10-1-1998

Defamation, the Free Press, and Latin America: A Roadmap for the Inter-American Court of Human Rights and Emerging Democracies

Edward J. Pauw

Ari Chaim Shapiro

COMMENT

DEFAMATION, THE FREE PRESS, AND LATIN AMERICA: A ROADMAP FOR THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND EMERGING DEMOCRACIES

I. INTRODUCTION

In many emerging democracies, journalists have quickly become aware that the democratic system in which they live forbids them from publishing articles that criticize governments.[1]

1. *See generally* INTER-AMERICAN PRESS ASSOCIATION, 1997 ANNUAL REPORT (1997) [hereinafter IAPA REPORT]. Panama, a member of the Organization of American States (OAS) subscribing to the American Convention, expelled Gustavo Gorriti, a journalist from Peru, in 1997 for criticizing the Panamanian government in a written newspaper article. *Panama Expels Peruvian Journalist Who Criticized Government*, DEUTSCHE PRESSE-AGENTUR, Sept. 9, 1997 (LEXIS, Nsamer Library, Curnws File); Gustavo Gorriti, *Tough Journalism*, N.Y. TIMES, Aug. 27, 1997, at op-ed page. Refusing to leave the country, Gorriti moved into the newspaper's office building which brought about a much maligned forcible expulsion from the country. *Id.* Ostensibly, Gorriti was expelled because he was holding a job that could be held by a Panamanian citizen. *Panama Expels Peruvian Journalist Who Criticized Government*, DEUTSCHE PRESSE-AGENTUR, Sept. 9, 1997 (LEXIS, Nsamer Library, Curnws File). Gorriti believes, however, that he was expelled because of his in-depth coverage of the collapse of Bank Banaico. Gustavo Gorriti, *Tough Journalism*, N.Y. TIMES, Aug. 27, 1997, at op-ed page. Important positions at the bank were held by several high ranking government officials; thus, the attack on the bank was perceived by these officials as an attack on the government. *Id.* This seems to be a blatant disregard for the American Convention and underscores the

In 1997 the editor-in-chief and two reporters of the Costa Rican newspaper *La Nación* had reported that the government was paying for a car, chauffeur, and police protection for the former minister of public safety and justice, Juan Diego Castro, although ostensibly no threats had been made against Castro.[2] *La Nación* also published an editorial condemning the apparent misuse of public funds.[3] Criminal and civil charges were brought against the newspaper.[4] Although absolved of criminal charges, *La Nación* was found guilty of libel and ordered to pay $40,000 for "moral damages."[5]

At the crux of this criminal and civil litigation is the nature of the press' right to publish information. Numerous countries adhere to the notion that the press should have the right to publish information, but that the right exists in concert with correlative duties.[6] The media has the generally recognized right to publish truthful information. In addition, it has the generally recognized complementary duties to report accurately and refrain from defamation.[7] Many Latin American countries, as signatories to the American Convention on Human Rights, subscribe to this view.[8]

As of this writing, the Inter-American Court of Human Rights (Inter-American Court) has yet to review a defamation case. When the Inter-American Court does face such a case, it will not have to interpret Inter-American defamation law in a

---

pervasive problem in several Latin American countries, specifically, Panama, Venezuela, Columbia, Peru, and Argentina where the balance of power between the judiciary and government is blurred. IAPA REPORT, *supra*.

2. *Absuelven y Condenan al Periodico La Nación*, LA NACIÓN DIGITAL, Mar. 3, 1998 (visited Mar. 31, 1998) <http://www.nacion.co.cr>. Costa Rica is a member of the OAS. Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3, 96; *see also* INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 7 (1995) [hereinafter INTER-AMERICAN COURT ANNUAL REPORT].

3. *Absuelven y Condenan al Periodico La Nación*, *supra* note 2.

4. *Id.*

5. *Id.*

6. *See* discussion *infra* Part IV.

7. *See* discussion *infra* Part IV.

8. For the full text of the Convention's position on freedom of the press, see text accompanying note 9, *infra*. American Convention on Human Rights, July 18, 1978, art. 13, sec. 1, 1144 U.N.T.S. 123 [hereinafter American Convention]. The American Convention brought into being the Inter-American Court of Human Rights, which has jurisdiction to adjudicate disputes in which a member State has allegedly violated the Convention. *Id.* It also gives advisory opinions on the interpretation of the Convention and whether a domestic State law complies with the Convention. *Id.*; *see also* INTER-AMERICAN COURT ANNUAL REPORT, *supra* note 2, at 7-10.

vacuum. The European Court of Human Rights, the United States Supreme Court, and international treaties offer substantial guidelines that the Inter-American Court might adopt and adapt to the particular needs of Latin America with its several nascent democracies.

This Comment delineates and analyzes a four-step approach to defamation cases before the Inter-American Court. First, the Inter-American Court must, of course, determine whether the domestic law in question comports facially with Article 13 of the American Convention on Human Rights (American Convention). Article 13 governs defamation, freedom of expression and the press. It states: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, or in writing, in print, in the form of art, or through any other medium of one's choice."[9] The American Convention and domestic law share common elements, such as defining defamation in terms of "public figures." Second, the Inter-American Court must weigh whether domestic judicial interpretation or its own judicial determination should construct the defamation doctrine applicable to the case before it. Third, the Inter-American Court must apply this doctrine to determine who qualifies as a "public figure" according to the defamation clause of the Human Rights Convention. Finally, the Inter-American Court must make the factual determination of whether the printed material was, indeed, defamatory.

