INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE NO. 12.367 "LA NACIÓN"
MAURICIO HERRERA ULLOA
AND FERNAN VARGAS ROHRMOSER
VERSUS THE REPUBLIC OF COSTA RICA

BRIEF *AMICUS CURIAE* OF OPEN SOCIETY JUSTICE INITIATIVE IN SUPPORT OF THE APPLICATION BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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The Open Society Justice Initiative (the Justice Initiative), as *amicus curiae*, submits this brief to request respectfully that the Court grant the application of the Inter-American Commission on Human Rights (the "Commission") by ordering Costa Rica to revoke the criminal defamation conviction of Mauricio Herrera Ulloa and bring its criminal libel and insult laws in line with international standards.

Preliminary Statement

This case is remarkable because it is based on the unremarkable situation of a reporter writing news articles about a public official. The reporter, Mauricio Herrera Ulloa, published articles in the Costa Rican newspaper *La Nación* about an honorary Costa Rican diplomat, Felix Przedborski Chawa. These articles repeated allegations in the European press that Mr. Przedborski was involved in illegal activities, and they also included information favorable to Mr. Przedborski. *La Nación* also printed a response letter from Mr. Przedborski disputing the allegations. Notwithstanding the clear public interest in the allegations against a Costa Rican public official, Costa Rican prosecutors brought charges of criminal defamation against Mr. Herrera, and the Costa Rican courts convicted Mr. Herrera because he did not prove the truth of all the information in the articles. This conviction cannot be reconciled with the freedom of expression guaranteed by Article 13 of the American Convention on Human Rights (the "American Convention").

A society cannot be free if its citizens must avoid criticism of public officials out of fear of criminal prosecution. As a result, there is an emerging consensus that criminal defamation statutes are *per se* violations of applicable protections of free expression at least insofar as they are used to suppress criticism of public officials. Civil defamation lawsuits and

the right of reply serve as less restrictive alternatives to criminal prosecutions. The Justice Initiative respectfully requests that the Court join this consensus.

Should the Court not choose to strike down all criminal defamation laws at this time, the Justice Initiative respectfully requests that at the very least the Court find that the prosecution must demonstrate "actual malice" in order to obtain a criminal defamation conviction where the aggrieved party is a public official or the reporting relates to a matter of public interest. Jurisdictions around the world have applied "actual malice" or similar standards such as a lack of "good faith." The "actual malice" standard, developed in the context of civil lawsuits, balances the interests of the public in the activities of public officials with the reputational interests of those officials. It recognizes that a healthy public debate may need to include factual errors that result from mistakes, but it does not protect the intentional defamation of public officials. The "actual malice" standard is necessary because stories of official corruption or wrongdoing should not be suppressed simply because a reporter who has done a sound investigation is insufficiently certain of being able to prove the facts to risk criminal prosecution.

Statement of Interest

The Open Society Justice Initiative, an operational program of the Open Society Institute (OSI), pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in five priority areas: national criminal justice, international justice, freedom of information and expression, equality and citizenship, and anticorruption. Its offices are in Abuja, Budapest, and New York.

The Justice Initiative promotes the right to freedom of expression as a fundamental human right and as a prerequisite for the protection of democracy and other human rights. The right to freedom of expression continues to be limited by both law and practice in many countries. The Justice Initiative focuses on the defense of political expression through the mass media and other means, and places an emphasis on the freedom of expression of marginalized groups. Our areas of work include the use of criminal and civil sanctions on speech, particularly criminal and civil defamation provisions; financial and other indirect interferences with media freedom; and threats to broadcasting freedom, particularly regarding harassment of community broadcasters and arbitrary licensing practices.

The Justice Initiative promotes defamation laws that protect reputations and at the same time ensure appropriate protection of the fundamental right to freedom of expression, taking into consideration the necessity of full debate on matters of public importance for the development of open, democratic societies. OSI and the Justice Initiative have particular expertise in the area of defamation law, having been engaged in a number of law reform projects, including being part of the committee of experts which drafted the Bosnian civil defamation law[1] and being in the working group currently re-drafting the Albanian civil and criminal defamation laws.

The Justice Initiative has been involved in standard-setting at the international level, including by participating in the development of the Principles on Freedom of Expression and Protection of Reputation.[2] We have also engaged into domestic and international free speech

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1 *See* Decision Enacting the Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina, Office of the High Representative of the United Nations, Sarajevo, November 1, 2002.

2 *Defining Defamation*, Article 19, London, July 2000.

litigation, including at the European Court of Human Rights, through submission of *amicus curiae* briefs or direct assistance to victims.

Drawing on this expertise, the Justice Initiative has prepared this *amicus* brief in order to provide the Inter-American Court with comparative information from a variety of jurisdictions concerning the development of defamation law in line with international standards. Our purpose is to assist the Court in its assessment of whether, and in what ways, the rights enshrined in the American Convention on Human Rights have been violated in the case at hand.

Statement of Facts

In light of the submissions by the parties and other *amici*, the Justice Initiative will not repeat the facts in detail but provides the following summary of pertinent facts.

A. *La Nación* Published Balanced Articles As Well As Mr. Przedborski's Letter About The Controversy Surrounding Mr. Przedborski

Mr. Przedborski is a wealthy Costa Rican businessman who has held honorary diplomatic posts in Costa Rica's foreign service as an unpaid representative to the International Atomic Energy Agency in Vienna as well as other posts in Brussels, Geneva and Paris. In 1993, a number of Belgian magazines and newspapers reported on allegations about Mr. Przedborski's involvement in a major political corruption scandal in Belgium. In 1994, as these allegations circulated in Belgium, the Costa Rican Foreign Ministry removed Mr. Przedborski from a post he held at the Costa Rican embassy in Paris.

