

Inter-American Court of Human Rights
Case No. 13.015 “Emilio Palacio Urrutia”

EMILIO PALACIO URRUTIA AND OTHERS

versus

ECUADOR

EXPERT STATEMENT BY TOBY MENDEL
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1. Statement of Expertise

- [1] The author of this Expert Statement, Toby Mendel, is recognised globally as a leading legal expert on international standards relating to freedom of expression. He is the Executive Director of the Centre for Law and Democracy (CLD), an international, non-profit human rights NGO, based in Canada, a position which he has held for 11 years. CLD works globally to protect and promote, among other things, the human right to freedom of expression, focusing its efforts at the legal and policy levels. Prior to that he was for nearly 13 years the Senior Director for Law at Article 19, another international, non-profit human rights NGO which works to promote freedom of expression.
- [2] Toby Mendel's services as a legal expert have been sought out by a wide range of intergovernmental bodies, such as the World Bank, UNESCO, OSCE and the Council of Europe, as well as numerous governments and NGOs in countries all over the world. He has undertaken a number of different activities with these various actors, including playing a leading role in drafting and analysing legislation on various freedom of expression issues, such as the right to information and media regulation. He is also well known for his standard-setting work on freedom of expression, for example having led on the drafting of the Joint Declarations on freedom of expression themes adopted annually by the special international mandates on freedom of expression.
- [3] He is widely published on a range of freedom of expression issues. This includes books, monographs and articles published by inter-governmental organisations such as UNESCO, the World Bank and the UNDP, books and articles published by commercial publishers and academically refereed journals, and works published by civil society organisations.
- [4] Toby Mendel has frequently engaged in litigation on freedom of expression issues before international courts and senior national courts, sometimes providing *amicus curiae* briefs, sometimes representing clients directly, sometimes working with local lawyers to prepare briefs and sometimes appearing as an expert witness. His work in this area focuses on highlighting relevant international and comparative standards with a view to assisting courts to elaborate on the specific meaning of the guarantee of freedom of expression in the context of the case being considered, in a manner which best protects this fundamental right.
- [5] This Expert Statement sets out international and comparative national standards relevant to the issues raised in the current case, *Emilio Palacio Urrutia and Others v. Ecuador*, which is being heard by the Inter-American Court of Human Rights. It argues that the actions of the Ecuadoran authorities breached the right to freedom of expression of the alleged victims, as guaranteed by Article 13 of the *American Convention on Human Rights (ACHR)*,¹ in a number of important respects.
- [6] Precedents and authoritative statements from other jurisdictions are not formally binding on the Inter-American Court of Human Rights. However, the guarantee of the right to freedom of expression in the ACHR is worded in fairly general terms, especially taking into account

¹ Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

the complexity of this right, leaving wide scope for interpretation. Given the fundamental importance of the right to freedom of expression, the Inter-American Court has taken a broad and holistic approach when elaborating on its nature and meaning in specific contexts, including by looking to standards from other jurisdictions to guide its interpretation.

- [7] Jurisprudence from international judicial bodies in other regions of the world and from national courts, as well as non-binding standard-setting documents, such as authoritative international declarations and statements, illustrate the manner in which leading judges and other experts have interpreted international and constitutional guarantees of freedom of expression. As such, they are good evidence of generally accepted understandings of the scope and nature of freedom of expression.² As a result, even though they are not formally binding, these documents provide valuable insight into possible interpretations of the scope and nature of Article 13 of the ACHR by the Inter-American Court of Human Rights.

2. Brief Statement of Facts

- [8] Ecuador ratified the ACHR on 12 August 1977 and accepted the contentious jurisdiction of the Inter-American Court of Human Rights on 24 July 1984. It also ratified the *International Covenant on Civil and Political Rights* (ICCPR)³ on 6 March 1969.
- [9] On 30 September 2010, police in Ecuador launched what has been described as a “chaotic rebellion” which led to conflicts between the police and security forces loyal to then President Rafael Correa. At one point, the former president was himself accosted by police officers and had tear gas thrown at him. Overall, some ten people were killed and 274 injured in the incidents of that day, during which then President Rafael Correa also declared a state of emergency in the country. In due course, calm was restored and Rafael Correa continued to hold the post of President until 2017.⁴
- [10] On 6 February 2011, the newspaper *El Universo*, which is published in the city of Guayaquil, Ecuador, and is one of the largest circulation newspapers in the country, published an article called “No a las mentiras” (No to the Lies), by the journalist Emilio Palacio Urrutia (Urrutia article). The article reviewed the events of 30 September 2010 and subsequent actions by then President Rafael Correa in a highly critical fashion, for example referring to Correa only as “the Dictator”.
- [11] Subsequently, then President Rafael Correa filed a criminal lawsuit against Emilio Palacio Urrutia, as author, along with Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga, all senior directors and legal representatives of *El Universo*, as well as the newspaper as a legal entity, for the crime of having disseminated a “slandorous

² See I. Brownlie, *Principles of Public International Law*, 5th Ed. (Oxford: Oxford University Press, 1998), pp. 12, 35.

³ UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

⁴ See, for example, Rory Carroll, “Ecuador declares state of emergency as country thrown into chaos”, 30 September 2010, *The Guardian*, <https://www.theguardian.com/world/2010/sep/30/ecuador-chaos-police-rafael-correa>; and France 24, “President extends state of emergency in wake of police uprising”, 6 October 2010, <https://www.france24.com/en/20101006-president-extends-state-emergency-wake-police-uprising-ecuador-correa>.

insult” (“injurias calumniosas”) against him, contrary to Article 489 of the Criminal Code which was in force at that time in Ecuador. This crime involves the dissemination of a false accusation that someone has committed a crime. The key statement in the article which appears relevant to this offence was the claim that a future president could take then President Rafael Correa “to a criminal court for ordering fire at will and without warning against a hospital full of civilians and innocent people”.

[12] In due course, all of the defendants were convicted. The four individual defendants were sentenced under Article 493 of the Criminal Code to three years’ imprisonment and ordered, collectively, to pay USD 30,000,000 in civil damages while an order to pay a further USD 10,000,000 in civil damages was made against the newspaper. Costs were also awarded against the defendants.

[13] The legal proceedings finally ended in December 2011 and, in February 2012, then President Rafael Correa granted a criminal pardon to all of the defendants and a cancellation of the obligation to pay the civil damages, while his lawyers waived their right to request payment of their fees. That same month a local court accepted these measures and archived the case.

3. Freedom of Expression

[14] Article 19 of the *Universal Declaration of Human Rights*,⁵ binding on all States as a matter of customary international law, proclaims the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek to receive and impart information and ideas through any media regardless of frontiers.

[15] Article 13 of the ACHR, formally binding on Ecuador as a State Party, states, in its essential core:

Article 13: Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - (a) respect for the rights or reputations of others; or
 - (b) the protection of national security, public order, or public health or morals.

[16] Ecuador is also bound by the international guarantee of freedom of expression which is spelt out in Article 19 of the ICCPR:

⁵ UN General Assembly Resolution 217A(III), 10 December 1948.

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

3.1 The Fundamental Nature of Freedom of Expression

[17] The overriding importance of freedom of expression as a human right has been widely recognised, both for its own sake and as an essential underpinning of democracy and means of safeguarding other human rights. At its very first session in 1946 the United Nations General Assembly declared:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.⁶

[18] Statements about the fundamental importance of freedom of expression have been made by all three regional judicial bodies dealing with human rights. For example, the Inter-American Court of Human Rights has stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.⁷

[19] Similar views have been expressed by the African Court on Human and Peoples' Rights, the European Court of Human Rights and numerous senior national courts around the world. It is not necessary to elaborate on the importance of freedom of expression before the Inter-American Court of Human Rights, given the recognition which it has already given to this fundamental human right.

[20] It may, however, be noted that the Inter-American Court of Human Rights has recognised that the right to freedom of expression has two dimensions: an individual dimension and a social dimension. Regarding the latter, it has stated:

In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.⁸

⁶ Resolution 59(1), 14 December 1946.

⁷ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 13 November 1985, Series A, No. 5, para. 70.