Given the existing needs of Latin America, this Comment suggests that the Inter-American Court adopt a four-step approach to analyze defamation cases. This approach recognizes the competence of Latin American countries to draft reasonable defamation standards appropriate for their nascent democracies; thus, it is characterized by deference to member nations, allowing members to craft a doctrine suitable to their needs in all but the most egregious cases. In addition, this approach permits the press to print substantiated information about public figures but prohibits the printing of information known to be false or printing as truth mere opinion deceptively commingled with facts.

---

9. American Convention, *supra* note 8, art. 13, 1144 U.N.T.S. 123. For a more detailed discussion of Article 13 in an international context, see discussion *infra* Part IV.

Part II of this Comment examines the European Court of Human Right's approach to defamation as it might be applied to the Inter-American situation. Part III analyzes U.S. case law as it pertains to defamation of public figures by way of a first amendment approach. Part IV considers international treaties and their collective insight into freedom of expression. Working from these analyses, Part V addresses the Inter-American Court's probable course of action in dealing with defamation of public figures. Part VI suggests a four-step approach that the Inter-American Court should adopt when faced with a defamation case. Finally, Part VII discusses how the four-step approach that this paper advocates would operate in light of the provisions of the Seventh Ibero-American Summit in 1997.

II. EUROPEAN COURT OF HUMAN RIGHTS

A. The European Court's Analysis of Cases

The European Court[10] has influenced the Inter-American human rights system in a number of ways. For example, the Inter-American Court considered European Court case law when developing Article 13 of the American Convention.[11] Both the Inter-American Court and the Inter-American Commission on Human Rights have used European Court analysis in their opinions also.[12] This past experience suggests that European analysis could make a considerable contribution to the Inter-American Court's development of defamation doctrine.

The European Court's review of several significant cases has raised issues that the Inter-American Court will undoubtedly face. Most importantly, the European Court has had to determine the degree to which it will defer to State legislatures and courts and what standard it should set in deciding whether domestic law comports with the European Convention on Human Rights (European Convention). The European Court has

10. *See* discussion *infra* Part IV, providing a useful context within which to consider the position of the European Court.

11. Advisory Opinion OC-5/85, Inter-Am. Ct. H.R., para. 43-50 (ser. A) No.5 (1986) [hereinafter Advisory Opinion].

12. Inter-American Court of Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1994*, O.A.S. Doc. OEA/Ser.L/V/ii.88 Doc. 9 rev. Feb. 17, 1995 (1995) at 204-5 [hereinafter *Inter-American Commission Annual Report*].

distinguished between what it considers fact and what it considers mere opinion. The European Court has also allowed the context behind putative defamation to play a significant role in determining whether defamation had occurred.

Article 10 of the European Convention governs defamation law analysis in the European Court.[13] It states:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[14]

When the European Court analyzes an Article 10 case, it follows a rigid process.[15] The European Court's analysis begins with four critical questions: (1) Has the State interfered with the applicant's rights? (2) Was the interference "prescribed by law?" (3) Does the limitation imposed conform with a purpose in Article 10? (4) Is the limitation "necessary" in a democratic society?[16]

---

13. MARK W. JANIS & RICHARD S. KAY, EUROPEAN HUMAN RIGHTS LAW 258-65 (1991).

14. COUNCIL OF EUROPE PRESS, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 18-19 (1994).

15. LOUKIS G. LOUCAIDES, ESSAYS ON THE DEVELOPING LAW OF HUMAN RIGHTS 183-95 (1995).

16. *Id.* *See also* JANIS & KAY, *supra* note 13, at 233-300; HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 110-36 (1996). *See generally* FRANCIS G. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 222-36 (1986). The four-step approach proposed by this Comment, while similar to the European Court's analysis, is more deferential to member States.

Then, the European Court proceeds to analyze the cases step by step.[17] First, because Article 10(1) states that a person has a right to exercise the rights enumerated in Article 10 without governmental interference, the European Court begins its analysis by looking for governmental interference.[18] If it does not find interference, it dismisses the case.[19]

Assuming the European Court finds interference, it proceeds to the second element,[20] which concerns whether the State interference is "prescribed by law."[21] The European Court interprets this to mean that the law must be "sufficiently precise" and "adequately accessible;"[22] that is, the person[23] must know what law(s) apply in the given circumstance, and the law(s) must be precise enough to allow that person to discern the appropriate behavior in the circumstances.[24] The European Court states that subsequent national court decisions explaining the law are sufficient to create the requisite precision to satisfy this part of Article 10.[25] Usually, the Court notes the fact that a law prohibiting defamation of government officials exists and proceeds to the next level of analysis.[26]

---

17. *See* LOUCAIDES, *supra* note 15, at 183-95. *See also* discussion *infra* Part III.

