

Inter-American Commission on Human Rights

In the Matter of

EMILIO PALACIO URRUTIA, CARLOS PÉREZ BARRIGA, CESAR PÉREZ
BARRIGA, AND NICOLÁS PÉREZ LAPENTTI V. REPUBLIC OF ECUADOR

No. P-143611

**BRIEF OF
THE ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN RIGHTS CLINIC
YALE LAW SCHOOL
AS AMICUS CURIAE**

James J. Silk, Esq.
Soo-Ryun Kwon, Esq.
Allard K. Lowenstein International Human Rights Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520-8215
Phone: 203-432-7480
Fax: 203-432-8260

April 2013

On the brief: Julia Brower
Tiffany Ng

TABLE OF CONTENTS

STATEMENT OF INTEREST.....	4
SUMMARY OF ARGUMENT.....	4
I. FREEDOM OF EXPRESSION IS INDISPENSIBLE TO DEMOCRATIC DEVELOPMENT AND THE PROTECTION OF ALL OTHER HUMAN RIGHTS	6
II. CRIMINAL DEFAMATION LAWS VIOLATE THE RIGHT TO FREEDOM OF EXPRESSION	8
A. Leading international authorities have declared that criminal defamation should be abolished because it chills public debate and stifles free speech.....	8
B. Other United Nations and European bodies have stated that criminal defamation may be used only in the most serious cases and that prison sentences should never be imposed or may be used only in strictly and narrowly limited exceptional circumstances.....	11
1. <i>U.N. bodies & the Parliamentary Assembly of the Council of Europe have held that states may use criminal defamation only in the most serious cases and that states may never impose imprisonment as a penalty</i>	12
2. <i>The European Court of Human Rights strictly limits the circumstances under which states may impose imprisonment as a punishment for defamation</i>	13
3. <i>Ecuador’s conduct in convicting petitioners of criminal defamation and sentencing them to prison violates the right to freedom of expression.....</i>	17
C. The U.N. Human Rights Committee, Special Rapporteurs on the Freedom of Expression, and the European Court have held that states may not ban criticism of or offensive expressions about public officials or provide special protection against defamation for public officials.....	18
1. <i>States may not ban criticism of or offensive expressions about public officials</i>	18
2. <i>States cannot grant public officials greater protection than ordinary citizens against defamation.....</i>	20
3. <i>Ecuador’s defamation law violates the right to freedom of expression.....</i>	21
III. SINCE 2000, MORE THAN THIRTY STATES HAVE DECRIMINALIZED DEFAMATION OR TAKEN SIGNIFICANT STEPS IN THAT DIRECTION, AND AT LEAST TEN ADDITIONAL STATES HAVE ABOLISHED PRISON SENTENCES FOR CRIMINAL DEFAMATION	21

IV. EXCESSIVE CIVIL DEFAMATION PENALTIES VIOLATE THE RIGHT TO FREEDOM OF EXPRESSION 26

A. International and regional bodies hold that civil sanctions for defamation should be proportionate to the harm caused. 26

B. Ecuador’s conduct in levying excessive damages on petitioners violates the right to freedom of expression..... 30

IV. CONCLUSION..... 30

STATEMENT OF INTEREST

The Allard K. Lowenstein International Human Rights Clinic (the Clinic) is a Yale Law School course that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses.

Clinic projects have included efforts to promote the work of regional and international organizations that protect human rights. The Clinic has prepared briefs and other submissions for the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, and various bodies of the United Nations, as well as for national courts, including courts in the United States and in other countries in the Americas. The Clinic has a longstanding commitment to protecting the right to freedom of expression. As a regular amicus party in support of victims of human rights abuses, the Clinic has an interest in having the Commission consider this claim because of the fundamental role that free expression plays in safeguarding democracy and the exercise of all other human rights.

SUMMARY OF ARGUMENT

Freedom of expression is an essential human right upon which individual liberty, democracy, and the exercise of all other fundamental rights depend. International human rights instruments and regional charters universally provide for the right to freedom of expression. Article 19 of the International Covenant on Civil and Political Rights, for example, proclaims "the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." The American Convention on Human Rights, the American Declaration on the Rights and Duties of Man, and the Inter-American Democratic Charter all also proclaim the right to free expression.

Criminal defamation laws threaten the vitality of freedom of expression. The threat of prosecution chills free speech, and governments too often abuse such laws to silence criticism of public officials and the state. This stifles and restricts public debate and diminishes government accountability. Accordingly, international authorities and regional bodies have called for states either to decriminalize defamation completely or to strictly limit its application to the most serious cases.

Special Rapporteurs on the Freedom of Expression for the United Nations, the Organization of American States (OAS), and the Organization for Security and Co-operation in Europe (OSCE) have repeatedly declared that criminal defamation should be abolished because it chills public debate and stifles free speech. The U.N. Human Rights Committee and the Parliamentary Assembly of the Council of Europe have stated that because criminal defamation poses a great risk of chilling valuable exercise of the freedom of expression, criminal defamation may be used only in the most serious cases and that prison sentences should never be imposed. Similarly, the European Court of

Human Rights has held that states are not justified in imprisoning individuals convicted of defamation on matters of public interest and that journalists may be imprisoned only in exceptional circumstances, such as where their conduct has impaired other fundamental rights, as in cases of hate speech and incitement to violence.

State practice since 2000 reinforces these international legal holdings. More than thirty states have either decriminalized defamation or taken significant steps toward decriminalization, by, for example, decriminalizing defamation on matters of public interest. Ten more have abolished prison sentences for defamation. Many of these states embarked on this path of reform precisely because they determined that criminal defamation posed too great a risk of chilling freedom of expression.

More generally, international authorities and regional bodies have also addressed laws regulating defamation of public officials. Public officials, by virtue of their positions, must expect a greater degree of public scrutiny. Requiring that public officials tolerate greater criticism also enables more robust public debate on matters of public interest, since public officials are often either participants in or the subjects of such debates. Accordingly, the holdings of the U.N. Human Rights Committee, Special Rapporteurs on the Freedom of Expression, and the European Court of Human Rights also make clear that states cannot ban criticism of or offensive expressions about public officials. Nor can states provide, in their defamation laws, special protections for public officials, whether criminal or civil.

Finally, international authorities and regional bodies have held that civil penalties for defamation must be proportionate to the harm caused by the defamation. Like criminal sanctions, disproportionate civil penalties for defamation can have a destructive effect on free speech and democracy. Exorbitant civil damages raise the same specter of intimidation and coercion that arises in the criminal context; both stifle freedom of expression.

Ecuador's conduct in prosecuting petitioners in this case for defamation and sentencing them to lengthy prison sentences violated their right to freedom of expression under these international law principles. Mr. Palacio, a journalist, wrote on a matter of clear public interest and about a public official, the President. He and his editors were sentenced to a longer prison term than if Mr. Palacio had been convicted of defaming a private individual, since Article 493 of Ecuador's Criminal Code provides for a greater prison term for slanderous libel against an authority – one to three years – than for slanderous libel against non-authorities – six months to two years. Finally, the damages of US\$ 40 million levied against Mr. Palacio and the *El Universo* editors were grossly disproportionate to the minimal harm President Correa suffered if, in fact, he suffered any at all.

I. FREEDOM OF EXPRESSION IS INDISPENSIBLE TO DEMOCRATIC DEVELOPMENT AND THE PROTECTION OF ALL OTHER HUMAN RIGHTS

Freedom of expression is an essential human right upon which individual liberty, democracy, and the exercise of all other fundamental rights depend.¹ The free flow of ideas helps to inform and strengthen individual participation in democratic decision-making. This is particularly true of expression that criticizes authorities or discusses matters of public interest, as this kind of debate helps keep public officials accountable to the public they serve.²

Article 19 of the Universal Declaration of Human Rights offers an authoritative proclamation of the right to free expression, including “the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”³ The International Covenant on Civil and Political Rights provides a legally binding corollary that echoes this language.⁴ On a more foundational level, freedom of expression is imbedded in the very origins of the modern world order. During its inaugural 1946 session, the United Nations General Assembly adopted a resolution calling for an international conference on freedom of information that stated: “Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.”⁵

Compared to both this universal system and the various regional frameworks, the inter-American human rights system provides perhaps the “greatest scope and the broadest guarantees of protection to the right to freedom of thought and expression.”⁶ The American Convention on Human Rights, the American Declaration on the Rights and Duties of Man, and the Inter-American Democratic Charter all proclaim the right to free expression.⁷ The Inter-American Court of Human Rights has deemed freedom of

¹ OFFICE OF THE SPECIAL RAPPORTEUR FOR THE FREEDOM OF EXPRESSION, INTER-AM. COMM’N H.R., THE INTER-AMERICAN LEGAL FRAMEWORK REGARDING THE RIGHT TO FREEDOM OF EXPRESSION 2-3 (2009), <http://www.oas.org/en/iachr/expression/docs/publications/INTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf> [hereinafter “INTER-AMERICAN LEGAL FRAMEWORK”].

² INTER-AM. COMM’N H.R., ANNUAL REPORT OF THE SPECIAL RAPPORTEUR FOR THE FREEDOM OF EXPRESSION: 1998, 4 (2002).

³ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 19 (Dec. 10, 1948).

⁴ International Covenant on Civil and Political Rights, art. 18, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

⁵ G.A. Res. 59 (I), at 95, U.N. Doc. A/RES/59(I) (Dec. 14, 1946).

⁶ INTER-AMERICAN LEGAL FRAMEWORK, *supra* note 1, at 1.

⁷ American Declaration of the Rights and Duties of Man, art. IV, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992) (“Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”); American Convention on Human Rights, art. 13, Nov. 21, 1969, 1144 U.N.T.S. 143 (“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.”); Inter-American Democratic

expression a “cornerstone upon which the very existence of democratic society rests,”⁸ and this Commission has similarly affirmed that freedom of expression is “not a concession by the states” but a “fundamental and inalienable right of all individuals” and an “indispensable requirement” for democracy.⁹

Other regional systems have also recognized the crucial nexus between freedom of expression and democracy.¹⁰ In particular, the European Court of Human Rights (European Court) has generated an expansive jurisprudence that interprets the right to free expression as enshrined in the European Convention on Human Rights. Like its inter-American counterpart, the European Court has held that freedom of expression is one of the “essential foundations” and “basic conditions for [democracy’s] progress and for the development of every man.” Furthermore, the protections for freedom of expression apply not only to information or ideas that are “favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”¹¹

Freedom of expression is not an optional luxury. It protects the most foundational of human liberties – the right to think for ourselves and communicate with others. It enables the exercise of all other fundamental rights, including rights to participation in civic life and government, religion, education, and equality.¹² Finally, it underpins the existence of modern democratic society by enabling citizens to engage in the kind of public debate – and criticism – that is necessary for representative government.

