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Balancing Rights and responsibilities: Human Rights Jurisprudence on Regulating the Content of Speech

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Balancing Rights and Responsibilities: Human Rights Jurisprudence on Regulating the Content of Speech

Dinah Shelton*

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“How come you let crime get so out of hand in your county?”

“It starts when you begin to overlook bad manners. Any time you quit hearin’ Sir and Mam the end is pretty much in sight... It reaches into ever strata. You’ve heard about that aint you? Ever strata? You finally get into the sort of breakdown in mercantile ethics that leaves people settin’ around out in the desert dead in their vehicles and by then it’s just too late.”

Cormac McCarthy, *No Country for Old Men* 305 (2005)

1 Introduction

The right to freedom of expression is one of the essential attributes of a democratic society, linked to transparency in government, public participation in decision-making, and each person’s individual self-determination. At its first session in 1946, the UN General Assembly affirmed that:

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

Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world.

Freedom of information requires as an indispensable element a willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent.

Understanding and cooperation among nations are impossible without an alert and sound world opinion which, in turn, is whole dependent upon freedom of information.¹

This ringing affirmation was countered the following year by resolution 110 (II) of 3 November 1947, which condemned all forms of propaganda involving a threat to the peace. During the same session, resolution 127 (II) invited Member States to study what national measures might be taken, within constitutional limits, to combat, “the diffusion of false or distorted reports likely to injure friendly relations between States.”

The tension revealed by these resolutions between upholding the right to freedom of expression and allowing appropriate limitations has occupied global and regional human rights bodies for more than sixty years. A draft convention on freedom of information, prepared by a United Nations Conference held in 1948 has never been adopted, although it was on the agenda of each regular session of the General Assembly from 1962 to 1980. Similarly, a Sub-Commission on Freedom of Information, created in 1947, was abolished after five sessions. These indications of controversy have not precluded guarantees of freedom of opinion and expression from being included in all the major human rights instruments, balanced by limitations clauses. A growing jurisprudence has

¹ Res. 59(I) of 14 December 1946.

applied these provisions without necessarily clarifying the exact scope of the right or assuring its enjoyment in a non-discriminatory manner

2 Provisions of Human Rights Instruments

In 1948, two human rights Declarations were adopted that have provided the models for all later human rights instruments. The Inter-American Declaration on the Rights and Duties of Man (American Declaration)² affirms in Article IV that “every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.” Article 19 of the Universal Declaration of Human Rights³ (UDHR) is similar:

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

Both Declarations also have “abuse of rights” provisions and contain statements of duties. The American Declaration, Art. XXVIII, provides that “the rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.” UDHR, Art. 30, specifies that nothing in the Declaration “may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

Subsequent human rights treaties tend to combine the statements of rights and responsibilities in a single, more detailed article on freedom of expression. Thus, Article 19 of the Covenant on Civil and Political Rights⁴ (ICCPR) reads:

1. Everyone shall have the right to hold opinions without interference.

2 Adopted by the 9th International Conference of American States, Bogota, Mar. 30 – May 2, 1948, O.A.S. Res. XXI, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/1.4, Rev. 12 (2007)[hereinafter Basic Documents]. Various additional resolutions and principles have been adopted in the Inter-American system to assist its Commission and Court in evaluating situations in which freedom of expression is in question. Most fundamental is the Inter-American Declaration of Principles on Freedom of Expression. See: Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission, in Basic Documents 211; See Inter-American Commission on Human Rights, *Declaration of Principles on Freedom of Expression*, “www.cidh.oas.org/relatoria/showarticle.asp?artID=26&IID=1”. Additionally, the OAS General Assembly has adopted resolutions on the “Right to Freedom of Thought and Expression and the Importance of the Media” and “Access to Public Information: Strengthening Democracy.” See *Organization of American States General Assembly, Thirty-Fifth Regular Session*, “www.oas.org/juridico/english/ga05/ga05.doc”.

3 Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR (III 1948).

4 International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967). Article 13 of the Convention on the Rights of the Child, 1577 U.N.T.S. 3, G.A. Res. 44/25, guarantees freedom of expression to each child in terms similar to that of the ICCPR.

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 right or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Several commentators have referred to ICCPR Article 19 as the “core of the Covenant and the touchstone for all other rights guaranteed therein.”⁵ It bridges the civil and the political dimensions of the Covenant as it reflects a liberal conception of society that focuses on the “marketplace of ideas” and the right of each person to select from the market in complete freedom from indoctrination and repression. It is linked to privacy, with its initial reference to the right of each individual to form and hold and opinions. The public dimension arises with the expression of personal views and is linked to democratic governance and to the rule of law. Legitimate state interference is limited to restricting speech that violates the rights of others or constitutes an obvious, direct threat to society. In the ICCPR, the importance of the right is reflected in its guarantees against interference from both public and private actors.

ICCPR Article 20 suggests, however, that certain speech is not protected by Article 19: States are expected to prohibit by law propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.⁶ The inclusion of Article 20 in the ICCPR proved controversial, because many States felt that the limitations clause of Article 19(3) would be sufficient to restrict the speech referred to in Article 20; others felt that the former measure was inadequate to reach advocacy and propaganda against certain groups. One group of States objected and continues to object to the potentially broad reach of Article 20. Sixteen western European and other industrialized states filed reservations to it. Five of them⁷ reserved the

5 See M. Novak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2d rev. ed. 2005) 438, and references cited therein.

6 Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 U.N.T.S. 195, 5 I.L.M. 352 (1966) similarly calls for measures to combat propaganda and incitement to discrimination. Articles 5 and 10 (c) of the Convention on the Elimination of Discrimination against Women (CEDAW), 1249 U.N.T.S. 13, G.A. Res. 180 (XXXIV 1979) less ambitiously refer to education and other promotional measures to combat stereotypes. Note, as discussed below, that the Human Rights Committee has held that all speech is protected by Article 19 and restrictions adopted pursuant to Article 20 must also comply with the limitations clauses of Article 19(2).

7 Australia, Malta, New Zealand, the United Kingdom and the United States. Five Nordic states, plus Ireland and the Netherlands, reserved only to Article 20(1) on propaganda for war.

right not to enact any prohibitions on speech beyond existing domestic Constitutional and legislative measures.

The scope of the text is not entirely clear. As Manfred Nowak has described it:

“...the prohibition in art. 20(2) relates to ‘incitement’ to discrimination, hostility or violence...This literally means that incitement to discrimination without violence must also be prohibited. However, incitement is only to be prohibited when it takes place by way of ‘any advocacy’ of national, racial or religious hatred. This means *a contrario* that incitement to violence against women, for example, does not fall under the prohibition of art. 20.”⁸ Nor is such a prohibition foreseen by CEDAW or the OAS Convention on the Prevention, Punishment and Eradication of Violence against Women.⁹

Article 4 (a) of CERD does include a requirement to prohibit hate speech based on “ethnic origin” which is deemed to extend to immigrants and aliens. When Denmark presented its periodic report to the CERD¹⁰ after the publication of notorious cartoons deemed insulting by many Muslims, the Racial Committee called for broader measures in respect of refugees, asylum seekers and other immigrants.¹¹ The Racial Committee noted the government’s efforts to combat hate crimes, but expressed concern about the increase in the number of racially motivated offenses and complaints of hate speech and asked the government to remind public prosecutors of the importance of prosecuting racist acts and racially motivated minor offenses.¹²

Regional treaties all contain provisions on freedom of expression and information, but they vary in content. The European Convention on Human Rights and Fundamental Freedoms,¹³ Article 10, is similar to the later-drafted ICCPR, but adds that its guarantees “shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.” In addition, Article 10(2) sets forth the parameters for legal restrictions on expression:

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

8 Novak, *op. cit.*, p. 474-475.

9 Convention of Belem do Para, adopted June 9, 1994, in force March 5, 1995, reprinted in OAS, Basic Documents 97.

10 Report of Denmark, CERD/C/496/Add.1 2 September 2005.

11 Concluding Observations of the Committee on the Elimination of Racial Discrimination, CERD/C/DEN/CO/17, 25 Oct. 2006.

12 *Id.* para. 11.

13 Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, 230 [hereinafter European Convention on Human Rights]. See generally Malcolm Shaw, *International Law* 321 (5th ed. 2002); Jean-François Flauss, *The European Court of Human Rights and the Freedom of Expression*, 84 Ind. L.J. 809 (2009).

Notably, the reference to “duties and responsibilities” set forth in Article 10(2) does not appear in any other Article of the Convention, but unlike other human rights treaties the European Convention contains no prohibition of hate speech; on the other hand, it also fails to prohibit prior censorship. The American Convention¹⁴ contains both these elements in a much longer and more detailed article:

Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

The initial draft of paragraph 5 was even broader¹⁵ but the United States delegation argued during the negotiations that it should be deleted because it required censorship and could conflict with the protection of freedom of speech.¹⁶ The Brazilian delegate, Carlos Dunshee de Abranches, responded that the provision did “not say that censorship must be established, but rather that the

14 American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. 36.

15 It read: “[a]ny propaganda for war shall be prohibited by law, as shall any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, crime or violence. See Thomas Buergenthal & Robert Norris, *Legislative History*, in 2 *Human Rights: The Inter-American System*, booklet 12, p. 89. The provision on freedom of expression was originally Article 12(5). See *id.*

16 *Id.* p. 88. The U.S. delegate also stated, “[i]nsofar as propaganda for war, a series of classical works such as Homer's *Iliad*, a good part of the works of Shakespeare and of St. Thomas Aquinas, in which there is propaganda for war, would be prohibited by law.” *Id.*

law shall prohibit a certain type of activity.”¹⁷ In consultation with delegates of other countries, the United States put forward a proposed amendment which was accepted and resulted in the current provision.

The African Charter of Human and Peoples Rights,¹⁸ Article 9, grants every individual the right to receive information and the right to express and disseminate opinions “within the law.” Finally, the 2004 Revised Arab Charter on Human Rights,¹⁹ Article 32, “guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any media, regardless of frontiers,” but like other treaties provides that “such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.