18. LOUCAIDES, *supra* note 15, at 183-95.

19. *See* Goodwin v. United Kingdom, 22 Eur. Ct. H.R. (ser. A) 123 (1996); Vereniging Weekblad Bluf! v. The Netherlands, 20 Eur. Ct. H.R. (ser. A) 189 (1995); Prager and Oberschlick v. Austria, 21 Eur. Ct. H.R. (ser. A) 1 (1995); Castell v. Spain, 14 Eur. Ct. H.R. (ser. A) 445 (1992); Oberschlick v. Austria, 19 Eur. Ct. H.R.(ser. A) 389 (1991); The Sunday Times v. United Kingdom (No. 2), 14 Eur. Ct. H.R. (ser. A) 229 (1991); The Observer and the Guardian v. United Kingdom, 14 Eur. Ct. H.R. (ser. A) 153 (1991); Barfod v. Denmark, 13 Eur. Ct. H.R. (ser. A) 493 (1989); Lingens v. Austria, 8 Eur. Ct. H.R. (ser. A) 407 (1986).

20. The approach proposed by this Comment does not contain this requirement. This Comment emphasizes the nature of the law rather than the way the member State crafted the law and publicizes its existence. *See* discussion *infra* Part VI.

21. *See* JANIS & KAY, *supra* note 13, at 297-300.

22. LOUCAIDES, *supra* note 15, at 186-87.

23. *See* HUMAN RIGHTS: A EUROPEAN PERSPECTIVE 203 (Liz Heffernan with James Kingston eds.) (1994).

24. *Id.*

25. *Id.*

26. *See* Prager and Oberschlick v. Austria, 21 Eur. Ct. H.R. (ser. A) 1 (1995); Castell v. Spain, 14 Eur. Ct. H.R. (ser. A) 445 (1992); Oberschlick v. Austria, 19 Eur. Ct. H.R. (ser. A) 389 (1991); Barfod v. Denmark, 13 Eur. Ct. H.R. (ser. A) 493 (1989); Lingens v. Austria, 8 Eur. Ct. H.R. (ser. A) 407 (1986).

The third element[27] of Article 10 requires the law, which allegedly circumscribed the expression, to conform with one of the purposes of Article 10.[28] The European Court states emphatically that it does not tolerate laws that purport to conform to one of the purposes in Article 10 but actually undermine the freedoms guaranteed by the Article.[29] In the defamation cases, the European Court does not sustain an appeal on a law's failure to conform with one of the principles outlined in the Article.[30]

1. Permissible Restrictions on Expression

Typically in defamation cases, the European Court has conducted a perfunctory analysis of the first three elements.[31] The fourth element is the crux of Article 10 analysis in defamation cases.[32] The fourth element of Article 10 provides that a country can limit the freedoms listed in Article 10 if the laws limiting the freedoms are "necessary in a democratic society."[33] What the European Court has tried to do is balance a country's desire to accomplish legitimate objectives (for example, protecting national security or upholding public mores) and a citizen's right to freedom of expression.[34]

---

27. The approach proposed by this Comment departs from the European Court's analysis here. While the European Court heavily emphasizes its responsibility to assure compliance to the European Convention of Human Rights, this Comment gives member States latitude in interpreting the American Convention. This Comment recommends that the Inter-American Court restrain member states only in egregious cases. *See* discussion *infra* Part VI.

28. HUMAN RIGHTS: A EUROPEAN PERSPECTIVE, *supra* note 23, at 203. Article 10 lists the following purposes as legitimate: protecting and maintaining the reputation of others; the authority and impartiality of the judiciary; public order; morals; national security; territorial integrity; public safety; public health; and confidential information. LOUCAIDES, *supra* note 15, at 189 and COUNCIL OF EUROPE PRESS, *supra* note 14, at 19.

29. LOUCAIDES, *supra* note 15, at 189.

30. *See Prager and Oberschlick*, 21 Eur. Ct. H.R. 1; *Castell*, 14 Eur. Ct. H.R. 153; *Oberschlick*, 19 Eur. Ct. H.R. 389; *Barfod*, 13 Eur. Ct. H.R. 493; *Lingens*, 8 Eur. Ct. H.R. 407.

31. *See Prager and Oberschlick*, 21 Eur. Ct. H.R. 1; *Castell*, 14 Eur. Ct. H.R. 153; *Oberschlick*, 19 Eur. Ct. H.R. 389; *Barfod*, 13 Eur. Ct. H.R.; *Lingens*, 8 Eur. Ct. H.R. 407; *see also* JACOBS & WHITE, *supra* note 16, 222-36.

32. *See Prager and Oberschlick*, 21 Eur. Ct. H.R. 1; *Castell*, 14 Eur. Ct. H.R. 153; *Oberschlick*, 19 Eur. Ct. H.R. 389; *Barfod*, 13 Eur. Ct. H.R.; *Lingens*, 8 Eur. Ct. H.R. 407; *see also* JACOBS & WHITE, *supra* note 16, at 226-27.

33. *See* COUNCIL OF EUROPE PRESS, *supra* note 14, at 19.