In May 1995, *La Nación* published three articles about the controversy. In addition to the allegations, the reports also provided substantial information supporting Mr. Przedborski including:

- a quotation from a memorandum by the Belgian prosecuting authority that the relevant file contained no adverse information about Mr. Przedborski;

- past statements by two former Costa Rican presidents defending Mr. Przedborski;

- references to Mr. Przedborski's receipt of Belgium's Great Officer of the Order of Leopold II honor; and

- a statement from the Costa Rican Minister of Foreign Relations that nobody has ever given him a concrete accusation about Mr. Przedborski.

Following the publication of these three articles, *La Nación* published a reply letter written by Mr. Przedborski.

In July 1995, the Belgian press reported that Mr. Przedborski was involved in other criminal activities, such as fraud and illegal trafficking in money, cigarettes, arms and narcotics. According to Belgian news reports, Mr. Przedborski was using his diplomatic immunity to evade prosecution and continue his criminal activities. In December 1995, *La Nación* published a fourth article by Mr. Herrera that reported on these new allegations as well as a recommendation by a Costa Rican government commission that the Minister of Foreign Relations eliminate all unpaid diplomatic positions. The article noted that Mr. Przedborski was taking legal action in Belgium about the Belgian press reports,[3] and it included quotes from Mr. Przedborski's May 1995 letter to *La Nación* as well as comments from public officials defending Mr. Przedborski.

B. The Costa Rican Courts Convicted Mr. Herrera Because He Failed To Prove The Truth Of All The European Press Allegations He Reported

In January 1996, Mr. Przedborski filed criminal defamation actions against Mr. Herrera in Costa Rica. On May 29, 1998, the Criminal Tribunal of the First Judicial Circuit of San Jose found for Mr. Herrera, noting that Mr. Herrera balanced accurate reports of the

[3] On December 22, 1995, Mr. Przedborski filed a civil defamation lawsuit in Belgium against the author of certain of the July 1995 news articles.

European allegations with statements and evidence supporting Mr. Przedborski and finding that Mr. Herrera was not acting out of a desire to offend or defame.

Mr. Przedborski appealed this judgment to the Third Chamber of the Supreme Court of Justice, which reinstated the criminal defamation charges and remanded the case to the Tribunal. The Chamber held that the Tribunal erred in acquitting Mr. Herrera on the basis that he lacked a specific intent to defame because it concluded that only a general intent to defame was necessary to convict. The Chamber also held that the Tribunal erred in upholding Mr. Herrera's defense of truth because Mr. Herrera had only proven the existence of the European press articles even though he was required to prove the truth of the allegations in those articles. The Chamber remanded the case to the Tribunal. Under the standards set forth by the Chamber, this very brief – filed in Costa Rica and mentioning the allegations against Mr. Przedborski – could constitute a criminal offense.

On November 12, 1999, the Tribunal found Mr. Herrera guilty of four counts of criminal defamation because he failed to prove the truth of certain assertions contained in the European press reports. The Tribunal fined Mr. Herrera 300,000 colones (approximately US $1,016 at the then-current exchange rate) and ordered that his name be put on a register of criminals. The Tribunal also imposed penalties on *La Nación* and its representative Fernán Vargas Rohrmoser, including fines and other costs of over 63 million colones and requirements that *La Nación* remove links between the name Przedborski and the articles and also establish links between the articles and the court's judgment. On January 24, 2001, the Third Chamber of the Supreme Court of Justice rejected appeals by Mr. Herrera and Mr. Vargas.

C. The Inter-American Commission On Human Rights Declares That The Convictions Violate Article 13 Of The American Convention

On March 1, 2001, Mr. Herrera and Mr. Vargas submitted this case to the Commission. The Commission requested that this Court order provisional measures, which this Court granted on April 6, 2001. Following hearings and submissions by the parties, on October 10, 2002, the Commission concluded that Costa Rica had violated the right to freedom of expression protected by Article 13 of the American Convention. The Commission held that Costa Rica should void the convictions, pay compensation to Mr. Herrera and take the steps necessary to prevent further violations. Costa Rica did not comply with the Commission's ruling so the Commission filed this case with the Court.

Argument

I. Criminal Defamation Statutes Violate Article 13 Of The American Convention

The Justice Initiative believes this Court should support the emerging trend of jurisdictions that have found that criminal defamation statutes violate applicable protections of freedom of expression that are equivalent to Article 13 of the American Convention.[4] As the submissions of the Commission and other *amici* more fully explain, criminal defamation laws are a disproportionate response to reputational harm because they not only punish the speaker but have a chilling effect on freedom of expression and the press in general. This problem is exacerbated when criminal defamation statutes are used to protect public officials – who have inserted themselves in the public debate and have substantial opportunities to reply to statements made about them – because the public has a greater need to know about the activities of their

[4] Article 13(1) of the American Convention recognizes that "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 . . ." Article 13(2) notes that this expression may be "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." (emphasis added).

representatives, including allegations of corruption. Finally, criminal defamation statutes are not necessary to protect reputation because civil lawsuits serve the same function at less cost to free expression.

As a result of these considerations, there is an emerging trend in both established and emerging democracies towards the elimination of criminal defamation statutes. Indeed, even developed countries that have criminal defamation statutes on the books use them infrequently. Thus, criminal defamation statutes are generally enforced only in less than democratic nations, particularly ones in which there are other human rights violations. Indeed, it is in these countries – with histories of government suppression of dissent – where it is most necessary that open public debate exist free of the threat of criminal defamation prosecutions. The Justice Initiative fully supports these arguments and the conclusion that the use of criminal defamation laws to protect public figures is a violation of Article 13 of the American Convention.

