RECENT DEVELOPMENTS

Fontevecchia v. Argentina: The "Ink Assassins," Self-Censorship, and Self-Preservation

I. OVERVIEW

After the magazine *Noticias* published three articles (the *Noticias* articles) that raised questions about abuses of power and misuse of government funds, former President of Argentina Carlos Saul Menem brought a civil action against the director and the editor of the publication, alleging the articles violated his right to privacy.[1] The director of *Noticias*, Jorge Fontevecchia, and its editor, Hector D'Amico (collectively the Representatives), were nationally renowned journalists with thirty and forty years of experience, respectively.[2] The articles focused on Menem's relationship with his mistress, Marta Meza, and their son, Carlos Nair.[3] The publications recounted a number of lavish gifts from Menem to Meza and Nair, as well as details of their generous child support agreement, which when contrasted with Menem's income, raised questions of his possible misuse of official resources.[4] A court of first instance found for the Representatives.[5] However, upon appeal, the National Chamber of Civil Appeals of the Federal Capital reversed, ordering the Representatives to pay $150,000 to Menem in compensation for violating his right to privacy, in addition to the costs of both

1. Fontevecchia v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶¶ 31-32, 34-35, 37 (Nov. 29, 2011).
2. *Id.* ¶ 30.
3. *Id.* ¶¶ 32, 34-35.
4. *Id.* ¶¶ 32-35.
5. *Id.* ¶ 38.

proceedings, and mandating that *Noticias* publish an excerpt of the judgment.[6]

The Representatives appealed to the Corte Suprema de Justicia de la Nación (Supreme Court of Argentina), which affirmed the appellate court's judgment, but reduced the damages to $60,000.[7] That Court noted that both freedom of speech and the right to privacy are protected under the Constitutión Nacional (Argentinian Constitution), but that neither right is absolute.[8] As such, the public's interest in the free flow of information must be weighed against each person's right to privacy.[9] The Court also noted that a public official's expectation of privacy should be lower than that of the average citizen given the nature of his profession, but that he is nevertheless entitled to a private sphere, unless the disclosed information is in the *public's interest*.[10] After weighing the two rights, the Court held that the dissemination of intimate family information is an intrusion into a person's private life that is not justified by the general interest of the community.[11] The Inter-American Court of Human Rights (IACtHR) *held* that the Supreme Court of Argentina mistakenly declined to address the veracity and consequences of the facts disclosed by the publication by focusing instead on whether the nature of the information was itself private, consequently violating the Representatives' right to freedom of expression under article 13 of the American Convention on Human Rights (Convention). *Fontevecchia v. Argentina, Merits, Reparations, and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶¶ 50, 57, 66, 75 (Nov. 29, 2011).

II. BACKGROUND

A. The Organization of American States

As part of its efforts to promote "an order of peace and justice," the Organization of American States (OAS) created two autonomous organs whose mission is to promote and protect human rights throughout the Inter-American system: the Inter-American Commission on Human Rights (IACHR) and the IACtHR.[12] Although the OAS is composed of

6. *Id.*
7. *Id.* ¶ 39.
8. *Id.* ¶¶ 39, 50.
9. *Id.* ¶ 39.
10. *Id.*
11. *Id.*
12. *Who We Are*, ORG. AM. STATES, http://www.oas.org/en/about/who_we_are.asp (last visited Mar. 13, 2013) (quoting Charter of the Organization of American States art. 1, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3) (internal quotation marks omitted); *What Is the IACHR?*, ORG. AM. STATES, http://www.oas.org/en/iachr/mandate/what.asp (last visited Mar. 13, 2013);

thirty-five Member States, only twenty-five countries have ratified the Convention, which created the IACtHR and defined its jurisdiction.[13]

The purpose of the Convention is to recognize that the essential rights of man do not result from their acknowledgment by local law, but rather are innate to every person, and, as a result, they should be protected at the international level to a uniform extent.[14] Amongst these rights is article 13 of the Convention, which provides:

> 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 [which] 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 . . . [r]espect for the rights or reputations of others.[15]

As a result, while the right to freedom of expression is recognized as a central human right, it is not absolute.[16] It can be restricted by state governments, but only insofar as is required to protect the rights of others or to protect the nation's security.[17] Thus, in cases of alleged journalistic abuse of the right to freedom of expression, this right must be weighed with the right to privacy protected under article 11 of the Convention: "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."[18] That same article also provides that everyone, including public persons and officials, has the right to protection under the law against such attacks.[19] In order to weigh these two rights and determine whether a publication exceeds the limits of freedom of expression and thus violates a person's right to privacy, the IACtHR has developed a test throughout its jurisprudence.[20]

Other Autonomous and/or Decentralized Organs, Agencies, Entities, and Dependencies, ORG. AM. STATES, http://www.oas.org/en/about/other_organs.asp (last visited Mar. 13, 2013).

13. *See What Is the IACHR?*, *supra* note 12.

14. Organization of American States, American Convention on Human Rights pmbl., Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

15. *Id.* art. 13(1)-(2)(a).

16. *Id.* art. 13(4)-(5).

17. *Id.* art. 13(2).

18. *Id.* art. 11.

19. *Id.*

20. *See infra* Part II.B.