34. *See Prager and Oberschlick*, 21 Eur. Ct. H.R 1.; *Castell*, 14 Eur. Ct. H.R. 445; *Oberschlick*, 19 Eur. Ct. H.R. 389; *Barfod*, 13 Eur. Ct. H.R. 493; *Lingens*, 8 Eur. Ct. H.R.

Prior to 1979, the balance tilted in favor of the State. During this period, the European Court adhered to the margin of appreciation doctrine. The essence of the margin of appreciation doctrine is that a degree of deference should be granted in permitting individual national courts to balance a citizen's right to freedom of expression and a country's desire to accomplish legitimate objectives.[35] Thus, the European Court had held countries to a standard of reasonableness and good faith in making and executing laws.[36] In 1979, however, *Sunday Times v. U.K.*, marked an important turning point in which the European Court discarded the margin of appreciation doctrine.[37] In *Sunday Times*, the European Court adopted a standard higher than good faith, saying that it would sustain a country's law only if the law satisfies a "pressing social need."[38] The Court has used this method of analysis to create freedom of expression doctrine preferential to the individual in defamation law.

2. The European Court Defines "Defamation"

On the narrower issue of defamation, the European Court classifies an alleged defamatory comment as either an opinion based on objective information or a value judgment.[39] Under the first classification, when opinion harms the reputation of a government official, its printing constitutes defamation.[40] The second classification is not considered defamation.[41] The European Court's analysis begins with this distinction, and the European Court takes the position that national laws curtailing statements of this former type are permissible, while laws

---

407.

35. YOUROW, *supra* note 16, at 110-36.

36. *Id.*, at 113. *See also* Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. (ser. A) 245 (1979).

37. YOUROW, *supra* note 16, at 110-20. *See also Sunday Times*, 2 Eur. Ct. H.R. 245; *see generally* MIREILLE DELMAS-MARTY, THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS, PART II 64-66 (1992) (containing useful background information on the *Sunday Times* case and its place in case law).

38. YOUROW, *supra* note 16, at 113; *see also Sunday Times*, 2 Eur. Ct. H.R. at para. 59.

39. *See Prager and Oberschlick*, 21 Eur. Ct. H.R. 389; *Castell*, 14 Eur. Ct. H.R. 229; *Oberschlick*, 19 Eur. Ct. H.R. 389; *Barfod*, 13 Eur. Ct. H.R. 493; *Lingens*, 8 Eur. Ct. H.R. 407.

40. *See Prager and Oberschlick*, 21 Eur. Ct. H.R. 389; *Barfod*, 13 Eur. Ct. H.R. 493

41. *Lingens*, 8 Eur. Ct. H.R. at para. 45-6; *Oberschlick*, 19 Eur. Ct. H.R. para. 63-4.

curtailing the latter are impermissible.[42]

The European Court addressed the first type of statement (comments classified as an opinion based on objective information) in two cases: *Barfod* and *Prager and Oberschlick*.[43]

In *Barford*, the Court distinguished between, on the one hand, informing the public of verifiable facts and, on the other hand, expressing opinions, not based on any verifiable facts, which damage the reputation of the government official.[44] *Barfod*, involved a magazine article in which a Danish citizen accused two judges of bias stemming from a likely conflict of interest.[45] Two of the three judges on the panel of a case worked for the Greenland Local Government, a party to the case.[46] The panel unanimously upheld a decision by the local government to tax Danish nationals working on American bases in Greenland.[47] The European Court noted that the Danish author of the article could have simply stated the facts surrounding the case and questioned whether the composition of the court was proper without attacking the integrity of the court and the reputations of the judges.[48] Thus, *Barfod* indicated the type of statement that the European Court considered defamatory, apparently a statement which was not based on any verifiable fact and was unnecessary to give a complete accounting of an event.

Second, the European Court considers as relevant the behavior of the State.[49] In *Prager and Oberschlick*, the European Court points out that the national courts in Austria did not curtail the journalists' right to disseminate information and concludes that the State acted properly to prevent defamation.[50] This outcome suggests that the conduct of the State could be a factor in the European Court's determining whether a statement is defamatory. This outcome also suggests that, if the State is

42. *See Prager and Oberschlick*, 21 Eur. Ct. H.R. 1; *Castell*, 14 Eur. Ct. H.R. 445; *Oberschlick*, 19 Eur. Ct. H.R. 389; *Barfod*, 13 Eur. Ct. H.R. 493; *Lingens*, 8 Eur. Ct. H.R. 407.

43. *Barfod*, 13 Eur. Ct. H.R. at para. 33 & 35; *Prager and Oberschlick*, 21 Eur. Ct. H.R. at para. 35-7.

44. *Barfod*, 13 Eur. Ct. H.R. at para. 33; *Prager and Oberschlick*, 21 Eur. Ct. H.R. at para. 35-7.

45. *Barfod*, 13 Eur. Ct. H.R. at para. 9. *See also* YOUROW, *supra* note 16, at 129.

46. *Barfod*, 13 Eur. Ct. H.R. at para. 8.

47. *Barfod*, 13 Eur. Ct. H.R. at para. 8; *see generally* YOUROW, *supra* note 16, at 129.

48. *Barfod*, 13 Eur. Ct. H.R. at para. 33.