II. A Criminal Conviction Without Proof Of "Actual Malice" Violates Article 13 Of The American Convention

As described above, the Justice Initiative believes that criminal defamation statutes violate Article 13 of the American Convention because they are not necessary to ensure respect for reputation and believes that the Court should rule accordingly. As an alternative, if the Court does not find that criminal defamation laws *per se* violate Article 13, the Justice Initiative believes that the Court should find the conviction of Mr. Herrera violated Article 13 because the prosecution did not prove actual malice.

When a defamation plaintiff is a public figure challenging a statement that involves a matter of public concern, principles of free expression in a democratic society require that the defendant not be liable for mere factual errors. Instead, numerous courts around the world – in jurisdictions with widely divergent histories and levels of development – have

recognized that an "actual malice" or similar standard appropriately balances freedom of expression and the protection of reputation. Significantly, many of these courts have reversed ordinary burdens of proof and required plaintiffs in civil defamation cases to prove "actual malice." The Justice Initiative believes it is axiomatic in criminal cases that the prosecution must prove "actual malice."

A. The "Actual Malice" Standard Develops To Balance Freedom Of Expression With Reputational Interests In The Context Of Political Speech

The origin of the "actual malice" standard is a decision by the United States Supreme Court, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that involved a claim of civil defamation resulting from the publication of an advertisement that allegedly libeled an elected official of the State of Alabama. The United States Supreme Court explained that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270. Accordingly, even though "erroneous statement is inevitable in free debate," such misstatements "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Based on these principles, the Court concluded that the First Amendment to the United States Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'" *Id.*, 376 U.S. at 279-80. A statement is made with "actual malice" if it is made "with knowledge that it [is] false or with reckless disregard of whether it [is] false or not." *Id.* at 280. The Court explicitly rejected a standard of liability less than actual malice, such as a sole defense of truth:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to . . . 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' The rule thus dampens the vigor and limits the variety of public debate.

New York Times, 376 U.S. at 279 (citations and footnote omitted).

The United States Supreme Court has subsequently explained that a plaintiff must therefore prove to a "clear and convincing" standard that the defendant knew the statement to be false or entertained serious doubts as to its truth. *Masson v. New Yorker Magazine, Inc.*, 390 U.S. 727, 731 (1968). The mere failure to investigate, without more, does not constitute actual malice; rather, the publisher must act with a "high degree of awareness of . . . probable falsity." *See, e.g., id.*

The U.S. Supreme Court is certainly not alone in its recognition that political and related forms of expression deserve an especially high level of normative protection. The philosophical and policy underpinnings of that approach are shared by courts and lawmakers throughout the democratic world. In *R v. Secretary of State for the Home Department, Ex p. Simms* [2000] 2 AC 115 (HL), Lord Steyn of the House of Lords explained the policy rationale for granting freedom of expression a special status in the hierarchy of norms:

> Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognized that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfillment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart

> Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market' . . . . Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country . . . .

Id. at 126 F-H (citation omitted). Similar statements can be found in many other jurisdictions, some of which have been highlighted in the following sections of this brief.

B. Argentina Applies The "Actual Malice" Doctrine Of *New York Times v. Sullivan*

In 1991, the Argentine Supreme Court found the actual malice doctrine applicable to a civil lawsuit brought by a public figure, the director of a recognized political magazine. "*Vago*," CSJN [1992-B], L.L. 367. The Court viewed as essential and invaluable the role of the press in informing the public and reporting on the actions of public officials and representatives in a democratic society but also recognized that this role does not permit the press to defame public officials or print falsehoods. The Court concluded that the "actual malice" doctrine is a reasonable balance between these two concerns.

In adopting the "actual malice" standard, the Court specifically rejected the argument that the "actual malice" test was inappropriate for Argentina because Argentina and the United States have different levels of development of freedom of expression and rights of the press. Instead, the Court acknowledged the risk that reporters might publish false or inaccurate statements about public figures or public matters but found that such statements would be protected from liability unless the public figure could prove that the journalist knew about the falsity of the published information and acted with the specific purpose of harming the public figure. The Court found that the protection of the rights of the press on issues of public

importance dictated this reversal of the ordinary burden of proof and placed it on the public official.

C. The European Court Of Human Rights Rejects Strict Liability In Defamation Cases Involving Political Speech

The European Court of Human Rights ("ECHR") has on several occasions affirmed the fundamental importance of the right to free expression on matters of public affairs and found that restrictions of free expression violate Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") whenever they are "not necessary in a democratic society."[5] Elaborating on the latter concept, the Court has established a three-part test to determine the limits of permissible restrictions on freedom of expression and other protected rights. Such restrictions will pass muster only if they correspond to a pressing social need; are proportional to one of the legitimate aims enumerated in the second paragraph of Article 10; and are justified by the government with relevant and sufficient reasons. *Handyside v. United Kingdom*, 1 Eur. Ct. H.R. 737 (1979), ¶ 48. Particularly weighty reasons are required to justify interferences with freedom of expression; such justifications must be "convincingly established" by the authorities. *Barthold v. Germany*, 7 Eur. Ct. H.R. 383 (1985), ¶ 58.