B. Jurisprudence

The IACtHR's first interpretation of these articles came in the form of an advisory opinion that predated its first freedom of expression case by more than fifteen years.[21] In that opinion, the IACtHR interpreted article 13 as having a dual character: first, the Convention protects the right to "impart information and ideas of all kinds"; and second, it protects the right to *seek* and *receive* the same.[22] As a result, when an individual's right to freedom of expression is illegitimately restricted, this not only violates his rights, but the right of all others to acquire that information.[23] In order to protect the dual character of this right, the IACtHR provided that any censorship measures taken *prior* to publication constitute a violation of the Convention.[24] However, it provided that even when states do find cause to restrict a person's freedom of information, those restrictions must meet the following requirements: "(a) the existence of previously established grounds for liability; (b) the express and precise definition of these grounds by law; (c) the legitimacy of the ends sought to be achieved; [and finally,] (d) a showing that these grounds of liability are 'necessary to ensure' the aforementioned ends."[25]

Although the IACtHR's advisory opinions are not binding, its first line of cases reinforces these principles and elaborates on certain aspects of their requirements.[26] In *Herrera-Ulloa v. Costa Rica*, the IACtHR reiterated the requirements that a state must meet in order to restrict the right to freedom of expression legitimately and elaborated on the "necessary to ensure" inquiry.[27] The IACtHR restated that the "necessity" and thus the "legality of restrictions" on freedom of expression hinge on whether the restriction was made pursuant to "a compelling govern-

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

22. *Id.* ¶ 30 (quoting American Convention on Human Rights, *supra* note 14, art. 13 (internal quotation marks omitted)).

23. *Id.*

24. *Id.* ¶ 38.

25. *Id.* ¶ 39.

26. *See* "The Last Temptation of Christ" (Olmedo-Bustos) v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001); Herrera-Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶¶ 120-123 (July 2, 2004).

27. Inter-Am. Ct. H.R. (ser. C) No. 107, ¶¶ 104, 120-124 (quoting American Convention on Human Rights, *supra* note 14, art. 13(2)).

mental interest."[28] Furthermore, the IACtHR required that the restriction be proportional to the governmental interest and that it be closely tailored to achieving the interest necessitating the restriction.[29] Accordingly, a restriction cannot be justified merely because it has a "desirable purpose."[30] Instead, these restrictions must be framed in view of a governmental objective, which, because of its importance, outweighs the full enjoyment of the rights protected under article 13.[31]

Furthermore, recognizing that a vibrant free press is essential to the exercise of this right, the IACtHR held that the threshold of acceptable restrictions should be modified when the object of the information is of public interest.[32] As a result, there is a difference between the restrictions that apply to expressions regarding an average citizen and those that apply to a politician or public person.[33] This distinction is based on the essential role that public opinion plays in controlling the acts of government and guaranteeing its transparency.[34] Thus, given the nature of his job and the repercussions that his actions have on the public interest, the public official has voluntarily exposed himself to a higher degree of criticism and scrutiny by the press and by the public in general.[35]

The IACtHR had an opportunity to elaborate further on these requirements in *Kimel v. Argentina*.[36] In *Kimel*, a journalist published a book criticizing the aftermath of the massacre of several clerics during Argentina's military dictatorship.[37] In particular, the book implies that a judge declined to further investigate the matter when it became clear that the government had ordered the massacre.[38] The judge thereafter sued Kimel for defamation, and although his conviction and imposition of civil and criminal penalties was overturned at the appellate level, the Supreme Court of Argentina reversed the acquittal, sending it back down to another appeals court, where his conviction was reaffirmed.[39]

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28. *Id.* ¶ 121 (quoting Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, *supra* note 21, ¶ 46).

29. *Id.* ¶ 123.

30. *Id.* ¶ 121 (quoting Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, *supra* note 21, ¶ 46).

31. *Id.*

32. *Id.* ¶¶ 124-125.

33. *Id.* ¶ 125.

34. *Id.* ¶ 127.

35. *Id.* ¶¶ 128-129.

36. Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177 (May 2, 2008).

37. *Id.* ¶ 41.

38. *Id.* ¶ 2.

39. *Id.* ¶¶ 2, 43-50.

The Argentinian government conceded that its defamation laws at the time violated article 13 of the Convention because the relevant national legislative provisions were vague and left too much discretion to the judge in assigning a penalty.[40] For that reason, the IACtHR did not analyze the restriction's legality.[41] However, the IACtHR did note that criminal and civil penalties are both legitimate vehicles for restrictions on the right, but cautioned that due to the severity of their application, this requirement must be viewed in light of the "necessity" of the measure.[42] The IACtHR proceeded to set out considerations for the appropriateness of criminal penalties as restrictions to the right of freedom of expression, finding them to be appropriate only when the abusive conduct is extremely serious, there is actual malice, the victim suffers a severe harm, and other information shows the absolute necessity for imposing criminal penalties.[43] On the other hand, in order to avoid the abuse of the right, journalists are required to diligently verify their sources and evaluate them in light of additional findings.[44] Still, the IACtHR held that the published information's verification need not be exhaustive, and that as long as the *basis* for his opinions are diligently researched, a journalist's opinion is protected under article 13.[45]

In evaluating the necessity of the restriction, the IACtHR noted that the threat of prison, financial ruin, and the harm already done to Kimel's reputation were severe restrictions, and as a result, the governmental interest in protecting the judge's reputation should have been imperative.[46] Because the published accusations were opinions of past government conduct relevant to the public interest, the IACtHR determined that Kimel acted within the protections of article 13.[47] As a result, the IACtHR held that the restrictions did not satisfy the strict proportionality requirement.[48]

In *Donoso v. Panama*, another freedom of expression case concerning a public official, the IACtHR discussed the importance of proportionality of civil penalties as a restriction.[49] The IACtHR held that statements regarding events of public interest within a context of intense