49. *Prager and Oberschlick*, 21 Eur. Ct. H.R. at para. 34.

50. *Id.*

not legitimately trying to curtail a journalist's right to disseminate information, the European Court may find that the statements were not defamatory. Thus, it seems that the European Court gives States little ability to protect the reputation of government officials and assigns itself the responsibility to determine what is defamation and when a public official's reputation has been harmed.

The second classification made by the European Court concerns value judgments. The European Court believes value judgments cannot be defamatory.[51] The seminal case is *Lingens*, in which a journalist published several articles about the Austrian chancellor, Bruno Kreisky.[52] Prior to the articles' publications, Chancellor Kreisky had accused Holocaust survivor Simon Wiesenthal of using "Mafia methods" in his denunciation of Freidrich Peter, an Austrian politician.[53] Responding to this accusation, a newspaper editor characterized the chancellor as "immoral" and "undignified" and succumbing to the "basest opportunism."[54]

The European Court found the newspaper editor's comments to be value judgments and held that they were not defamatory. The European Court distinguished between value judgments and facts, which are subject to proof.[55] The European Court further stated that in the political arena wider deference must be given to the media as they play an essential role in maintaining a democracy by allowing an open debate of issues.[56] Although the statements in *Lingens* and the statements made in *Barfod* and *Prager and Oberschlick*[57] appeared to be defamatory, the distinction between the statements made in these cases was small. The European Court apparently decided to allow defamatory comments in the political sphere, while giving countries a limited ability to sanction defamatory comments made about government officials, though it was unclear where

51. Lingens v. Austria, 8 Eur. Ct. H.R. (ser. A) at para. 45-6 (1986).

52. *Id.* at para. 10-17.

53. *Id.* at para. 9-17.

54. *Id.* at para. 18. *See generally* YOUROW, *supra* note 16, at 124-25.

55. *Lingens*, 8 Eur. Ct. H.R. at para. 45-46.

56. *Lingens*, 8 Eur. Ct. H.R. at para. 41-42. *See also* YOUROW, *supra* note 16, at 124-25.

57. *See* Barfod v. Denmark, 13 Eur. Ct. H.R. (ser. A) para. 9 (1989) where the applicant accused the judges of bias; *see also* Prager and Oberschlick v. Austria, 21 Eur. Ct. H.R (ser. A) para. 32 (1995) where the journalists accused one judge of bias and the other judge of improper behavior.

the line of distinction resided.

The final aspect of defamation law under the European Court concerns how broadly the law is applied.[58] In American jurisprudence, this is known as the "Public Figure" standard.[59] First, the European Court more readily permits defamation of politicians.[60] Its explanation for having a lower standard for politicians and political officials in government is to encourage an open discussion of political issues.[61] In addition, the European Court believes the lower standard for public figures is necessary because the press' monitoring of politicians fosters an open and democratic society.[62] While the European Court has indicated that this standard is applicable only to politicians,[63] it has not addressed the issue of whether anyone operating in public view (e.g. a president of a charitable organization, a football coach, or a police official) is subject to the same standard. It has suggested, however, that private individuals are subject to greater protection from defamation.[64]

Second, it appears that the European Court has divided defamation into two areas: public and private. Government officials have some protection from defamation though they must be willing to accept criticism, even harsh criticism, while private individuals are afforded more protection from defamation.

B. Conclusion to Part II

The European Court's analysis of defamation law is useful in considering the direction that the Inter-American Court may take regarding defamation. Its analysis provides a well-developed framework that balances the legitimate desire of the press to inform the public with necessary limits on that freedom.[65] Further, the European Court's doctrine outlines several relevant issues regarding defamation. First, what is a

58. This part of the European Court's analysis is similar to the third step proposed by this Comment.

59. *See* discussion *infra* Part III.

60. *Lingens*, 8 Eur. Ct. H.R. at para. 41-42.

61. *Id.*

62. *Id.*

63. Oberschlick v. Austria, 19 Eur. Ct. H.R. (ser. A) at para. 58-59 (1991).

64. *Lingens*, 8 Eur. Ct. H.R. para. 42.

65. This position is similar to the position taken by several of the international treaties discussed *infra* Part IV.

public figure?[66] Second, is the statement a value judgment, a statement based on verifiable facts, or a statement not based on verifiable facts which damages the reputation of the government official?[67] Finally, to what degree should a regional court defer to the national courts in crafting a doctrine suitable to their needs?[68] For example, the Inter-American Court could adopt the margin of appreciation, or it could adopt the European Court's current, stricter, standard. The European Court in *Sunday Times* decided that it was best equipped to decide how to interpret Article 10;[69] in so doing, it discarded the reasonableness and good faith standard which gave deference to national courts to decide the meaning and scope of Article 10.[70] This decision is important because it significantly affects the way in which defamation doctrine is crafted. The Inter-American Court must decide whether it believes it is better equipped than Latin American judiciaries to shape this doctrine for member nations or whether it should step back from crafting stringent rules and allow a common Inter-American doctrine to percolate up from the member nations.