Charter, art. 4 (“freedom of expression and of the press are essential components of the exercise of democracy.”).

⁸ Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-American Ct. H.R. (ser. A) No. 5, ¶ 70 (Nov. 13, 1985).

⁹ Inter-American Declaration of Principles on Freedom of Expression, INTER-AM. COMM’N H.R., 108th Sess. (Oct. 19, 2000), <http://www.iachr.org/declaration.htm>.

¹⁰ African Charter on Human and Peoples’ Rights (“Banjul Charter”), art. 9, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (“1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.”); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221 (“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.”).

¹¹ Handyside v. The United Kingdom, App. No. 5493/72, Eur. Ct. H.R., ¶ 49 (1976).

¹² INTER-AMERICAN LEGAL FRAMEWORK, *supra* note 1, at 4.

II. CRIMINAL DEFAMATION LAWS VIOLATE THE RIGHT TO FREEDOM OF EXPRESSION

A. Leading international authorities have declared that criminal defamation should be abolished because it chills public debate and stifles free speech.

Criminal defamation laws suffocate freedom of expression and silence the kind of open public debate necessary for democracy. These abusive laws allow authorities to invoke the coercive power of the state to intimidate and punish those who criticize the state or state officials.¹³ While the enforcement of criminal defamation laws silences those who are prosecuted under their authority, just having these laws on the books also stifles free expression. Laws such as Article 489 of Ecuador’s Criminal Code thus place impermissible restrictions on free speech.

Leading international authorities on freedom of expression have called on states to decriminalize defamation. The U.N. Special Rapporteur on Freedom of Opinion and Expression, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media have repeatedly denounced criminal defamation laws and appealed to states to abolish them. The holders of these special mandates have identified the “the abuse of restrictive defamation and libel laws” as one of the two main threats to freedom of expression worldwide. In their 2000 joint declaration, these experts deemed the criminalization of defamation, along with censorship by killing journalists, a pernicious danger that had reached “crisis proportions.”¹⁴ In a 2010 joint declaration, the same group of international mandate holders also named criminal defamation one of the “ten key threats to freedom of expression” in the next decade.¹⁵

Special rapporteurs on freedom of expression frequently call on states to eliminate criminal defamation laws. In 1999, the first-ever joint declaration of the U.N., OSCE, and OAS special rapporteurs on this issue urged states to review unduly restrictive criminal defamation laws “with a view to bringing them into line with their international obligations.”¹⁶ In 2002 and again in 2005, with the addition of the newly established

¹³ Jane E. Kirtley, *Criminal Defamation: An “Instrument of Destruction,”* in ENDING THE CHILLING EFFECT: WORKING TO REPEAL CRIMINAL LIBEL AND INSULT LAWS 89 (Ana Karlsreiter and Hanna Vuokko eds., 2004), available at <http://www.osce.org/fom/13573> [hereinafter Kirtley, CHILLING EFFECT].

¹⁴ U.N. Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media & the OAS Special Rapporteur on Freedom of Expression, *International Mechanisms for Promoting Freedom of Expression Joint Declaration* (2000), <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=142&IID=1> [hereinafter *Joint Declaration* (2000)].

¹⁵ U.N. Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, & the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, *Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade* (2010), <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=784&IID=1> [hereinafter *Tenth Anniversary Joint Declaration*].

¹⁶ U.N. Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media & the OAS Special Rapporteur on Freedom of Expression, *International Mechanisms for*

African Commission on Human and Peoples' Rights (African Commission) Special Rapporteur for Freedom of Expression, the group of international special-mandate holders declared, "Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."¹⁷

The U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has also adopted this unequivocal stance against criminal defamation. In fact, the Special Rapporteur has made criminal defamation a top priority and has addressed it more times than any other issue involving freedom of expression in reports to the U.N. Human Rights Council under this mandate,¹⁸ specifically noting that "penal sanctions [for defamation], in particular imprisonment, should never be applied."¹⁹ In his 2010 annual report to the Human Rights Council, for example, the U.N. Special Rapporteur stated, "Any attempt to criminalize freedom of expression as a means of limiting or censoring that freedom must be resisted."²⁰ He also encouraged "all efforts to decriminalize acts considered to be acts of defamation and to make civil liability proceedings the sole form of redress for complaints of damage to reputation."²¹

The OSCE Representative on Freedom of the Media has been similarly strong in denouncing criminal defamation. He succinctly summarized the problem as one in which criminal defamation laws "pos[e] a threat to journalists and the media as it creates a 'chilling effect' – a fear of prosecution for speech. That leads to intimidated public discourse, less free social debate, diminished transparency of government, and, generally speaking, more self-censorship."²²

Recognizing this insidious danger, the OSCE Representative has advocated vigorously for fully decriminalizing defamation and has engaged in a multi-year effort to

Promoting Freedom of Expression Joint Declaration (1999),
<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=141&IID=1>.

¹⁷ U.N. Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media & the OAS Special Rapporteur on Freedom of Expression, *International Mechanisms for Promoting Freedom of Expression Joint Declaration* (2002),

<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&IID=1>; OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration* (2005),

<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=394&IID=1>.

¹⁸ And to its predecessor, the U.N. Commission on Human Rights. See *Freedom of Opinion and Expression - Issues in focus*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS,

<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Issues.aspx> (last visited Jan. 21, 2013).

¹⁹ Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression, *Rep. on Civil and Political Rights, Including the Question of: Freedom of Expression Comm'n on Human Rights*, ¶¶ 24-28, U.N. Doc. E/CN.4/1999/64 (Jan. 29, 1999) (by Abid Hussain).

²⁰ Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression, *Second Annual Rep.*, Human Rights Council, ¶ 83, U.N. Doc. A/HRC/14/23 (Apr. 20, 2010) (by Frank La Rue).

²¹ *Id.*

²² Miklós Haraszti, *Campaign against Criminal Libel Laws and Disproportionate Civil Damages*, 2005 OSCE REPRESENTATIVE ON FREEDOM OF THE MEDIA Y.B.: FREEDOM & RESPONSIBILITY (OSCE) 175.

compile information about OSCE member states' defamation laws in order to inform debate and increase momentum toward decriminalization.²³ Beyond this initiative, the OSCE Representative has plainly and repeatedly called on states to abolish criminal defamation, which he has called "the major instrument of oppression" of OSCE journalists.²⁴ In a statement before the OSCE Parliamentary Assembly in 2005, the OSCE Representative on Freedom of the Media announced:

I call on the members of the European Union to abolish all their criminal libel and insult laws. Even though they rarely, if ever, apply these laws, their mere existence allows new democracies to use this fact to justify having similar laws on their books and applying them. The possibility for them to point fingers at the established democracies should be eliminated.²⁵

The OSCE Representative has stated that "libel and defamation should be dealt with only in the civil-law courts. Otherwise even the most advanced democracies are not insured against threats to press freedom."²⁶ In many other press releases, reports, and statements, the OSCE Representative has reiterated the position that "the only way forward is to ban criminal defamation provisions."²⁷

The call to decriminalize defamation enjoys, in addition to the endorsements of subject-matter experts such as the special rapporteurs, backing from regional organizations. The OAS General Assembly, of which Ecuador is a member, has joined the growing global movement to abolish all forms of criminal defamation. In 2007, 2008, and 2009, the General Assembly adopted resolutions on the "Right to Freedom of Thought and Expression and the Importance of the Media," which invited member states to repeal or amend all criminal defamation, *desacato*, slander, and libel laws and to "regulate these conducts exclusively in the area of civil law."²⁸

²³ Miklós Haraszti, *Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like to Achieve*, 2004 OSCE REPRESENTATIVE ON FREEDOM OF THE MEDIA Y.B.: FREEDOM & RESPONSIBILITY (OSCE) 301-302 [hereinafter OSCE Y.B. 2004].

²⁴ Miklós Haraszti, *Statement by the Representative on Freedom of the Media at the Fourth Winter Meeting of the OSCE Parliamentary Assembly in Vienna on 25 February 2005*, 2005 OSCE REPRESENTATIVE ON FREEDOM OF THE MEDIA Y.B.: FREEDOM & RESPONSIBILITY (OSCE) 51.

²⁵ Miklós Haraszti, *Statement by the Representative on Freedom of the Media at the Fourth Winter Meeting of the OSCE Parliamentary Assembly in Vienna on 25 February 2005*, 2005 OSCE REPRESENTATIVE ON FREEDOM OF THE MEDIA Y.B.: FREEDOM & RESPONSIBILITY (OSCE) 51.

²⁶ Miklós Haraszti, *OSCE Media Representative says new French Libel Case shows EU Countries should Abolish Criminal Defamation*, 2005 OSCE REPRESENTATIVE ON FREEDOM OF THE MEDIA Y.B.: FREEDOM & RESPONSIBILITY (OSCE) 188.

²⁷ Miklós Haraszti, *OSCE Media Freedom Representative Expresses Shock after more Azerbaijani Journalists Jailed, Calls on Authorities to Stop Prosecutions for Libel*, 2007 OSCE REPRESENTATIVE ON FREEDOM OF THE MEDIA Y.B. 9 (OSCE) 390.

²⁸ Right to Freedom of Thought and Expression and the Importance of the Media, OAS General Assembly, 39th Sess., (Vol. I), AG/RES.2523 (XXXIX-O/09) (June 4, 2009); Right to Freedom of Thought and Expression and the Importance of the Media, OAS General Assembly, 38th Sess., (Vol. I), AG/RES. 2434 (XXXVIII-O/08) (June 3, 2008); Right to Freedom of Thought and Expression and the Importance of the Media, OAS General Assembly, 37th Sess., (Vol. I), AG/RES. 2287 (XXXVII-O/07) (June 5, 2007).