Political speech, in particular, has received heightened protection by the European Court, which considers freedom of political debate to be at the very core of the concept of a

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[5] Article 10 of the European Convention is very similar to Article 13 of the American Convention. Article 10(1) of the European Convention provides that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . ." Article 10(2) notes that these freedoms "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others . . ."

democratic society. In the seminal case of *Lingens v. Austria*, 8 Eur. Ct. H.R. 407 (1986), the Court established the basic principle that "the limits of acceptable criticism are … wider as regards a politician as such than as regards a private individual." The Court emphasized that a politician or government official "inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance."[6] *Id*. at ¶ 42. In addition, the Court has interpreted 'political expression' broadly to include all discussions on matters of general public interest. Thus, publications discussing the impartiality of a court (*see Barfod v. Denmark*, 13 Eur. Ct. H.R. 493 (1989) or the availability of veterinary services (*see Barthold v. Germany*, 7 Eur. Ct. H.R. 383 (1985)), have received special protection as political expression.

Applying these principles, the ECHR has found convictions unnecessary in cases where the publisher acted in "good faith" and complied with journalistic ethics.

1. A Criminal Defamation Conviction Based On The Reporting Of Facts From Reliable Sources Violates Article 10

The case of *Dalban v. Romania*, 31 Eur. Ct. H.R. 39 (1999), is particularly instructive because the relevant facts – a journalist who in good faith relied on credible sources – are similar to the case here. Ionel Dalban published an article in a local weekly magazine suggesting that the chief executive of a state-owned agricultural company committed a series of frauds and that a senator who served as the state representative on the company's board made substantial profits from holding that position. *Id.* at ¶ 13. Dalban based his article on police reports supporting these allegations. *Id.* Dalban was convicted of two counts of criminal defamation. The court found that the story "did not correspond to reality" because the senator

[6] Public figures and other individuals who willingly participate in public debate are also subject to the same standard. *Nilsen and Johnsen v. Norway*, Judgment of November 25, 1999, ¶ 52.

received smaller payments than the article suggested and because the public prosecutor had declined to prosecute the executive after an investigation. *Id.* at ¶ 17. On appeal, the Romanian Supreme Court of Justice acquitted Dalban of the charge of defaming the executive on the grounds that Dalban had acted in good faith and held that Dalban was properly convicted of defaming the senator but quashed the conviction due to Dalban's death. *Id.* at ¶ 28.

The ECHR accepted the case because Dalban's widow could still receive redress. *Id.* at ¶ 44. Significantly, the Government of Romania did not dispute that Dalban's conviction violated Article 10 of the European Convention because it could not be considered necessary in a democratic society. *Id*. at ¶ 51. The Court nevertheless considered the case and relied heavily on the public interest in the allegations, explaining that "[i]t would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth." *Id.* at ¶¶ 48-49. The Court also implicitly acknowledged a lack of actual malice by giving weight to the lack of proof that Dalban's reporting was "designed to fuel a defamation campaign against" the senator or the executive. *Id.* at ¶ 50. Accordingly, the ECHR held that "in relation to the legitimate aim pursued, convicting Mr. Dalban of a criminal offence and sentencing him to imprisonment amounted to disproportionate interference with the exercise of his freedom of expression as a journalist" and therefore violated Article 10. *Id.* at ¶ 52. The Government of Romania's concession that the conviction of a journalist who printed inaccurate statements on the basis of a credible source constitutes a violation of Article 10 of the European Convention, and the ECHR's validation of that view, strongly support a finding that the conviction of Mr. Herrera violates a similar governing standard, Article 13 of the American Convention.

2. The ECHR Finds A Violation Of Article 10 Where The Defendant Is Not Permitted To Invoke "Good Faith" And The Defense of Truth

Though the *Dalban* decision does not explicitly refer to "good faith," the ECHR has done so in other cases. In *Castells v. Spain*, 14 Eur. Ct. H.R. 445 (1992), the ECHR held that Spain violated Article 10 by prosecuting Miguel Castells, a senator at the time, for insulting the government. Castells was a member of a political group supporting independence for the Basque region of Spain. *Id.* at ¶ 6. Castells published an article in a weekly magazine decrying a string of murders and assaults against citizens of the Basque region and suggesting that the right-wing government was "[b]ehind these acts" by extreme right-wing organizations. *Id.* at ¶ 7.

The ECHR noted that the freedom of expression constitutes one of the essential foundations of a democratic society and that it "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." *Id.* at ¶ 42. The Court found that Castells' article related to a "matter of public interest" and thus afforded his exercise of his freedom of expression "extra guarantees." *Id.* at ¶ 40. The Court concluded that the Spanish courts violated Article 10 by upholding Castells's conviction without allowing him to "demonstrate his good faith" or prove the truth of his assertions. *Id* at ¶¶ 48, 50.

With respect to the criminal nature of the charges against Castells, the Court noted that "the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media." *Id*. at ¶ 46.[7]

[7] Similarly, in *Lingens*, the criminal defamation case arising out of remarks critical of Austrian Chancellor Bruno Kreisky, the European Court emphasized that criminal sanctions for defamation can lead to the suppression of legitimate expression, even where they do not result in prison terms. *Lingens v. Austria*, 8 Eur. Ct. H.R. 407, at ¶ 44.

3. A Criminal Insult Law Granting Special Protection To Foreign Heads of State Violates Article 10

The European Court reiterated more recently, in *Colombani v. France*, Judgment of June 25, 2002, that the media is entitled to rely on official reports and that absolute liability for reputational offenses is inconsistent with freedom of expression. Colombani was a journalist convicted of having insulted the King of Morocco by questioning his administration's commitment to fighting the growing trafficking of hashish from Morocco. The French courts found Colombani guilty under an 1881 strict liability statute that did not allow a defense of justification (i.e., proof that the defamatory allegations were true). The ECHR concluded that such a privilege, whose aim and effect was to shield foreign heads of state from any kind of criticism, whether warranted or not, could not be considered necessary in a modern democracy.[8] *Id*. at ¶ 68.