III. THE UNITED STATES' APPROACH

Defamation law in the United States offers the Inter-American Court both legal arguments and policy approaches. The U.S. Supreme Court has adopted and defined an actual malice standard. Another rule that the Inter-American court might find helpful is the U.S. Supreme Court's definition of "public figure." Moreover, the U.S. Supreme Court offers substantial precedent that may assist the Inter-American Court in avoiding decisions that would chill robust political debate, essential to any democracy, but perhaps especially important to democracies in their infancies.

---

66. *See* discussion *supra* Part II.A.2 and accompanying footnotes analyzing the public figure standard in the European Court.

67. *See* Prager and Oberschlick v. Austria, 21 Eur. Ct. H.R. (ser. A) 1 (1995); Castell v. Spain, 14 Eur. Ct. H.R. (ser. A) 445 (1992); Oberschlick v. Austria, 19 Eur. Ct. H.R. (ser. A) 389 (1991); Barfod v. Denmark, 13 Eur. Ct. H.R. (ser. A) 493 (1989); Lingens v. Austria, 8 Eur. Ct. H.R. (ser. A) 407 (1986).

68. YOUROW, *supra* note 16, at 113. *See also* Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. (ser. A) 245 (1979); *see generally* DELMAS-MARTY, *supra* note 37, at 64-66.

69. *Sunday Times*, 2 Eur. Ct. H.R. at para. 59.

70. *Prager and Oberschlick*, 21 Eur. Ct. H.R. 1.

A. Defamation

In *N.Y. Times Co. v. Sullivan,*[71] the Committee to Defend Martin Luther King and The Struggle for Freedom in the South placed an advertisement in the *New York Times* communicating information, expressing grievances, reciting opinions and seeking financial support on behalf of African-Americans' right to vote movement. The advertisement stated:

> In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.[72]

The advertisement continued:

> Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a felony under which they could imprison him for ten years....[73]

Sullivan, an elected official of the City of Montgomery, sued the New York Times alleging that the advertisement was factually inaccurate and defamatory.[74] Sullivan claimed that while the police were deployed, they did not ring the campus as the advertisement had stipulated, that the protest was not attended by the entire student body, that the hall had never actually been padlocked and that Dr. King had not been arrested seven times.[75] The newspaper publisher and clergymen whose names appeared in the advertisement refused to print a retraction and refused to acknowledge any wrongdoing against

71. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
72. *Id.* at 257.
73. *Id.* at 257-58.
74. *Id.* at 258.
75. *Id.* at 259.

the plaintiffs.[76] The Alabama State Court applied a strict liability malice standard and found in favor of the plaintiffs. The Court construed defendant's failure to issue a retraction as malice.

The *Times* appealed, and the U.S. Supreme Court granted certiorari to address for the first time, the extent to which constitutional protection of freedom of speech and press would place a limit on a state's power to award damages in a defamation suit bought by a public official in his official capacity.[77] The U.S. Supreme Court viewed the Alabama Court's application of a strict liability standard as an abridgment of free speech and press as protected by the first amendment.[78] The Supreme Court asserted that the press, if compelled to guarantee the veracity of its statements with an impending defamation suit for each factually inaccurate line, would in effect have to implement self-censorship for fear of continual litigation.[79] The Supreme Court opined that such a rule would be inconsistent with the first amendment, would discourage robust debate and would infringe upon the people's democratic right to cast criticism.[80] Additionally, the Court worried that putatively true statements which were believed to be true would not be disseminated for fear that, subsequently, they would be found to be false and the newspaper vulnerable to suit.[81]

To avoid such negative impacts, the Supreme Court adopted an actual malice standard that must be met for public officials to recover damages from defamatory falsehoods.[82] To prove liability for defamation, this standard requires a showing of false or reck-

---

76. *Id.* at 261.

77. WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 147 (1976). The U.S. Supreme Court was not presented with a case involving free press, speech or political dissent until 1919. *Id.* By that time, nearly thirteen decades after the country's inception, over two thousand newspapers had been established. JEREMY COHEN, CONGRESS SHALL MAKE NO LAW 3 (1989). When the Supreme Court finally did take a first amendment case, it was in the context of war and had more to do with sedition than freedom of the press. Schenck v. United States, 249 U.S. 47 (1919). *See also*, JEREMY COHEN, OLIVER WENDELL HOLMES, THE FIRST AMENDMENT, AND JUDICIAL DECISION MAKING (1989).

78. *Sullivan*, 376 U.S. at 283.

79. *Id.* at 278.

80. *Id.* at 270.

81. *Id.* at 277.