The OSCE, the world's largest regional security organization, comprised of 57 member countries across Europe, Central Asia, and North America, has also joined the fight against criminal defamation.²⁹ In 2010, the OSCE Parliamentary Assembly adopted a resolution that called upon its member states to “[r]epeal criminal defamation statutes that make it a crime to defame, slander or libel someone or something.”³⁰ The Parliamentary Assembly has since reiterated its support for this resolution by issuing a press release in response to a court ruling in a member state that upheld a journalist's criminal defamation conviction: “The OSCE Parliamentary Assembly as a whole wishes therefore to convey its heartfelt solidarity to journalists and encourages parliaments to repeal laws that criminalize libel or defamation in line with our Oslo Annual Session in 2010.”³¹

Leading international and regional authorities have increasingly recognized that criminal defamation laws are a *per se* violation of the right to freedom of expression. It is the *existence* of such laws, as well as their actual application, that creates a chilling effect on the free flow of ideas. By causing fear of prosecution and punishment, criminal defamation laws such as Article 489 of Ecuador's Criminal Code stifle open public debate, cloud the transparency of the political process, and ultimately threaten the health and continued progression of democratic society.

B. Other United Nations and European bodies have stated that criminal defamation may be used only in the most serious cases and that prison sentences should never be imposed or may be used only in strictly and narrowly limited exceptional circumstances.

While Special Rapporteurs on the Freedom of Expression have universally taken the position that criminal defamation *per se* violates international law, prominent U.N. and European bodies concede that states may convict individuals of criminal defamation in certain circumstances. Most, however, place significant limitations on states' authority to do so. The U.N. Human Rights Committee has concluded that the International Covenant on Civil and Political Rights allows states to convict individuals of defamation only in the most serious cases. The Parliamentary Assembly of the Council of Europe has taken a similar stance. Both bodies also hold that states may never imprison those convicted of defamation, because the threat of prison exerts too great a chilling effect on the freedom of expression. While the European Court has never held that states may not imprison individuals convicted of defamation, it has strictly limited the circumstances under which imprisonment is permissible.

²⁹ *Who we are*, ORG. FOR SECURITY & CO-OPERATION IN EUR., <http://www.osce.org/who> (last visited Jan. 21, 2013).

³⁰ Oslo Declaration of the OSCE Parliamentary Assembly and Resolutions Adopted at the Nineteenth Annual Session, *Resolution on the Protection of Investigative Journalists*, July 6, 2010, at 63.

³¹ *Statement of President Migliori on Sentencing for Journalist Alessandro Sallusti*, OSCE PARLIAMENTARY ASSEMB. (Sept. 27, 2010), <http://www.oscepa.org/news-a-media/press-releases/1085-statement-of-president-migliori-on-sentencing-for-journalist-alessandro-sallusti>.

1. *U.N. bodies & the Parliamentary Assembly of the Council of Europe have held that states may use criminal defamation only in the most serious cases and that states may never impose imprisonment as a penalty*

The U.N. Human Rights Committee (HRC),³² the entity established under the International Covenant on Civil and Political Rights (ICCPR) to monitor compliance with that treaty's provisions, has declared that states should impose criminal sanctions for defamation only in the most serious cases and that prison sentences should never be imposed. The HRC does not interpret the ICCPR as banning criminal defamation *per se*: States can limit freedom of expression to protect "the reputations of others" under paragraph 3 of Article 19 of the ICCPR.³³ States may criminalize defamation to accomplish this goal. But the HRC qualifies this in its General Comment No. 34 by stating that "[d]efamation laws must be crafted with care to ensure ... that they do not serve, in practice, to stifle freedom of expression."³⁴ The HRC recommended that "[s]tates parties should consider the decriminalization of defamation and, in any case, the application of the criminal law *should only be countenanced in the most serious of cases*."³⁵ It further stated that "imprisonment is never an appropriate penalty" for those convicted of defamation.³⁶

The Parliamentary Assembly of the Council of Europe has taken a similar position. In 2007, it passed Resolution 577, in which it recognized that "[a]nti-defamation laws pursue the legitimate aim of protecting the reputation and rights of others."³⁷ However, it "urge[d] member states to apply these laws with the utmost restraint since they can seriously infringe freedom of expression."³⁸ The Parliamentary Assembly also called on member states to "abolish prison sentences for defamation without delay."³⁹ The Assembly explained that "imprisonment of a media professional is an unacceptable hindrance to freedom of expression" and risks chilling exercise of the right to freedom of expression that is "in the public interest."⁴⁰ The Assembly added, "The whole of society suffers the consequences when journalists are gagged by pressure of this kind."⁴¹

The U.N. Special Rapporteur on the Freedom of Opinion and Expression has advocated for fully decriminalizing defamation. Even before he asserted this principle, however, he took an unequivocal stance that imprisonment for defamation is never permissible. The U.N. Special Rapporteur first reported on defamation in his 1999 annual

³² Not to be confused with the U.N. Human Rights Council, the principle and general U.N. human rights body established under the Charter, or its predecessor, the U.N. Commission on Human Rights.

³³ U.N. Human Rights Comm., General Comment No. 34: Article 19, Freedoms of Opinion and Expression, ¶ 21, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter "General Comment"].

³⁴ *Id.* ¶ 47.

³⁵ *Id.* (emphasis added).

³⁶ *Id.*

³⁷ Eur. Parlia. Ass., *Resolution 1577: Towards Decriminalisation of Defamation*, ¶ 6, 34th Sess., (Oct. 4, 2007), <http://www.assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta07/ERES1577.htm> [hereinafter "Resolution 1577"].

³⁸ *Id.*

³⁹ *Id.* ¶ 17.1.

⁴⁰ *Id.* ¶ 12.

⁴¹ *Id.*

report. He recommended that, at minimum, “penal sanctions, in particular imprisonment, should never be applied.”⁴² The Special Rapporteur has frequently reiterated this principle. In the 2006 report, for example, the Special Rapporteur stated that “[t]he threat of criminal sanctions, in particular imprisonment, exerts a chilling effect on freedom of expression. Prison sentences[] [and] suspended prison sentences ... should never be available as a sanction for breach of defamation laws.”⁴³

2. *The European Court of Human Rights strictly limits the circumstances under which states may impose imprisonment as a punishment for defamation*

The European Court of Human Rights has strictly limited the circumstances under which states may imprison individuals for defamation. It has stated that it is within the prerogative of states to employ criminal defamation to safeguard the right to reputation.⁴⁴ But the European Court also requires that any restriction on a fundamental right (in this context, the right to freedom of expression) be “proportionate to the legitimate aim pursued”⁴⁵ and that “the nature and severity of the penalties imposed” should be taken into account in determining whether it is proportionate.⁴⁶ In cases in which a penalty infringes on freedom of expression, the European Court considers an additional factor in assessing the penalty’s severity – “[t]he chilling effect that the fear of such sanctions” has on permissible exercise of the right to freedom of expression.⁴⁷ Such an effect is particularly serious if it risks chilling speech on matters of public interest or political debate, which are “at the very core of the concept of a democratic society which prevails throughout the Convention.”⁴⁸

⁴² U.N. Econ. & Soc. Council, Comm. on Human Rights, Report of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression, ¶ 28(h), U.N. Doc. E/CN.4/1999/64 (Jan. 29, 1999).

U.N. Econ. & Soc. Council, Comm. on Human Rights, Report of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression, ¶ 52, U.N. Doc. E/CN.4/2006/55 (Dec. 30, 2005). *See also* U.N. H.R.C., Report of the Special Rapporteur on the Right to Freedom of Opinion and Expression, ¶ 48, U.N. Doc. A/HRC/4/27 (Jan. 2, 2007) (“Recourse to the judiciary system would also be possible but jail sentences and disproportionate fines should totally be excluded for offences such as defamation.”).

⁴⁴ *Castells v. Spain*, App. No. 11798/85, Eur. Ct. H.R., ¶ 46 (1992) (“[I]t remains open to the competent State authorities to adopt ... measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.”).

⁴⁵ *Lingens v. Austria*, App. No. 9815/82, Eur. Ct. H.R., ¶ 40 (1986).

⁴⁶ *Krasulya v. Russia*, App. No. 12365/03, Eur. Ct. H.R., ¶ 44 (2007). *See also* *Sabanovic v. Montenegro and Serbia*, App. No. 5995/06, Eur. Ct. H.R., ¶ 40 (2011) (“What remains to be resolved, therefore, is whether the interference was ‘necessary in a democratic society’ or, in other words, whether the criminal conviction was proportionate to the legitimate aim pursued.”); *Cumpana and Mazare v. Romania*, App. No. 33348/96, Eur. Ct. H.R., ¶ 11 (2004) (same).

⁴⁷ *Cumpana and Mazare v. Romania*, ¶ 114.

⁴⁸ *Lingens v. Austria*, ¶ 42. *See also* *Fatullayev v. Azerbaijan*, App. No. 40984/07, Eur. Ct. H.R., ¶ 116 (2010) (“[T]he Court again stresses that there is little scope under Article 10 § 2 for restrictions on political speech or on debate on questions of public interest.”).

In applying this proportionality analysis to defamation cases, the European Court has struck down prison sentences for defamation in thirteen⁴⁹ of the fourteen cases it has heard on the issue.⁵⁰ These cases reveal two broad principles that limit a state's authority to imprison those convicted of defamation. First, states may not justify imposing prison sentences on individuals convicted of defamation on matters of public interest or in the context of political speech. Second, states may sentence journalists convicted of defamation – regardless of whether it concerned a matter of public debate – to prison only in exceptional circumstances, such as where the expression at issue impaired other fundamental rights, as in the case of hate speech or incitement to violence. In two recent cases, the European Court applied this principle even though the applicants were not journalists. Convictions that violate these principles, the European Court has ruled, are inherently disproportionate. Not only is a prison sentence itself a severe sanction because it involves the restriction of liberty, but imposing it in these two circumstances poses too great a risk of chilling speech “at the very core” of a democratic society.