⁸ *Ibid.*, para. 32.

[21] The right to freedom of expression is also widely recognised as both limiting what States may do (negative guarantees) and imposing obligations on States to take measures to ensure respect for freedom of expression (positive guarantees).⁹ For example, the European Court of Human Rights has stated:

Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals.¹⁰

3.2 Restrictions on Freedom of Expression

[22] The right to freedom of expression is not absolute. Every system of international and domestic rights recognises carefully drawn and limited restrictions on freedom of expression in order to take into account the values of individual dignity and democracy. Under international human rights law, for countries which have ratified these instruments, national laws which restrict freedom of expression must comply with the provisions of Article 13(2) of the ACHR and Article 19(3) of the ICCPR, which impose substantially similar requirements.

[23] In particular, restrictions must meet a strict three-part test.¹¹ First, the restriction must be provided by law. Second, the restriction must pursue one of the legitimate aims listed in Article 13(2); this list is exclusive. Third, the restriction must be necessary to secure that aim.

3.2.1 Provided by Law

[24] International law and most constitutions only permit restrictions on the right to freedom of expression that are set out in law. This implies not only that the restriction is based in law, but also that the relevant law meets certain standards of clarity and accessibility. The European Court of Human Rights has elaborated on the requirement of "prescribed by law" under the European Convention on Human Rights (ECHR):¹²

[A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.¹³

[25] Vague provisions are susceptible of wide interpretation by both authorities and those subject

⁹ See, for example, *Vgt Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, Application No. 24699/94 (European Court of Human Rights), para. 45. See also *Miranda v. Mexico*, 13 April 1999, Report No. 5/99, Case No. 11.739 (Inter-American Commission on Human Rights).

¹⁰ *Özgür Gündem v. Turkey*, 16 March 2000, Application No. 23144/93, para. 43.

¹¹ This test has been affirmed by the UN Human Rights Committee. See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7. It has also been confirmed by the Inter-American Court of Human Rights, which has held that the test for restrictions under Article 13(2) of the ACHR is substantially similar to that applied under the ICCPR and the European Convention on Human Rights. See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 7, paras. 38-46. For an elaboration of the test under the European Convention on Human Rights, see *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 45.

¹² Adopted 4 November 1950, in force 3 September 1953.

¹³ *The Sunday Times v. United Kingdom*, note 11, para.49.

to the law. As a result, they are an invitation to abuse and authorities may seek to apply them in situations that bear no relationship to the original purpose of the law or to the legitimate aim sought to be achieved. Vague provisions also fail to provide sufficient notice of exactly what conduct is prohibited or prescribed. As a result, they exert an unacceptable “chilling effect” on freedom of expression as individuals stay well clear of the potential zone of application in order to avoid censure.

[26] Courts in many jurisdictions have emphasised the chilling effects that vague and overbroad provisions have on freedom of expression. The US Supreme Court, for example, has cautioned:

The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within “narrowly limited classes of speech.” ... [Statutes] must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.¹⁴

[27] The requirement of “provided by law” also prohibits laws that grant authorities excessively broad discretionary powers to limit expression. The Inter-American Court of Human Rights has noted, in this regard:

Regarding the first requirement, strict legality, the Court has established that restrictions must be previously established by law to ensure that these are not left to the discretion of the public authorities.¹⁵

[28] The UN Human Rights Committee, the body of independent experts appointed under the ICCPR to monitor compliance with that treaty, has expressed concern about excessive discretion being granted to authorities, specifically in the context of broadcast licensing:

21. The Committee expresses its concern ... about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has wholly discretionary power to grant or deny licences to radio and television broadcasters.¹⁶

3.2.2 Legitimate Aim

[29] The ACHR provides a full list of the aims that may justify a restriction on freedom of expression, which is identical to the list found in the ICCPR. It is quite clear from both the wording of Article 13(2) of the ACHR and the views of the Inter-American Court of Human Rights that restrictions on freedom of expression which do not serve one of the legitimate aims listed in Article 13(2) are not valid.¹⁷ This is also the position under the ICCPR and ECHR.¹⁸

¹⁴ *Gooding v. Wilson*, 405 U.S. 518 (1972), p. 522.

¹⁵ *Álvarez Ramos v. Venezuela*, 30 August 2019, Series C, No. 380, para. 105.

¹⁶ Concluding Observations on Kyrgyzstan’s Initial Report, 24 July 2000, CCPR/CO/69/KGZ, para. 21.

¹⁷ See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 7, para. 40.

¹⁸ See, for example, *Mukong v. Cameroon*, note 11, para. 9.7. The African Charter takes a different approach, simply protecting freedom of expression, “within the law.”

[30] It is not sufficient, to satisfy this second part of the test for restrictions on freedom of expression, that the restriction in question has a merely incidental effect on the legitimate aim. The restriction must be primarily directed at that aim, as the Indian Supreme Court has noted:

So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.¹⁹

3.2.3 Necessary in a Democratic Society

[31] The third part of the test for restrictions on freedom of expression requires restrictions to be “necessary”. This part of the test presents a high standard to be overcome by the State seeking to justify the restriction, apparent from the following quotation, cited repeatedly by the European Court:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.²⁰

[32] The European Court has noted that necessity involves an analysis of whether:

[There is a] “pressing social need” ... [whether] the interference at issue was “proportionate to the legitimate aim pursued” and whether the reasons adduced...to justify it are “relevant and sufficient.”²¹

[33] The Inter-American Court of Human Rights has identified the key factors to take into account when assessing whether a restriction meets the necessity part of the test:

[I]f there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.²²

[34] The UN Human Rights Committee has also elaborated on the specific meaning of the necessity part of the test, stating:

Restrictions must not be overbroad. The Committee observed in general comment No. 27 that “restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the

¹⁹ *Thappar v. State of Madras*, (1950) SCR 594, p.603.

²⁰ See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

²¹ See *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40.

²² *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 7, para. 46.

law that frames the restrictions but also by the administrative and judicial authorities in applying the law". The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.²³

[35] The first factor noted by the Inter-American Court of Human Rights, namely that the least restrictive option to protect a legitimate aim must be used, is uncontroversial. Clearly a measure cannot be "necessary" if another effective measure which is less harmful to freedom of expression exists. In practice, this means that when imposing restrictions on freedom of expression States must carefully design those measures so that they do indeed represent the legal restrictive way of protecting the legitimate aim. It is a very serious matter to restrict a fundamental right and, when considering imposing such a measure, States are bound to reflect carefully on the various options open to them.

[36] The first factor noted by the UN Human Rights Committee, namely that restrictions should not be overbroad, is uncontroversial. In practice it means that restrictions should only apply to harmful speech and not go beyond that. In applying this factor, courts have recognised that there may be practical limits on how finely honed and precise a legal measure may be. But subject only to such practical limits, restrictions must not be overbroad. Other courts have also stressed the importance of restrictions not being overbroad. For example, the US Supreme Court has noted:

Even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved.²⁴

[37] Finally, both of the statements above reflect the idea that restrictions must be proportionate in the sense that the harm to freedom of expression must not be greater than the benefits in terms of protecting the legitimate aim. A restriction which provided limited protection to reputation but which seriously undermined freedom of expression would, for example, not pass muster. This again is uncontroversial. Freedom of expression is a fundamental right and it is only when, on balance, the greater public interest is served by limiting that right that such a limitation can be justified. This implies that the benefits of any restriction must outweigh the costs for it to be justified.

4. Issues Addressed

[38] This Expert Statement argues that the State of Ecuador breached the alleged victims' right to freedom of expression in the following ways:

²³ General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, paras. 34 and 35. The Committee adopts general comments from time to time to provide a synopsis of its jurisprudence and thinking in relation to different aspects of rights. General Comment No. 34 is the most recent one on freedom of expression.

²⁴ *Shelton v. Tucker*, 364 US 479 (1960), p. 488.

- I. By holding that the statements in question were defamatory in the first place, when they were not.
- II. By convicting the victims of criminal defamation.
- III. By imposing a sentence of imprisonment on the alleged victims.
- IV. By imposing a requirement on the alleged victims to pay excessive civil damages.
- V. By convicting the alleged victims under defamation rules which improperly provided special protection for officials.
- VI. By convicting the alleged victims under defamation rules which were not sufficiently clear.
- VII. By holding the three non-author alleged victims responsible for criminal defamation.