82. *Id.* at 280.

less disregard for whether or not information is false or a showing of actual knowledge that the information is false.[83]

Based on the Supreme Court's view that the possible harm of presenting factually inaccurate and defamatory information is outweighed by the interest in promoting free press,[84] the *Sullivan* rationale is employed by courts today when dealing with defamation issues.[85] The U.S. Constitution, as interpreted by *Sullivan,* recognizes the need for the press to have the freedom to publish material that may be false.[86]

B. Standard of Verification

While *Sullivan* established a methodology for reviewing defamation cases, it left several unanswered questions. The *Times* advertisement was a clear example of inadvertent error in publication that did not meet the actual malice standard.[87] The Supreme Court never reached the point of defining the reckless disregard for truth espoused by Brennan in *Sullivan* as a requisite showing for defamation. The Supreme Court addressed this issue in *St. Amant v. Thompson*[88] when it adopted a standard of verification. In *St. Amant* petitioner, a candidate for public office made a televised speech.[89] In the course of the speech, petitioner read a series of questions and answers.[90] The answers falsely charged respondent, a public official, with criminal conduct.[91] The Supreme Court ruled that petitioner had failed to verify whether the information that he relayed was true but held

---

83. *Id.*

84. *Id.*

85. *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Andreson v. Liberty Lobby Inc., 477 U.S. 242 (1986); Bose Corp. v. Consumer's Union, 466 U.S. 485 (1984); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Cantrell v. Forest City Pub. Co., 419 U.S. 245 (1974); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Ginzburg v. Goldwater, 396 U.S. 1049 (1970); St. Amant v. Thompson, 390 U.S. 727 (1968); Rosenblatt v. Baer, 383 U.S. 75 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Beauharnais v. Illinois, 343 U.S. 250 (1952); Green v. Alton Telegraph, 438 N.E.2d 203 (1982).

86. *Sullivan*, 376 U.S. at 271.

87. *Id.*

88. St. Amant v. Thompson, 390 U.S. 727 (1968).

89. *Id.* at 728.

90. *Id.*

91. *Id.* at 728-29.

that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication," before liability will be found.[92] The Supreme Court also determined that a story cannot be fabricated, be a product of the reporter's imagination, or be based on an unidentified anonymous telephone call.[93]

C. *"Public Figure" Defined*

Sullivan left another unanswered question–namely who qualifies as a public official subject to the actual malice standard? Over the years, the Supreme Court has provided an expansive category of public figure. For example, in *Rosenblatt v. Baer*,[94] the Supreme Court extended the actual malice standard to cover not only public officials but private citizens also. In *Rosenblatt* Baer, a supervisor of a county recreation area, sued the publisher of *Laconica Evening Citizen* because *Laconica* printed an article that implied that he had mismanaged $31,000.[95] The Supreme Court held that Baer was a public official and that he failed to prove actual malice.[96] Writing on behalf of the Court, Brennan asserted that "we honor the commitment to robust debate on public issues, which is embodied in the first amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern."[97] As press editors are not likely to print that which is not of "general concern," in essence the Supreme Court extended the actual malice standard to cover not only public individuals but private citizens as well.[98] One year later the Supreme Court determined that both a football coach[99] and a riot leader[100] were public figures. These cases established that a public official was not only someone who works for the government or who participates in politics.[101]

---

92. *Id.* at 731.
93. *Id.* at 733.
94. Rosenblatt v. Baer, 383 U.S. 75 (1966).
95. *Id.* at 77-78.
96. *Id.* at 76.
97. *Id.*
98. PETER E. KANE, ERRORS, LIES, AND LIBEL 73 (1992).
99. Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967).
100. Associated Press v. Walker, 379 U.S. 47 (1964).
101. *See* Rosenblatt v. Baer, 383 U.S. 75 (1966); *Butts*, 388 U.S. at 130; *Walker*, 379 U.S. at 47. This view is in contrast to desacato laws, which are primarily aimed at

The Supreme Court clarified the public/private distinction in *Gertz v. Welch* when it held that public figures were those individuals who had thrust themselves to the forefront of particular public controversies with the purpose of influencing resolution of the issues involved. The Court excluded from its definition of "public persons" individuals who had been involuntarily drawn in to controversies.[102]

After establishing the actual malice standard, the Supreme Court directed its attention to one's right to reply to defamatory press.[103] In *Miami Herald v. Tornillo*, the Court held that there is no constitutional right of the defamed party to reply to personal attack.[104] The Supreme Court further stated that any government effort to mandate the right of reply insofar as the print media are concerned would violate the first amendment.[105]

D. Conclusion to Part III

The U.S. Supreme Court's defamation doctrine is comprised of four elements that are useful for the Inter-American Court. First, the press is not held to a standard of knowing that the information it prints is true based on the theory that it would discourage robust debate and people's democratic right to cast criticism. Second, a reporter is prohibited from printing a story that the reporter knows is false. The Court recognizes that

---

government officials. While U.S. defamation law concerns itself with defaming public figures in general, Latin American desacato laws refer to public officials only. However, this does not preclude a focused comparison of the systems because the U.S. definition of public figure, even as later amended, includes public officials.

102. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

103. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

104. *Id.*

105. *Id.* This issue is one of immense importance as it arguably undermines the rationale behind the holding in New York Times v. Sullivan, 376 U.S. 254 (1964). The Supreme Court in *Sullivan* was concerned that there would be no debate should the standard in defamation fall below actual malice. *Sullivan*, 376 U.S. at 270. The Court further felt that public figures inherently had a way of responding because of their public roles. *Id.* It was this ability to respond in an equally public forum to the press' alleged defamatory statements that compelled the Court to create a standard as high as actual malice. *Id.* But that ability to reply has been severely curtailed after *Tornillo*, as there is no constitutional right to reply. *See Tornillo*, 418 U.S. at 241. Today's technologically advanced media is very pervasive. If the media engages in the type of behavior allowed under *Sullivan*, (printing of factually inaccurate statements as long as they are not printed with actual malice or a wanton disregard for proof) a factually inaccurate "story" can be spread across the globe in a number of minutes. Clearly, the rationale behind *Sullivan* has been strained.

information exists in the middle between what is known to be true and that which is known to be false. The press is given the benefit of the doubt in this middle area. Third, a public official is an individual who has thrust himself to the forefront of public debate and thus, must expect criticism. Fourth, there is no constitutional right of reply. The U.S. formulation is one possible blueprint that the Inter-American Court should note as it considers the implication of defamation doctrine in Latin America.