The European Court has repeatedly found that states may not impose prison sentences for defamation involving matters of public debate or in the context of political speech. In the seminal case, *Cumpana and Mazare v. Romania*, Romanian courts had sentenced a journalist and his editor to three months' imprisonment for committing the offense of insult and to seven months' imprisonment for defamation.⁵¹ The journalist had written an article accusing the former deputy mayor and his former legal expert (then a serving judge) of illegally awarding a contract to a company to tow away illegally parked

⁴⁹ See *Otegi Mondragon v. Spain*, App. No. 2034/07, Eur. Ct. H.R., ¶ 59 (2011); *Sabanovic v. Montenegro and Serbia*, App. No. 5995/06, Eur. Ct. H.R., ¶ 44 (2011); *Fatullayev v. Azerbaijan*, ¶ 103; *Mariapori v. Finland*, App. No. 37751/07, Eur. Ct. H.R., ¶¶ 62, 68-70 (2010); *Gavrilovici v. Moldova*, App. No. 25464/05, Eur. Ct. H.R., ¶ 60 (2009); *Marchenko v. Ukraine*, App. No. 4063/04, Eur. Ct. H.R., ¶ 52 (2009); *Mahmudov and Aazade v. Azerbaijan*, App. No. 35877/04, Eur. Ct. H.R., ¶¶ 50-52 (2008); *Krasulya v. Russia*, App. No. 12365/03, Eur. Ct. H.R., ¶ 44 (2007); *Lyashko v. Ukraine*, App. No. 21040/02, Eur. Ct. H.R., ¶ 57 (2006); *Malsiewicz-Gasior v. Poland*, App. No. 43797/98, Eur. Ct. H.R., ¶ 68 (2006); *Cumpana and Mazare v. Romania*, ¶ 116; *Dalban v. Romania*, App. No. 28114/95, Eur. Ct. H.R., ¶¶ 50-51 (1999); *Castells v. Spain*, App. No. 11798/85, Eur. Ct. H.R., ¶ 46 (1992).

⁵⁰ Several factors make *Lesnik v. Slovakia*, the one exception, a unique case that does not undermine the force of this otherwise-clear trend. *Lesnik v. Slovakia*, App. No. 35640/97, Eur. Ct. H.R. (2003). First, the facts of the case are unique in that it involved defamation of a public prosecutor. In several cases, the European Court has given member states more leeway to protect “the judicial machinery,” since, as it explained in *Lesnik*, “[i]t is in the general interest that they ... should enjoy public confidence.” *Id.* ¶ 54. See also *Perna v. Italy*, App. No. 48898/99, Eur. Ct. H.R., ¶ 41 (2001); *Pedersen and Baadsgaard v. Denmark*, App. No. 49017/99, Eur. Ct. H.R., ¶ 66 (2003). Second, the prison sentence imposed, four months, was relatively minor, and it was suspended for a probationary period of one year. Third, in upholding the sentence, the European Court placed considerable emphasis on the margin of appreciation, a doctrine unique to the European context. *Id.* ¶ 64 (“In view of the above considerations and bearing in mind that a certain margin of appreciation is left to the national authorities in such matters, the European Court finds that the interference complained of was not disproportionate to the legitimate aim pursued and can be regarded as ‘necessary’ within the meaning of Article 10 § 2 of the Convention.”) (emphasis added). Finally, the case did not involve either a journalist or a matter of public interest. As discussed more fully below, the European Court has been most willing to find that a state violated Article 10 for imprisoning an individual convicted of defamation if the defamation concerned a matter of public interest or the convicted individual was a journalist.

⁵¹ *Cumpana and Mazare v. Romania*, ¶ 49.

vehicles.⁵² The European Court held that “[t]he circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence.”⁵³ It continued that “[s]uch a sanction, by its very nature, will inevitably have a chilling effect” on individuals seeking to exercise the kind of expression that is highly protected under the Convention, speech involving a matter of public debate.⁵⁴

The European Court has repeated in other cases the principle that there is “no justification” for states to impose prison sentences for defamation on matters of public debate or in the context of political speech, even if the convicted individual is not a journalist.⁵⁵ In the case of *Marchenko v. Ukraine*, for example, Ukrainian courts had convicted a trade union leader of defamation and sentenced him to one year’s imprisonment suspended for one year.⁵⁶ At a public protest, he had accused a public school teacher of abusing her office to misappropriate public funds.⁵⁷ The European Court held that the case involved “debate on a matter of public interest,” “the misappropriation of public funds.”⁵⁸ Therefore, it concluded that the case “presented no justification for the imposition of a prison sentence.”⁵⁹

Furthermore, the European Court has repeatedly held that states may sentence journalists convicted of defamation – regardless of its subject matter – to prison only in exceptional circumstances, such as where the journalists’ expression has impaired other fundamental rights, as in the case of hate speech or incitement to violence. In *Cumpana and Mazare v. Romania*, for example, the Court stated that “the imposition of a prison sentence for a press offence [including defamation] will be compatible with journalists’ freedom of expression ... only in exceptional circumstances.”⁶⁰ The European Court has explained its rationale for this prohibition: “Investigative journalists are liable to be inhibited from reporting on matters of general public interest if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment.”⁶¹ The European Court elaborated that

⁵² *Id.* ¶ 20.

⁵³ *Id.* ¶ 116.

⁵⁴ *Id.*

⁵⁵ For cases that hold that there is “no justification” for sentencing an individual convicted of defamation on matters of public debate to prison, see *Otegi Mondragon v. Spain*, App. No. 2034/07, Eur. Ct. H.R., ¶ 60 (2011) (applicant was not a journalist); *Sabanovic v. Montenegro and Serbia*, App. No. 5995/06, Eur. Ct. H.R., ¶ 44 (2011) (applicant was not a journalist); *Mariapori v. Finland*, App. No. 37751/07, Eur. Ct. H.R., ¶ 68 (2010) (applicant was not a journalist); and *Mahmudov and Aazade v. Azerbaijan*, App. No. 35877/04, Eur. Ct. H.R., ¶ 51 (2008) (applicant was a journalist). The European Court made a similar holding with respect to political speech in *Malisiewicz-Gasior v. Poland*. *Malisiewicz-Gasior v. Poland*, App. No. 43797/98, Eur. Ct. H.R., ¶ 68 (“[T]he circumstances of the instant case - concerning defamation of a politician in the context of a heated political debate - present no justification for the imposition of a prison sentence.”).

⁵⁶ *Marchenko v. Ukraine*, App. No. 4063/04, Eur. Ct. H.R., ¶ 24 (2009).

⁵⁷ *Id.* ¶ 16.

⁵⁸ *Id.* ¶ 52.

⁵⁹ *Id.*

⁶⁰ *Cumpana and Mazare v. Romania*, App. No. 33348/96, Eur. Ct. H.R., ¶ 115 (2004) (emphasis added). See also *Mahmudov and Aazade v. Azerbaijan*, App. No. 35877/04, Eur. Ct. H.R., ¶ 50 (2008) (same).

⁶¹ *Mahmudov and Aazade v. Azerbaijan*, ¶ 49 (emphasis added).

“fear of such a sanction *inevitably* has a chilling effect on the exercise of journalistic freedom of expression.”⁶² While the European Court offered no further analysis, its finding suggests that the chilling effect presumably results from journalists’ inability to predict whether the topics on which they report will later be deemed matters of public interest. The European Court has identified the exceptional circumstances in which a journalist may be sentenced to prison as those “where other fundamental rights have been impaired, as for example, in the case of hate speech or incitement to violence.”⁶³

In two recent decisions, the European Court applied this principle even though the applicants were not journalists. Moreover, in one of the cases, the alleged defamation did not concern a matter of public interest. In *Mariapori v. Finland*, Finnish courts convicted a tax expert (and non-journalist) of defamation for accusing, in a book she had published, a tax inspector of committing perjury.⁶⁴ The tax-expert author was sentenced to four months’ conditional imprisonment.⁶⁵ The European Court stated that “the imposition of a prison sentence for a defamation offence will be compatible with an applicant’s right to freedom of expression as guaranteed by Article 10 of the Convention *only in exceptional circumstances*, notably where other fundamental rights have been seriously impaired.”⁶⁶ Unlike in *Cumpana and Mazare*, the European Court referred generally to an “*an applicant’s* right to freedom of expression,”⁶⁷ refraining from narrowing the article’s application to only journalists.⁶⁸ It continued that the circumstances of the case – “defamation of an individual in the context of a debate on an important matter of legitimate public interest, namely the actions of the tax authorities” – did not qualify as exceptional.⁶⁹ The European Court, therefore, ruled that Finland had violated Article 10.⁷⁰

Similarly, in *Gavrilovici v. Moldova*, Moldovan courts convicted a private citizen of insult (a type of defamation offense) and sentenced him to five days in detention.⁷¹ He had allegedly called the county president a fascist at a city council meeting.⁷² The European Court did not consider whether the insult concerned a matter in the public interest. Rather, it emphasized that the Moldovan courts had not given sufficient weight to the fact that the applicant had allegedly insulted a politician, writing that the “limits of acceptable criticism are wider as regards a politician than as regards a private individual” (a principle in the European Court’s jurisprudence discussed more fully below in the next

⁶² *Id.*

⁶³ *Cumpana and Mazare v. Romania*, ¶ 115. *See also* *Fatullayev v. Azerbaijan*, App No. 40984/07, Eur. Ct. H.R., ¶ 103 (2010); *Ruokanen and Others v. Finland*, App. No. 45130/06, Eur. Ct. H.R., ¶ 50 (2010).

⁶⁴ *Mariapori v. Finland*, App. No. 37751/07, Eur. Ct. H.R., ¶ 10 (2010).

⁶⁵ *Id.* ¶ 17.

⁶⁶ *Id.* ¶ 67 (emphasis added).

⁶⁷ *Id.*

⁶⁸ *Cumpana and Mazare v. Romania*, App. No. 33348/96, Eur. Ct. H.R., ¶ 115 (2004) (emphasis added).

⁶⁹ *Id.* ¶ 68.

⁷⁰ *Id.* ¶ 71.

⁷¹ *Gavrilovici v. Moldova*, App. No. 25464/05, Eur. Ct. H.R., ¶ 19 (2009). Article 47/3 of the Moldovan Code of Administrative Offences provides: “Insult, i.e. an intentional attack on a person’s honour and dignity by act, orally or in writing, shall be punished by 7-15 times the conventional unit or by administrative detention of up to fifteen days” *Id.* ¶ 28.