5. The Statements in Question Were Not Defamatory

[39] In assessing whether particular statements are defamatory, a crucial distinction needs to be made between statements of opinion and statements of fact. This distinction goes to the conditions for liability, as assessed under international standards, as well as to defences.

[40] The 6 February 2011 article by Emilio Palacio Urrutia, titled “No a las mentiras”, which is the subject of the current case, contained a number of statements of both fact and opinion. However, the conviction under Article 489 of the Criminal Code which was in force at that time was for “slanderous insult” (“injurias calumniosas”), which involves a false accusation of having committed a crime. As such, only the final paragraphs of the article would appear to be relevant, namely the following:

The Dictator should remember, finally, and this is very important, that with the pardon, in the future, a new president, perhaps his enemy, could take him to a criminal court for ordering fire at will and without warning against a hospital full of civilians and innocent people.

Crimes against humanity, lest not forget, do not prescribe. [footnote omitted]²⁵

[41] This conclusion is supported by the fact that these paragraphs were an important focus of the Report on the current case by the Inter-American Commission on Human Rights and that they represent the only quote from the article found in the Brief of the Ecuadorian State (although that Brief also notes that the article referred to former President Rafael Correa as a “dictator”).²⁶

5.1 When is a Statement an Opinion?

[42] What constitutes a statement of fact versus one of opinion is often a matter of debate given the complex ways in which language is used. This is important from a human rights perspective because international law rules out requiring proof of truth when it comes to statements of opinion, as noted below. The approach of the European Court of Human Rights has generally been to define what constitutes an opinion, which it tends to describe as a “value judgment”, broadly, especially where the status of a statement is debatable. This

²⁵ See Inter-American Commission on Human Rights, Report No. 29/19, Case 13.015, Merits, Emilio Palacio Urrutia and Others v. Ecuador, OEA/Ser.L/V/II., Doc. 34, 19 March 2019, para. 20, English translation.

²⁶ Brief of the Ecuadorian State, p. 7 and then also p. 24.

has the effect of ensuring greater protection for freedom of expression, which accords with its status as a human right and, specifically, the requirements of the necessity part of the test for restrictions.

[43] In a number of cases, the European Court has held that national courts had wrongly treated allegedly defamatory statements as factual in nature when they should have been treated as opinions. For example, in *Feldek v. Slovakia*, which bears some resemblance on its facts to the current case, the Court had to assess a highly critical statement, which included an allegation that a minister had a “fascist past”, and for which the applicant had been held liable in defamation. The Slovakian courts had held that this was a statement of fact which was tantamount to alleging that the minister had actively practised or promoted fascism.

[44] In *Feldek*, the European Court reiterated a number of general principles concerning freedom of expression, including the following:

[T]hat there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest ... [and] the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual.

...

[T]he Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. [references omitted]²⁷

[45] In relation to the statement, the European Court took into account the fact that the statement had been “made in a very political context and one that was crucial for the development of Slovakia”, which had just been established as an independent State (out of former Czechoslovakia).²⁸ This contributed to the Court’s holding that the statement was a value judgment, “the truthfulness of which is not susceptible of proof”.²⁹ The Court also specifically rejected the decision of the national courts that they would regard the statement as an opinion only if it had been accompanied by the facts upon which it were based, as well as the narrow interpretation of the national courts that the statement could only be understood as an allegation that the minister had actively promoted fascism.³⁰

[46] Overall, this case stands for a number of propositions including that where there is some doubt as to the matter, courts should err on the side of treating statements as opinions, that the wider context is very important in making this assessment, and that there is no general obligation on speakers to indicate in statements of opinion any facts upon which those opinions are based.

[47] Similarly, in the case of *Unabhängige Initiative Informationsvielfalt v. Austria*, the European Court was called upon to assess an injunction imposed on the applicant, following an application by Mr. Jörg Haider, leader of the right-wing Austrian Freedom Party (FPÖ), not

²⁷ *Feldek v. Slovakia*, 12 July 2001, Application No. 29032/95, paras. 74 and 75.

²⁸ *Ibid.*, para. 84.

²⁹ *Ibid.*, para. 85.

³⁰ *Ibid.*, para. 86.

to repeat a statement which claimed that the latter had incited people to “racist agitation”. The Court once again took into account the wider political context and, in particular, that the statement was a reaction to an anti-immigration opinion poll conducted by the FPÖ under the title “Austria first”.³¹

[48] The national courts had construed the statement about “racist agitation” as one of fact, which had to be proven, and, once again, the European Court disagreed, stating:

[T]he applicant published what may be considered to have been fair comment on a matter of public interest, that is a value judgment, and the Court disagrees with the qualification of that statement by the Austrian courts.³²

[49] The idea of a broad approach to classifying statements as opinions is also found in the standard adopted by Article 19, an international human rights NGO focusing on freedom of expression, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (Article 19 Principles). Principle 13 calls for a statement which cannot reasonably be considered to be a statement of fact to be treated as an opinion, for all of the circumstances to be taken into account when classifying statements and for the “real”, rather than “apparent” meaning to be given to a statement.³³

[50] Applying these standards to the reference in the Urrutia article to “crimes against humanity”, it seems clear that this can only be characterised as an opinion. To start with, the whole reference is cast as a possible future scenario (i.e. what might happen should a future, unfriendly – “enemy” – president take power). Such a statement could not be proven to be true and, as such, is by definition not a statement of fact but one of opinion. There is no specific allegation in that statement about what former President Rafael Correa actually did, only speculation about what court action a future president might try to take. Even that is linked to former President Rafael Correa’s granting of pardons, which is presumably an uncontested fact, not to any other action he might have taken. The political context in which the article was written also supports the conclusion that this reference must be treated as a statement of opinion. As for the other statement referred to in the Brief of the Ecuadorian State, that former President Rafael Correa was a “dictator”, this is clearly not a statement of fact but, instead, simply a strongly-worded opinion about the former President’s behaviour. Indeed, there is no sufficiently accepted definition of what constitutes a “dictator” to serve as the basis of proving that someone is or is not one.

5.2 What Standards Apply to Statements of Opinion

[51] International standards provide strong protection against defamation liability for the expression of opinions. This flows in part from the absolute protection that international law provides to opinions, as set out in Article 19(1) of the ICCPR: “Everyone shall have the right to hold opinions without interference.”³⁴ The ability to express critical or dissenting

³¹ *Unabhängige Initiative Informationsvielfalt v. Austria*, 26 February 2002, Application No. 28525/95, para. 41.

³² *Ibid.*, para. 46.

³³ Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, 2000, <https://www.article19.org/wp-content/uploads/2018/02/defining-defamation.pdf>.

³⁴ See also the UN Human Rights Committee’s General Comment No. 34, note 23, para. 9, stating that freedom of expression protects: “All forms of opinion...including opinions of a political, scientific, historic, moral or religious

opinions or views on matters of public importance is considered to be central to democracy and many of the other important social values that are underpinned by freedom of expression.

[52] At the highest level of protection, some authoritative international sources have called for absolute protection for opinions against liability in defamation law. In their 2000 Joint Declaration, the special international mandates on freedom of expression stated: “[N]o one should be liable under defamation law for the expression of an opinion”.³⁵ Similarly, the UN Human Rights Committee has stated that defamation laws “should not be applied with regard to those forms of expression that are not, by their nature, subject to verification.”³⁶

[53] The Inter-American Court of Human Rights has made clear distinctions between statements of opinion and statements of fact.³⁷ It has repeatedly affirmed the protection of freedom of expression “in respect of opinions or information on matters in which society has a legitimate interest to keep itself informed”.³⁸ And, in *Kimel v. Argentina*, the Court appeared to rule out sanctions, at least in defamation law, for the expression of an opinion, stating:

The opinions expressed by Mr. Kimel can neither be deemed to be true nor false. As such, an opinion cannot be subjected to sanctions, even more so where it is a value judgment on the actions of a public official in the performance of his duties.³⁹

[54] The European Court of Human Rights has also provided strong protection to opinions in the context of defamation actions. Like the Inter-American Court of Human Rights, this is partly informed by the impossibility of proving truth in relation to opinions. As the Court noted in *Dichand and Ors v. Austria*, citing other prominent cases on the subject:

In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10.⁴⁰

nature.”