40. *Id.* ¶¶ 18, 38, 66-67.
41. *Id.* ¶¶ 58, 66-67.
42. *Id.* ¶ 71.
43. *Id.* ¶¶ 77-78.
44. *Id.* ¶ 79.
45. *See id.*
46. *Id.* ¶¶ 83-85.
47. *Id.* ¶ 93.
48. *Id.* ¶¶ 93-94.
49. Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 129 (Jan. 27, 2009).

public debate, especially those involving the actions of the highest public officials of a country, deserve the highest degree of protection.[50] While the IACtHR held that the civil penalty imposed in that case was not an abuse of the state's punitive power, it noted that steep civil penalties may be "equally or more intimidating and inhibiting for the exercise of freedom of expression than a criminal punishment."[51] The IACtHR explained that, because civil penalties often lead to the accused's financial ruin and threaten his family life, their effect on freedom of expression is impermissible because it can lead to self-censorship by others when the fine is disproportionate to the violation.[52]

C. Regional Context

The IACtHR's focus on the proportionality of civil penalties in its last line of cases is highly relevant within its regional context.[53] In the past decade, several states parties to the Convention have implemented legislative and judicial restrictions on the right to freedom of expression.[54] Ecuador's government, headed by President Rafael Correa, exemplifies this trend.[55] On March 21, 2011, Correa filed a criminal defamation suit against three board members of *El Universo*, a national newspaper, as well as Emilio Palacio, the director of its opinion section.[56] The subject of the suit was an article published by Palacio, in which he

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50. *Id.* ¶¶ 121-22.

51. *Id.* ¶ 129.

52. *Id.*

53. *Latin American Press Faces Violence, Legal Harassment*, COMMITTEE TO PROTECT JOURNALISTS (Oct. 3, 2012, 10:33 AM), http://cpj.org/blog/2012/10/latin-american-press-faces-violence-legal-harassme.php.

54. *See* Monica Campbell, *Venezuela's Private Media Wither Under Chávez Assault*, COMMITTEE TO PROTECT JOURNALISTS (Aug. 29, 2012, 7:32 AM), http://cpj.org/reports/2012/08/after-years-of-assault-venezuelas-independent-pres.php; *see also Bolivia: Law on Telecommunications and Information and Communication Technologies*, ARTICLE 19 (Feb. 3, 2012), http://www.article19.org/resources.php/resource/2950/en/bolivia:-law-on-telecommunications-and-information-and-communication-technologies ("[T]he [l]aw falls short of international standards for the protection of freedom of expression in several key respects."); *cf.* Sara Rafsky, *In Government-Media Fight, Argentine Journalism Suffers*, COMMITTEE TO PROTECT JOURNALISTS (Sept. 27, 2012, 12:01 AM), http://cpj.org/reports/2012/09/amid-government-media-fight-argentine-journalism-suffers.php ("Kirchner's critics accuse her of stifling press freedom by rewarding allied media and hammering—with regulation as well as advertising—unsympathetic outlets into silence.").

55. Tim Padgett, *Correa's Clemency: Why Critics Say Ecuador's President Is Still a Threat to Press Freedom*, TIME (Feb. 28, 2012), http://world.time.com/2012/02/28/correas-clemency-why-critics-say-ecuadors-president-is-still-a-threat-to-press-freedom/.

56. Annual Report of the Inter-American Commission on Human Rights 2011, Vol. II, Annual Report of the Office of the Special Rapporteur for Freedom of Expression, at 75-86, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 69, ¶¶ 164-167 (2011), *available at* http://www.oas.org/en/iachr/expression/reports/annual.asp.

criticized Correa's decision to pardon several police officers who had been accused of carrying out a failed coup on September 30, 2010.[57] A court of first instance convicted the four defendants to three years in prison and awarded $40 million in compensation to Correa.[58]

That court based its judgment on articles 489, 491, and 493 of the Ecuadorian Criminal Code.[59] Article 489 defines defamatory statements as those that falsely accuse an individual of a crime, or when an expression is used to discredit, dishonor, or scorn another person.[60] Article 491 provides that individuals convicted of defamatory statements that impute crimes to another person are punishable by a prison term of up to two years, while article 493 provides that defamatory statements made against public officials that do not impute a crime but are nonetheless grave are punishable by fines and up to two years of prison.[61]

Faced with the defendants' threat to bring the case before the IACtHR, Correa chose to pardon the defendants, rather than face international scrutiny and a binding adverse judgment.[62] Nevertheless, the *El Universo* case is one of several examples of the Ecuadorian government's use of defamation actions to silence its critics.[63] Furthermore, these tactics are not only used against journalists but also against private citizens.[64] On February 25, 2011, Marcos Luis Sovenis, a private citizen, shouted "fascist" as Correa was walking through the town

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57. Emilio Palacio, Op-Ed., *NO a las mentiras*, EL UNIVERSO (Feb. 6, 2011), http://www.eluniverso.com/2011/02/06/1/1363/mentiras.html (Ecuador). Palacio suggested that the President offer the officers amnesty instead of a pardon, claiming that both sides were responsible for that day's events. *Id.* Referring to him as "el Dictador," the article cautioned Correa that, were he to grant a pardon instead of decreeing amnesty, a future president could prosecute him for crimes against humanity. *Id.*

58. Annual Report of the Inter-American Commission on Human Rights, *supra* note 56, ¶¶ 167-168.

59. *Id.* ¶ 167; Código Penal [Penal Code], Jan. 22, 1971, arts. 489, 491, 493 (Ecuador).