⁷² *Id.*

subsection).⁷³ It concluded by stating that “imposing criminal sanctions on *someone* who exercises the right to freedom of expression can be considered compatible with Article 10 ‘... *only in exceptional circumstances*, notably where other fundamental rights have been seriously impaired.’”⁷⁴ At least partly because the domestic courts had not conducted “any analysis of the need to send the applicant to prison” under this standard, the European Court held that Moldova had violated Article 10 of the Convention.⁷⁵

Thus, although the European Court has not held that states may never imprison individuals convicted of defamation, it has strictly and narrowly limited the circumstances under which it is permissible. Recently, too, in several decisions, the European Court has taken note of Resolution 1577 (passed by the Parliamentary Assembly of the Council of Europe), urging member states to abolish prison sentences for defamation.⁷⁶ These recent references suggest that the European Court may be moving toward prohibiting prison sentences for all types of defamation cases, not just those involving exceptional circumstances.

3. *Ecuador’s conduct in convicting petitioners of criminal defamation and sentencing them to prison violates the right to freedom of expression*

These broad principles, which authoritative international bodies and experts concerned with freedom of expression have based directly on well-established international human rights standards, make it clear that Ecuador’s conduct in prosecuting petitioners in this case for defamation and sentencing them to lengthy prison sentences violated their right to freedom of expression. The HRC, the U.N. Special Rapporteur, and the Council of Europe have declared explicitly that states violate their international obligations if they imprison individuals convicted of defamation. More broadly, under the principles articulated by the HRC, Mr. Palacio’s and his editors’ criminal convictions would themselves violate the right to freedom of expression, as their alleged conduct would not constitute one of “the most serious of cases,” the only circumstances under which the HRC principles permit states to convict individuals of criminal defamation.⁷⁷

Under the European Court’s jurisprudence, petitioners’ prison sentences would also be violative because they are clearly disproportionate. Mr. Palacio, a journalist, wrote on a matter of public interest and about a politician, President Correa; his editors provided him with the medium with which to exercise his right to freedom of expression. Thus, their conduct falls squarely within the type of expression for which the European Court requires any sanction to be proportionate. Furthermore, even if a court concluded that Mr. Palacio’s article did not concern a matter of public interest, it did not present any “exceptional circumstances” – it cannot be construed as either hate speech or incitement

⁷³ *Id.* ¶ 59.

⁷⁴ *Id.* ¶ 60 (emphasis added).

⁷⁵ *Id.* ¶ 61.

⁷⁶ See, e.g., *Otegi Mondragon v. Spain*, App. No. 2034/07, Eur. Ct. H.R., ¶ 31 (2011); *Mariapori v. Finland*, App. No. 37751/07, Eur. Ct. H.R., ¶ 69 (2010).

⁷⁷ General Comment, *supra* note 33, ¶ 47.

to violence – that the European Court requires to be present for states to permissibly sentence individuals convicted of defamation to prison.

C. The U.N. Human Rights Committee, Special Rapporteurs on the Freedom of Expression, and the European Court have held that states may not ban criticism of or offensive expressions about public officials or provide special protection against defamation for public officials.

The U.N. Human Rights Committee (HRC), Special Rapporteurs on the Freedom of Expression, and the European Court of Human Rights have held that states may not ban criticism of or offensive expressions about public officials or provide special protections against defamation for public officials. Public officials, by virtue of their positions, must expect a greater degree of public scrutiny. The OAS Special Rapporteur on Freedom of Expression has stated that “[p]ublic officials are subject to greater scrutiny by society.”⁷⁸ As the European Court has explained, this principle reflects the fact that “[a] politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed.”⁷⁹ Thus, “the limits of acceptable criticism ... are wider with regard to a politician acting in his public capacity” than for private individuals.⁸⁰ Requiring that public officials tolerate greater criticism also enables more robust public debate on matters of public interest, since public officials are often either participants in or the subjects of such debates. As the HRC has held, fostering this kind of debate is central to the freedom of expression: “[In] circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.”⁸¹

1. *States may not ban criticism of or offensive expressions about public officials*

The OAS Special Rapporteur for Freedom of Expression has, since 1998, consistently urged member states to abolish *desacato* laws.⁸² The Special Rapporteur’s

⁷⁸ See OAS Special Rapporteurship for Freedom of Expression, Declaration of Principles on Freedom of Expression, ¶ 11, <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26&IID=1>.

⁷⁹ *Colombani and Others v. France*, App. No. 51279/99, Eur. Ct. H.R., ¶ 56 (2002).

⁸⁰ *Id.* ¶ 56. See also *Lingens v. Austria*, App. No. 9815/82, Eur. Ct. H.R., ¶ 42 (1986) (“The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.”).

⁸¹ General Comment, *supra* note 33, ¶ 38.

⁸² INTER-AM. COMM’N ON HUMAN RIGHTS, ANNUAL REPORT OF THE SPECIAL RAPPORTEUR FOR THE FREEDOM OF EXPRESSION: 2004, 140 (2004) (“Since its creation, the Office of the Special Rapporteur has examined the problem of *desacato* laws because of the danger that they could become a mechanism to stifle pluralistic and democratic debate on affairs of government.”); INTER-AM. COMM’N ON HUMAN RIGHTS, ANNUAL REPORT OF THE SPECIAL RAPPORTEUR FOR THE FREEDOM OF EXPRESSION: 2002, 120 (2002) (“[T]he Office of the Special Rapporteur reiterates and updates the arguments in favor of the abolition of *desacato* laws.”); INTER-AM. COMM’N ON HUMAN RIGHTS, ANNUAL REPORT OF THE SPECIAL RAPPORTEUR FOR THE FREEDOM OF EXPRESSION: 2000, 50 (2000) (“*Desacato*, or contempt laws, violate the human right to freedom of expression as it is expressed in numerous international instruments, including the American Convention on Human Rights and the Universal Declaration of Human Rights.”); INTER-AM. COMM’N ON HUMAN RIGHTS, REPORT OF THE OFFICE OF THE SPECIAL RAPPORTEUR FOR THE FREEDOM OF EXPRESSION:

2011 annual report, for example, recommended that member states “[p]romote the repeal of contempt (desacato) laws, whatever their form, given that these norms are contrary to the American Convention on Human Rights and restrict public debate, an essential element of the practice of democracy.”⁸³ The OAS General Assembly has passed several resolutions “invit[ing] the Member States to consider the recommendations of the Office of the Special Rapporteur regarding defamation, namely by repealing or amending the laws that criminalize desacato.”⁸⁴

Similarly, the HRC has stated that criticism of public officials must be permitted: “[A]ll public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.”⁸⁵ The HRC “express[ed] concern” about common types of laws that prohibit criticism of or offensive comments about authorities, such as “lese majesty, desacato, disrespect for authority[,] ... defamation of the head of state and the protection of the honour of public officials.”⁸⁶

The European Court, too, has found that laws that make insulting public officials a separate offense violate the right to freedom of expression under the European Convention. In *Colombani and Others v. France*, the applicant challenged his conviction under a French law that made it a separate offense, punishable by up to one year’s imprisonment or a fine of 300,000 francs or both, to publicly insult a foreign head of state, head of government or minister of foreign affairs. The European Court held that the conviction violated Article 10 of the Convention.⁸⁷ It explained that the law “confer[red] a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted.”⁸⁸ This kind of law, the European Court expanded, “is liable to inhibit freedom of expression without meeting any ‘pressing social need’ capable of justifying such a restriction.”⁸⁹ Such an official may still use the “standard procedure available to everyone” to pursue claims that his or her reputation has been attacked, but, the Court held, there is no justification for having a separate law giving special protection to heads of state or other public officials.⁹⁰

1998, 37 (1998) (“The Rapporteur sets out below which States and which laws have contempt provisions and are therefore not compatible with the terms of the American Convention and should be revoked.”).

⁸³ INTER-AM. HUMAN RIGHTS COMM., ANNUAL REPORT OF THE OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION: 2011, 388 (2011).

⁸⁴ See OAS G.A. Res. 2523 (XXXIX-O/09), Right to Freedom of Thought and Expression and the Importance of the Media, ¶ 12 (June 4, 2009), OEA/Ser.P/XXXIX-O.2 (Oct. 21, 2009); OAS G.A. Res. 2434 (XXXVIII-O/08), Right to Freedom of Thought and Expression and the Importance of the Media, ¶ 12 (June 3, 2008), OEA/Ser.P/XXXVII-O.2 (Oct. 14, 2008); OAS G.A. Res. 2287 (XXXVII-O/07), Right to Freedom of Thought and Expression and the Importance of the Media, ¶ 12 (June 5, 2007), OEA/Ser.P/XXXVII-O.2 (Oct. 22, 2007).

⁸⁵ General Comment, *supra* note 33, ¶ 38.

⁸⁶ *Id.*

⁸⁷ *Colombani and Others v. France*, App. No. 51279/99, Eur. Ct. H.R. (2002).

⁸⁸ *Id.* ¶ 68.

⁸⁹ *Id.* ¶ 69.

⁹⁰ *Id.* (“Accordingly, the offence of insulting a foreign head of State is liable to inhibit freedom of expression without meeting any ‘pressing social need’ capable of justifying such a restriction. It is the

2. *States cannot grant public officials greater protection than ordinary citizens against defamation*

U.N. and European bodies and special rapporteurs on the freedom of expression have also held that laws providing special protections from defamation for public officials are prohibited. The HRC stated in General Comment No. 34 that “laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned.”⁹¹ Special rapporteurs on the freedom of expression for the inter-American and European systems have likewise condemned laws that prohibit criticism of public officials or impose a greater penalty for such criticism. Their 2000 Joint Declaration stated that “laws which provide special protection for public figures ... should be repealed.”⁹² Such laws should be repealed because of “the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens.”⁹³

The European Court, too, has held that defamation laws may not provide increased protection for public officials. In *Otegi Mondragon v. Spain*, the Court held that a conviction under Article 490 § 6 of the Spanish Criminal Code violated Article 10 of the European Convention.⁹⁴ The Spanish Criminal Code provided a greater degree of protection for heads of state and government officials than for private citizens. Individuals convicted of insulting the head of state could be sentenced to prison, whereas the penalty for insulting ordinary citizens included only day-fines (i.e., a person would be ordered to pay X days of their daily salary).⁹⁵ The Code also provided that those convicted of insulting government officials could be sentenced to a longer period of day-fines than those convicted of insulting private citizens.⁹⁶ The European Court, referring to its earlier decision in *Colombani*, stated that “providing increased protection by means of a special law on insults will not, as a rule, be in keeping with the spirit of the Convention.”⁹⁷ The Council of Europe has endorsed the European Court’s jurisprudence on this point. The Parliamentary Assembly called on member states to “remove from their defamation legislation any increased protection for public figures, in accordance with the Court’s case law.”⁹⁸

special protection afforded foreign heads of State by section 36 that undermines freedom of expression, not their right to use the standard procedure available to everyone to complain if their honour or reputation has been attacked or they are subjected to insulting remarks”).