³⁵ See the 2000 Joint Declaration, 30 November 2000, <https://www.osce.org/files/f/documents/c/b/40190.pdf>. The special mandates – namely the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information – adopt a Joint Declaration each year with the support of CLD and Article 19. The Declarations adopted since 2010 are available at: <https://www.law-democracy.org/live/legal-work/standard-setting/> and since 1999 at: <https://www.osce.org/fom/66176>.

³⁶ General Comment No. 34, note 23, para. 47.

³⁷ See, for example, *Tristán Donoso v. Panamá*, 27 January 2009, Series C, No. 193, para. 124, noting: “While opinions cannot be declared true or false, statements of fact can.”

³⁸ See, for example, *Álvarez Ramos v. Venezuela*, note 15, para. 116, citing *Tristán Donoso v. Panamá*, *ibid.*, para. 121; and *Mémoli v. Argentina*, 22 August 2013, Series C, No. 265, para. 146.

³⁹ *Kimel v. Argentina*, 2 May 2008, Series C, No. 177, para. 93.

⁴⁰ *Dichand and Ors v. Austria*, 26 February 2002, Application No. 29271/95, para. 42, citing *Lingens v. Austria*, note 21, para. 46 (European Court of Human Rights) and *Prager and Obershlick v. Austria*, 16 April 1995, Application No. 15974/90, para. 63 (European Court of Human Rights). See also *Dalban v. Romania*, 28 September 1999, Application No. 28114/95, para. 49 (European Court of Human Rights) (stating that it would be “unacceptable

[55] Protection for opinions at least extends to a wide range of expression, even where statements are offensive or harsh in nature. In the case of *De Haes and Gijssels v. Belgium*, the European Court considered the case of an editor and journalist who had published articles criticising judges for awarding child custody to a man who considered himself to be a Nazi and had been accused of incest and rape of a child. The articles suggested that the judges were biased in favour of the man due to their sympathy for his Nazi views. The judges successfully brought a civil defamation claim against the applicants in Belgium. In finding a breach of the applicants' right to freedom of expression, the European Court noted that the allegations were an opinion and that journalistic freedom "covers possible recourse to a degree of exaggeration or even provocation".⁴¹ In this case, the statements were protected under freedom of expression, given the high public interest in the editor and journalist's allegations, even though they were extremely critical in tone.⁴²

[56] In general, the European Court has refused to uphold liability in defamation based merely on the strong language used in the impugned statements of opinion. Thus, the Court has frequently stated:

Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. [references omitted]⁴³

[57] Although the European Court has not quite stated this explicitly, it seems willing to allocate a very strong measure of protection to statements of opinion, especially on matters of public interest. Thus, in *Dichand and Ors v. Austria*, the Court stated:

It is true that the applicants, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that Article 10 also protects information or ideas that offend, shock or disturb. [references omitted]⁴⁴

This protection is even stronger when it has not been shown that the person making the statement acted in bad faith. While the Court has recognised that even statements of opinion may be "excessive",⁴⁵ it has also protected very strong statements made in the absence of bad faith. Thus, in *Feldek v. Slovakia* the Court noted, in respect of the impugned statement, that there was "nothing to suggest that it was made otherwise than in good faith and in pursuit of the legitimate aim of protecting the democratic development of" the country.⁴⁶

6. Criminal Defamation and Imprisonment

[58] In the current case, the alleged victims were all convicted under a criminal defamation provision – namely the crime of slanderous insult or alleging falsely that someone had

for a journalist to be barred from expressing critical value judgments unless he or she could prove their truth") and *Flux v. Moldova*, 23 October 2007, Application No. 28700/03 (European Court of Human Rights).

⁴¹ *De Haes and Gijssels v. Belgium*, 24 February 1997, Application No. 19983/92, paras. 46-49.

⁴² *Ibid.*, paras. 48-49.

⁴³ *Dichand and Ors v. Austria*, note 40, para. 41.

⁴⁴ *Ibid.*, para. 52.

⁴⁵ See, for example, *Unabhängige Initiative Informationsvielfalt v. Austria*, note 31, para. 47.

⁴⁶ *Feldek v. Slovakia*, note 27, para. 84.

committed a crime under Article 489 of the Criminal Code – and sentenced to three years’ imprisonment as well as to pay damages. The application of criminal defamation provisions in the context of the circumstances of this case is not a legitimate restriction on freedom of expression as guaranteed by international law. Indeed, the very existence of criminal defamation provisions is arguably a breach of the right to freedom of expression. Imposing a sentence of imprisonment on the alleged victims is a further breach of that right.

[59] In the Brief of the Ecuadorian State, Ecuador recognises that the application of the criminal rules in the current case, along with the penalties, did not represent a legitimate restriction on freedom of expression, accepting that they were “unnecessary and disproportionate”.⁴⁷ The Inter-American Court of Human Rights has made relevant comments about the legitimacy of applying criminal measures in defamation cases⁴⁸ but the current case provides it with an opportunity to clarify further the applicable standards in this context.

6.1 Is Criminal Defamation Legitimate?

[60] International standards on freedom of expression are not entirely clear as to the status of criminal defamation laws. A number of authoritative international bodies and actors have stated that criminal defamation as a whole represents a breach of the right to freedom of expression. For example, in their 2002 Joint Declaration, the special international mandates on freedom of expression stated: “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.”⁴⁹ The African Commission on Human and Peoples’ Rights’ 2019 *Declaration of Principles of Freedom of Expression and Access to Information in Africa* (African Declaration) takes a similar position, stating: “States shall amend criminal laws on defamation and libel in favour of civil sanctions which must themselves be necessary and proportionate.”⁵⁰ Similarly, the Article 19 Principles call for the repeal of criminal defamation laws, where they exist, and their progressive replacement with civil defamation laws.⁵¹

[61] Furthermore, although defamation remains a criminal offence in most countries, a growing number of countries – such as Estonia, Ghana, Jamaica, Mexico, Sri Lanka, the United Kingdom and Zimbabwe – have done away with criminal defamation laws. The fact that these countries – along with the many others where criminal defamation rules have not in practice been applied for decades – do not appear to have been unable to provide adequate protection for reputation, considered alongside the fact that “criminal prosecution is the most restrictive measure to freedom of expression”,⁵² suggests that criminal defamation could rarely, if ever, pass muster as a restriction on freedom of expression. In other words, since civil defamation laws provide sufficient protection for reputation, it cannot be necessary to maintain the far more intrusive criminal defamation laws.

⁴⁷ Brief of the Ecuadorian State, pp. 3-4.

⁴⁸ See, for example, *Kimel v. Argentina*, note 39, paras. 72-80.

⁴⁹ Adopted 10 December 2002, <https://www.osce.org/fom/66176>.

⁵⁰ Adopted by the African Commission on Human and Peoples’ Rights at its 65th Ordinary Session, 21 October to 10 November 2019, <https://www.achpr.org/legalinstruments/detail?id=69>.

⁵¹ Note 33, Principle 4(a).

⁵² *Álvarez Ramos v. Venezuela*, note 15, para. 119.

[62] The *Inter-American Declaration of Principles on Freedom of Expression* (Inter-American Declaration), adopted by the Inter-American Commission on Human Rights, took a more limited position, stating:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁵³

Inasmuch as the current case involves a public official defamation defendant, it clearly falls within the scope of this standard.