60. Código Penal art. 489.

61. *Id.* arts. 491, 493.

62. *See* William Neuman, *President of Ecuador To Pardon 4 in Libel Case*, N.Y. TIMES INT'L, Feb. 28, 2012, at A7; *see also* Padgett, *supra* note 55.

63. Annual Report of the Inter-American Commission on Human Rights 2011, *supra* note 56, ¶¶ 148-163; Carlos Lauría, *As It Backs Assange, Ecuador Stifles Expression at Home*, COMMITTEE TO PROTECT JOURNALISTS (Aug. 16, 2012, 5:25 PM), http://www.cpj.org/blog/2012/08/as-it-backs-assange-ecuador-represses-free-express.php ("A 2011 CPJ special report found that Correa and his administration had a record of filing defamation lawsuits . . . as a means of intimidating critics."); *see also* Neuman, *supra* note 62.

64. *See* Paola Aguilar, *Dos ciudadanos son detenidos por supuestamente insultar y hacer señales obscenas*, GRUPO ANDINO PARA LAS LIBERTADES INFORMATIVAS (June 2, 2011, 12:38 PM), http://www.elgali.org/monitoreo/ecuador/dos-ciudadanos-son-detenidos-supuestamente-insultar-y-hacer-senales-obscenas (Ecuador).

of Babahoyo.[65] Sovenis claims that at least seven members of Correa's security team forced him into a vehicle and proceeded to threaten and assault him.[66] Sovenis filed a complaint denouncing the actions of the presidential escorts.[67] In response, Correa announced he would file a criminal complaint against Sovenis under article 489 of the Ecuadorian Criminal Code.[68] More recently, the Ecuadorian government has threatened to bring a defamation action against the country's largest newspaper for comments posted by readers of its digital version that offend the President's dignity.[69]

Further evidence of this trend can be found in Ecuador's new Communications Law, which is currently awaiting legislative approval and provides for the creation of an administrative body with jurisdiction to regulate the content of all media.[70] It dictates grounds for liability and their sanctions, as well as the power to enforce said laws.[71] Critics of the new Communications Law have observed that its provisions are written in ambiguous terms that would give undue discretion to the administrative body, which would be incompatible with the Convention.[72] The approval of the new law is central to Correa's stated long-term goal of creating a state-run media empire, where private media outlets are the exception, rather than the norm.[73]

In June 2011, a Special Working Group was created by the OAS with the express purpose of enhancing the Inter-American system of human rights; however, when it submitted its recommendations to the OAS, "includ[ing] three recommendations by the Ecuadorian government," the report seemed to compromise its own mandate.[74] The three recommendations promoted by the Ecuadorian government have been labeled by at least sixty nongovernmental organizations as attempts to

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65. Annual Report of the Inter-American Commission on Human Rights 2011, *supra* note 56, ¶ 157 (internal quotation marks omitted).

66. *Id.*

67. *Id.*

68. *Id.* ¶ 157 & n.243.

69. *El Gobierno amenaza a EL COMERCIO y a comentaristas de su versión digital*, EL COMERCIO.COM (Sept. 29, 2012, 8:47 PM), http://www.elcomercio.com/politica/Gobierno-COMERCIO-comentaristas-version-digital_0_782921825.html (Ecuador).

70. Annual Report of the Inter-American Commission on Human Rights 2011, *supra* note 56, ¶¶ 207-213.

71. *Id.*

72. *Id.* ¶¶ 210-213.

73. *Ecuador and Julian Assange: An Ecuadorean History of the World*, ECONOMIST, Aug. 25, 2012, at 27.

74. Joel Simon, *Insulza Must Repudiate Attacks Against IACHR*, COMMITTEE TO PROTECT JOURNALISTS (Jan. 18, 2012, 2:20 PM), http://www.cpj.org/2012/01/january-18-2012-jose-miguel.php.

limit the scope and influence of the IACHR in the region.[75] The recommendations would *prevent* the IACHR's Office of the Special Rapporteur for Freedom of Expression (Rapporteur) from publishing its independent annual report, would limit the Rapporteur's funding, and would create a code of conduct that would increase the state's control over it.[76] The states parties accepted the recommendations, and although they are not binding on the IACHR, they nevertheless exemplify the animosity toward freedom of expression in the region.[77]

III. THE COURT'S DECISION

In the noted case, the IACtHR followed its jurisprudence to determine whether the subsequent liability imposed by the Supreme Court of Argentina violated the Representatives' right to freedom of expression, as protected by article 13 of the Convention.[78] First, the IACtHR analyzed the legality of the local statute (Argentina's privacy provision), holding that it "is a law in the formal and material sense."[79] Second, the IACtHR inquired as to whether the local law had a legitimate end and whether the kind of liability it imposed was appropriate.[80] Finding that article 11 of the Convention explicitly guarantees the protection of a person's right to privacy and that the civil forum is appropriate to achieve the protection of that right, the IACtHR held that the local law had a legitimate end that was appropriately implemented.[81] Third, the IACtHR inquired as to whether the finding of subsequent liability was "necessary in a democratic society,"[82] taking into account the different threshold of privacy protection for elected officials, as well as "the public interest in the actions taken."[83] The IACtHR held that there was no arbitrary interference with Menem's right to privacy, finding that the publications disclosed information of public interest that was already

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75. *ONGs alertan de que recomendaciones de OEA buscan limitar efectividad de CIDH*, BBC MUNDO, http://www.bbc.co.uk/mundo/ultimas_noticias/2012/01/120125_ultnot_recomendaciones_oea_ar.shtml (last visited Mar. 13, 2013).