The Court also noted, in a frequently quoted passage, that Article 10 protects journalistic reporting on matters of public interest provided that the media act "in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism." Given that the press is generally entitled to rely on information from official sources without having to confirm it independently, the ECHR considered that the applicants in this case had met that double standard of good faith and due diligence. *Id*. at ¶ 65.[9]

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[8] In January 2004 the French Senate repealed the offending provision of the 1881 Press Law to ensure compliance with the ECHR's judgment. *See* Reporters sans Frontières, "The Senate Repeals the Offense of Insulting A Foreign Head of State," January 21, 2004, available at www.rsf.org.

[9] In line with that standard, the ECHR has at times validated criminal defamation convictions in cases where factual allegations were found to be especially serious, malicious and essentially unfounded. Thus, in the recent case of *Perna v. Italy*, Judgment of May 6, 2003, the Grand Chamber of the Court found that an article accusing a magistrate, without offering any factual proof, of having abused his powers due to political bias was not entitled to Article 10 protection.

D. Germany Protects Political Expression Without Requiring Strict Proof Of Factual Assertions

The German Federal Constitutional Court has led the way in Europe in its efforts to define the boundaries of constitutionally protected expression vis-à-vis reputational interests. The starting point in this area of the German Court's case law is the seminal *Lüth* case, 7 BVerfGE 198 (1958), which involved a court injunction against an appeal to the public to boycott the films of a director associated with the Nazi regime and the production of a notoriously anti-Semitic movie. The Court took this opportunity to elaborate a number of key principles regarding the constitutional status of freedom of expression and its relationship to restrictions imposed by general statutory law. First, these general laws, including criminal or civil defamation laws, are to be interpreted in the light of the constitutional principles designed to protect basic rights. While constitutional rights are not absolute, the restrictions imposed on them by ordinary law must themselves be limited by the language and spirit of constitutional rights provisions. *Id*. at 209.

The Court then defined the central importance of freedom of expression in a constitutional democracy:

> As the most immediate manifestation of the human personality in society, the basic right to free expression of opinion is one of the noblest of all human rights. . . . To a free democratic constitutional order it is absolutely basic, for it alone makes possible the continuing intellectual controversy, the contest of opinions that forms the lifeblood of such an order. In a certain sense it is the basis of all freedom whatever, "the matrix, the indispensable condition of nearly every other form of freedom."

Id. at 208 (citing *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

To ensure the vigor of that "contest of opinions," the Court went on, there ought to be a general presumption of constitutionality in favor of communications on matters of public interest whenever these come into conflict with other rights and interests: "When the formation

of public opinion on a question important to the general welfare is at stake, private … interests of individuals must basically yield." The remedy available to private interests under these circumstances is more, rather than less, speech. *Id*. at 219.

The Constitutional Court instructed ordinary courts to take these principles into account in applying laws that may infringe upon freedom of expression. In particular, lower courts must seek to balance the various rights and interests involved in each case through a consideration of all relevant circumstances. The balancing exercise is subject to the ultimate review of the Constitutional Court: "An incorrect balancing of these factors can lead to a violation of basic rights." *Id*. at 212.

Having thus defined in *Luth* the constitutional parameters of freedom of expression, the German Court has consistently protected speech that contributes to socio-political debate. Opinions, including those with an implied factual basis, have consistently enjoyed a very high level of protection. One of the first cases to discuss opinions in depth was *Echternach*, 42 BVerfGE 167 (1976), where the Court was asked to rule on the constitutionality of a judicial injunction against calling a private foundation a "nationalistic enterprise in democratic clothing." The Constitutional Court concluded that the ordinary courts had erred in requiring the author to provide strict proof of the factual basis of that statement. "The basic right to free expression is intended not merely to promote the search for truth but also to assure that every individual may freely say what he thinks, even when he does not or cannot provide an examinable basis for his conclusion." *Id*. at 170-71.

The special protection granted to opinions is even higher when they involve comments on the performance and character of politicians, as confirmed by two defamation cases brought by the prominent politician Franz Josef Strauss. In *Stern-Strauss Interview*, 82 BVerfGE 272 (1990), Strauss claimed damages for his depiction by a commentator as an

"opportunistic democrat" exemplifying a class of German politicians with supposedly authoritarian tendencies. Despite the seriousness of such allegations in the eyes of a German public keenly aware of the totalitarian past, the Court ruled that the statement was protected speech: "Especially in public dialogue, including political campaigns, criticism must be accepted, even in exaggerated and polemical forms, because otherwise there is a danger of chilling or limiting the process by which opinion is formed." *Id*. at 282. A public person must legitimately expect criticism – with the narrow exception of criticism that is primarily meant to defame that person and is of little substantive value. *Id*. at 283-284.

Similarly, in the *Anti-Strauss Placard* case, 82 BVerfGE 43 (1990), the Court held that a "Strauss protects Fascists" sign, displayed at a public rally, ought to be protected as a form of core political expression. *Id*. at 53. Drawing on the facts of the case, the Court took the opportunity to announce that cases involving criminalization of expression deserve a particularly intense level of scrutiny, whereby the Court reserves the right to make its own assessment of the facts – especially where the ordinary courts have assigned liability based on the falsity, or failure to prove the truth, of factual statements – as well as the nature of the sanctioned communication. *Id*. at 50-51.