[63] In other cases, authoritative bodies have put forward a less clear-cut rule on criminal defamation. For example, the UN Human Rights Committee stated in its 2011 General Comment No. 34: "States 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".⁵⁴

[64] Some of the strongest statements on criminal defamation made by the Inter-American Court of Human Rights come from the case of *Álvarez Ramos v. Venezuela*, which involved the criminal conviction of a lawyer and professor for publishing an article in a newspaper alleging that the head of the legislature had improperly appropriated funds from National Assembly's Savings Bank to cover costs of the legislature. On the issue of the use of criminal law in such cases, the Court stated:

It is understood that in the case of speech that is protected because it concerns matters of public interest, such as the conduct of public officials in the performance of their duties, the State's punitive response through criminal law is not conventionally appropriate to protect the honor of an official. ... In other words, in the hypothesis outlined previously, the protection of honor through the criminal law, which may be legitimate in other cases, is not consistent with the Convention. ... This does not mean that journalistic conduct cannot produce liability in another legal sphere, such as in civil law, or require correction or public apologies, for example, in cases of possible abuses or excesses of bad faith. However, this case involves the exercise of an activity protected by the Convention, which precludes its criminal characterization and, therefore, the possibility of being considered a crime and being subject to penalties.⁵⁵

This comes close to the standard set out in the Inter-American Declaration, namely that statements on matters of public interest should never be subjected to criminal defamation liability, although the language is not entirely clear on this point. It also appears to suggest that there may be other cases in which it is appropriate to protect honour through the criminal law, but it does not elaborate on what these might be.

[65] In an early criminal defamation case, decided in 1992, *Castells v. Spain*, the European Court of Human Rights suggested that criminal defamation measures might be appropriate in certainly limited circumstances, stating:

⁵³ Adopted at the 108th Regular Session of the Inter-American Commission on Human, Rights 19 October 2000.

⁵⁴ General Comment No. 34, note 23, para. 47.

⁵⁵ *Álvarez Ramos v. Venezuela*, note 15, paras. 121-124.

[I]t remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, 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.⁵⁶

This places quite stringent conditions on the application of criminal defamation rules, including that they should somehow be linked to the role of the State in guaranteeing public order (and not just reputation) and that they should apply only in very egregious cases. In its decisions adopted since that time, the Court has refrained from going further to rule out criminal defamation rules entirely. However, it has expressed very serious reservations about the imposition of prison sentences for defamation (see below).

[66] One of the reasons for the reluctance of these authoritative bodies to rule out criminal defamation entirely may be that while the “chilling effect that the fear of [criminal] sanctions has on the exercise of journalistic freedom of expression is evident”,⁵⁷ and while the vast majority of defamation laws do indeed create a serious chilling effect, at the same time it is possible to create criminal defamation rules that are relatively protective of freedom of expression.

[67] Recognising this possibility, as well as the fact that, at a practical level, it will take some time to bring about the full repeal of all criminal defamation laws, the Article 19 Principles set out four conditions that should be applied immediately to any defamation laws that are still in force. These are that: i) the party claiming to be defamed should have to prove, beyond a reasonable doubt (i.e. to the normal criminal standard of proof), all of the elements of the offence; ii) key elements of the offence should include that the impugned statements are false, that they were made either with actual knowledge of falsity or recklessness as to whether or not they were false, and that they were made with an intention to cause harm to the party claiming to be defamed; iii) public authorities should take no part in the investigation or prosecution of criminal defamation cases; and iv) imprisonment, excessive fines and other harsh penalties should never be imposed upon conviction for criminal defamation.⁵⁸

[68] All of these conditions flow fairly naturally from a rigorous application of the necessity requirement for restrictions on freedom of expression and many also flow naturally from the presumption of innocence and established criminal due process guarantees. The Inter-American Court of Human Rights has called for at least two of these standards to be applied, namely the presence of “actual malice”, corresponding to the *mens rea* requirement for criminal conviction, and for the burden of proof to fall on the party bringing the case, a key implication of the presumption of innocence.⁵⁹

[69] The fact that a reasonable selection of these conditions are present in the criminal

⁵⁶ *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para. 46.

⁵⁷ *Cumpănă y Mazăre v. Rumania*, 17 December 2004, Application No. 33348/96, para. 114 (European Court of Human Rights).

⁵⁸ Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, note 33, Principle 4(b).

⁵⁹ *Kimel v. Argentina*, note 39, para. 78.

defamation laws of some European countries, including low penalties for breach, a multi-tiered classification of crimes with defamation being in the lowest category and, in some cases, limits on when officials may bring cases at all,⁶⁰ may have led the European Court of Human Rights to be reluctant to rule out criminal defamation rules entirely.

[70] Doing away with criminal defamation entirely, as many countries have done successfully, is overall the most speech-friendly approach. At the same time, placing strict conditions on when criminal defamation rules may pass muster as restrictions on freedom of expression, along the lines of the Article 19 Principles, could lead to almost the same result, by making criminal defamation sufficiently unattractive to plaintiffs. It seems reasonably clear that if those standards had been applied properly in the current case, for example, it would have been very hard to secure a conviction in the first place and any penalty that did flow from such a conviction would bear no resemblance to the one that was in fact imposed.

6.2 Imprisonment for Defamation

[71] The idea that imprisonment for defamation is never compatible with the right to freedom of expression has received very widespread endorsement among the leading authorities. It goes without saying that, for the authorities which have ruled out criminal defamation entirely, *a fortiori* imprisonment for defamation is not legitimate. A number of other authorities have also come out either entirely or strongly against the idea of imprisonment for defamation.

[72] In General Comment No. 34, the UN Human Rights Committee stated simply, in relation to criminal defamation laws, that “imprisonment is never an appropriate penalty.”⁶¹

[73] In a Grand Chamber decision, *Cumpănă y Mazăre v. Romania*, the European Court of Human Rights made it quite clear that, at the very least in cases involving debate about matters of public interest, there was no space for a sentence of imprisonment for defamation. Setting out the framework of principles on sentencing, the Court recognised that this was “in principle” a matter for national courts, but then went on to note:

[T]he imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.⁶²

[74] Although the Court refrained from stating it outright, the clear implication of this is that imprisonment for defamation is not legitimate. Article 20(2) of the ICCPR specifically calls for hate speech to be “prohibited by law”, generally understood as meaning the criminal law, and Article 13(5) of the ACHR has a broadly similar, albeit generally narrower, requirement for States to ban hate speech. This is one of the only instances of international human rights law specifically requiring speech to be restricted (as opposed to allowing States to restrict it). For its part, incitement to violence is clearly a serious crime, just as the commission of

⁶⁰ See, for example in relation to France, Dominique Mondoloni, *Legal divisions*, <https://journals.sagepub.com/doi/pdf/10.1177/0306422014537174>.

⁶¹ General Comment No. 34, note 23, para. 47.

⁶² *Cumpănă y Mazăre v. Rumania*, note 57, para. 115. See also *Otegi Mondragon v. España*, 15 September 2011, Application No. 2034/07, para. 59 (European Court of Human Rights).

violence is. In stark contrast to these types of rules, both the ICCPR (Article 17(1)) and the ACHR (Article 11(2)) simply provide for protection against “unlawful attacks” on one’s honour or reputation, a much lower standard of protection, since it applies only to the extent of what the law in question happens to say rather than prescribing what that law should say, as Article 20(2) of the ICCPR and Article 13(5) of the ACHR do. In other words, in the quotation above from *Cumpănă y Mazăre v. Romania*, the Court was saying that imprisonment should be reserved exclusively for the most serious categories of harmful speech, such as hate speech and incitement to violence, and by implication not for less harmful forms of speech, such as defamatory statements. The Court also explained why the use of imprisonment should be limited in this way, noting: “The chilling effect that the fear of [imprisonment] has on the exercise of journalistic freedom of expression is evident.”⁶³

[75] Moving from principles to the facts of the case at hand, in *Cumpănă y Mazăre v. Romania*, the European Court went on to state:

The 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.⁶⁴

It may be noted that, although the applicants in that case were both journalists, the European Court accepted that, in relation to the impugned statements, “the domestic authorities were entitled to consider it necessary to restrict the exercise of the applicants’ right to freedom of expression”.⁶⁵ In other words, it was appropriate to impose a sanction on the applicants for what they had written, but imprisonment as a form of sanction was not proportionate and hence did not pass the necessity part of the test for restrictions on freedom of expression.