Both the American Convention and Arab Charter contain specific guarantees for individuals to be protected by law against attacks on their honor and reputation²⁰ with the American Convention uniquely adding a right of reply in Article 14.

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

In sum, more variation exists in the formulation of the right to freedom of expression than exists with respect to nearly all other rights common to global and regional human rights instruments. All of them allow guarantee freedom of opinion and expression, but all of them also permit or even require some content-based restrictions or sanctions for abusive expression.

3 UN Studies and Reports

The early work of the United Nations on freedom of expression, in the aftermath of the Second World War and the outbreak of the Korean conflict, focused on

17 *Id.* p. 89.

18 Banjul, 19 Jan. 1981, 21 I.L.M. 59 (1982); 7 Hum. Rts. I.J. 403 (1986).

19 Revised Arab Charter of Human Rights, reprinted in D. Shelton, *Regional Protection of Human Rights*, Documentary Supp. 486 (2008).

20 American Convention, art. 11; Arab Charter, art. 21.

journalism and the dissemination of press reports.²¹ In recent years, the General Assembly and human rights bodies of the United Nations have addressed freedom of opinion and expression more broadly. The Human Rights Council has continued the mandate of the Special Rapporteur on the right to freedom of expression, a mandate which began in 1993 under the auspices of the former UN Human Rights Commission. In its 2008 resolution re-authorizing the mandate, the Council recognized that the exercise of the right to freedom of expression is one of the essential foundations of a democratic society.²² It specifically requested the Special Rapporteur to report on instances of hate speech and incitement to racial or religious discrimination as “abuse of the right of freedom of expression.”²³

The successive Special Rapporteurs have addressed many issues, including internet governance, legislation concerning defamation offenses, security of journalists,²⁴ and defamation of religion.²⁵ The exercise of freedom of expression is viewed as a significant indicator of the level of protection and respect for all other human rights. The Special Rapporteur has noted that most of the reported problems concern threats, aggressions, harassment, murder and other attacks on journalists, students, human rights defenders and unionists in retaliation for the exercise of their right to freedom of expression. Many of the attacks involve peaceful protests and wrongful prosecution and punishment of individuals for defamation and libel. In other words, suppression of legitimate speech remains far more common than failure to limit hate speech.

The Special Rapporteur has been most outspoken on the need to decriminalize defamation, arguing that “[t]he right to question ideologies, political figures, social and economic actors, especially for investigative aims, is thoroughly legitimate and represents a significant part of the exercise of the right to freedom of opinion and expression.” He recommends completely eliminating

21 The Economic and Social Council adopted a series of recommendations in 1954 on the transmission of news dispatches, the status and movement of foreign correspondents, copyright, professional training, international broadcasting, etc. Reports on some of these topics were submitted in 1954 and 1955. In 1955, ECOSOC called for an end to censorship of outgoing news dispatches in peacetime. See, e.g. *Freedom of Information*, 1953, E/2426 and Add.1-5, presented to the Economic and Social Council in 1954; and *Report on developments in the field of freedom of information since 1954*, E/3443.

22 Human Rights Council res. 7/36 (March 2008).

23 *Id.* para. 4(d).

24 Several reports have highlighted the importance of print media as a fundamental instrument for the dissemination of ideas and opinions. See: Implementation of General Assembly Resolution 60/251 of March 2006, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Ambeyi Ligabo, A/HRC/4/27, 2 January 2007.

25 The mandate includes gathering relevant information relating to violations of the right to freedom of expression, including from non-governmental organizations, making recommendations and suggestions on improving the promotion and protection of the right to freedom of expression, and assisting in the provision of technical assistance. The Special Rapporteur can receive urgent appeals and complaints as well as report on current issues of concern. See E/CN.4/2006/55; E/CN.4/2005/64 and the most recent report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/11/4, 30 April 2009.

prison sentences and disproportionate fines and handling defamation through independent professional bodies. He also suggests that public figures should be ready to accept criticism in a greater measure than the ordinary citizen. Defamation laws should not be simply replaced with new offenses, such as “flag desecration” or other attacks on national symbols, defamation of the state or other broad political offenses based on expression.²⁶

The Special Rapporteur has also indicated caution in respect to limiting speech by invoking ICCPR art. 20. In his view, “A broad interpretation of these limitations, which has recently been suggested in international forums, is not in line with existing international instruments and would ultimately jeopardize the full enjoyment of human rights. Limitations to the right to freedom of opinion and expression have more often than not been used by States as a means to restrict criticism and silence dissent.”²⁷ Ethnic or religious tensions demand debate and free speech, not its suppression.

The issue of hate speech has been addressed, however. In response to the publication in Danish newspapers of cartoons offensive to many Muslims, the Special Rapporteur on freedom of expression joined the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and the Special Rapporteur on freedom of religion or belief, in issuing an unprecedented call for tolerance and dialogue. The three experts noted that Article 18 of the ICCPR protects religion or belief as an essential right and recalled that Article 19 is also a pillar of democracy and reflects a country’s standard of justice and fairness. In their view, both rights should be equally respected, but the exercise right to freedom of expression carries with it special duties and responsibilities based on good judgment, tolerance and a sense of responsibility.

On his own in 2007, the Special Rapporteur visited Denmark at the invitation of the Danish Institute for Human Rights, where he looked into Danish press laws and ethical standards. He noted an active debate within the country about immigration, religious and the role of the media. He found that members of the minority community felt that the publications were part of “incessant provocations against them and their community” but added that the debate had brought some benefit to the Danish society “in reinforcing the concepts of respect and tolerance through a non-violent confrontation of ideas and opinions.”

4 Jurisprudence of Human Rights Bodies

All human rights tribunals recognize that freedom of expression has several interdependent components. In *Kang v. Republic of Korea*,²⁸ the UN Human Rights Committee found a violation of the right to hold an opinion, one of the

26 See the concluding observations of the Human Rights Committee, Mexico, UN doc. CCPR/C/79/Add.109, para. 19; concluding observations of the Human Rights Committee, Slovakia, UN doc. CCPR/CO/79/SVK (2003).

27 See: 2009 Report, supra n. 20.

28 Human Rights Committee, App. No. 878/1999.

rights guaranteed by ICCPR art. 19(1). The applicant had been detained in solitary confinement for 13 years on the sole basis of his political opinion; he was also forced into an “ideology conversion system” designed to change his political opinion.²⁹ The European Court, like the Human Rights Committee, grants expressions of opinion, broadly defined,³⁰ near-absolute protection, as long as the opinions are not devoid of any factual basis and are made in good faith.³¹ The American Convention, unlike the ICCPR and the European Convention, does not expressly protect an individual's right to hold opinions. Nonetheless, the right should be considered to be subsumed within the right to express ideas, a right that is protected by the American Convention. The issue has not come before the Inter-American Court.

The Inter-American Court recognizes several dimensions to the freedom of thought and expression. Exercise of the right “requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.”³² The individual dimension of freedom of expression is broader than the theoretical right to write and speak.³³ The individual dimension “includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible.”³⁴ According to the Court, freedom of expression “is also a means for the interchange of ideas and information” and includes both the individual's right to communicate views to others as well as the equally important right to receive news and opinions from others.³⁵

29 The Committee also wrongly addressed possible limitations to the right to hold an opinion.

30 *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A.) 11, 28 (1986); See, e.g., *Lepojic v. Serbia*, App. No. 13909/05 (Eur. Ct. H.R. Nov. 6, 2007), “www.echr.coe.int/echr/”; *Ferihumer v. Austria*, App. No. 30547/03 (Eur. Ct. H.R. Feb. 1, 2007), “www.echr.coe.int/echr/”; *Patrel v. France*, App. No. 54968/00 (Eur. Ct. H.R. Dec. 22, 2005), <http://www.echr.coe.int/echr/>.

31 See *Brasilier v. France*, App. No. 71343/01 (Eur. Ct. H.R. Apr. 11, 2006), “www.echr.coe.int/echr/”; *Jerusalem v. Austria*, 2001-II Eur. Ct. H.R. 69, 84; *De Haes v. Belgium*, 1997-I Eur. Ct. H.R. 198, 235 36. In part, the extensive protection afforded opinions reflects concern about the restrictions imposed on freedom of expression in newer Member States. See *Karman v. Russia*, App. No. 29372/02 (Eur. Ct. H.R. Dec. 14, 2007); *Krasulya v. Russia*, App. No. 12365/03 (Eur. Ct. H.R. Feb. 22, 2007); *Feldek v. Slovakia*, 2001-VIII Eur. Ct. H.R. 85, 109; *Gorelishvili v. Georgia*, App. No. 12979/04 (Eur. Ct. H.R. June 5, 2007).

32 *Canese v. Paraguay*, 111 Inter-Am. Ct. H.R. (ser. C)(2004), 77; *Advisory Opinion OC-5/85*, 5 Inter-Am. Ct. H.R. (ser. A) (1985), 31-32.

33 *Advisory Opinion OC-5/85*, supra n. 32 p. 31-32; *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, 109 (Jul. 2, 2004); *Canese*, supra n. 32 p. 77.

34 *Advisory Opinion OC-5/85*, supra n. 32 p. 31; “The Last Temptation of Christ,” 73 Inter-Am. Ct. H.R. (ser. C)(2001), 65 (also known as Last Temptation of Christ case); *Herrera Ulloa*, supra n. 33 p. 109.

35 *Advisory Opinion OC-5/85*, supra n. 32 p. 32; *Herrera Ulloa*, supra n. 33 p. 107, 110; *Canese*, supra n. 32 p. 79; *Ivcher Bronstein v. Peru*, 74 Inter-Am. Ct. H.R. (ser. C)(2001), 178; “The Last Temptation of Christ,” supra n. 34 p. 66.