Under the German Court's case law on defamation, truth or falsity of facts is a relevant consideration. For example, a misquote used by a commentator accusing the author Heinrich Boll of making statements aiding political terrorism was deemed not protected. *Boll* Judgment, 54 BVerfGE 208 (1980).[10] However, the standard applied by the Court to unproven

[10] Boll was quoted as having attacked the German state as "a dung heap defended with rat-like rage by remnants of rotten power." In deciding against the speaker, the Court emphasized that a quote can be "an especially potent weapon in the battle of opinion" and that, on the other hand, requiring the media to verify quotations was not as burdensome as requiring proof of other statements of fact.

statements of fact is far from strict liability. Thus, in *Bayer Dissident Stockholders*, 85 BVerfGE 1 (1991), the Court reviewed the constitutionality of a pamphlet that criticized Bayer, a pharmaceutical company, for "violating democratic principles, human rights and political fairness in its limitless search for profits." *Id*. at 3. The ordinary courts had construed the allegations as an expression of opinion based on factual assertions that had not been proven by the author.

Applying special scrutiny, the Constitutional Court concluded that mixed statements of fact and opinion must be treated essentially as opinions insofar as they contain elements of personal assessment. *Id*. at 15. Even statements alleging that Bayer had "spied upon [and] exerted pressure" on critics and "supported pliable right-wing politicians" were treated as opinions that should not be subjected to a requirement (and burden) of proof: "Everyone has the right to assert and disseminate their opinion … regardless of whether it is with or without value, true or false, grounded or ungrounded, emotional or irrational." *Id*. at 14-15.

Similarly, in the *Nursing Home* case, 85 BVerfGE 23 (1991), a member of an environmental group had published a report raising questions about the quality of care in a nursing home. The ordinary courts had required the publisher to prove the factual allegations, but the Constitutional Court held that to require the speaker to prove all factual assertions made in commenting on matters of public concern would curtail public discourse. *Id*. at 34.

In sum, the German Constitutional Court has established a very high level of protection for political expression, which is defined broadly to include all matters of public interest. It has done so, in part, by expanding the definition of what constitutes permissible value judgment and fair comment on questions of public interest and, in part, by requiring convincing evidence that defamatory communications are gratuitous and of negligible value to democratic debate before it can hold them unworthy of constitutional protection.

E. Commonwealth Countries Adopt 'Actual Malice' Or Qualified Privilege Defenses

Leading Commonwealth jurisdictions have granted heightened protection to public interest expression, including by explicitly adopting the 'actual malice' principle or by broadening the traditional defense of qualified privilege.

1. The Privy Council Has Recognized That Journalists May Criticize Public Officials Without Having to Verify All Factual Statements

In *Hector v Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312 (PC), the appellant, a newspaper editor, was criminally charged for printing a false statement "likely to undermine public confidence in the conduct of public affairs." The appellant argued that the prosecution violated his rights under the Constitution of Antigua and Barbuda, which guarantees freedom of expression so long as interference in that freedom was not "reasonably required . . . in the interests of . . . public order." The High Court concluded that the statutory exception for expression that "undermine[s] public confidence in the conduct of public affairs" was unconstitutional and ordered that the criminal proceedings be quashed. The Court of Appeal of the Eastern Caribbean Supreme Court reversed and gave the appellant leave to appeal to the Privy Council, a final court of appeal for a number of Commonwealth countries.

The Privy Council found that it was inconsistent with the notion of a free and democratic society to criminalize statements likely to undermine confidence in the conduct of public affairs because "[i]n a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism." The Privy Council further explained that "it would on any view be a grave impediment to the freedom of the press if those who print, or *a fortiori* those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism

was based." Accordingly, the Court quashed the criminal proceedings, concluding that, despite the presumption of constitutionality, it could not reconcile the statute with the constitutional safeguards of free speech because the statute was not reasonably required in the interests of public order.

The Privy Council returned more recently to the issue of criminalization of political speech in *de Freitas v. Permanent Secretary of Agriculture* [1999] 1 AC 69 (PC). At issue in this appeal from the Court of Appeal of Antigua and Barbuda was the constitutionality of a statute prohibiting civil servants, at the threat of criminal penalties, from disseminating any information or opinions on matters of political controversy. Applying a test of proportionality similar to that developed by the European Court of Human Rights, Lord Clyde, writing for the Judicial Committee, concluded that the seriousness and the sweeping scope of the offence could not be justified in a democratic society.[11]

2. Australia, New Zealand, South Africa And The United Kingdom Grant Qualified Privilege To Political Expression

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[11] The Privy Council recently upheld the constitutionality *in abstracto* of a criminal defamation statute that it considered to have struck an appropriate balance between free expression and reputational interests. *George Worme and Grenada Today Ltd v. Commissioner of Police* [2004] UKPC 8. The provision at issue was intentional libel, defined as the publication of any false defamatory matter, imputing to another person a crime or misconduct in public office, with the intention of defaming that other person. In declining to hold the statute facially unconstitutional, the Privy Council relied greatly on the fact that the statute, as construed by the Council itself, required the prosecution to both prove the falsity of the allegations and to convince the jury that the publication, taken in its entirety, was "not for the public benefit" – the latter being a key element of the offence. The Council argued that the statute, limited in scope as it was to "situations where the publication was not for the public benefit," could not be considered not necessary in a democratic society. *Id*. at ¶¶ 43, 44. The standard of liability validated by the Privy Council in this case is not at odds with the "actual malice" principle proposed by the Justice Initiative since the latter standard applies to circumstances, like those of Mr. Herrera's case, in which the public is clearly entitled to be informed of matters of general interest.