[76] The European Court of Human Rights has extended this standard to cover even suspended sentences of imprisonment. Thus, in *Marchenko v. Ukraine*, the Court accepted that it was appropriate for national courts to find the impugned statements, made by a teacher while engaging in public picketing, to be defamatory. However, the Court noted that the one-year suspended sentence, “by its very nature, will inevitably have a chilling effect on public discussion, and the notion that the applicant’s sentence was in fact suspended does not alter that conclusion particularly as the conviction itself was not expunged”.⁶⁶ Similarly, in *Mariapori v. Finland*, the European Court held that imprisonment was not an appropriate penalty for defamation, adding: “The fact that the applicant’s prison sentence was conditional and that she did not in fact serve it does not alter that conclusion.”⁶⁷

[77] The African Court on Human and Peoples’ Rights has taken a clear position against imprisonment for defamation, in the case of *Lohe Issa Konate v. Burkina Faso*. That case involved a criminal conviction for defamation, public insult and contempt of court for articles alleging corruption on the part of the prosecutor and others, leading to a sentence of 12 months’ imprisonment, a fine and damages of 6 million CFA Francs (about USD

⁶³ *Cumpănă y Mazăre v. Rumania*, note 57, para. 110.

⁶⁴ *Ibid.*, para. 116.

⁶⁵ *Ibid.*, para. 110.

⁶⁶ *Marchenko v. Ukraine*, 19 February 2009, Application No. 4063/04, para. 52.

⁶⁷ *Mariapori v. Finland*, 6 July 2010, Application No. 37751/07, para. 68.

11,000), as well as suspension of the concerned weekly for six months. The Court essentially followed the reasoning of the European Court, but took it a step further, stating clearly that, “[a]part from serious and very exceptional circumstances”, for which it gave as examples incitement to international crimes or hatred, “violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences” without breaching the right to freedom of expression.⁶⁸

[78] It is thus clear that there is broad agreement among leading international and regional human rights courts and other authoritative actors that it is not appropriate to impose a sentence of imprisonment for defamation. Based on a principled analysis of the rules for restrictions on freedom of expression, this should apply broadly to all types of defamatory statements. However, as a matter of fact, many of the cases involved statements about matters of public interest and it is at least clear that imprisonment is not legitimate in those cases.

[79] Ecuador appears to have accepted this point, recognising in the Brief of the Ecuadorian State that the criminal sanction imposed on the alleged victims “did not respond to an imperative social interest”.⁶⁹

7. Excessive Civil Damages

[80] Just as imprisonment is not a legitimate sanction for defamation because it is disproportionate and hence does not satisfy the necessity part of the test for restrictions on freedom of expression, excessive civil damages awards are also not legitimate. In the case of *Tolstoy Miloslavsky v. the United Kingdom*, before the European Court of Human Rights, the applicant had published a pamphlet accusing a high-ranking army officer of sending 70,000 prisoners of war and refugees to Soviet authorities without authorisation, following which they were allegedly massacred or sent to labour camps. The accusation appeared to be based on a personal grievance and the applicant was unable to prove the truth of the allegations, leading the British courts to order the applicant to pay GBP 1,500,000 (approximately USD 2,100,000) in damages.

[81] The European Court recognised that this was a gravely defamatory statement and that significant damages were appropriate. However, the quantum of damages in the case was three times higher than any other defamation award in the history of the United Kingdom. The Court made it clear that sanctions, on their own, had to be assessed under the test for restrictions on freedom of expression and, as such, must bear a “reasonable relationship of proportionality to the injury to reputation suffered”.⁷⁰ Although States enjoyed some margin of appreciation in terms of the level of damages awarded, in that case the award was not proportionate given both the exceptional magnitude of the damages and the fact that there was neither a legal requirement in the United Kingdom for damages to be proportionate nor any mechanism to keep them proportionate in practice.⁷¹

[82] In a subsequent case, decided in 2017, *Independent Newspapers (Ireland) Limited. v.*

⁶⁸ *Lohe Issa Konate v. Burkina Faso*, 5 December 2014, Application No. 004/2013, para. 165.

⁶⁹ Brief of the Ecuadorian State, p. 3.

⁷⁰ *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 49.

⁷¹ *Ibid.*, paras. 49-50.

Ireland, in which the applicant accepted that the statements it had published were seriously defamatory, the European Court noted that high damages awards automatically require close review as restrictions on freedom of expression, even if it has not specifically been proven that they exert a chilling effect, given their overall tendency to do so, stating:

[I]t is not necessary to rule on whether the impugned damages' award had, as a matter of fact, a chilling effect on the press. As a matter of principle, unpredictably large damages' awards in libel cases are considered capable of having such an effect and therefore require the most careful scrutiny.⁷²

[83] In that case, the European Court also indicated that, in the context of a large award of damages, the Court would look not only at the actual size of the award, but also “the adequacy and the effectiveness of the domestic safeguards against disproportionate awards”.⁷³

[84] The jury at the trial stage awarded damages of EUR 1,872,000 (approximately USD 2,300,000), after receiving general instructions from the trial judge as to the factors to take into account, the need for damages to be proportionate and fair to both parties, and the need to avoid being overgenerous in the amount of the award. On appeal, the Supreme Court held that the award was excessive and reduced it to EUR 1,250,000 (approximately USD 1,500,000). Although this award was assessed directly by a very senior court, the European Court held that it represented a breach of the right to freedom of expression. This was in part due to the Supreme Court's failure to amend its earlier, rather straight-jacketed requirements for trial judges regarding instructions to juries as to appropriate damages, despite the fact that “the experienced trial judge had voiced strong misgivings at the constraints”, and in part due to its own failure to explain fully the reasons for its decision.⁷⁴ This case thus stands for the proposition that it is incumbent upon courts not only to avoid disproportionate damages awards but also to provide either clear and appropriate directions to juries or clear and adequate reasons for judge-assessed damages where damages awards are high.

[85] The Inter-American Court of Human Rights has also recognised that unduly high civil damage awards can exert a chilling effect on freedom of expression and thus represent an independent breach of that right. In *Tristán Donoso v. Panama*, the Court was faced with a civil damages award of PAB 1,100,000 (the Panamanian Balboa is pegged at par to the USD), as well as a much smaller criminal fine. In respect of the former, the Court stated:

[T]he facts the Tribunal is examining show that the fear of a civil penalty, considering the claim by the former Attorney General for a very steep civil reparation, may be, in any case, equally or more intimidating and inhibiting for the exercise of freedom of expression than a criminal punishment, since it has the potential to attain the personal and family life of an individual who accuses a public official, with the evident and very negative result of self-censorship both in the affected party and in other potential critics of the actions taken by a public official.⁷⁵

⁷² *Independent Newspapers (Ireland) Limited. v. Ireland*, 15 June 2017, Application No. 28199/15, para. 85.

⁷³ *Ibid.*, para. 84.

⁷⁴ *Ibid.*, paras. 86-104, quote from para. 101.

⁷⁵ *Tristán Donoso v. Panama*, note 37, para. 129.

[86] A number of other authorities have also referred to the need for civil damages awards to be proportionate. The UN Human Rights Committee, for example, has indicated: “Care should be taken by States parties to avoid excessively punitive measures and penalties.”⁷⁶ The African Declaration indicates: “Sanctions shall never be so severe as to inhibit the right to freedom of expression.”⁷⁷ And the 2000 Joint Declaration of the special international mandates on freedom of expression goes into some detail on this issue, stating:

[C]ivil 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.⁷⁸

[87] The Article 19 Principles include a whole section containing six principles on remedies.⁷⁹ This starts off with an important overriding principle, namely that the role of defamation remedies should be to redress the harm done to the reputation of the plaintiff and not to punish the defendant, aligning with the same call by the special international mandates on freedom of expression. The Principles also call for the prioritisation of non-pecuniary remedies, such as the rights of correction and reply, for damages relating to non-material harm (i.e. harm to reputation *per se* rather than actual proven losses) to be subject to a fixed ceiling, given how impossibly subjective it is to assess this, and for punitive damages to be applied only in highly exceptional circumstances. The Principles also address the issue of injunctions and costs. These suggestions are all derived through principled analysis from the core standard that civil damages should not be excessive and implementing them can be an important practical measure to keep damages awards proportionate.