76. Simon, *supra* note 74; *see Review of Inter-American Human Rights System Must Not Restrict Role of Special Rapporteur*, ARTICLE 19 (Jan. 13, 2012), http://www.article19.org/resources.php/resource/2926/en/review-of-inter-american-human-rights-system-must-not-restrict-role-of-special-rapporteur.

77. *See* Simon, *supra* note 74.

78. Fontevecchia v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶¶ 51, 53 (Nov. 29, 2011).

79. *Id.* ¶ 52.

80. *Id.* ¶¶ 51, 53, 56.

81. *Id.* ¶ 53.

82. *Id.* ¶ 54.

83. *Id.* ¶ 59.

in the public domain and that pertained to Argentina's highest elected official.[84] As a result, the Supreme Court of Argentina's judgment imposing subsequent liability was not necessary and thus violated article 13 of the Convention to the detriment of the Representatives.[85]

The IACtHR began its analysis by looking at the language of the Convention's articles.[86] On the one hand, the IACtHR acknowledged that article 13 has a dual character, in that it not only protects the right to "impart[]" information, but also to "seek" and "receive" it.[87] However, the IACtHR also noted that this right is not absolute, as evidenced by article 13(2), which provides for the possibility of restricting the abuse of the right by way of subsequent liability.[88] Accordingly, while states parties have an obligation to "minimize restrictions on the dissemination of information" and to foster "informative pluralism,"[89] they must also provide a judicial framework that guarantees that it is "exercised with regard for other fundamental rights."[90] On the other hand, article 11 of the Convention characterizes the scope of privacy "as being free and immune to invasions or abusive or arbitrary attacks by third parties . . . and may include . . . the option of reserving certain aspects of private life."[91] As a result, the IACtHR held that the limits of freedom of expression are to be found within the Convention itself.[92]

The IACtHR proceeded to look to its jurisprudence to determine the permissible restrictions that national governments can place on the right to freedom of expression.[93] Any restrictions must conform to the following requirements: (1) they must be explicitly provided for by law, (2) that law must have a legitimate end that is achieved through appropriate means, and (3) the restriction must be necessary in a democratic society.[94]

In order to determine whether the restriction complied with the first two requirements, the IACtHR looked at article 1071*bis* of the Argentinian Civil Code, which provides that arbitrary interference with the lives of others, that in any way disturbs their privacy, will be stopped, and that the violator must "pay a compensation that shall be equitably

84. *Id.* ¶ 71.
85. *Id.* ¶ 72.
86. *Id.* ¶¶ 42-50.
87. *Id.* ¶¶ 42, 46.
88. *Id.* ¶ 43.
89. *Id.* ¶ 45.
90. *Id.* ¶ 50.
91. *Id.* ¶ 48.
92. *Id.* ¶ 50.
93. *See id.* ¶¶ 44-45.
94. *Id.* ¶¶ 51, 54.

established by a judge, according to the circumstances."[95] The Representatives argued that, while 1071*bis* "is law in the formal sense, it is not in the material sense" because it is too vague and because it allows for improper discretion regarding interpretation of the merits and reparations, thus failing to meet the first requirement.[96] However, the IACtHR found that the proper threshold of specificity for civil norms is lower than that of criminal norms.[97] This is because, on the one hand, criminal norms provide the specific conduct and factual circumstances that they prohibit, while, on the other hand, civil norms are meant to adapt to a wider range of conduct and circumstances that may arise after their enactment, and thus should be drafted with less specificity.[98] Civil norms meet the specificity threshold by enabling people to regulate their conduct so as to reasonably predict, under the circumstances, the consequences of their actions.[99] As a result, the IACtHR held that 1071*bis* is a law in the formal and material sense.[100]

In order to determine whether 1071*bis*' end is legitimate and that the measures it provides for are appropriate, the IACtHR relied on its interpretation of the Convention.[101] Noting that article 11 explicitly protects the right to privacy, and that article 13(2)(a) provides for the subsequent liability for expression that violates the rights of others, the IACtHR held that the protection afforded by 1071*bis* to the right to privacy was legitimate.[102] Furthermore, the IACtHR held that the civil forum, through actions for damages, is a particularly apt safeguard to the rights protected under 1071*bis*.[103] Having established the legality, legitimacy, and appropriateness of the local law, the IACtHR proceeded to analyze the third and final requirement.[104]

In order to be compatible with the Convention, a restriction on freedom of expression "must be necessary in a democratic society."[105] The IACtHR provided that the only "necessary" restrictions on freedom of expression are those justified by a pressing social need.[106] Although the IACtHR recognized that protecting the fundamental rights of others

95. *Id.* ¶ 41 (citing CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] art. 1071*bis* (Arg.)).
96. *Id.* ¶ 23.
97. *Id.* ¶ 89.
98. *Id.*
99. *Id.* ¶ 90.
100. *Id.* ¶ 52.
101. *Id.* ¶ 53.
102. *Id.*
103. *Id.*
104. *Id.* ¶ 54.
105. *Id.*
106. *Id.* (internal quotation marks omitted).

is a pressing social need, it cautioned that this is not an automatic grant to impose civil sanctions.[107] Instead, the IACtHR instructed national courts to also "consider[] the conduct displayed by the person making the statements, the characteristics of the damage allegedly caused, and other information" that may justify civil liability.[108]