⁹¹ General Comment, *supra* note 33, ¶ 38.

⁹² *Joint Declaration* (2000), *supra* note 14.

⁹³ *Id.*

⁹⁴ *Otegi Mondragon v. Spain*, App. No. 2034/07, Eur. Ct. H.R., ¶ 55 (2011).

⁹⁵ *Id.* ¶¶ 27-28 (quoting Articles 209 and 410 of the Spanish Criminal Code).

⁹⁶ *Id.* ¶ 29 (quoting Articles 496 and 504 of the Spanish Criminal Code).

⁹⁷ *Id.* ¶ 55. *See also* *Pakdemirli v. Turkey*, App. No. 35839/97, Eur. Ct. H.R. (2005).

⁹⁸ Resolution 1577, *supra* note 37, ¶ 17.6.

3. *Ecuador's defamation law violates the right to freedom of expression*

Thus, the holdings of the HRC, special rapporteurs on the freedom of expression, and the European Court make clear that states may not ban criticism of or offensive expressions about public officials. Nor may states in their defamation laws, provide special protections for public officials. Article 493 of the Ecuadoran Criminal Code violates these principles. It provides for a greater prison term for slanderous libel against an authority – one to three years – than for slanderous libel against non-authorities –six months to two years.

III. SINCE 2000, MORE THAN THIRTY STATES HAVE DECRIMINALIZED DEFAMATION OR TAKEN SIGNIFICANT STEPS IN THAT DIRECTION, AND AT LEAST TEN ADDITIONAL STATES HAVE ABOLISHED PRISON SENTENCES FOR CRIMINAL DEFAMATION

In recent decades, the trend in state practice has been toward decriminalizing defamation. Since 2000, more than 30 states have either fully decriminalized defamation or taken steps in that direction by decriminalizing certain kinds of defamation. Ten more states have abolished prison sentences for criminal defamation. Many of these states embarked on this path of reform because they determined that criminal defamation posed too great a risk of chilling freedom of expression. For example, UK MP Lord Lester of Herne Hill advocated for decriminalizing defamation in the United Kingdom (Parliament passed a law accomplishing this in 2009)⁹⁹ by explaining that “[o]ne of the major problems with criminal defamation is the possibility of a harsh sanction.... The threat of such penalties has a severe chilling effect on the right to free speech.”¹⁰⁰ Newer democracies, particularly in Eastern and Central Europe, are among the leaders in the recent movement toward decriminalizing defamation. These states have taken steps that are in line with international authorities’ warnings that criminal defamation threatens the continued progression of democratic society by stifling open public debate and clouding the transparency of the political process.

Latin America and the Caribbean:

A. States that have decriminalized or taken steps in that direction:

- **Costa Rica** amended Article 309 of the Criminal Code to abolish the offense of *desacato* in March 2002.¹⁰¹

⁹⁹ Council of Eur., *Study on the Alignment of Laws and Practices Concerning Defamation with the Relevant Case-law of the European Court of Human Rights on Freedom of Expression, Particularly with Regard to the Principle of Proportionality*, at 120, CDMSI(2012)MISC11 (2012) [hereinafter Council of Eur., *Study*].

¹⁰⁰ Speech by Lord Lester of Herne Hill, Coroners and Justice Bill, Amendment 178, Com. Stage, H.L. 712 (105) PARL. DEB., H.L. (Session 2008-9) Column 845, July 9, 2009, <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90709-0012.htm#09070996000339>.

¹⁰¹ ANNUAL REPORT OF THE SPECIAL RAPPORTEUR FOR THE FREEDOM OF EXPRESSION: 2002, *supra* note 82, at 138.

- **Peru** repealed Article 374 of its Penal Code, which criminalized *desacato*, in May 2003.¹⁰²
- In 2005, **Chile** amended its Penal and Military Justices Codes to eliminate the crime of *desacato*.¹⁰³
- **Mexico** decriminalized defamation at the federal level in April 2007.¹⁰⁴
- **Panama** decriminalized defamation involving opinions about official acts or omissions of high-ranking public servants in 2007.¹⁰⁵
- **Argentina** decriminalized defamation on matters of public interest in November 2009.¹⁰⁶
- In May 2009, the **Brazilian** Supreme Federal Tribunal struck down the 1967 Press Law, holding that it violated the constitutional right to free expression. The Press Law had provided for prison sentences of up to three years for journalists convicted of criminal defamation.¹⁰⁷
- **Uruguay** amended its Penal Code in June 2009 to exempt individuals from liability for defamation on a matter of public interest or about public officials (unless he or she acted with actual malice).¹⁰⁸
- In 2011, the Supreme Court of **Bermuda** held that criminal defamation violates the constitutional right to free expression.¹⁰⁹
- **El Salvador** eliminated criminal defamation in 2011, replacing it with civil damages and administrative consequences.¹¹⁰
- **Grenada** decriminalized defamation in 2012.¹¹¹

B. *States that have abolished prison sentences:*

- In 2009, **Argentina** amended its criminal code to abolish prison sentences for criminal defamation, instead allowing only monetary damages.¹¹²

¹⁰² Patti McCracken, *A Guide to Evolution of Insult Laws in 2010*, WORLD PRESS FREEDOM COMM. & FREEDOM HOUSE 102 (2012),

<http://www.freedomhouse.org/sites/default/files/Insult%20Law%20Report.pdf>.

¹⁰³ INTER-AM. COMM’N H. R., ANNUAL REPORT OF THE SPECIAL RAPPORTEUR FOR THE FREEDOM OF EXPRESSION: 2005, 33 (2005).

¹⁰⁴ McCracken, *supra* note 102, at 100-101. Many Mexican states, however, still have criminal defamation provisions in their penal codes. *Id.*

¹⁰⁵ Press Release, Inter-Am. Comm’n H.R., Office of the Special Rapporteur Welcomes Important Advances in Freedom of Expression in the Region, Press Release R128/12 (Oct. 26, 2012),

<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=912&IID=1>.

¹⁰⁶ INTER-AMERICAN LEGAL FRAMEWORK, *supra* note 1, at 93-94.

¹⁰⁷ *In Victory for Press, High Court Strikes Down Repressive Law*, COMM. TO PROTECT JOURNALISTS (May 7, 2009), <http://cpj.org/2009/05/in-victory-for-press-brazils-high-court-strikes-do.php>.

¹⁰⁸ INTER-AMERICAN LEGAL FRAMEWORK, *supra* note 1, at 104.

¹⁰⁹ *Latin America: Free expression and the law in 2011*, ARTICLE 19 (Mar. 1, 2012), <http://www.article19.org/resources.php/resource/2979/en/latin-america:-free-expression-and-the-law-in-2011>.

¹¹⁰ *Id.*

¹¹¹ *Grenada Abolishes Criminal Defamation*, INT’L PRESS INSTITUTE (Oct. 18, 2012), www.freemedia.at/home/.../grenada-abolishes-criminal-libel.html. However, IPI notes that “[d]espite the repeal of Sections 252 and 253, seditious libel, regulated under Section 327, remains a criminal offence in Grenada and can result in up to two years in prison. Section 328, which makes insulting the Queen a misdemeanor, also remains on the books.” *Id.*

- In February 2010, the **Costa Rican** Supreme Court eliminated provisions in the Printing Press Law that imposed prison terms of up to 120 days for defamation in print media.¹¹³
- In 2011, **El Salvador** eliminated prison sentences as permissible punishment for criminal defamation.¹¹⁴

Europe:

A. States that have decriminalized or taken steps in that direction:

- **Ukraine** decriminalized defamation in 2001.¹¹⁵
- **Bosnia and Herzegovina** decriminalized defamation in 2002.¹¹⁶
- **Estonia** decriminalized defamation in 2002, except in certain specific cases.¹¹⁷
- **Cyprus** decriminalized defamation in 2003,¹¹⁸ except as regards foreign heads of state, other foreign officials and the National Guard.¹¹⁹
- **Georgia** decriminalized libel in June 2004.¹²⁰
- In 2004, **Moldova** repealed Article 170 of the new Criminal Code to eliminate imprisonment for “slander” (knowingly spreading false information alleging particularly serious crimes).¹²¹
- **Romania** decriminalized defamation in 2006.¹²² Furthermore, the new Criminal Code, adopted in 2010 but not yet in force, contains no provisions criminalizing insult or defamation.¹²³

¹¹² INTER-AMERICAN LEGAL FRAMEWORK, *supra* note 1, at 93-94.

¹¹³ *Costa Rica Eliminates Prison Terms for Defamation*, COMM. TO PROTECT JOURNALISTS (Feb. 12, 2010), <http://cpj.org/2010/02/costa-rica-eliminates-prison-terms-for-defamation.php>.

¹¹⁴ *Freedom of the Press 2012 – El Salvador*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-press/2012/el-salvador>. See also *Codigo Penal*, <http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/codigo-penal> (Articles 177-183).

¹¹⁵ *In Victor for Journalists, Recriminalization of Defamation Rejected*, REPORTERS WITHOUT BORDERS (Oct. 2, 2012), <http://en.rsf.org/ukraine-appeal-on-parliament-about-02-08-2012.43153.html>.

¹¹⁶ Council of Eur., *Study*, *supra* note 99, at 47-48.

¹¹⁷ Council of Eur., *Study*, *supra* note 99, at 56-57. Exceptions to the general ban on criminal defamation are for persons enjoying international immunity of the state (article 247), state authorities (article 275), official symbols of the Republic of Estonia (article 245), a judge or a court (article 305); the maximum sentence is two years' imprisonment.

¹¹⁸ *Id.* at 53.

¹¹⁹ The legislation for defamation, libel and insult was amended by Law 84(I)/2003, which repealed criminal liability and imprisonment provisions for defamation, libel and insult in the Criminal Code (Cap. 154). In the Criminal Code, however, there is a specific provision (section 68) that envisages criminal liability for insulting a foreign sovereign, ambassador or any other foreign state official. Further, section 50D of the code provides for criminal liability for insulting the National Guard. Such an offense is punishable with imprisonment not exceeding two years, or with a fine not exceeding 1,500 Cyprus pounds, or with both such penalties.” *Id.*

¹²⁰ Council of Eur., *Study*, *supra* note 99, at 65.