[88] According to the Brief of the Ecuadorian State, it is up to the judges who are responsible for a case to determine the appropriate level of compensation based on both certain categories of damages – namely rehabilitation, financially assessable compensation, symbolic reparation, and measures of satisfaction and non-repetition – and his or her discretion.⁸⁰

[89] The decision in the *Tolstoy Miloslavsky v. the United Kingdom* case was rendered in 1995 but is relevant inasmuch as it involved a very specific allegation regarding the commission of a massive war crime. The Bank of England shows that inflation in the United Kingdom between 1995 and today has not quite doubled prices of goods and services.⁸¹ As such, the approximately USD 2,100,000 award that the European Court found to be disproportionately excessive in 1995 would be equivalent to an award of approximately USD 4,200,000 today, or just one-tenth of the award in the current case.⁸² The *Independent Newspapers (Ireland)*

⁷⁶ General Comment No. 34, note 23, para. 47.

⁷⁷ Note 50, Principle 21(1)(c).

⁷⁸ Note 35.

⁷⁹ Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, note 33, Principles 13-18.

⁸⁰ Brief of the Ecuadorian State, p. 95.

⁸¹ See Bank of England, Inflation Calculator, <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator>.

⁸² In both cases, a stricter comparison would involve updating these figures to take into account the dates on which the original decisions were made.

Limited. v. Ireland case involved false allegations to the effect that the target, a married woman with two children, was involved in an affair with a minister, including completely doctored pictures wrongly placing her in romantic locations with the minister, and had also received illegitimate benefits. Although it was decided just four years ago and involved very seriously defamatory statements, the European Court of Human Rights still found that the damages award of approximately USD 1,500,000 was excessive.

[90] While damages awards always depend, at least to some extent, on all of the circumstances of the case, it is hard to see how such a vast damages award as was made in the current case could possibly be deemed to be proportionate to the harm done to the reputation of former President Rafael Correa simply by the publication of the Urrutia article. This is particularly true given Correa's position as head of State and the fact that, by the time the Urrutia article was published, the events of 30 September 2010, to which that article referred, had been the subject of very extensive public debate. In other words, the Urrutia article was just one of a torrent of public commentary – some supportive and some critical – on the behaviour of former President Rafael Correa on and around 30 September 2010. As such, it cannot possibly have had such a dramatic impact on his reputation, even taking into account the popularity of the newspaper in which it was published, namely *El Universo*, as to justify a damages award totalling USD 40,000,000.

[91] Ecuador would appear to have accepted this point, recognising in the Brief of the Ecuadorian State that the civil award “did not respond to an imperative social interest”,⁸³ which could be understood as an admission that it was unduly large.

8. Special Protection for Officials

[92] It has been widely recognised that public officials must tolerate a greater degree of criticism than ordinary citizens. In its very first defamation case, the European Court of Human Rights indicated:

The limits of acceptable criticism are ... 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 must consequently display a greater degree of tolerance.⁸⁴

The Court has affirmed this principle in several cases and it has become a fundamental tenet of its jurisprudence.⁸⁵

[93] The same principle has been endorsed eloquently by the Inter-American Court of Human Rights, as follows:

A different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a

⁸³ Brief of the Ecuadorian State, p. 3.

⁸⁴ *Lingens v. Austria*, note 21, para. 42.

⁸⁵ See, for example, *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, para. 59; *Wabl v. Austria*, 21 March 2000, Application No. 24773/94, para. 42; and *Lopes Gomez da Silva v. Portugal*, 28 September 2000, Application No. 37698/97, para. 30.

specific individual. Those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate.⁸⁶

[94] The principle is not limited to criticism of politicians acting in their public capacity. Matters relating to private or business interests can also be subject to this higher standard of tolerance. For example, the “fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises.”⁸⁷ The higher standard of protection has been applied broadly to debate on all matters of public interest by the European Court of Human Rights and that same idea is explicit in the quote above from the Inter-American Court of Human Rights.

[95] There are a number of reasons for this higher standard of tolerance, particularly in relation to public officials. First, and most importantly, democracy depends on the possibility of open public debate about matters of public interest. Without this, democracy is a formality rather than a reality. This is the underpinning for the frequent references to the press as ‘watchdog’ of government.⁸⁸ As the Judicial Committee of the Privy Council so aptly put it:

In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.⁸⁹

[96] Second, as the European Court of Human Rights has noted, a public official, “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.”⁹⁰ Third, public officials normally have greater access to the means of communication and hence can respond publicly to any public criticism of them whereas this may not be easy for ordinary citizens.

[97] An immediate consequence of this is that laws restricting freedom of expression, including defamation laws, should never provide special protection to public figures, including politicians. This includes both the substance of the protection and the penalties for breach of the rules. As the UN Human Rights Committee has stated: “laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned”.⁹¹ Similarly, the 2000 Joint Declaration of the special international mandates on freedom of expression states:

⁸⁶ *Herrera Ulloa v. Costa Rica*, 2 July 2004, Series C, No. 107, para. 129.

⁸⁷ *Dichand and others v. Austria*, note 40, para. 51 (European Court of Human Rights).

⁸⁸ *Lingens v. Austria*, note 21, para. 44.

⁸⁹ *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312 (PC), p. 318. The Judicial Committee of the Privy Council is the court of final appeal for United Kingdom overseas territories and Crown dependencies, as well as those Commonwealth countries which have retained the right to appeal to it, which currently number twelve.

⁹⁰ *Lingens v. Austria*, note 21, para. 42.

⁹¹ General Comment No. 34, note 23, para. 38.

[D]efamation laws should reflect 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; in particular, laws which provide special protection for public figures, such as *desacato* laws, should be repealed.⁹²

[98] The Inter-American Declaration includes a statement along the same lines, indicating:

Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as “*desacato* laws,” restrict freedom of expression and the right to information.⁹³

[99] The penalty in the current case was based on Article 493 of the Criminal Code in force at the relevant time, which provides for one to three years’ imprisonment for slanderous insult directed at an “authority” (“*dirigido a la autoridad*”). In contrast, at that time “ordinary” slanderous insult only attracted a sentence of six months’ to two years’ imprisonment pursuant to Article 491 of the Criminal Code. In the current case, the maximum penalty of three years’ imprisonment was imposed on all of the defendants, such that the specific provisions of Article 493 were directly relevant in their case. The reference to an “authority” in this provision is unclear, including in the Spanish original. It could mean a public authority, an official and/or an official, like a president, whose status means that he or she is also somehow a public authority (as in “office of the president”). Given that it was applied in a case involving the then President of the country, the local courts at least seem to have considered it to cover the second or third options above. As such, it essentially represents a form of “*desacato*” law, providing special protection to officials, which have been widely discredited in Latin America. Regardless, this provision is in clear breach of the standards outlined above, which rule out special or harsher penalties in cases involving officials, including a president.

[100] Ecuador appears to have recognised this since, according to the Brief of the Ecuadorian State, the new Criminal Code no longer has a provision referring specifically to authorities.⁹⁴

9. Requirement of Legality

[101] As noted above, one part of the test for restrictions on freedom of expression is that any restriction must be “provided by law” (Article 19(3) of the ICCPR) or “established by law” (Article 13(2) of the ACHR). It is not enough, to meet this standard, for the restriction to be found in a law; that law must also meet certain minimum conditions of clarity such that it provides clear advance notice of exactly what is prohibited and avoids granting undue discretion to officials to interpret its meaning.

[102] There are several problems with the clarity of the key provisions relied upon here, namely Articles 489 and 493 of the Criminal Code which was in force at the relevant time. The former starts with the concept of “insult” (“*injuria*”), which is an inherently vague notion, if not carefully defined in law, which it does not appear to be. Two types of insult are then defined, slanderous insult, consisting of falsely accusing someone of having committed

⁹² Note 35.

⁹³ Note 53, Principle 11.