Although the IACtHR noted that everyone's right to privacy is protected under article 11 of the Convention, it reiterated that, according to its jurisprudence, public officials are protected to a lesser extent, given that their actions (even those in the personal sphere) can affect the public interest.[109] Thus, the determination of whether the dissemination of details pertaining to a public official's private life is a protected expression depends on whether that information reveals matters of public interest.[110] Applying the standard it set out in *Donoso*, the IACtHR provided that matters of which society has a legitimate right to be informed, that affect the functioning of the state, or that affect general rights, interests, or have adverse consequences, are matters of public interest.[111]

Thereafter, the IACtHR turned to its analysis of the Supreme Court of Argentina's judgment.[112] First, the IACtHR noted that the judgment did not establish the specific facts that had allegedly violated Menem's right to privacy, and that, as a consequence, generated the Representatives' responsibility.[113] Instead, the Supreme Court focused on whether the nature of the information was public or private, while failing to determine whether it revealed matters of public interest.[114] From that decision, the IACtHR was forced to infer that the violation occurred through the disclosure of (1) "the alleged family ties"; (2) the attitude of Meza toward that relationship; and (3) the images and name of the minor, as well as his relation to Menem.[115]

The IACtHR proceeded to analyze the appropriate threshold of protection for Menem, as well as the character and nature of the disclosed information in order to determine whether the restriction placed on freedom of expression by the Supreme Court exceeded the

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107. *Id.* ¶ 54 n.46.
108. *Id.* ¶ 56.
109. *Id.* ¶¶ 60-61.
110. *Id.* ¶¶ 57, 61.
111. *Id.* ¶ 61; *accord* Donoso v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 121 (Jan. 27, 2009).
112. *Fontevecchia*, Inter-Am. Ct. H.R. (ser. C) No. 283, ¶ 57.
113. *Id.*
114. *Id.* ¶¶ 57-58, 61.
115. *Id.* ¶ 58.

state's punitive power.[116] The IACtHR identified three relevant facts that were disclosed in the *Noticias* articles that were relevant to the public interest: (1) the large sums of money given by the highest ranked elected official of the country to Meza and Nair, (2) the delivery of expensive gifts to such persons, and (3) the alleged economic and political favors for Meza's former husband.[117] Furthermore, the IACtHR found that the provision of large sums of money and expensive gifts, as well as the alleged interference with a judicial investigation by the President of the nation, even without the certainty of the misuse of official funds, are issues that constitute a legitimate social interest.[118]

Additionally, the IACtHR identified two circumstances that rendered the restriction unnecessary: first, it cited a book and a Spanish newspaper article, both published prior to the *Noticias* articles, which alleged the same facts about Meza and Menem's relationship.[119] Second, it found that by appearing in public forums in Meza and Nair's company, including the Government House and other presidential residences, Menem's conduct did not safeguard his own right to privacy.[120] Finding that the contested information was already in the public domain and that Menem took no positive steps to safeguard his privacy knowing that he had voluntarily exposed himself to a higher degree of public scrutiny, the IACtHR held that the *Noticias* articles did not amount to an arbitrary interference with Menem's right to privacy.[121] Furthermore, the IACtHR held that, because the Supreme Court judgment failed to consider whether the disclosed information was of public interest, its restriction on the right to freedom of expression "was unnecessary in relation to [its] alleged purpose of protecting the right to private life."[122]

Finally, the IACtHR noted that Menem, his relatives, his secretaries, and his ministers had filed *no less than* nineteen civil and criminal suits against *Noticias* at the time of the controversy.[123] The prospect of significant civil liability threatened the magazine's dissolution, which consequently had to adopt new policies in order to survive.[124] Although the IACtHR did not consider whether the civil penalty was disproportionate, it did reiterate that "fear of a disproportionate civil

116. *See id.* ¶ 59.
117. *Id.* ¶ 62.
118. *Id.*
119. *Id.* ¶¶ 63-64.
120. *Id.* ¶¶ 64-65.
121. *Id.* ¶ 71.
122. *Id.*
123. *Id.* ¶ 73.
124. *Id.*

sanction may clearly be as or more intimidating and inhibiting for the exercise of freedom of expression than a criminal sanction . . . with the obvious and unmerited result of self-censorship for . . . potential critics of the performance of a public official."[125]

IV. ANALYSIS

The IACtHR's decision in *Fontevecchia* brought about the just vindication of the Representatives. However, by refusing to extend the same specificity requirements for civil defamation sanctions that it requires for criminal sanctions, the IACtHR missed an opportunity to prevent the wide abuse of restrictions on freedom of expression by other states parties.[126] Because the IACtHR specifically mentioned, as it had in previous cases, that civil sanctions have the potential to be equally or more inhibiting to freedom of expression than criminal sanctions,[127] its refusal to extend similar specificity requirements is inconsistent with its own reasoning. Furthermore, by recognizing the legality of subsequent liability provisions that are drafted in vague terms and give undue discretion to judges in terms of punishable offenses and their respective penalties, the IACtHR's decision has created a significant loophole in its jurisprudence.

In the noted case, the IACtHR reasoned that "it was not the norm itself that determined the harmful result . . . but rather its application in the particular case by the . . . State."[128] Although the Representatives questioned the compatibility of article 1071*bis* with the Convention, the IACtHR held that criminal and civil laws require different specificity thresholds because of the nature of the conflicts they are designed to solve.[129] Nevertheless, 1071*bis* punishes individuals for "meddling arbitrarily in the lives of others" through actions that are "disturbing, in any way, [to] their privacy," through "equitable compensation fixed by a judge, under the circumstances."[130] Because of the expansive nature of the language of 1071*bis*, not only is the conduct punishable by that article difficult to predict, but more importantly, it gives the judge

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125. *Id.* ¶ 74 (footnote omitted).