¹²¹ *Id.* at 85. However, it retains imprisonment as an acceptable punishment for slander of state authorities or symbols, military members, or judges, with a maximum sentence of seven years' imprisonment. *Id.*

¹²² *Id.* at 115.

¹²³ *Id.* at 95-96.

- The **United Kingdom** decriminalized defamation in 2009.¹²⁴
- **Ireland** decriminalized defamation, “seditious libel” and “obscene libel” by abolishing these common-law offenses in the Defamation Act 2009 (section 35). This law entered into force on January 1, 2010.¹²⁵
- **Armenia** decriminalized defamation in May 2010.¹²⁶
- **Montenegro** decriminalized defamation in 2011.¹²⁷
- In November 2012, the **Macedonian** parliament voted to decriminalize defamation. Under the new law, journalists no longer face criminal charges for libel and judges can no longer set arbitrary fines if journalists are found guilty of the offense.¹²⁸

B. *States that have abolished prison sentences:*

- In 2000, **Bulgaria** repealed provisions in its Criminal Code that allowed for the imprisonment of those convicted of defamation.¹²⁹ Instead, criminal defamation is now punishable only by fines ranging from BGN 5000 to BGN15000 and by public reprimand.¹³⁰
- In 2000, **France** repealed most terms of imprisonment for libel or insult and, in 2004, eliminated the crime of insult against the head of a foreign state.¹³¹
- **Serbia** abolished prison sentences for defamation and insult in 2005.¹³²
- **Albania** abolished prison sentences for criminal defamation in 2012.¹³³
- In October 2011, **Croatia** passed a new Criminal Code, which makes defamation punishable by fines only.¹³⁴

¹²⁴ *Id.* at 120.

¹²⁵ *Id.* at 74. However, at the same time, it also introduced a criminal “blasphemy” provision that penalizes statements that are “grossly abusive or insulting in relation to matters held sacred by any religion.” *See OSCE Media Freedom Representative Welcomes Ireland’s Decriminalization of Defamation, Calls for Crime of ‘Blasphemy’ to be Abolished*, OSCE REPRESENTATIVE ON FREEDOM OF THE MEDIA (Jan. 12, 2010), <http://www.osce.org/fom/51819>.

¹²⁶ Council of Eur., *Study*, *supra* note 99, at 40. *See also Freedom of the Press 2012 – Armenia*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-press/2012/armenia>. Nevertheless, a great many civil suits in which journalists have been sentenced to pay exorbitant damages have been reported. *OSCE Media Freedom Representative Expresses Concern over Growing Number of Libel Lawsuits in Armenia*, OSCE REPRESENTATIVE ON FREEDOM OF THE MEDIA (Nov. 10, 2011), <http://www.osce.org/fom/84878>.

¹²⁷ Council of Eur., *Study*, *supra* note 99, at 86.

¹²⁸ *Libel Law Changes Criticised in Macedonia*, BALKAN INSIGHT (Nov. 13, 2012), <http://www.balkaninsight.com/en/article/macedonia-decriminalizes-libel-tightens-rules-on-foreign-media>. However, the law still allows steep fines of up to 27,000 euros for journalists, editors, and media owners found guilty of libel. *Id.*

¹²⁹ Council of Eur., *Study*, *supra* note 99, at 48.

¹³⁰ *Id.* (quoting Article 147 of the Criminal Code).

¹³¹ *Id.* at 61-62. The only exception allowing for the imposition of prison terms applies solely to cases relating to a party’s relationship to an ethnicity, race, nation, religion, gender, sexual orientation, or disability.

¹³² *Id.* at 99. Imprisonment for up to three months is, however, still foreseen in cases of exposure to ridicule of the state and state symbols, foreign states and their symbols, selected international organizations, and national and ethnic groups (Articles 173 and 175). *Id.*

¹³³ *Id.* at 37. The only exceptions to this general decriminalization is for defamation of the President, foreign senior officials, and state symbols, which can be still punishable by three years’ imprisonment.

Africa:

A. States that have decriminalized or taken steps in that direction:

- In 2001, **Ghana** repealed the provisions of its Criminal Code criminalizing defamation, including Section 183A, which specifically criminalized defamation of the President.¹³⁵
- In 2004, **Togo** amended its Press Code to remove criminal penalties for some press offenses, including defamation of public figures and institutions.¹³⁶
- **Uganda**'s Constitutional Court held in 2010 that the offense of criminal seditious libel, which had been used to prosecute journalists, is unconstitutional.¹³⁷

B. States that have abolished prison sentences:

- The **Central African Republic** amended its Press Law in November 2004 to remove prison sentences for press offenses, including defamation and the publication of "false news."¹³⁸
- In its 2004 Press Law, **Côte d'Ivoire** eliminated prison sentences for defamation.¹³⁹

Asia and the Pacific:

A. States that have decriminalized or taken steps in that direction:

- **New Zealand** decriminalized defamation in 1992, in large part because it concluded that criminal defamation inhibited free speech and public criticism.¹⁴⁰
- In **Papua New Guinea**, journalists can be sued for defamation in civil cases, but defamation is not a criminal offense.¹⁴¹

¹³⁴ *Id.* at 52.

¹³⁵ INT'L FEDERATION OF JOURNALISTS, DECRIMINALIZING DEFAMATION: AN IFJ CAMPAIGN RESOURCE FOR DEFEATING CRIMINAL DEFAMATION 18 (2005), asiapacific.ifj.org/assets/docs/009/148/a1b1809-294c794.pdf [hereinafter "DECRIMINALIZING DEFAMATION: AN IFJ CAMPAIGN"].

¹³⁶ *Togo: Promises and the Press*, COMM. TO PROTECT JOURNALISTS (Oct. 20, 2004), <http://www.cpj.org/reports/2004/10/togo-oct-04.php>. However, the authors note that "several press offenses would [still] carry criminal penalties of up to one year in prison, including publishing news deemed to incite crime, theft, destruction of public or private property, or ethnic or racial hatred, and 'crimes against the internal or external security of the state.'" *Id.*

¹³⁷ *Uganda: Using the Law to Fight for Media Freedom*, MEDIA LEGAL DEFENCE INITIATIVE (Aug. 30, 2010), <http://www.mediadefence.org/article/uganda-using-law-fight-media-freedom>.

¹³⁸ *Parliament Decriminalizes Defamation*, IFEX (Dec. 9, 2004), http://www.ifex.org/central_african_republic/2004/12/09/parliament_decriminalises_press/; *Freedom of the Press 2006 – Central African Republic* (Apr. 27, 2006), <http://www.unhcr.org/refworld/docid/473451adc.html>.

¹³⁹ McCracken, *supra* note 102, at 68 ("A press law introduced in December 2004 (Law 2004-643) abolished prison terms for press offenses, imposing large fines instead. Art. 68 specifies that press offenses are not punishable by imprisonment.").

¹⁴⁰ JOHN BURROWS & URSULA CHEER, *MEDIA LAW IN NEW ZEALAND* 10 (5th ed. 2005).

- **Sri Lanka** repealed its criminal defamation laws in 2002.¹⁴²
- The **Maldives** decriminalized defamation in December 2009.¹⁴³
- **Timor-Leste** decriminalized defamation in its 2009 penal code.¹⁴⁴
- In July 2011, **Kyrgyzstan** became the first Central Asian state to decriminalize libel.¹⁴⁵
- In 2012, **Tajikistan** repealed Articles 135 and 136 of the criminal code, thus eliminating the criminal offenses of defamation and insult.¹⁴⁶

As this survey of state practice reveals, more than thirty states have either fully decriminalized defamation or taken steps in that direction by decriminalizing certain kinds of defamation. Ten more states have abolished prison sentences for criminal defamation. The trend since 2000 has been toward decriminalizing defamation. As many of these states realized, criminal defamation simply poses too great a risk of chilling the freedom of expression.

IV. EXCESSIVE CIVIL DEFAMATION PENALTIES VIOLATE THE RIGHT TO FREEDOM OF EXPRESSION

Like criminal sanctions, disproportionate civil penalties for defamation can have a destructive effect on free speech and democracy. Exorbitant civil damages raise the same specter of intimidation and coercion that arises in the criminal context; both stifle freedom of expression. Indeed, the OSCE Rapporteur on Freedom of the Media observed that high fines on journalists exerted a chilling effect “just as great as prison sentences.”¹⁴⁷ Key international and regional bodies have drawn attention to the dangers of inordinately large civil sanctions.

A. International and regional bodies hold that civil sanctions for defamation should be proportionate to the harm caused.

The U.N. Human Rights Committee has warned that in both the criminal and civil contexts, “care should be taken by States parties to avoid excessively punitive measures and penalties.”¹⁴⁸ The U.N., OAS, and OSCE special rapporteurs on freedom of

¹⁴¹ *Freedom of the Press 2012 – Papua New Guinea*, FREEDOM HOUSE (Oct. 24, 2012), <http://www.freedomhouse.org/report/freedom-press/2012/papua-new-guinea>.

¹⁴² DECRIMINALIZING DEFAMATION: AN IFJ CAMPAIGN, *supra* note 135, at 23.

¹⁴³ *U.N. Rights Expert Pleads Defamation No Longer Criminal Offence in Maldives*, U.N. News Service (Dec. 1, 2009) <http://www.unhcr.org/refworld/docid/4b191378c.html>.

¹⁴⁴ *Freedom of the Press 2012 - East Timor*, FREEDOM HOUSE (Oct. 24, 2012), <http://www.unhcr.org/refworld/country,,,TMP,4562d8cf2,50895d9124,0.html>.

¹⁴⁵ *OSCE Media Freedom Representative Welcomes Decriminalization of Libel by Kyrgyzstan*, OSCE REPRESENTATIVE ON FREEDOM OF THE MEDIA (July 19, 2011), <http://www.osce.org/fom/81026>.

¹⁴⁶ *Tajikistan’s President Decriminalizes Libel*, KYIV POST (July 4, 2012) <http://www.kyivpost.com/content/russia-and-former-soviet-union/tajikistans-president-decriminalizes-libel.html>.

