. On December 10, 2000, Velichkin began to distribute flyers with the text of the Universal Declaration of Human Rights in downtown Brest. That same day a police agent approached Velichkin and asked that he stop distributing the flyers and go away. Velichkin refused. Subsequently, Velichkin was taken to the offices of the local police and detained there temporarily. On January 15, 2001, the Leninsky District Court of Brest imposed a fine on Velichkin for "conduct of a meeting [at] a place [not] authorized by the Brest City Executive Council" in violation of the provisions of the Law on Assemblies, Meetings, Street Processions, Demonstrations and Pickets.

112. In its decision, the Human Rights Committee held that the "action of the authorities, irrespective of its legal qualification, amounts to a de facto limitation of the author's rights under article 19, paragraph 2, of the Covenant." It considered that the State had not invoked any specific ground "to justify the restrictions imposed on the author's activity (whether or not it took place within the context of a meeting), that it is uncontested it did not pose a threat to public order, which would be necessary within the meaning of article 19, paragraph 3, of the Covenant."

*Communication No. 1009/2001: Belarus (August 8, 2006)*  
*Vladimir Viktorovich Shchetko and Vladimir Vladimirovich Shchetko*<sup>67</sup>

113. On October 27, 2000, Vladimir Viktorovich Shchetko and Vladimir Vladimirovich Shchetko were held liable and ordered to pay a fine for having distributed in public, on October 12, 2000, some pamphlets calling for a boycott of the legislative elections planned for October 15, 2000.

114. In its decision, the Committee considered that in order to carry out its analysis it should distinguish, on a preliminary basis, as follows: "Any situation in which voters are subject to intimidation and coercion must, however, be distinguished from a situation in which voters are encouraged to boycott an election without any form of intimidation."

115. The Committee noted that in the case, the State had argued only "that the restrictions of the authors' rights were provided by the law, without presenting any justification whatsoever for these restrictions." The Committee took into account that the law under which Messrs. Shchetko were convicted had subsequently been amended to bring it into line with the provisions of the Electoral Code, which only prohibited campaigning on election day. This, in the opinion of the Committee, "tends to underline the lack of reasonable justification for the restrictions set out in the above law."

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<sup>66</sup> Communication No. 1022/2001: Belarus. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.85.D.1022.2001.Sp?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.85.D.1022.2001.Sp?Opendocument).

<sup>67</sup> Communication No. 1009/2001: Belarus. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.87.D.1009.2001.Sp?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.87.D.1009.2001.Sp?Opendocument).

116. Finally, the Committee considered that from the information provided one could not deduce "that the authors' acts in any way affected the possibility of voters freely to decide whether or not to participate in the general election in question." Accordingly, it concluded that the fine imposed was not justified by any of the criteria of Article 19(3).

*Communication No. 968/2001: Republic of Korea (August 23, 2005)*

*Kim Jong-Cheol*<sup>68</sup>

117. On December 11, 1997, Kim Jong-Cheol published an article in a weekly that included information on opinion surveys done from July 31 to December 11, 1997, in the context of the presidential elections to be held December 18, 1997 in Korea. On July 16, 1998, Jong-Cheol was found liable and ordered to pay a fine for having violated the provisions of the Election Act that provided for criminal sanctions for anyone who disseminated the results of opinion polls during the 23 days prior to the elections, including the day of the vote.

118. In its analysis, the Committee affirmed that through his articles Jong-Cheol "was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant." Nonetheless, on examining the restriction imposed, it considered that "the underlying reasoning for such a restriction is based on the wish to provide the electorate with a limited period of reflection, during which they are insulated from considerations extraneous to the issues under contest in the elections, and that similar restrictions can be found in many jurisdictions. The Committee also notes the recent historical specificities of the democratic political processes of the State party, including those invoked by the State party. Under such circumstances, a law restricting the publication of opinion polls for a limited period in advance of an election does not seem *ipso facto* to fall outside the aims contemplated in article 19, paragraph 3."

119. As for the question as to the proportionality of the measure, the Committee considered that "while a cut-off date of 23 days prior to the election is unusually long, it need not pronounce itself on the compatibility per se of the cut-off date with article 19, paragraph 3, since the author's initial act of publishing previously unreported opinion polls took place within seven days of the election." In that sense, the Committee concluded that holding the author liable for that publication – even with a criminal sanction – could not be considered excessive and "cannot be considered excessive in the context of the conditions obtaining in the State party," and that therefore, there was no violation of Article 19 of the Covenant.

*Communication No. 1157/2003: Australia (August 10, 2006)*

*Patrick Coleman*<sup>69</sup>

120. On December 20, 1998, Patrick Coleman gave a speech at a mall in Townsville, Queensland, without authorization from the City Council of Townsville. As a result, on March 3, 1999, Coleman was found guilty by a Court of Townsville and ordered to pay a fine plus 10 days in prison for delivery of an unlawful address. On August 29, 1999, after failing to pay the fine, Coleman was detained by the police and held for five days at the local police station.

121. On November 21, 2000, the Queensland Court of Appeal dismissed Coleman's appeal, indicating that "the bylaw served the legitimate end of preserving users of the small area of the pedestrian mall from being harangued by public addresses. The bylaw was also reasonably

<sup>68</sup> Communication No. 968/2001: Republic of Korea. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.84.D.968.2001.Sp?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.84.D.968.2001.Sp?Opendocument).

<sup>69</sup> Communication No. 1157/2003: Australia. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.87.D.1157.2003.Sp?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.87.D.1157.2003.Sp?Opendocument).

appropriate and adapted to serve that end as it covered "a very limited area, leaving plenty of opportunity for making such addresses in other suitable places."

122. The Committee began its analysis on the merits examining "whether the restriction was necessary for one of the purposes set out in article 19, paragraph 3, of the Covenant, including respect of the rights and reputations of others or public order (*ordre public*)." The Committee considered that Coleman had made a speech in public "on issues of public interest." It continued its reasoning indicating that "there was no suggestion that the author's address was either threatening, unduly disruptive or otherwise likely to jeopardise public order in the mall; indeed, police officers present, rather than seeking to curtail the author's address, allowed him to proceed while videotaping him. The author delivered his speech without a permit. For this, he was fined and, when he failed to pay the fine, he was held in custody for five days." The Committee concluded by noting that the State's response to the conduct was disproportionate and tantamount to a restriction on Coleman's freedom of expression incompatible with Article 19(3) of the Covenant.