126. *See* Jo M. Pasqualucci, *Criminal Defamation and the Evolution of the Doctrine of Freedom of Expression in International Law: Comparative Jurisprudence of the Inter-American Court of Human Rights*, 39 VAND. J. TRANSNAT'L L. 379, 383 (2006) ("Human rights issues must be decided on the international level so that subsequent victims may receive justice in national courts.").

127. *Fontevecchia*, Inter-Am. Ct. H.R. (ser. C) No. 283, ¶ 74.

128. *Id.* ¶ 91.

129. *Id.* ¶¶ 86-87, 89.

130. *Id.* ¶¶ 86-87 (internal quotation marks omitted).

complete discretion in assessing its penalty. A law that fails to give notice to society as to the conduct it punishes should have failed the IACtHR's "legality" inquiry. Furthermore, because the law gives the judge the discretion to interpret what constitutes "meddling" and conduct that in "any way" disturbs another's privacy and does not limit the amount of the award, the law should have also failed the "appropriateness" inquiry.

Although the IACtHR has previously noted that civil liability as a subsequent restriction can be easily abused,[131] it has neglected to give equal weight to both aspects of the dual character of the right to freedom of expression. On the one hand, an individual's financial, family, and professional life can be decimated by civil penalties.[132] On the other hand, the impact of disproportionate civil penalties also threatens society as a whole through indirect censorship. Because article 13 of the Convention not only protects the right to "impart" information and ideas, but also the right to "seek" and "receive" them,[133] states parties should also be required to provide an appropriate legislative framework that protects the media outlets through which citizens seek and receive information. This is because the very survival of private media outlets often depends on the proportionality of civil awards in freedom of expression cases.

A vibrant and independent press is essential in a democratic society because it serves as a check on governmental corruption, abuse, and incompetence.[134] A society without an autonomous press is neither democratic nor free, because the choices citizens make are informed by official propaganda.[135] Given that the private media outlets that guarantee this transparency in the region are being threatened by the systematic abuse of legislative restrictions, it is imperative that the IACtHR adopt not only a different standard, but also a different test to define the limited protection afforded to expressions about public officials that are in the public interest. By doing so, the IACtHR could minimize the abuse of restrictions on the kinds of expressions that it should protect the most.

Although the IACtHR did not analyze the proportionality of the Supreme Court of Argentina's award, it did note that Menem's government had accumulated several lawsuits against *Noticias*, which in turn forced its directors to reconsider its content or face financial

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131. *Id.* ¶ 74; *e.g.*, Donoso v. Panama, Preliminary Objections, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 129 (Jan. 27, 2009).

132. *Donoso*, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 129.

133. American Convention on Human Rights, *supra* note 14, art. 13.

134. Pasqualucci, *supra* note 126, at 399-401. *See generally* Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, *supra* note 21.

135. *See* Pasqualucci, *supra* note 126, at 400-01.

dissolution.[136] As exemplified by the noted case, civil penalties not only affect the rights of the individual involved in the suit but can also have a significant impact on the kind of information to which the rest of society has access. This impact exists because media outlets that cannot discern the line between opinions and defamatory statements will regard self-censorship as the only means of self-preservation.

Furthermore, the general animosity of the region's democratically elected governments toward freedom of expression should have led the IACtHR to place strict limits on the kinds of restrictions it legitimizes.[137] Throughout its jurisprudence, the IACtHR has focused on its "necessity" inquiry, while neglecting to narrow the scope of civil sanctions that can be applied arbitrarily to government critics.[138] By conditioning the protection it affords to freedom of expression on the discretionary inquiry of "necessity," the IACtHR has provided states parties with a loophole that can be systematically abused to intimidate private media outlets into self-censorship. Instead, the IACtHR should have required a higher degree of specificity at the "legality" and "appropriateness" levels of its inquiry for public officials. In doing so, the IACtHR would still allow local judiciaries discretion in assessing the necessity of restrictions, while limiting the arbitrariness of the conduct they punish. This, in turn, would serve the IACtHR's broad objective of closely tailoring restrictions to the legitimate interests that other rights are meant to protect.[139]

The IACtHR could achieve this purpose by extending the specificity requirements of criminal defamation laws that it promulgated in *Kimel*[140] to civil actions involving expressions about public officials that are in the public interest. By requiring a higher threshold of specificity at the legislative level, the IACtHR could limit the kinds of conduct to which the restrictions apply, and thus prevent the arbitrary punishment of government critics. Moreover, by requiring these laws to demand the alleged violator's actual malice, as well as evidence that the alleged victim suffered an actual harm, the IACtHR could prevent

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136. *Fontevecchia*, Inter-Am. Ct. H.R. (ser. C) No. 283, ¶¶ 73-74.

137. *See* Campbell, *supra* note 54; *see also Peru: TV Reporter Sentenced to Two Years for Defamation*, ARTICLE 19 (July 27, 2011), http://www.article19.org/resources.php/resource/2407/en/peru:-tv-reporter-sentenced-to-two-years-for-defamation. *See generally* Annual Report of the Inter-American Commission on Human Rights 2011, *supra* note 56 (reporting violations of freedom of expression by states parties).

138. *See* Kimel v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177, ¶¶ 72-80 (May 2, 2008); Donoso v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶¶ 119-125 (Jan. 27, 2009).

139. *Donoso*, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶¶ 119-129.

140. *See Kimel*, Inter-Am. Ct. H.R. (ser. C) No. 177, ¶ 78.

government harassment toward opposition media outlets in the form of the accumulation of petty suits that inhibit the essential role that the media must play in a democratic society.

Like other leaders in the region,[141] Ecuadorian President Rafael Correa has publicly set the goal of a state-run media empire, where private media outlets are the exception rather than the norm.[142] Subsequent liability for abuses of freedom of expression has been his main tool to achieve that purpose.[143] Like *Noticias*, *El Universo* was threatened with the prospect of financial dissolution when it was held severally liable for $10 million of the $40 million awarded to Correa in compensation for the defamatory suit.[144] Although Correa pardoned *El Universo*, the effects of the realization by other media outlets that an opinion column criticizing the official actions of the President could lead to their financial dissolution are already being felt. In a letter from the Secretary of Communications, the Ecuadorian government threatened legal action against *El Comercio*, a national newspaper, for its permissive attitude toward comments posted by its readers insulting Correa and other public officials.[145] In response to that threat, *El Comercio* immediately removed its readers' ability to comment on its online publication.[146]

So far, the only effective deterrent to Correa's systematic abuse of these restrictions has been the prospect of international scrutiny,[147] which makes his new offensive against the IACHR all the more perilous.[148] When Venezuelan President Hugo Chávez faced the same predicament, he decided to avoid international scrutiny altogether by withdrawing

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141. Campbell, *supra* note 54; *see Bolivia: Law on Telecommunications and Information and Communication Technologies*, *supra* note 54.

142. *Ecuador and Julian Assange: An Ecuadorean History of the World*, *supra* note 73, at 27 ("While building a state media empire, the government has recently shut down 19 radio stations and a television channel.").

143. *Id.*; *see* Padgett, *supra* note 55.

144. Annual Report of the Inter-American Commission on Human Rights 2011, *supra* note 56, ¶ 167.

145. Letter from Fernando Alvarado Espinel, Nat'l Sec'y of Commc'n, Republic of Ecuador, to El Comercio (Sept. 18, 2012).

146. *El Comercio de Ecuador suspende comentarios en Internet por amenazas*, EL TIEMPO (Sept. 30, 2012, 2:05 PM), http://www.eltiempo.com/mundo/latinoamerica/ARTICULO-WEB-NEW_NOTA_INTERIOR-12268162.html (Colom.).

147. *See Ecuador and Julian Assange: An Ecuadorean History of the World*, *supra* note 73.

148. *Instituciones del Gobierno han emprendido una campaña de descrédito hacia Organizaciones defensoras de Derechos Humanos*, FUNDAMEDIOS (Jan. 6, 2012), http://www.fundamedios.org/monitoreo-de-libertades/alertas/instituciones-de-gobierno-han-emprendido-una-campana-de-descredito (Ecuador).

from the Inter-American Court system.[149] While that move left Venezuelans vulnerable to the decisions of their own courts by eliminating their recourse at the international level,[150] Correa's attempts to weaken the Inter-American Human Rights system could affect citizens of the entire region. The Rapporteur, which is in charge of denouncing government censorship and enabling freedom of expression, has become the focus of Correa's attacks.[151] By limiting the visibility of the mechanism in charge of denouncing violations of the right to freedom of expression, restricting its scope by reducing its resources, and depriving it of its independence,[152] the Ecuadorian government's recommendations could significantly weaken the protection of freedom of expression in the region.

V. CONCLUSION

In a region that has become notorious for the use of legislative provisions and judicial decisions that force private media outlets into self-censorship, where government leaders label journalists "ink assassins,"[153] and the idea of media pluralism is to create a state-run media empire, international human rights organs must take decisive action, not just to safeguard journalists, but also to defend the people's right to access information. While the noted case brought about the just vindication of the Representatives, the IACtHR missed an opportunity to shine an international spotlight on regimes that are systematically silencing their critics through the arbitrary application of archaic laws.

The IACtHR's holding could have had much wider implications. Had the IACtHR adopted a different line of inquiry that reflected its own views about the threshold of protection for expressions related to public officials, it could have put significant pressure on governments that can only be fearlessly criticized from outside of their borders. By requiring additional specificity from the kind of laws that are evidently being abused and resulting in indirect censorship, the IACtHR would have

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149. *Venezuela's Withdrawal from the Inter-American Court Would Undermine the Protection of Human Rights in the Country*, CTR. FOR JUST. & INT'L L. (July 31, 2012), http://cejil.org/en/comunicados/venezuela%C2%B4s-withdrawal-inter-american-court-would-undermine-protection-human-rights-coun.

150. *Id.*

151. Simon, *supra* note 74; *see supra* Part II.C.

152. Simon, *supra* note 74; *see supra* Part II.C.

153. *Correa dice que combatirá a "sicarios de tinta" aunque "le cueste la próxima elección"* [*Correa Says He Will Fight "Ink Assassins" Even If It Cost Him Reelection*], EL TIEMPO (July 12, 2011, 5:42 PM), http://www.eltiempo.com.ec/noticias-cuenca/72757-correa-dice-que-combatira-a-a-sicarios-de-tintaa-aunque-a-le-cueste-la-pra-xima-eleccia-na/ (Colom.).

forced nations like Ecuador to conform to requirements that would at least reduce the arbitrariness of their application, or else face international scrutiny and condemnation. The IACtHR will never hear most of the citizens that suffer these abuses because, by issuing pardons in high profile cases, states parties can strip the IACtHR of its jurisdiction. Therefore, the IACtHR should have used the means at its disposal to resist this trend of methodical violations to the right to freedom of expression.

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