¹⁴⁷ Miklós Haraszti, *Preface*, in *ENDING THE CHILLING EFFECT*, *supra* note 13, at 9, 9 [hereinafter Haraszti, *CHILLING EFFECT*].

¹⁴⁸ General Comment, *supra* note 33, ¶ 47.

expression have also recognized that excessive fines are an “unduly harsh sanctio[n]” for defamation.¹⁴⁹ In their 2000 Joint Declaration, they stressed that:

civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritise the use of a range of non-pecuniary remedies.¹⁵⁰

The U.N. Special Rapporteur reiterated this standard in nearly identical language in his 2010 annual report to the U.N. Human Rights Council. However, the 2010 report replaced the words “chilling effect” with “block” to describe the destructive effect of heavy civil damages on freedom of expression,¹⁵¹ suggesting a growing recognition of the serious threat such abuses pose.

In order to determine whether civil damages for defamation violate the right to freedom of expression, international authorities and regional courts rely on the principle of proportionality. The inter-American system uses a strict proportionality test that requires that restrictions on free speech “be proportionate to the interest that justifies it and closely tailored to the accomplishment of that legitimate purpose, interfering as little as possible with the effective exercise of the right to freedom of thought and expression.”¹⁵² In other words, any limitations on the freedom of expression, including civil damages, must be “proportionate to the seriousness of the damage caused.”¹⁵³ The OAS Special Rapporteur for Freedom of Expression has urged all member states to apply this inter-American standard to ensure that all results flowing from civil defamation proceedings are “proportionate and reasonable.”¹⁵⁴

The European Court of Human Rights also applies proportionality analysis to ensure that damages for civil defamation do not stifle free speech. In *Tolstoy Miloslavsky v. the United Kingdom*, the European Court first held that “under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.”¹⁵⁵ The case involved a historian who had published pamphlets accusing a school warden of war crimes in World War II. A jury convicted the applicant of defamation and awarded roughly US\$ 2.4 million in damages.¹⁵⁶ The

¹⁴⁹ *Tenth Anniversary Joint Declaration*, *supra* note 15, ¶ 2.

¹⁵⁰ *Joint Declaration* (2000), *supra* note 14.

¹⁵¹ A/HRC/ Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression, *Second Annual Rep.*, Human Rights Council, ¶¶ 82-83, U.N. Doc. A/HRC/14/23 (Apr. 20, 2010) (by Frank La Rue).

¹⁵² *See, e.g.*, *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177, ¶ 83 (May 2, 2008); *Usón-Ramírez v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 87 (Nov. 20, 2009).

¹⁵³ *Kimel v. Argentina*, ¶ 77.

¹⁵⁴ INTER-AM. COMM. ON HUMAN RIGHTS, ANNUAL REPORT OF THE SPECIAL RAPPORTEUR FOR THE FREEDOM OF EXPRESSION: 2011, 388 (2011).

¹⁵⁵ *Tolstoy Miloslavsky v. the United Kingdom*, App. No. 18139/91, Eur. Ct. H.R., ¶ 49 (1995).

¹⁵⁶ *Id.* ¶¶ 8, 12. The amount awarded in UK currency was £1.5 million.

European Court held that the United Kingdom had violated Article 10 of the European Convention because of both the “size of the award” and “the lack of adequate and effective safeguards [in UK law] at the relevant time against a disproportionately large award.”¹⁵⁷

The European Court has applied this proportionality requirement ever since, and the largest damages award for defamation that the Court has ever upheld is US\$ 448,350.¹⁵⁸ Irish courts had convicted an Irish journalist of defamation for writing an article about Mr. de Rossa, an Irish politician. The article accused de Rossa – while he was head of the Irish Worker’s Party – of signing a letter to the Central Committee of the Communist Party of the Soviet Union that detailed criminal activities, including armed robbery and currency forgery, that his political party had undertaken with his knowledge.¹⁵⁹ The European Court noted that, although the jury award was a “substantial sum[,]... the libel was serious and grave, involving an imputation that Mr. de Rossa was involved in or tolerated serious crime and personally supported anti-Semitism and violent Communist oppression.”¹⁶⁰ In holding that Ireland had not violated Article 10, the European Court also emphasized that the Irish legal system had adequate and effective safeguards against disproportionate jury awards.¹⁶¹ The European Court has found a violation of Article 10 in other cases involving substantially smaller damages awards. As the European Court has explained, damages can be disproportionate, “although relatively moderate by contemporary standards,” if they are “very substantial when compared to the modest incomes and resources of ... applicants.”¹⁶²

The OSCE Representative on Freedom of the Media has also placed great emphasis on ending disproportionate civil defamation damages.¹⁶³ He has called on member states to end prison sentences (“de-prisoning”) and to remove defamation from their penal codes (decriminalizing) but has explained that these are “intermediate aim[s]” toward the final goal of eliminating excessively harsh civil defamation penalties. He noted, in a 2004 publication about the chilling effect of defamation, “If we are to create an environment that allows the media to exercise their corrective function and encourages critical thinking, many provisions in civil codes will also need to be made less harsh. In this case, we could say a ‘de-harshening’ is needed.”¹⁶⁴ The OSCE Representative recommended that member-state judiciaries limit financial penalties for civil defamation to those that are proportionate to the harm. He added that courts should allow “demonstrable damages only, not punitive damages” – as defamation laws “should not be used to bankrupt the media.”¹⁶⁵ He noted that excessive civil penalties pose “just as great

¹⁵⁷ *Id.* ¶ 51.

¹⁵⁸ *Case of Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, App No. 55120/00, Eur. Ct. H.R., ¶ 132 (2005). The amount awarded in the local currency was 300,000 Irish pounds. *Id.*

¹⁵⁹ *Id.* ¶ 11.

¹⁶⁰ *Id.* ¶ 129.

¹⁶¹ *Id.* ¶ 132.

¹⁶² *Steel and Morris v. the United Kingdom*, App. No. 68416/01, Eur. Ct. H.R., ¶ 96 (2005).

¹⁶³ OSCE Y.B. 2004, *supra* note 23, at 301-302.

¹⁶⁴ Haraszti, CHILLING EFFECT, *supra* note 147.

¹⁶⁵ Kirtley, CHILLING EFFECT, *supra* note 13, at 88.

a danger” to freedom of expression as criminal defamation laws.¹⁶⁶ Recognizing that the two threats can be equally grave, the OSCE Representative has integrated the issues of decriminalization and civil “de-harshening” in his efforts to protect the right to freedom of expression.

The Council of Europe’s Committee of Ministers, Parliamentary Assembly, and Commissioner for Human Rights have also firmly defended free speech and democracy from criminal defamation and the “equally serious and unacceptable” award of excessive civil damages. Like the European Court of Human Rights, the Council of Europe has adopted the principle of proportionality and strongly opposed excessive civil damages for defamation. The Committee of Ministers of the Council of Europe, the decision-making body comprised of the foreign ministers of the Council’s 47 member states,¹⁶⁷ declared in 2004 that damages or fines for defamation “must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others.”¹⁶⁸

The Parliamentary Assembly of the Council of Europe has reiterated this principle. In a 2007 report, for example, the Parliamentary Assembly’s Committee on Legal Affairs and Human Rights noted its concern that some member states lacked the “necessary moderation in respect of sanctions for defamation, whether these come under criminal or civil law.” Referring to the case law of the European Court, the report went on to note that:

the sanctions (whether criminal or civil) imposed by the courts in the case of proven defamation must be proportionate in order to avoid the effect of media self-censorship. Such an effect can only be harmful in a democratic society because it puts an end to debates and discussions on matters of public interest.”¹⁶⁹

The Parliamentary Assembly concluded by recommending that the Council’s member states pass legislation limiting such excessive civil damages.¹⁷⁰ On other occasions, the Assembly has passed resolutions that call on members states to set “reasonable and proportionate” maximum amounts for civil defamation awards “so that the viability of a defendant media organ is not placed at risk” and to “provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury.”¹⁷¹

¹⁶⁶ *Id.*

¹⁶⁷ *About the Committee of Ministers*, COUNCIL OF EUR., http://www.coe.int/t/cm/aboutcm_en.asp (last visited Jan. 21, 2013).

¹⁶⁸ Council of Eur., Comm. of Ministers, *Declaration on Freedom of Political Debate in the Media*, 872nd meeting of the Ministers’ Deputies, (Feb. 12, 2004), <https://wcd.coe.int/ViewDoc.jsp?id=118995&Site=CM>.

¹⁶⁹ Council of Eur., Parliamentary Assemb., *Towards decriminalisation of defamation*, Doc. No. 11305 (2007).

¹⁷⁰ *Id.*

¹⁷¹ Council of Eur., Parliamentary Assemb., *Towards decriminalisation of defamation*, Res. No. 1577 (2007).

Exorbitant civil sanctions have a destructive effect on free expression and open, democratic debate. Ruinously high financial damages stifle speech in much the same ways that the threat of prison sentences and criminal records do. Journalists either self-censor their reporting and their ideas out of fear of these excessive punishments or they and their publications are effectively sanctioned out of existence by the cost of the damages.

B. Ecuador's conduct in levying excessive damages on petitioners violates the right to freedom of expression.

The damages of US\$ 40 million levied against Mr. Palacio and the *El Universo* editors were grossly disproportionate to the minimal harm President Correa suffered if, in fact, he suffered any at all. Even without the abusive prison sentence, the civil penalties imposed on Mr. Palacio and the editors constitute an independently sufficient reason for finding that the Ecuadorian court's ruling violates the well-established right to freedom of expression.

IV. CONCLUSION

Criminal defamation unduly hinders freedom of expression and, in turn, democracy. The chilling effect of prohibiting defamation is especially acute when the prohibition is enforced through prison sentences and disproportionate civil damages. Faced with the possibility of such onerous punishments, citizens and journalists alike are prevented from engaging in the kind of valuable public debate that is the lifeblood of modern democratic society. The movement away from criminal defamation enjoys support from leading international authorities on freedom of expression, U.N. and European human rights bodies, and recent trends in state practice in every region of the world. Mr. Palacio and the *El Universo* editors' criminal defamation convictions, sentences, and disproportionate civil damages are inconsistent with contemporary international human rights law, the clear trend in the practices of other states, and Ecuador's own obligations under international law to protect the fundamental right of freedom of expression.