Human Rights tribunals are in accord that freedom of expression, in its collective or societal dimension, is guaranteed because it is “indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”³⁶ “Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard.”³⁷ In an early advisory opinion, the Inter-American Court explained that “an extreme violation of the right to freedom of expression occurs when governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news.”³⁸

Similarly, the European Court has long considered freedom of speech as not only as an individual right essential for each person’s self-fulfillment, but as fundamental to the establishment and maintenance of a democratic society³⁹ based on pluralism, tolerance, and open-mindedness.⁴⁰ Such a society requires public confidence in government institutions and authorities,⁴¹ a requirement which demands transparency. Freedom of speech is also frequently cited as necessary to protect other rights - including political rights, freedom of assembly, and freedom of association.⁴² Contracting State have an affirmative obligation⁴³ to ensure that freedom of expression is protected against attacks

36 Advisory Opinion OC-5/85, supra n. 32 p. 70; Herrera Ulloa, supra n. 33 p. 112; Canese, supra n. 32 p. 82.

37 Advisory Opinion OC-5/85, supra n. 32 p. 70; Ivcher Bronstein, supra n. 35 p. 151.

38 Advisory Opinion OC-5/85, supra n. 32 p. 54.

39 See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976); Lingens, para. 41 (23 May 1991); Oberschlick, para 57 (23 April 1992); Castells, para 42 (23 Sept. 1994); Jersild, para 31 (27 March 1996); Goodwin, para. 38 (16 Nov. 2004); Karhuvaara & Italehti, para. 37 (21 Dec. 2004); Busuioc, par. 58 (15 Feb. 2005).

40 See *Handyside*, 24 Eur. Ct. H.R. p. 23.

41 See *De Haes v. Belgium*, 30 Eur. Ct. H.R. 198 (1997).

42 For an illustration, See *Socialist Party v. Turkey*, 1998-III Eur. Ct. H.R. 1233, 1255 (“The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11.”).

43 See *Fuentes Bobo v. Spain*, App. No. 39293/98, 31 Eur. H.R. Rep. 1115 (2001). See also *K.L. v. The Netherlands*, CERD case No. 4/1991 finding a violation of article 4 of the Convention on the Elimination of All Forms of Racial Discrimination because the State Party had not taken all the necessary measures to protect the victim from incitement to hatred. CERD 1994 Report, A/48/18, Annex IV. The Committee said that the State Party must fully investigate allegations of expressions of racial hatred and other threats to the victim. See also *The Jewish Community of Oslo et al. v. Norway*, CERD 2005 Report A/60/18 Annex III B holding that the acquittal of the head of a neo-Nazi group violated the Racial Convention because, despite being absurd and lacking logic, they were based on racial superiority or hatred and constituted an incitement to racial discrimination, if not violence.

coming from private individuals,⁴⁴ although this obligation is not systematically enforced by the Court.⁴⁵

4.1 *Protected and Unprotected Speech*

The approach of the UN Human Rights Committee on the scope of protected speech differs from that adopted by the European Court of Human Rights. The latter has determined that some speech is completely excluded from the guarantees of Article 10, while the Human Rights Committee deems the protection afforded by ICCPR Article 19 to extend to “information and ideas of all kinds,” including artistic, commercial, political, sexual, religious and even hate speech.⁴⁶ The prohibition of hate speech demanded by Article 20 must therefore be compatible with Article 19 and meet the tests set forth in Article 19(2). Nonetheless, the Committee declared two early communications inadmissible, suggesting that the expressions in question did not fall within the guarantees of Article 19. *Western Guard Party v. Canada* was brought by a radical, right-wing political party that had been prevented from using telephone services to disseminate anti-Semitic messages.⁴⁷ The Committee found that the messages fell within Article 20(2) and therefore banning them could not be a violation of Article 19. *M.A. v. Italy* was brought by an individual convicted of participating in the re-establishment of the dissolved fascist party. The Committee rejected it as an abusive petition but added that it could also have been reviewed on the merits under the limitation clause in Article 19(3).⁴⁸ More recently, as discussed below, the Committee has chosen to address such petitions on the merits and explicitly linked Articles 19 and 20.⁴⁹

The European Court extends the Convention’s protection to discussion of all matters of public concern⁵⁰ in a general debate over public policy.⁵¹ The narrow and/or local character of an issue is not a ground for excluding the matter as one

44 See *VgT Verein Gegen Tierfabriken v. Switzerland*, App. No. 24699/94 (Eur. Ct. H.R. June 28, 2001), “www.echr.coe.int/echr/”; *Ozgur Gundem v. Turkey*, 2000-III Eur. Ct. H.R. 1, 21 (holding that in failing to either adequately protect a pro-Kurdish newspaper or investigate criminal activity directed against the paper, the Turkish government failed to meet its positive obligation to ensure the newspaper’s freedom of expression).

45 *Perna v. Italy*, 2003-V Eur. Ct. H.R. 333, 360 (Conforti, J., dissenting). Compare, e.g. *VgT Verein Gegen Tierfabriken*, App. No. 24699/94 with *Murphy v. Ireland*, 2003-IX Eur. Ct. H.R. 1, 31 (holding that the Radio and Television Act of 1988 did not, by proscribing the broadcast of religious and political advertisements, unreasonably limit the applicant’s freedom of expression).

46 *Ballantyne, Davidson and McIntyre v. Canada*, Apps. 359 and 385/1989 (finding commercial advertising to be protected by art. 19).

47 App. No. 104/1981.

48 App. No. 117/1981.

49 See *infra* p. n.

50 See *Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A) p. 27 (1992); See *Filatenco v. Russia*, App. No. 73219/01 (Eur. Ct. H.R. Dec. 6, 2007), “www.echr.coe.int/echr/”.

51 See *Giniewski v. France*, App. No. 64016/00 (Eur. Ct. H.R. Jan. 31, 2006).

of general interest.⁵² The Court instead bases its analysis on the character of the message, even if it is in the form of an advertisement, to determine if the content forms part of a debate on matters of general interest.⁵³ The Court has found publicity concerning public health issues to be part of a general interest debate⁵⁴ while also providing general advertising information to the public.⁵⁵ The Court also expressly recognizes the public's interest in information about the activities and practices of domestic and multinational companies⁵⁶ and it extends its protection to symbolic speech as well as publications and oral expressions.⁵⁷

In contrast, the European Court has held that there exists a category of clearly established historical events whose denial or revision does not, by virtue of Article 17,⁵⁸ come under the protection of Article 10,⁵⁹ including the Holocaust, Nazi persecution of Jews, the Nuremberg trials, and crimes against humanity committed during World War II. In order to justify the application of Article 17 to this speech, the court does not rely solely upon the denial of a "notorious historical truth," but also to the disregard shown toward fundamental values of the Convention: "The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order."⁶⁰ The court also sometimes makes reference to abuses of freedom of speech that are incompatible with democracy and human rights.⁶¹

European jurisprudence very clearly "condemns" any form of hate speech,

52 See *Boldea v. Romania*, App. No. 19997/02 (Eur. Ct. H.R. Feb. 15, 2007), "www.echr.coe.int/echr/".

53 See *Jacobowski v. Germany*, 291 Eur. Ct. H.R. (ser. A) 3, 13 15 (1994); *Casado Coca v. Spain*, 285 Eur. Ct. H.R. (ser. A) 3, 20 (1994); *Markt Intern Verlag GmbH v. Germany*, 165 Eur. Ct. H.R. (ser. A) p. 19 21 (1989).

54 *Hertel v. Switzerland*, 1998-VI Eur. Ct. H.R. 2298, 2330.

55 For an application of this concept to medical information, See *Stambuk v. Germany*, App. No. 37928/97 (Eur. Ct. H.R. Oct. 17, 2002).

56 *Steel v. United Kingdom*, 2005-II Eur. Ct. H.R. 1, 36 37; *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 483.

57 *Vajnai v. Hungary* (2008).

58 European Convention article 17 provides that "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." For the interplay of articles 10 and 17, see: *Garaudy v. France*, 2003-IX Eur. Ct. H.R. 375; *Karatepe v. Turkey*, App. No. 41551/98 (Eur. Ct. H.R. July 31, 2007); *Seurot v. France*, App. No. 57383/00 (Eur. Ct. H.R. May 18, 2004); *Osmani v. Former Macedonia*, 2001-X Eur. Ct. H.R. 389.

59 See, e.g., *Chauvy v. France*, 2004-VI Eur. Ct. H.R. 205, 229 (noting, in an aside, that the Holocaust belongs "to the category of clearly established historical facts"); *Garaudy v. France*, 2003-IX Eur. Ct. H.R. 369 (stating that, under Article 17, historical descriptions that negate the Holocaust are not protected by Article 10); *Lehideux v. France*, 1998-VII Eur. Ct. H.R. 2864, 2879 (describing the applicants' text as "present[ing] certain historical facts in a manifestly erroneous manner").

60 *Garaudy*, 2003-IX Eur. Ct. H.R. p. 397.

61 See *Witzsch v. Germany*, App. No. 7485/03 (Eur. Ct. H.R. Dec. 13, 2005).

because, as the Court stated in *Jersild v. Denmark*, “Article 10 . . . should not be interpreted in such a way as to limit, derogate from or destroy the right to protection against racial discrimination under the UN Convention.”⁶² More recently, the court has explained that “remarks aimed at inciting racial hatred in society or propagating the idea of a superior race can not claim any protection under Article 10 of the Convention”;⁶³ that “expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10”;⁶⁴ and finally that the protection granted by Article 10 does not apply to “concrete words constituting hate speech that might be offensive to individuals or groups.”⁶⁵

The Council of Europe Committee of Ministers defined hate speech broadly in 1997 to encompass “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination, and hostility against minorities, migrants, and people of immigrant origin.”⁶⁶ Hate speech as excluded from the guarantees of Article 10⁶⁷ clearly goes beyond the standard of incitement to violence to include speech that would be protected in other societies, including the United States. Thus, the Court qualified as unprotected hate speech a poster displayed in the window of a British house that read: “Islam out of Britain - Protect the British People,” accompanied by a photo of the World Trade Center in flames⁶⁸ According to the court, the words and images constituted an attack against all Muslims in the United Kingdom and was therefore incompatible with the values of tolerance, social peace, and nondiscrimination proclaimed and protected by the Convention.⁶⁹ The Court has nonetheless found violations of Article 10 in three well-known cases that concerned the dissemination of hate speech.