These four countries have modified the traditional common law of defamation to move away from a regime of strict liability for erroneous and defamatory statements of fact. Courts in these countries have recognized the need for a new balancing approach that grants greater weight to free expression interests and, in particular, the vital role played by the media for informing a democratic citizenry. Lord Bingham of Cornhill of the British House of Lords described the rationale for that special normative status of the media in *McCartan Turkington Breen v Times Newspapers Ltd.* [2001] 2 AC 277 (HL):

> In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."

Id. at 290G-291A.

In one of the first cases to outline the new balancing approach to defamation disputes, the Australian High Court held that the traditional defense of qualified privilege should extend to general discussions of political issues in the media. *Lange v. Australian Broadcasting Corporation*, [1997] 71 ALJR 818. The Australian Court considered that the potential effects of defamation through mass media should be mitigated by requiring defendants to prove that the publication was reasonable in the light of all relevant circumstances. The factors to be considered

in this respect include whether "the defendant had reasonable grounds for believing that the information was true, [and] took proper steps … to verify the accuracy of the material." *Id*. at 834.

The Court of Appeal of New Zealand followed a similar approach in *Lange v. Atkinson*, [1998] 3 NZLR 424 (CA), a case brought by the same former Prime Minister of New Zealand who was the plaintiff in the Australian case. This case involved a newspaper article critical of Mr. Lange's capacity and sense of responsibility in his performance as former prime minister and then-leader of the opposition. Echoing the reasoning of the Australian ruling, the New Zealand court held that qualified privilege should be available with respect to mass publications: "The nature of [our] democracy means that the wider public may have a proper interest in respect of generally published statements which directly concern the functioning of representative and responsible government." *Id*. at 467-78. In contrast with the Australian decision, however, the *Atkinson* court held that, once a qualified privilege of this sort is established, the only option available to the plaintiff is to prove actual malice. It was not justified to require the defendant to prove reasonableness, due care or lack of negligence generally.[12]

In South Africa, the Supreme Court of Appeal addressed an essentially similar set of issues in *National Media Ltd v. Bogoshi*, [1999] 3 LRC 617. The central issue in the case was a constitutional challenge by the media defendants, who argued that the common law regime of strict liability for erroneous statements failed to comply with constitutional protections for

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[12] This decision was appealed to the Privy Council, which ruled on the appeal on the same day the *Reynolds* case (see below), heard by the same Law Lords, was decided. The Privy Council asked the New Zealand court to reconsider its *Atkinson* decision in view of *Reynolds*, but the latter court declined to do so, maintaining that "the *Reynolds* decision appears to alter the structure of the law of qualified privilege in a way which adds to the uncertainty and chilling effect almost inevitably present in this area of law." *Lange v. Atkinson*, [2000] 4 LRC 596.

freedom of expression. The court agreed, noting that "nothing can be more chilling [for free speech] than the prospect of being mulcted in damages for even the slightest error." *Id*. at 629. As in Australia, the South African court concluded that the defendant should be required to prove that the publication was "reasonable", that is, that "upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time." *Id*. at 631. The issue has not yet reached the Constitutional Court, the country's highest tribunal on constitutional matters.

In the United Kingdom case of *Reynolds v. Times Newspapers Ltd*, [2001] 2 AC 127 (HL), the House of Lords concluded that, whether 'publications to the world at large' are entitled to a defense of qualified privilege would have to be decided case by case, after consideration of all the circumstances of each publication. In order to mitigate the inherent uncertainties of such a liability regime, Lord Nicholls laid out a non-exhaustive list of ten factors to be taken into account in making that decision. These include the tone, nature and seriousness of the allegations; the sources and status of the information; and the steps taken to verify the facts, including by soliciting a reaction from the affected person. The *Reynolds* decision is currently under challenge before the European Court of Human Rights.

3. India Requires That Public Officials Bringing Civil Defamation Claims Prove "Reckless Disregard For Truth"

In *Rajagopal v. State of Tamil Nadu,* 1994 SOL Case No. 151 (India), two editors of a Tamil weekly magazine brought a writ to enjoin various state officials from taking action against them for their anticipated publication of a prisoner's autobiography that implicated various public officials in his crimes. On appeal, India's Supreme Court discussed the *New York Times* and *Hector* cases and concluded that public officials cannot bring suit:

> even where the publication is based upon facts and statements which are not true, unless the official establishes that the

> publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages.

The Indian Supreme Court thus placed the burden on the plaintiff in a civil case to prove reckless disregard for the truth.

4. A Pakistani Court Applies The "Actual Malice" Standard Of New York Times v. Sullivan To Reverse A Civil Defamation Judgment

In the Pakistani case of *Nazami v. Rashid*, P.L.D. 1996 Lahore 410 (Pak.), the court invoked the "actual malice" standard to reverse a civil defamation judgment against a publisher who made substantially less of an effort than Mr. Herrera to ascertain the facts he published. Sheikh Muhammad Rashid, a prominent politician, brought civil defamation claims against Majid Nazami for publishing statements by Naveed Malik, another politician, in Mr. Nazami's daily newspapers, *The Nation* and *Nawa-e-Waqt*. Those statements, published after *The Nation* had published Sheikh Rashid's critical statements about Mr. Malik, alleged, among other things, that Sheikh Rashid was senile, suffered from mental illness, and had regularly accepted bribes during his tenure as the chairman of a Federal Land Commission. *The Nation* subsequently published defenses of Sheikh Rashid and offered Sheikh Rashid the opportunity to rebut Mr. Malik's allegations, but he replied that it was beneath his dignity to do so. The trial court found for Sheikh Rashid. On appeal, the two judges wrote divergent opinions, so the Chief Justice appointed a referee judge.