⁹⁴ Brief of the Ecuadorian State, p. 95.

a crime, and non-slanderous insult, which includes any expression which discredits, dishonours or disparages another person. The latter could cover a truly vast range of statements, including because no requirement of falsity is built into it, depending how the almost inherently vague terms it relies upon are interpreted. The former is clearer but it fails to indicate the circumstances in which it is acceptable to make such an allegation, such as when reporting suspicious behaviour to the police.

[103] Problems with Article 493 have already been noted above, in relation to the lack of clarity as to what the term “authority” refers to. Given that this serves to increase by 50% the maximum possible term of imprisonment, it is hardly a minor concern.

[104] The respondent State, Ecuador, appears to have accepted that the provisions are problematical from a legality point of view, with the Brief of the Ecuadorian State recognising that the provisions of the Criminal Code which were applied in the current case “involved a breach of the requirement of strict legality” and accepting the claims by the Commission that the provisions in question “did not establish clear parameters that would allow foreseeing the conduct prohibited and its elements”.⁹⁵

10. Liability of Directors and Media Outlet

[105] Apart from Emilio Palacio Urrutia, the author of the article, the other victims – namely Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga (collectively the “other victims”) – all served as senior directors (president and vice-president) and legal representatives of the newspaper which published the article, El Universo. All three were convicted of the same offences as Emilio Palacio Urrutia and sentenced to three years’ imprisonment and an obligation to pay civil damages of USD 30,000,000. The three were apparently convicted on the basis that they were “intervening authors”, who should have taken advantage of their positions to prevent the publication of the article. El Universo, as the legal entity which was responsible for publishing the article, was also ordered to pay civil damages of USD 10,000,000.

[106] It is not inappropriate to impose joint civil liability on legal entities in the position of El Universo which publish articles, among other things because it is primarily through publication in such a newspaper that any defamatory impact of an article is realised (i.e. an article may be read by a large number of third parties precisely due to its publication in a newspaper and not solely because the author has written it). It is also appropriate to impose joint civil liability on individuals who play a direct role in approving articles for publication, such as editors, given the responsibility they bear for the fact that the articles were ultimately disseminated by the newspaper. A precise assessment of whether it was appropriate to impose civil liability on the other victims would require a detailed assessment of the exact roles they played at El Universo, which is beyond the scope of this Statement.

[107] As noted above, the primary position taken in this Statement is that criminal convictions for defamation, of themselves, represent a breach of the right to freedom of expression, at the very least in the context of statements on matters of public interest. The issue addressed

⁹⁵ *Ibid.*, pp. 3-4.

here is whether, should the Inter-American Court of Human Rights reject that primary position and uphold the possibility of criminal defamation convictions, it was appropriate to impose criminal responsibility on the other victims in addition to Emilio Palacio Urrutia, as the author of the article.

[108] It is not uncommon to impose criminal responsibility on senior corporate officials in certain limited circumstances, for example where they use their positions to direct a corporation to act in criminal ways or otherwise participate in criminal activities (normally ones that benefit the corporation, which is what engages their responsibility as corporate officials as opposed to just as ordinary individuals). Such general standards can and should incorporate all of the normal criminal protections, including a requirement that the accused were actively involved in the commission of an offence through participating in it both physically (*actus rea*) and mentally (*mens rea*). In some countries, senior corporate officials may also bear criminal responsibility even in circumstances where they did not actively engage in criminal behaviour, for example because they were in effect wilfully blind as to ongoing criminal activity.

[109] For purposes of the current case, the implications in terms of freedom of expression of holding senior directors of a newspaper liable for the publication in the newspaper of criminally defamatory content prepared by their subordinates also needs to be taken into account. Assuming that the other victims do not normally engage in reviewing and approving content for publication by the newspaper, accepting that they might be held criminally liable for that content would be likely to fundamentally alter the way the newspaper operated, to the serious detriment of freedom of expression. Specifically, it would be likely to lead to a situation where directors either themselves, or with the assistance of third parties, likely lawyers, engaged directly in reviewing content before it was approved for publication. This could only have a seriously negative impact on the content side of a newspaper's operations, slowing down the publication cycle, undermining innovation and investigative journalism, and resulting in a higher rate of refusals to publish even perfectly legal content. Newspapers already have individuals who are responsible for reviewing content and approving it for publication, if necessary after review by a lawyer, namely editors. Imposing criminal responsibility for content on directors would effectively turn them all into part-time editors, which is neither an appropriate nor an efficient way for a newspaper to operate.

[110] Ecuador appears to have recognised that it was not legitimate to pursue a criminal case at least against El Universo, as a legal entity, since the Brief of the Ecuadorian State recognises that this “constituted a non-observance of the principle of jurisdiction and legality”.⁹⁶

Conclusion

[111] According to the assessment of international standards on freedom of expression presented in this Expert Statement, the conviction of Emilio Palacio Urrutia, Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga, along with El Universo, as a legal entity, for the crime of having disseminated a “slandorous insult”

⁹⁶ *Ibid.*, p. 5.

represents a breach of their right to freedom of expression, as guaranteed in Article 13 of the ACHR, in a number of ways.

[112] First, the impugned statements in the Urrutia article were statements of opinion or value judgments, rather than statements of fact, and they related to a matter of evident public interest. This follows from the broad definition of what stands to be classified as an opinion under international law, as well as the inherent nature of the statements.

[113] As such, they are subject to a high level of protection under international human rights law. Although the Inter-American Court of Human Rights has made important statements about protection in this context, the current case provides it with an opportunity to clarify further the precise standards which apply. An important body of authority stands for the proposition that statements of opinion should receive absolute protection under international law. At least that should be the case for statements on matters of public interest. At a very minimum, statements of opinion on matters of public interest that are made in good faith should always be protected.

[114] A number of international authorities call for the complete decriminalisation of defamation and the experience of the growing number of countries which have done this suggests that it can no longer be maintained that criminal defamation laws are necessary. Having the Inter-American Court of Human Rights join these authorities in making a clear statement to the effect that criminal defamation laws are not justifiable would provide great impetus to getting rid of these laws which, in practice, exert a considerable chilling effect on freedom of expression in many countries. An interim position would be that it is not legitimate to apply criminal defamation laws to statements on matters of public interest. If the Court is not willing to support either of these positions, it could expand upon the conditions that it has already set out for criminal defamation laws, in line with the detailed suggestions in the body of this Expert Statement.

[115] Regardless of the position taken on the above, it is now clear that imprisonment is never legitimate as a sanction for defamation. The current case provides an opportunity for the Inter-American Court of Human Rights to affirm that position.

[116] The current case provides an opportunity to reaffirm that excessive civil damages awards represent a breach of the right to freedom of expression. It would be useful if the Inter-American Court of Human Rights went further and adopted some clear principles on civil damages, for example by establishing that the primary aim of these damages should be to repair the harm done and not to punish the defendant or enrich the plaintiff, by calling for ceilings on the amount of non-material damages that can be awarded and by establishing that punitive damages are appropriate only in highly exceptional circumstances.

[117] The current case also provides an opportunity for the Inter-American Court of Human Rights to reaffirm its position that defamation rules which provide special protection for officials or public authorities, whether of a substantive nature or in terms of the sanctions that may be imposed, represent a breach of the right to freedom of expression. This may be particularly important if some countries have adopted refashioned rules along these lines as

a new form of desecato laws.

[118] The legal provisions applied at the national level in the current case failed to meet the standards of clarity and precision that are required by the legality part of the international law test for restrictions on freedom of expression. The Inter-American Court of Human Rights could take advantage of this case to elaborate in more detail on what is expected in terms of precision in the context of defamation laws.

[119] To the extent that the Inter-American Court of Human Rights rules out, in full or in substantial part, criminal defamation laws, it may be unnecessary to make a holding on the issue of the criminal responsibility of directors of media outlets, such as newspapers. Otherwise, it could be important to clarify the limits on both civil and criminal liability in the context of a defamation action.

[120] The current case raises a number of very important freedom of expression issues. As such, it provides the Inter-American Court of Human Rights with an excellent opportunity to clarify human rights, and in particular freedom of expression, standards. Hopefully this Expert Statement will be helpful to the Court as it undertakes this task.

Signed at Halifax, Canada
the 3rd day of June 2021

Toby Mendel

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