In *Jersild v. Denmark*,⁷⁰ a journalist who broadcast racist remarks was protected because the comments came in the context of a report on racism and xenophobia in the country. In *Gunduz v. Turkey*,⁷¹ verbal attacks on those born of parents not married according to the law of the Koran were deemed hate speech, but the television station was not held liable because the remarks were made during a live television broadcast by a religious dignitary. In *Erbakan v.*

62 *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) p. 20 (1995).

63 *Aksoy v. Turkey*, App. No. 28635/95 (Eur. Ct. H.R. Oct. 10, 2000).

64 *G nd z v. Turkey*, 2003-XI Eur. Ct. H.R. 257, 275.

65 *Erbakan v. Turkey*, App. No. 59405/00 (Eur. Ct. H.R. July 6, 2006).

66 Comm. of Ministers, Council of Eur., Recommendation No. R (1997) 20 of the Committee of Ministers to Member States on “Hate Speech” (1997), available at “www.coe.az/pfd/doc/committee_of_ministers/Rec%20No.%C20R%20(97)%2020%20(e).pdf”.

67 See *La Liberté d'expression en Europe: Jurisprudence Relative a l'article 10 de la Convention Europeenne de Droits de L'homme* (Conseil de l'Europe, 3d ed. 2006).

68 *Norwood v. United Kingdom*, 2004-XI Eur. Ct. H.R. 343, 347.

69 See also *Ivanov v. Russia*, App. No. 35222/04 (Eur. Ct. H.R. Feb. 20, 2007) (condemning anti-Semitic speech).

70 298 Eur. Ct. H.R. (ser. A) (1994).

71 2003-XI Eur. Ct. H.R. 257.

Turkey,⁷² the speech in question called upon voters to identify themselves based upon the criteria of religious affiliation. The speech called for the rejection of nonbelievers, that is to say non-Muslims and non-practicing Muslims. However, the Court found other factors reduced the impact of the speech, including the context of a constitutionally-guaranteed secular state and the long delay before the government acted.

In sum, the European Court uniquely holds that some speech cannot be tested according to the permissible limitations of Article 10(2) because that speech is *per se* excluded from the protections of Article 10(1). It is a narrow range of speech, almost entirely confined to hate speech linked to the events of the Second World War. All other speech and content-based restrictions are assessed according to the provisions of Article 10. In performing this assessment, the European Court is more closely aligned to the approach of other human rights tribunals.

4.2 Content-based Limitations on Protected Speech

The Inter-American Court and the European Court of Human Rights agree in principle that freedom of expression must be guaranteed not only for the dissemination of expressions, information and ideas that are favorably received or considered inoffensive or indifferent, but also for those that shock, concern or offend the State or any sector of the population.⁷³ The European Court has consistently stated, if not consistently upheld, that “freedom of expression . . . is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb,”⁷⁴ or those that counter conventional wisdom.⁷⁵ In political discourse, polemic⁷⁶ and sarcastic⁷⁷ language is acceptable. Indeed, the Court views fierce attacks as part of the nature of politics: “in the domain of political discourse, the invective often touches upon a personal note; these are

72 App. No. 59405/00 (Eur. Ct. H.R. July 6, 2006).

73 Herrera Ulloa, *supra* n. 33 p. 113; Canese, *supra* n. 32 p. 83 quoting Scharsach and News Verlagsgesellschaft v. Austria, 2003 Eur. Ct. H.R. 596, p. 29; Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. 245, p. 65 (1979).

74 Hertel v. Switzerland, 1998-VI Eur. Ct. H.R. 2298, 2329; See, e.g., Giniewski, App. No. 64016/00 (protecting the freedom of expression in the context of a publication charging the hierarchy of the Catholic Church with complicity in the Nazi genocide).

75 *Id.* p. 2332 (“It matters little that [the] opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.”).

76 See Lopes Gomes da Silva v. Portugal, 2000-X Eur. Ct. H.R. 101 (analyzing a publication that described a local candidate in a municipal election as being “grotesque” and “buffoonish” as well as “an incredible mixture of crude reactionaryism..., fascist bigotry[,] and coarse anti-Semitism”). See also Oberschlick v. Austria (No. 2), 1997-IV Eur. Ct. H.R. 1266, 1270, where the Court accepted the permissibility of referring to the leader of a far-right Austrian political party as an “idiot”, even though the term was openly used in place of “Nazi,” a taboo term in Austria. See Walb v. Austria, No. 24773/94 (Eur. Ct. H.R. Mar. 21, 2000), (stating that the use of the term “Nazi journalism” by a member of Parliament to describe a newspaper was particularly stigmatizing in light of the Austrian context).

77 See Katrami v. Greece, App. No. 19331/05 (Eur. Ct. H.R. Dec. 6, 2007).

the occupational hazards of the game of politics and part and parcel of the open debate of ideas, the guarantors of a democratic society.”⁷⁸ The same broad acceptance of militant speech may apply to some other areas of public policy, such as environmental issues.⁷⁹ The court has been uneven, however, in the protection afforded shocking artistic expression.⁸⁰ Sensationalism for its own sake is not legitimate, according to the Court,⁸¹ nor is the gratuitous insult of another, but language such as “beasts in uniform,” “wild beasts in uniform,” and “sadistic brutes” uttered against police officers is not considered unacceptably insulting.⁸² Such insults have been deemed a legitimate response to contested behavior of public officials.⁸³

Yet, international tribunals increasingly recognize that the public dissemination of opinions and information carries with it risks and consequences. As the International Criminal Tribunal for Rwanda observed “[t]he power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for the consequences.”⁸⁴ Thus, it is permitted to restrict the exercise of the right to freedom of expression, but only under strict conditions, which should be enforced simultaneously: (a) restrictions must be provided by law; (b) they should pursue an aim recognized as lawful, and (c) be proportionate – especially the time-span of any restrictive measure – to the accomplishment of that aim.⁸⁵

The formulation of ICCPR Article 19 makes clear that opinion makers must exercise their rights responsibly and states must ensure that there is no distortion, monopoly, or misuse of the media. Indeed, because Article 17 expressly includes reputation as part of the right to privacy, states are not only entitled under Art. 19(3) to restrict freedom of expression, but are required to provide statutory protection against intentional infringements of reputation by defamatory statements (insults, negative value judgments, and other expressions of opinion and true statements remain protected speech). It is also possible to refer to the protection of freedom of religion to warrant restrictions on

78 *Sanocki v. Poland*, App. No. 28949/03 (Eur. Ct. H.R. July 17, 2007).

79 *See Steel v. United Kingdom*, 2005-II Eur. Ct. H.R. 3, 88.

80 *See Vereinigung Bildender Künstler v. Austria*, App. No. 68354/01 (Eur. Ct. H.R. Jan. 25, 2007), but *See Müller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A) p. 22 23 (1988).

81 *See Stoll v. Switzerland*, App. No. 69698/01 (Eur. Ct. H.R. Dec. 10, 2007).

82 *Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A) p. 17 (1992). Contrast *Klein v. Slovakia*, App. No. 72208/01 (Eur. Ct. H.R. Dec. 31, 2006), where the court considered insulting the use of vulgar double entendres and sexual references against an archbishop, who had proposed banning a film he considered profane and blasphemous.

83 Notwithstanding the defamatory nature of the use of the term “Nazi” in Austria, the court allowed the phrase “closet Nazi” to be uttered against a political leader whose position was very much in line with a party of the extreme right and who was suspected of having sympathies along the lines stated. See: *Scharsach v. Austria*, 2003-XI Eur. Ct. H.R. 125.

84 *Prosecutor v. Nahimana, Barayagwiza and Ngeza* Case ICTR-99-52, Judgment and Sentence p. 945 (Dec. 3, 2003).

85 *Id.*, para 46. Note that the CCPR has insisted that all restrictions on the exercise of art. 19 rights “must meet a strict test of justification.” *Park v. Republic of Korea*, App. No. 628/1995, para. 10.3; *Kim v. Republic of Korea*, App. No. 574/1994, paras 12.4 and 12.5.

expression of religious intolerance. Most importantly, under Article 19(3) any interference by the state must be “necessary.” In case of doubt, the restrictions must be read narrowly, partly because this is the general approach with respect to all limitations on rights, but also because of the continual reference to freedom of expression and information as the cornerstone of a democratic society.

The Human Rights Committee has decided two important cases on hate speech. *Malcolm Ross v. Canada* upheld the dismissal of a teacher after he made public statements on conflicts between Judaism and Christianity and defense of the Christian religion.⁸⁶ After a Jewish parent filed a complaint with the provincial human rights committee, the teacher was transferred to a non-teaching position. The Committee focused on whether the interference with his freedom of expression was necessary to protect the rights or reputations of others. It recalled the special duties and responsibilities referred to in Article 19(3) as well as Article 20(2), which it found of added significance in the education of young people. It also noted a causal link between the teacher’s expression and the “poisoned school environment” experienced by Jewish children in the school district. Therefore, it found no violation. Perhaps in reference to the earlier Committee decisions on inadmissibility, the government argued that because the speech fell with Article 20(2), the state could not be in violation of Article 19. The Committee explicitly rejected the government’s argument, however: “the Committee considers that restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible. In applying those provisions, the fact that a restriction is claimed to be required under article 20 is of course relevant.”⁸⁷

The most well-known of the Committee’s cases on freedom of expression is *Faurisson v. France*⁸⁸ brought after a professor of literature was removed from his chair at the University of Lyon because he expressed doubt about the existence of gas chambers for extermination purposes at Auschwitz and other Nazi concentration camps. In 1990 the French legislature made it an offence to contest the existence of crimes against humanity as defined in the Charter of the Nuremberg Tribunal. In an interview for a French magazine, Faurisson criticized the new law and expressed his doubts about the gas chambers. Both he and the editor of the magazine were convicted and fined for having committed the crime of “contestation de crimes contre l’humanité.” The Committee expressed concern that the French law could lead to decisions or measures incompatible with the Article 19 of the Covenant, but found no violation on these facts. The Committee took into account the statement of the French minister of justice that Holocaust denial was the “principal vehicle for anti-Semitism” and thus found that the restriction was justified in permitting the Jewish community to live free from fear and upholding “their right to be protected from religious hatred.”