The referee judge explained, that "[i]t is now a popularly acknowledged fact that public men are public property and discussion of their conduct in public affairs cannot be denied and that the right, as well as the duty of criticism, must not be stifled by putting curbs on those

responsible for reporting to the public the conduct of the leaders. . . . It is almost too obvious that those who hold office in Government and who are responsible for public administration are, and must always be open, to public criticism." *Id.*, ¶ 22. Citing a Pakistani Supreme Court case, the judge concluded that the publication of statements about public figures was entitled to a qualified privilege that could be defeated only by a showing of malice, personal ill-will or "spite and deliberate and false attack on one's personal life." *Id.*, ¶ 30.

The judge then reviewed the reasoning of *New York Times v. Sullivan* and found with regard to malice that a public figure must prove that the defendant "not only published false information but also did so recklessly and maliciously without attempting to determine whether it was true." *Id.*, ¶ 33-35. The court concluded that the defendant's offer to the plaintiff to express his views on the subject negated actual malice and that the defendant simply "reproduced the allegations and counter-allegations of the parties" giving "no impression of their truth or falsehood." *Id.*, ¶ 41. Under this reasoning, the conviction of Mr. Herrera, who investigated the facts in the European press and reported substantial facts favorable to Mr. Przedborski, cannot stand.

F. Japan Requires The Prosecution To Disprove Mistaken Belief

In *Ex Parte Kawachi*, 23 Keishu 975 (Sup. Ct. June 25, 1969), Mr. Kawachi, a newspaper publisher was charged under Japan's Penal Code with defamation for printing a story accusing a local businessman of corruption. At trial, his argued that he could not be found guilty of defamation because he believed the contents of the story were true, but the trial court held that the defendant's mistaken belief in the published allegations was not a defense.

On appeal, the Supreme Court of Japan overturned the conviction and remanded the case on the grounds that the prosecution had failed to establish the requisite *mens rea*. The Court explained that there could be no defamation where a party "believed mistakenly in the

existence of the facts and there was good reason for his mistaken belief on the basis of reliable information. . . ." The court emphasized that this result was necessary because the legislation in question was "enacted to reconcile the personal security to honor of an individual and the freedom of speech" enshrined in Japan's constitution. Accordingly, Japan assigns the burden on the prosecution to prove that a defendant does not have a reasonable belief in the accuracy of his statements.

G. The Philippines Expressly Adopts The "Actual Malice" Standard Of *New York Times v. Sullivan*

In *Borjal v. C.A.*, 301 SCRA 25 (Phil. 1999), a private businessman brought a civil defamation suit against a newspaper president and publisher based on a series of articles that criticized the businessman's role on a public commission. The trial court found for the petitioner and awarded damages. The Court of Appeals affirmed the decision finding that the communications were not protected because they were directed at a private citizen and published in a public paper and because they "crossed the thin but clear line that separated fair comment from actionable defamation."

The Philippines' Supreme Court expressly followed the reasoning of *New York Times v. Sullivan* and its progeny in reversing the decision on the grounds that the petitioner had not proved actual malice. The court found that for communications about public officials or public issues, "[t]he onus of proving actual malice then lies on plaintiff." (citations omitted). In order for a plaintiff to demonstrate actual malice, "the libelous statements must be shown to have been written or published with the knowledge that they are false or in reckless disregard of whether they are false or not, . . . the defendant entertains serious doubt as to the truth of the publication, or that he possesses a high degree of awareness of their probable falsity." (citations

omitted). The court set a high bar for finding defamation of public officials because of the vital need for public debate.

> Even assuming that the contents of the articles are false, mere error, inaccuracy or even falsity alone does not prove actual malice. Errors or misstatements are inevitable in any scheme of truly free expression and debate. Consistent with good faith and reasonable care, the press should not be held to account, to a point of suppression, for honest mistakes or imperfections in the choice of language. There must be some room for misstatement of facts as well as for misjudgment. Only by giving them much leeway and tolerance can they courageously and effectively function as critical agencies in our democracy.

(citation omitted). Applying these principals to the facts in *Borjal*, the court held that the statements in question were not defamatory because they were made about matters of public interest and based on "reasonable grounds formed after the columnist conducted several personal interviews and after considering the varied documentary evidence provided to him by his sources."

* * *

In sum, many leading jurisdictions around the world have applied an "actual malice" or similar standard to protect speech about public officials or matters of legitimate public interest. These jurisdictions include countries with differing legal traditions, political systems and levels of democratic consolidation. What unites these judgments, however, is what Justice Brennan of the US Supreme Court, writing for the majority in *Sullivan*, defined as a "profound … commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times*, 376 U.S. at 270.

The comparative case law described in this brief indicates that these jurisdictions may have made somewhat varying choices with respect to what they consider to be the precise standards of liability, defense, or burden of proof that should apply in this area of law. They all

share, however, a basic recognition that regimes of strict liability for defamatory statements, be it criminal or civil, are inconsistent with respect for freedom of expression. The Justice Initiative believes that, especially with respect to criminal defamation, the minimum standard needed to ensure compliance with international free expression standards would be to require the prosecution to prove that the defendant acted with actual malice, that is, with knowledge of falseness or with reckless disregard for the truth.

Conclusion

For the foregoing reasons, the Justice Initiative respectfully requests that this Court should, *at the very least*, require States to comply with the "actual malice" standard. The emerging trend of jurisprudence strongly supports this conclusion. The Justice Initiative respectfully submits, however, that ideally this Court find that criminal defamation statutes violate Article 13 of the American Convention on Human Rights because they are not necessary in a democratic society to ensure respect for the reputation of others.

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