Nearly half the Committee appended separate opinions expressing concern that the scope of the French law could stifle legitimate research and

86 *Malcolm Ross v. Canada*, No. 736/1997, paras. 11.1-11.6.

87 App. No. 736/1997, para. 10.6.

88 App. No. 550/1993, paras. 9-10.

suggesting that the law should be replaced by one prohibiting well-defined acts of anti-Semitism or with a law protecting the rights and reputations of others in general.

The American Convention sets forth specific permissible restrictions on the right to freedom of expression: one that is prescribed by law, satisfies a legitimate purpose specified in the American Convention, and one that is necessary in a democratic society.⁸⁹ A restriction has been prescribed by law when there is a domestic statute in effect that limits freedom of expression. The State must identify the domestic law that authorizes the restriction and show that the law has a legitimate purpose. The legitimate purposes permitted by the American Convention are ensuring "respect for the rights or reputations of others or the protection of national security, public order, or public health or morals."⁹⁰

Even though a domestic law has a legitimate purpose, it may not limit freedom of expression more than is strictly necessary in a democratic society.⁹¹ The State must choose the least restrictive option available to limit a protected right.⁹² The Inter-American Court stated in this regard that the necessity and thus the legality of restrictions "depend[s] upon showing that the restrictions are required by a compelling public interest."⁹³ To demonstrate a compelling public interest the State has the burden to specifically show that there is a pressing social need for the restriction.⁹⁴ It is not sufficient for the State to demonstrate

that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to collective purposes, which, owing to their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees and do not limit the right established in this Article more than is strictly necessary.⁹⁵

In addition, "the restriction must be proportionate to the interest that justifies it and closely tailored to accomplishing this legitimate objective, interfering as little as possible with the effective exercise of the right to freedom of

89 Herrera Ulloa, *supra* n. 33 p. 120. Likewise, the European Court and the UNHRC require that restrictions on the exercise of freedom of expression must be prescribed by law, have a legitimate purpose, and be necessary and justified. *See Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. 245, p. 59 (1979).

90 American Convention, *supra* note 13, art. 13(2).

91 Canese, *supra* n. 32 p. 95.

92 *Id.* p. 96; Herrera Ulloa, *supra* n. 33 p. 121; Advisory Opinion OC-5/85, *supra* n. 32 p. 46, 59; *See also Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. 245, p. 59 (1979).

93 Canese, *supra* n. 32 p. 96.

94 The Inter-American Court espoused the European Court of Human Rights' interpretation of "necessary" to require the existence of a "pressing social need." Herrera Ulloa, 2004 Inter-Am. Ct. H.R., p. 122 (citing *Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. 245, p. 59 (1979); Advisory Opinion OC-5/85, *supra* n. 32 p. 46; Canese, *supra* n. 32 p. 96).

95 Canese, *supra* n. 32 p. 96; Herrera Ulloa, *supra* n. 33 p. 121; Advisory Opinion OC-5/85, *supra* n. 32 p. 46; *See also Sunday Times*, 2 Eur. Ct. H.R. p. 59.

expression.”⁹⁶ To date, the Inter-American Court has not been presented with the opportunity to interpret the American Convention’s restriction on hate speech.

The European Court has held that the need for exceptions to fulfill a pressing social need must be established convincingly.⁹⁷ Authorities have a “certain” margin of appreciation in determining the existence of such a need, but the European Court nonetheless exercises supervision over the scope and need for the measures taken. European judges utilized multiple variables in order to assess the legitimacy of restrictions placed on freedom of expression. Based on the text of Article 10(2), the Court determines whether the interference was proportionate to the legitimate aims pursued and whether the reasons were relevant and sufficient. The Court also looks at the content of the speech and the context in which the expression was made. Indeed, so many factors are included that some judges have complained that “it is difficult to ascertain what principles determine the scope” of the review power in litigation over the freedom of speech.⁹⁸ In general, over the years, the Court has shifted towards reducing Contracting Parties’ discretionary powers by exercising greater scrutiny of restrictions on freedom of expression.

Governments have extensive power to implement measures limiting the exercise of freedom of speech that incites to violence.⁹⁹ Incitement to violence, insurrection, or armed resistance may be prohibited or sanctioned, even when the aim is to protect minority rights¹⁰⁰ and any speech advocating the use of force for secessionist ends will be considered language inviting violence.¹⁰¹ The European Court has defined incitement to include not only a direct call to violence but more indirect and diffuse language,¹⁰² such as remarks that have the potential to awaken and strengthen deeply entrenched prejudices that could result in deadly violence. The Court is divided about the role of context in determining whether or not authorities have exceeded their discretion to prevent incitement. Some judges prefer to give priority to examining the content of the speech¹⁰³ while others accord more weight to the context speech and propose attaching decisive importance to the actuality or imminence of a risk of violence.¹⁰⁴

96 Canese, 2004 Inter-Am. Ct. H.R., p. 96; Herrera Ulloa, 2004 Inter-Am. Ct. H.R., p. 123.

97 The Observer and Guardian, para. 59 (26 Nov. 1991).

98 See *Wingrove v. United Kingdom*, 1996-V Eur. Ct. H.R. 1937, 1966 (L. hmus, J., dissenting).

99 See *S rek v. Turkey* (No. 1), 1999-IV Eur. Ct. H.R. 353, 382 (requiring that the reasoning for interference be “relevant and sufficient”).

100 See *Zana v. Turkey*, 1997-VII Eur. Ct. H.R. 2533, 2548-49.

101 But see *Yazar v. Turkey*, App. No. 42713/98 (Eur. Ct. H.R. Sept. 23, 2004), (holding that, because the speech was determined to not have as its aim inciting violence or armed resistance, the state had not violated Article 10 of the Convention).

102 *Dogan v. Turkey* (No. 3), App. No. 4119/02 (Eur. Ct. H.R. Oct. 10, 2006).

103 *Karatas v. Turkey*, 1999-IV Eur. Ct. H.R. 81, 120-21 (Wildhaber, J., dissenting).

104 See e.g., *S rek v. Turkey* (No. 4), App. No. 24762/94 (Eur. Ct. H.R. July 8, 1999) (Palm, Tulkens, Fischbach, Casadevall & Greve, JJ., concurring). See also *Hogefeld v. Germany*, App. No. 35402/97 (Eur. Ct. H.R. Jan. 20, 2000) (declaring the application inadmissible after considering the applicant’s background in evaluating the statements at issue).

When Turkey attempted to justify its interference with journalists' rights to freedom of expression on national security grounds, the European Court of Human Rights resolved the journalists' complaints against the State by applying the above-referenced test. In *Halis v. Turkey*¹⁰⁵ the Turkish government imprisoned a journalist for publishing a book review that expressed positive opinions about aspects of the Kurdish separatist movement. The journalist was convicted domestically of violating the Turkish Prevention of Terrorism Act through the dissemination of propaganda about an illegal separatist terrorist organization. The State defended its actions on the ground of national security. The Court found that the restriction was made pursuant to Turkish law and that in view of the sensitive security situation and the use of violence by a separatist movement in Turkey, the measures taken by the government had the legitimate aim of protecting national security and public safety. The Court found, however, that the conviction and sentence of the journalist were disproportionate. Thus, the restriction was not necessary in a democratic society and violated the journalist's right to freedom of expression.

Similarly, in *Sener v. Turkey*,¹⁰⁶ the owner and editor of a weekly Turkish paper was convicted of "disseminat[ing] propaganda against the State" for publishing an article that referred to the military attacks on the Kurdish population as genocide. Turkey again defended its interference with freedom of speech on national security grounds because, in its view, merely by speaking negatively of the violence against the Kurdish population, the applicant had "incited and encouraged violence against the State." The European Court of Human Rights held that the State had violated the applicant's right to freedom of expression.

The Human Rights Committee has also rejected limitations imposed on the ground of national security. It held, for example, that South Korea had contravened the ICCPR's Article 10 when it convicted and imprisoned a South Korean activist for criticizing the government of South Korea and advocating national reunification.¹⁰⁷ The government had convicted the complainant of violating its National Security Law.

The European Court has also had several cases in which it has had to balance the interest in protecting government secrets with freedom of expression and it has shown itself somewhat skeptical of limiting freedom of expression or the public's right to information on this basis. According to the Court, "[p]ress freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature."¹⁰⁸ The Court cited Council of Europe Resolution 1551/2007, regarding the fairness of legal proceedings in cases of espionage or divulgence of government secrets, as well as the position of the Inter-American Commission on Human Rights when evaluating these cases: "The disclosure of State-held information should play a very important role in a democratic society,

105 *Halis v. Turkey*, 2005 Eur. Ct. H.R. 3; *Sener v. Turkey*, 2000 Eur. Ct. H.R. 377.

106 *Sener*, 2000 Eur. Ct. H.R. 377, p. 7-8.

107 *Kim v. Republic of Korea*, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, 64th Sess., p. 2.1-2.3, 12.5 (Jan. 4, 1999).

108 *Stoll v. Switzerland*, App. No. 69698/01 (Eur. Ct. H.R. Dec. 10, 2007).

because it enables civil society to control the actions of the Government to which it has entrusted the protection of its interests.”¹⁰⁹

The case of *Dupuis v. France*¹¹⁰ raised the issue of protecting court secrecy and judicial proceedings. The European Court expressed concern with protecting the public's right to information about the proper functioning of the criminal justice system, a concern shared by the Committee of Ministers as stated in its recommendation “on the provision of information through the media in relation to criminal proceedings.”¹¹¹ For both institutions, the only legitimate reason for confidentiality is the protection of the presumption of innocence of the suspect or accused individual.¹¹²

4.3 *Is All Speech Guaranteed Equally?*

The Human Rights Committee has indicated that there is no preference afforded political speech, in contrast to the European Court's interpretation of Article 10. The European Court expressly privileges the media as the “watchdog” over democratic society.¹¹³ This promotion of journalistic expression aims to produce an increase in the public's right to information and transparency in government. The degree of this heightened status has been a source of contention among the judges.¹¹⁴ The European Court affords artistic expression less protection than political speech, even if it enjoys only limited distribution.¹¹⁵ In addition, whether for historical reasons or in order to conform to current trends, the European Court gives less protection to expressions of far-right extremism, which it views as presenting the biggest threat to values protected by the Convention. In the past, the far left was treated with similar disdain.¹¹⁶

The duties and responsibilities of speakers take on importance in the European Court's jurisprudence when assessing limitations for the protection of morals. The Court has held that a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or “especially” religion. The rationale is that “as in the field of morals, and perhaps to an even greater degree, there is no uniform European

109 *Claude-Reyes v. Chile*, 2006 *Inter-Am. Ct. H.R.* (ser. C) No. 151 (Sept. 19, 2006).

110 *Dupuis v. France*, App. No. 1914/02 (Eur. Ct. H.R. June 7, 2006).

111 *Comm. of Ministers, Council of Eur., Recommendation No. R (2003) 13 of the Committee of Ministers to Member States on the Provision of Information Through the Media in Relation to Criminal Proceedings* (2003), available at “www.cra.ba/en/broadcast/reports/default.aspx?cid=2673”.

112 *See also Eerikäinen and Others v. Finland*, App. No. 3514/02, 2 Feb. 2009 (citing the Committee of Ministers recommendation).

113 *See Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A) (1992); *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) (1992).

114 *See Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 483, 506, 510-11. *See also Stoll v. Switzerland*, App. No. 69698/01 (Eur. Ct. H.R. Dec. 10, 2007) (Zagrebeljsky, J., dissenting).

115 *See Alinak v. Turkey*, App. No. 40287/98 (Eur. Ct. H.R. Mar. 29, 2005), (finding a violation when the work was a novel with limited mass appeal).

116 *Glazenapp v. Germany*, 104 Eur.Ct. H.R. (Ser. A) (1986); *Vogt v. Germany*, 323A Eur. Ct.H.R. (Ser. A)(1995).

conception of the requirements of ‘the protection of the rights of others’ in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterized by an ever growing array of faiths and denominations.”¹¹⁷

The European Court often upholds limits on speech for the “protection of rights of others” when speech concerns a matter of religion or belief.¹¹⁸ This has sometimes led to preventing minority groups from openly expressing their beliefs and exercising their right to freedom of expression. The importance given to the defense of religious convictions at times tends to confuse the moral views of the majority with the “protection of the rights of others” and to lead to coerced politeness. The Court deems that each speaker has “an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement on their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.”¹¹⁹ While the Court holds that expressions of doctrines antagonistic to the faith of believers must be tolerated, an important exception is made for injurious attacks against sacred symbols or objects of religious veneration.¹²⁰ Unfortunately, the criteria seem to be selectively applied and often ignored for religions that are unfamiliar to the Court or to the majority,¹²¹ but in general, European jurisprudence seems to privilege religious belief over freedom of expression.¹²² Remarks aimed at discrediting nonbelievers do not fall within the category of hate speech based on religious intolerance.¹²³

4.4 *Defamation*

Defamation generally means expression that is published (spoken, written, pictured or gestured); false (totally untrue); injurious (there is no defamation without injury); and unprivileged (not stated in the context of a protected professional activity, such as a judge). Some laws add a requirement of malice or specific intent to harm. Governments often seek to silence particular individuals for their opinions or expression by criminal prosecution for defamation, imposing penalties that range from fines and prohibitions on publication to exile or prison. Defamatory speech that impugns the honor or reputation of another person also may lead to a civil action against the speaker. Some States allow a

117 Murphy, paras. 65, 67 (10 July 2003).

118 *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) p. 6, 12, 19 (1994).

119 See, e.g., *Giniewski v. France*, App. No. 64016/00 (Eur. Ct. H.R. Jan. 31, 2006).

120 See *Tatlav v. Turkey*, App. No. 50692/99 (Eur. Ct. H.R. May 2, 2006); *I.A. v. Turkey*, 2005-VIII Eur. Ct. H.R. 249, 257-58.

121 *Paturel v. France*, App. No. 54968/00 (Eur. Ct. H.R. Dec. 22, 2005).

122 See *I.A.*, 2005-VIII Eur. Ct. H.R. p. 260-61 (*Costa, Cabral Barreto & Jungwiert, JJ.*, dissenting).

123 See *Nur Radyo Ve Televizyon Yayinciligi A. . v. Turkey*, App. No. 6587/03 (Eur. Ct. H.R. Nov. 27, 2007) (commenting that the court is to measure remarks by whether they encourage violence or hatred against nonbelievers); *Gunduz v. Turkey*, 2003-XI Eur. Ct. H.R. 257, 275 (finding that defending a religious view without calling for violence to establish it is not hate speech).

defamation suit to be filed in either civil or criminal court or in both.¹²⁴ *Descato* laws, also referred to as “insult laws” or “contempt laws,” criminalize any expression which offends, insults, or threatens a public functionary in the performance of his or her official duties.”¹²⁵ International bodies and press associations have condemned criminal defamation laws and some State courts have held that *descato* laws are unconstitutional.¹²⁶

Before the Human Rights Committee, most communications challenging defamation laws have resulted in findings that the State violated Article 19. In *Aduayam et al. v. Togo*, two professors and a civil servant alleged they had been detained and charged with defaming the head of state because they criticized the Togolese government. The applicants were released without being convicted, but they lost their positions for several years. The Committee found a violation, stating that “the freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their governments without fear of interference or punishment, within the limits set out by article, 19 paragraph 3.”¹²⁷

In 2005, the Inter-American Court decided three criminal defamation cases in which the applicants had been convicted in domestic courts of defaming a public official or person who was involved in activities of public interest.¹²⁸ The Court ruled in each case that the State had violated the right to freedom of expression because there were less restrictive ways of protecting the reputation of others. In *Herrera Ulloa v. Costa Rica*,¹²⁹ the Court held that requiring a

124 See *Herrera Ulloa v. Costa Rica*, supra n. 33 p. 95.

125 Press Release, Inter-American Commission on Human Rights, Satisfaction with the Repeal of “Descato” In Costa Rica, No. 19/02 (Apr. 25, 2002), “www.cidh.org/Comunicados/English/2002/Press19.02.htm”; See Jairo E. Lanao, *Legal Challenges to Freedom of the Press in the Americas*, 56 U. Miami L. Rev. 347, 365 (2002).

126 Press Release, International Press Institute [IPI], Resolutions Passed by the 53rd IPI General Assembly, Resolution on Criminal Defamation and “Insult Laws” (May 18, 2004), “www.freemedia.at/resolutions2004.htm”. The Inter-American Declaration on Principles of Freedom of Expression states “[l]aws that penalize offensive expressions directed at public officials, generally known as ‘descato laws,’ restrict freedom of expression and the right to information.” Declaration of Principles on Freedom of Expression, supra n. 2, Principle 11. In 2005, the Honduran and Guatemalan Constitutional Courts declared *descato* laws to be unconstitutional. Press Release, OAS, Office of the Special Rapporteur for Freedom of Expression of the IACHR, The Office of the Special Rapporteur for Freedom of Expression of the IACHR Expresses its Satisfaction with Decisions in Guatemala and Honduras Declaring Descato Laws Unconstitutional, No. 126/05 (July 1, 2005), “www.cidh.oas.org/relatoria/showarticle.asp?artID=638&IID=1”; Honduran High Court Strikes Down Descato Provision, CPJ 2005 News Alert, May 26, 2005, “www.cpj.org/news/2005/Honduras26may05na.html”. Subsequently, the Costa Rican Legislative Assembly removed *descato* laws from the Costa Rican criminal code. (Press release of IaCHR).

127 Apps. No. 422-424/1990, para. 7.4.

128 *Canese v. Paraguay*, supra n. 32; *Herrera Ulloa v. Costa Rica*, supra n. 33; *Palamara Iribarne v. Chile*, 135 Inter-Am. Ct. H.R. (ser. C)(2005).

129 *Herrera Ulloa v. Costa Rica*, supra n. 33 p. 135. For a discussion of this and other Inter-American cases, see: Jo M. Pasqualucci, “Criminal Defamation And The Evolution Of The Doctrine Of Freedom Of Expression In International Law: Comparative Jurisprudence Of

journalist to prove the truth of statements made by third parties to avoid conviction for defamation was an excessive restriction on the journalist's right to freedom of expression, and that there is a higher standard of protection for statements made about persons whose activities are within the domain of public interest.¹³⁰ The journalist had written a series of articles which quoted or reproduced parts of several articles from Belgian newspapers alleging that an honorary diplomat had engaged in illegal activities. The journalist presented both sides of the story, but the diplomat brought both criminal and civil suits for defamation in Costa Rican courts. Costa Rican law required the defendant to prove the truth of the statements that he had quoted from, which he could not and, therefore, he was convicted and he and the newspaper were ordered to pay large fines.

In *Canese v. Paraguay*,¹³¹ the Inter-American Court suggested that criminal sanctions for defamation are generally a disproportionate restriction on freedom of expression in the context of political campaigns and that civil defamation suits are sufficient to repair any damage to reputation. While the case was pending before the Inter-American Court, the Supreme Court of Paraguay annulled the criminal conviction.¹³² The Inter-American Court nonetheless held that Canese's right to freedom of expression had been violated.

In the third case, *Palamara Iribarne v. Chile*,¹³³ a former military intelligence officer had been convicted in a Chilean military court of the crime of desacato for insulting the Naval prosecutor. The Inter-American Court held that Chile had violated Palamara Iribarne's right to freedom of expression because the crime of desacato was disproportionate and unnecessary in a democratic society. The Court stated that the law as applied to Palamara Iribarne "established disproportionate sanctions for criticizing the functioning and members of a State institution," in that it "suppressed the essential debate for the functioning of a truly democratic system and unnecessarily restricted the right to freedom of thought and expression."¹³⁴

The Inter-American Court insists that domestic laws must provide a higher level of protection from defamation suits for statements made about a person whose activities are within the domain of public interest.¹³⁵ In this regard, the

The Inter-American Court Of Human Rights," 39 Vand. J. Transnat'l L. 379 (2006).

130 Herrera Ulloa, supra n. 33 p. 127-29.

131 *Canese v. Paraguay*, supra n. 32 p. 104.

132 *Id.* p. 69(49). In annulling the sentences against Canese and absolving him of guilt, the Criminal Chamber of the Supreme Court of Justice of Paraguay stated, [t]he statements made by Mr. Canese--in the political context of an election campaign for the presidency--were, necessarily, important in a democratic society working towards a participative and pluralist power structure, a matter of public interest. There is nothing more important and public than the popular discussion on and subsequent election of the President of the Republic. *Id.* p. 99 (quoting the Criminal Chamber of the Supreme Court of Justice of Paraguay).

133 *Palamara Iribarne v. Chile*, supra n. 133 p. 63(73).

134 *Id.* p. 88.

135 *Herrera Ulloa v. Costa Rica*, supra n. 33 p. 129. The Inter-American Declaration of Principles on Freedom of Expression states that "[t]he protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person

Court stated that “[t]hose 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.”¹³⁶ Persons involved in such activities should have a greater tolerance and openness to criticism.¹³⁷ Statements questioning the competence and suitability of a candidate made during an electoral campaign concern matters of public interest and a greater margin of tolerance must be shown during political debates.¹³⁸ Indeed, in general the democratic oversight that society exercises through public opinion encourages transparency in the business of the State and promotes a sense of responsibility in public officials as regards their function, which is why there should be so little margin for any restriction of political discourse on matters of public interest.¹³⁹ In *Canese*, the Inter-American Court stated that “[e]veryone must be allowed to question and investigate the competence and suitability of the candidates, and also to disagree with and compare proposals, ideas and opinions, so that the electorate may form its opinion in order to vote.”¹⁴⁰

Likewise, the European Court of Human Rights has stated that it is

offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.” Declaration of Principles on Freedom of Expression, *supra* note 35, Principle 10.

- 136 Herrera Ulloa, *id.* p. 129; *Ivcher Bronstein v. Peru*, 74 Inter-Am. Ct. H.R. (ser. C)(2001) 155. The Inter-American Court stated approvingly that the European Court of Human Rights has emphasized that “freedom of expression leaves a very reduced margin to any restriction of political discussion or discussion of matters of public interest.” *Ivcher Bronstein*, *id.* p. 155. The European Court stated in this regard that the “acceptable limits to criticism are broader with regard to the Government than in relation to the private citizen or even a politician.” *Id.* (quoting *Sürek & Ozdemir v. Turkey*, 1999 Eur. Ct. H.R. 50, p. 60 (1999)). In a democratic system, the acts or omissions of the Government would be subject to rigorous examination, not only by the legislative and judicial authorities, but also by public opinion.” *Id.*
- 137 *Palamara Iribarne v. Chile*, *supra* n. 133 p. 83)(citing *Canese* *supra* n. 32 p. 97 and *Herrera Ulloa*, *supra* n. 33 p. 127.
- 138 *Canese*, *supra* n. 32 p. 97; *See Ivcher Bronstein*, *supra* n. 136; *Feldek v. Slovakia*, 2001 Eur. Ct. H.R. 463; *Sürek & Ozdemir v. Turkey*, 1999 Eur. Ct. H.R. 50, p. 60 (1999).
- 139 *Palamara Iribarne*, *supra* n. 133 p. 83; *Canese*, *supra* n. 32 p. 97; *Herrera Ulloa*, *supra* n. 33 p. 127 (citing *Ivcher Bronstein*, *supra* n. 136 p. 155).
- 140 *Canese*, 2004 Inter-Am. Ct. H.R., p. 90. The Inter-American Court stated that it considers it important to emphasize that, within the framework of an electoral campaign, the two dimensions of freedom of thought and expression are the cornerstone for the debate during the electoral process, since they become an essential instrument for the formation of public opinion among the electorate, strengthen the political contest between the different candidates and parties taking part in the elections, and are an authentic mechanism for analyzing the political platforms proposed by the different candidates. This leads to greater transparency, and better control over the future authorities and their administration. *Id.* p. 88. The European Court of Human Rights has also called for latitude for freedom of expression within the context of politics, stating that [w]hile precious to all, freedom of expression is particularly important for political parties and their active members They represent their electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with the freedom of expression of a politician who is a member of an opposition party, like the applicant, call for the closest scrutiny on the Court's part. *Incal v. Turkey*, 1998 Eur. Ct. H.R. 48, p. 46).

“particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.”¹⁴¹ The European Court of Human Rights also held that a public official who “lays himself open to close scrutiny of his every word and deed” must show “a greater degree of tolerance.”¹⁴²

There is no provision in the European Convention that expressly guarantees a right to one's reputation and it has been treated as a component of “protecting the rights of others.”¹⁴³ As a consequence, the Court's jurisprudence shows preference given to freedom of expression in cases over the preservation of the reputation of others, where matters of public debate or concern are involved,¹⁴⁴ Recently, however, the court afforded protection to the reputation of a particularly controversial, even extremist politician.¹⁴⁵ It may be that some on the court seek to add a right to reputation to the Convention.¹⁴⁶ Textually, the protection of reputation is one admissible ground for restricting the freedom of expression, which makes it an exception and placing the burden on the state to prove the necessity of taking proportional measures to limit speech for this reason. In its latest jurisprudence, however, the court has taken another direction and established the right to the protection of one's reputation as a component of the right to respect for one's private life (Article 8 of the Convention), which affords it greater protection than does Article 10(2).¹⁴⁷

Unlike factual assertions, personal opinions cannot be tested for truth or falsity and the European Court of Human Rights has ruled that Austrian courts violated the European Convention's provision on freedom of expression when they held that value judgments and personal opinions were defamatory under domestic law. In the *Lingens* case, an Austrian journalist had been convicted in the domestic courts for using the expressions “the basest opportunism,”

141 *Bowman v. The United Kingdom*, 1998 Eur. Ct. H.R. 4, p. 42.

142 *Dichand et. al. v. Austria*, 2002 Eur. Ct. H.R., Application No. 29271/95, 26 February 2002, p. 39. The European Court of Human Rights also applies a different standard to “restrictions applicable when the object of the expression is an individual and when reference is made to a public person.” *Lingens v. Austria*, App. No. 9815/82, 8 Eur. H.R. Rep. 407, p. 42 (1986). In this regard, the European Court stated that “[t]he limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual.” *Id.*

143 The right to one's reputation and honor is recognized both by Article 12 of the Universal Declaration of Human Rights, G.A. Res. 217A, p. 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), and Article 17 of the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171, 177.

144 See *Fuentes Bobo v. Spain*, App. No. 39293/98, 31 Eur. H.R. Rep. 1115 (2001); *Fressoz v. France*, App. No. 29183/95 (Eur. Ct. H.R. Jan. 21, 1999); *Bladet Troms v. Norway*, 1999-III Eur. Ct. H.R. 289, 297-99; *Kanellopoulou v. Greece*, App. No. 28504/05 (Eur. Ct. H.R. Oct. 11, 2007); *Selist v. Finland*, App. No. 56767/00 (Eur. Ct. H.R. Nov. 16, 2004); *Tidende v. Norway*, 2000-IV Eur. Ct. H.R. 371, 379; *Dalban v. Romania*, 1999-VI Eur. Ct. H.R. 221, 229-30; *Steel v. United Kingdom*, 2005-II Eur. Ct. H.R. 1, 8-13.

145 *Lindon v. France*, App. Nos. 21279/02 & 36448/02 (Eur. Ct. H.R. Oct. 22, 2007).

146 See *id.* (Loucaides, J., concurring).

147 *Pfeifer v. Austria*, App. No. 12556/03 (Eur. Ct. H.R. Nov. 15, 2007) (Loucaides, J., dissenting).

“immoral,” and “undignified” in reference to the Chancellor of Austria.¹⁴⁸ The European Court of Human Rights found that the statements were not defamatory, reasoning that “a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, but the truth of value-judgments is not susceptible of proof.”¹⁴⁹

Even where defamation can be shown, the reputation of a person can be protected adequately through a victorious civil suit. Criminal prosecution is disproportionate. Another remedy for defamation may be a reprimand by an independent professional body or organization of the journalist or publication that printed the defamatory statement. A third remedy is the right of reply. The American Convention provides that “[a]nyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communication outlet, under such conditions as the law may establish.” The Inter-American Court stated that there is an inescapable relationship between the right of reply or correction and the right to freedom of expression; this relationship is evidenced by the placement of the right of reply immediately after the right to freedom of expression in the American Convention¹⁵⁰. The Court further stated that “in regulating the application of the right of reply or correction, the State’s Parties must respect the right of freedom of expression guaranteed by Article 13. They may not, however, interpret the right of freedom of expression so broadly as to negate the right of reply proclaimed by Article 14(1).”¹⁵¹ The right of reply may require the publisher or broadcaster responsible for the defamatory statement to print or broadcast the reply of the victim or the court’s judgment in the victim’s favor. Although the European Convention does not provide for a right of reply, the European Committee of Ministers is said to have “pioneered the concept of a right of reply in the press and on radio and television.”¹⁵²

4.5 *Prior Censorship and Sanctions*

Many of the complaints presented to the UN Human Rights Committee have concerned censorship of particular media, such as films, broadcasts, or art. All of the interferences are examined under the limitations clause of art. 19(3), although the *travaux préparatoires* indicate an intention to prohibit prior censorship completely,¹⁵³ similar to the prohibition contained in the American Convention. Eleven Latin American states proposed expressly excluding every form of prior censorship¹⁵⁴ and only withdrew their motion on the understanding that it was already precluded by the text.

148 *Lingens v. Austria*, App. No. 9815/82, 8 Eur. H.R. Rep. 407, PP 22, 45 (1986).

149 *Id.*

150 Advisory Opinion OC-7/86, 1986 Inter-Am.Ct. H.R. (ser.A) No. 7, p. 25 (Aug. 29).

151 *Id.*

152 Kayhan Karaca, *Guarding the Watchdog: The Council of Europe and the Media* 13 (2003).

153 See Marc Bossuyt, *Travaux Préparatoires of the International Covenant on Civil and Political Rights*, 398 ff.

154 A/C.3/L.926.

The European Court does not prohibit prior restraints on expression, but it does subject any such measure to rigorous control.¹⁵⁵ The Court thus condemned the French system of prior restraint of foreign publications,¹⁵⁶ because the Court found that “[s]uch legislation appears to be in direct conflict with the actual wording of Article 10(1) of the Convention, which provides that the rights set forth in that Article are secured ‘regardless of frontiers.’”¹⁵⁷ The Court also struck down the French law which forbid any criticism of a foreign head of state.¹⁵⁸ According to the court, both laws were archaic and “cannot be reconciled with modern practice and political conceptions.”¹⁵⁹

As for post-publication sanctions, the Court tends to consider that any penal sanction must be disallowed, whether in the form of a monetary fine¹⁶⁰ or a prison sentence.¹⁶¹ Nonetheless, the Court has held that criminal law fines do not necessarily conflict with the demands of Article 10 of the Convention.¹⁶² In general, however, the Court opposes criminal prosecutions and punishments for speech,¹⁶³ except in cases “where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.”¹⁶⁴ As a consequence, the state must be satisfied merely with civil law remedies.¹⁶⁵ Even here, the Court has been reluctant to allow excessive civil fines or other remedies that are likely to have a dissuasive effect on open discourse in light of the limited financial resources of the defendant.¹⁶⁶

The American Convention, Art. 31(2) provides that the exercise of freedom of thought and expression “shall not be subject to prior censorship” except in specifically limited circumstances. In this regard, the Inter-American Court has stated that “[a]buse of freedom of information thus cannot be controlled by preventive measures but only through the subsequent imposition of sanctions on

155 *The Observer and Guardian*, para. 53 and *The Sunday Times* (No. 2), para. 51 (26 Nov. 1991).

156 *Assoc. Ekin v. France*, 2001-VIII Eur. Ct. H.R. 323, 347-48.

157 *Id.* p. 346.

158 *Colombani v. France*, 2002-V Eur. Ct. H.R. 25.

159 *Id.* p. 44.

160 *See Falakaoglu v. Turkey*, No. 11461/03 (Eur. Ct. H.R. Dec. 19, 2006); *Selisto v. Finland*, No. 56767/00 (Eur. Ct. H.R. Nov. 16, 2004).

161 *Erdal Tas v. Turkey*, No. 77650/01, Eur. Ct. H.R. (Dec. 19, 2006).

162 *Stoll v. Switzerland*, No. 69698/01 (Eur. Ct. H.R. Dec. 10, 2007).

163 *See, e.g., Kannellopoulou v. Greece*, No. 28504/05 (Eur. Ct. H.R. Oct. 11, 2007) (stating that the sentencing of the plaintiff to a prison sentence, even a suspended sentence, constitutes a disproportionate punishment for the crime within the framework of Article 10); *See also Erbakan v. Turkey*, No. 59405/00 (Eur. Ct. H.R. July 6, 2006).

164 *Cumpana v. Romania*, 2004-XI Eur. Ct. H.R. 63, 95 (2004).

165 *Kannellopoulou v. Greece*, No. 28504/05, Eur. Ct. H.R. (Oct. 11, 2007).

166 *See Steel v. United Kingdom*, 2005-II Eur. Ct. H.R. 3; *See Brasilier v. France*, No. 71343/01 (Eur. Ct. H.R. Apr. 11, 2006), “www.echr.coe.int/echr/” (click “case-law” then “HUDOC,” select “decisions” on the left-hand column, and search for the application number) (where plaintiff was fined one franc for damages as symbolic gesture); *See also Giniewski v. France*, App. No. 64016/00 (Eur. Ct. H.R. Jan. 31, 2006).

those who are guilty of the abuses.”¹⁶⁷ The only exceptions to prior censorship authorized by the American Convention are State regulation of access to public entertainment “for the moral protection of childhood and adolescence” and State derogation from its obligations during a state of emergency. In its first decision on prior censorship, the Inter-American Court found that Chile had failed to meet its obligations under the American Convention when it refused to permit the movie *The Last Temptation of Christ* to be shown in Chile.¹⁶⁸ Both the Commission and then the Inter-American Court held that Chile had violated the American Convention’s protection of freedom of expression and must allow the exhibition and publicity for the film, and take the appropriate measures to amend its domestic laws to eliminate prior censorship of movies so as to protect freedom of expression in accordance with the American Convention. Following the Court’s ruling, in 2002, the Chilean Senate ended film censorship by enacting legislation to comply with the Court’s orders.¹⁶⁹ The law established a ratings system based on age that is similar to the ratings categories employed in Europe and the United States.¹⁷⁰ The American Court’s judgment in stark contrast to the European Court’s decision in *Otto Preminger-Institut v. Austria*¹⁷¹ which upheld the ban and seizure of a film deemed offensive to the Catholic majority of a community, even though the film was being shown at a private club where admission was charged, the content was made known in advance, and minors were prohibited from entering.

5 Conclusions

Freedom of opinion and expression are essential in a democratic society and to individual liberty. Nonetheless, the genocide in Rwanda and ethnic conflicts in other parts of the world, where inflammatory speeches, degrading insults, and other propaganda of hatred served to dehumanize “the others” and make them legitimate targets for extermination, emphasize that words matter and they have consequences. In his mission to Serbia and Montenegro, the UN Special Rapporteur on Freedom of Expression encountered numerous examples of hate

167 Advisory Opinion OC-5/85, p. 39.

168 “The Last Temptation of Christ,” 73 Inter-Am. Ct. H.R. (ser C) (2001) 88; See Human Rights Watch, Chile: Progress Stalled: Setbacks in Freedom of Expression Reform (2001), pt. VI. Film Censorship Reform, “www.hrw.org/reports/2001/chile/Foe05fin-05.htm#P539_145947” [hereinafter Film Censorship Reform].

169 Pasqualucci, supra n. 129 p. 391.

170 In a subsequent case also involving Chile, the Inter-American Court held that Chile’s prior censorship of a book written by a retired Chilean military officer violated the author’s right to freedom of expression. The government’s actions were not based on the content of the book, but on the asserted violation of a confidentiality agreement. See: Palamara Iribarne v. Chile, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, p. 78 (Nov. 22, 2005).

171 App. no. 13470/78, 295-A Eur. Ct. H.R. (ser. A), 19 EHRR 34 (1995). See also Handyside v. The United Kingdom, 24 Eur. Ct. H.R. (ser. A)(1976); Wingrove v. The United Kingdom, App. no. 17419/90, 24 EHRR 1 (1997).

speech and linked violence.¹⁷² In his view, “[t]he polarization of opinions, the stigmatization of ethnic groups and the use of hate speech aggravate the persistent instability and do not contribute to the creation of an enabling environment for the development of freedom of opinion and expression, which is a prerequisite for democracy and good governance.”¹⁷³ Journalists were found to be working under varying degrees of pressure from political power, economic lobbies and organized crime. Investigative journalism had become a dangerous exercise and objectivity was rare. Hate speech triggered violence, including one incident in which 19 people were killed and 2400 displaced as the result of false reporting and incitement by one group against another. Reports came in of broadcasts referred to killing Roma peoples as “a recreational activity” and other hate speech directed at public personalities. The government in such circumstances often is or appears to be complicit, failing to stop the wide dissemination of hate speech.

At the opposite extreme are governments that purport to be controlling the dissemination of hate speech, but who are, in reality, attempting to enforce broad restrictions on access to information and freedom of expression. The jurisprudence of human rights bodies suggests that one of the major problems is protecting minorities from hate speech while ensuring their right to freedom of expression. Too often the decisions come down on the side of protecting the majority, as in the European Court’s *Otto Preminger* case, by suppressing the expression of a less-favored minority, while allowing the majority much wider latitude to express views contrary to those in the minority, as exemplified by the Danish cartoons controversy.

The “marketplace of ideas” theory of free speech posits that debate and discussion of “good” as well as “bad” speech helps all involved to arrive at the truth.¹⁷⁴ Moreover social science research indicates that suppression of hate speech does not eliminate prejudice, but may channel it into more destructive avenues and allow stereotypes to remain unchallenged and even to become more powerful.¹⁷⁵ Suppression of speech may also suggest to many in society a preference for force over reason.¹⁷⁶

But the marketplace of ideas only works in an open market. The concentration of media ownership into the hands of a few individuals or companies today threatens the fabric of democracy. Editorial independence, unbiased news reporting or, at least, multiple news sources providing differing views are essential to a democracy. Only with pluralism of the media can freedom of expression and, ultimately, democracy be protected. The Inter-American Court has interpreted the right to freedom of expression as barring

172 See Report submitted by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, “Mission to the State Union of Serbia and Montenegro,” E/CN.4/2005/64/Add.4, 8 February 2005.

173 *Id.* p. 2.

174 See, e.g. *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting).

175 See Cynthia Lee, “The Gay Panic Defense,” 42 U.C. Davis L. Rev. 471, 536-549 (2008) and the sources cited therein.

176 See Thomas I. Emerson, *The System of Freedom of Expression* 7 (1970).

monopolization of the media.¹⁷⁷ Although addressing one form of monopolization of the media, that of licensing journalists, the Court held that the Convention's right to freedom of expression prohibits other forms of media monopoly. In this regard, the Court stated "there must be, *inter alia*, a plurality of means of communication, the barring of all monopolies thereof, in whatever form" (including, one might add, government monopolies).¹⁷⁸

The power of human communication is unique and a power which many seek to control and to manipulate. Law cannot fully resolve the tensions between the free exercise of expression and protecting the rights and freedoms of others, which depends instead on building a society of tolerance and responsibility, but until such a society exists the legal guarantees and limitations contained in human rights instruments must serve to impose restraints that individuals are unwilling to impose on themselves.

¹⁷⁷ Advisory Opinion OC-5/85, *supra* n. 32 p. 33.

¹⁷⁸ *Id.* p. 34.