IV. INTERNATIONAL TREATIES

In addition to the viewpoints of the European and U.S. Courts, the Inter-American Court may consider several international treaties as it develops its own approach to defamation law. These treaties provide insight into defamation law because they reflect international norms existing among nations. Presumably, a norm that is found in many treaties has more customary authority than one acknowledged in fewer treaties and other instruments.[106] The greater the number of treaties espousing the same norm, the greater the likelihood the Inter-American Court will adhere to this norm, particularly if numerous Latin American countries are signatories to the documents.[107] For this reason, it is useful to analyze several international documents to determine the precise nature of the international norm surrounding defamation law[108] so that one can speculate as to the degree to which the Inter-American Court may be influenced by international custom.

A. The International Instruments

Besides the American Convention, there are four major international instruments that address freedom of expression.[109] They are the African Convention,[110] the European Convention,[111]

106. Amit Mukherjee, *International Protection of Journalists: Problem, Practice, and Prospects*, 11 ARIZ. J. INT'L. & COMP. L.J. 339, 355 (1994).

107. Advisory Opinion, *supra* note 11, at para. 51.

108. The discussion of press freedom and the extent to which the press should not be sanctioned for defamation is often couched in terms of "freedom of expression."

109. Mukherjee, *supra* note 106, at 355.

110. African [Banjul] Charter on Human and People's Rights, June 27, 1981, OAU Doc. CAB/LEB/67/3 rev. 5 [hereinafter African Charter].

111. COUNCIL OF EUROPE PRESS, *supra* note 14.

the International Covenant on Civil and Political Rights,[112] and the Universal Declaration of Human Rights.[113] These documents create three categories of rights:

> 1. Rights which cannot be limited under any circumstances, for example freedom from slavery and torture;
>
> 2. Rights in which restrictions are permissible only during a state of emergency, for example, the right to be free from submission to forced labor;
>
> 3. *Rights in which restrictions are permissible even when there is not a state of emergency, for example freedom of expression.*[114]

This third category suggests that the international norm concerning freedom of expression includes the right of a society to limit expression under certain circumstances. Deciphering the scope of the limitation requires further analysis.

Taken together these instruments contain three criteria for a permissible restriction on expression: legality, legitimacy, and democratic necessity.[115] Legality is satisfied if there is a law in the country permitting the restriction.[116] Legitimacy is satisfied as long as the law meets one of the objectives enumerated in the governing treaty.[117] The third permissible restriction, democratic necessity, is included only in the European Convention, thus it is not discussed here.[118]

Some documents have unique features. For example, the European Convention contains additional justifications for

---

112. International Covenant on Civil and Political Rights, Dec. 16, 1966, No. 2200A [hereinafter International Covenant].

113. Universal Declaration of Human Rights, Dec. 10, 1948, No. 217 A (III) [hereinafter Universal Declaration].

114. Mukherjee, *supra* note 106, at 357-58.

115. *Id.*

116. *Id.*

117. *Id.* There are four objectives common in these documents: respect for the rights or the reputations of others; national security; public order or safety; and the protection of public health or morals. African Charter, *supra* note 110, art. 29; International Covenant, *supra* note 112, art. 19; Universal Declaration, *supra* note 113, art. 29; COUNCIL OF EUROPE PRESS, *supra* note 14, at 19.

118. Mukherjee, *supra* note 106, at 359.

limiting expression discussed in Part II.[119] Further, the Universal Declaration, while containing a general limitation of rights at the end of the document, does not contain any explicit limitation on freedom of expression.[120] Broad similarities can be drawn, however. Generally, limits on expression espoused in these international treaties indicate that the drafters wanted to balance three considerations: a desire for unlimited freedom of expression; a society's legitimate desire to curtail expression that harms other people and society generally; and governmental abuse.

B. Interpretations by Institutions and Governments

In light of this desire for balance, it is useful to consider how international institutions and governments have interpreted treaties that address freedom of expression. The U.N. Commission on Human Rights (Commission) takes the position that expression is "essential" to ensure participation in self-governance and realization of all the rights contained in international human rights instruments.[121] In addition, the Commission believes that the scope of the protection of expression in the International Covenant on Civil and Political Rights (ICCPR) is comprehensive and should be limited only as necessary "for the respect of the rights and reputations of others, or for the protection of national security or public order. . .or of public health or morals...."[122] The Commission points out that restrictions on expression, particularly public order, are vague.[123] It also believes that there is a risk that governments will misinterpret the scope of this limitation to unjustifiably curtail freedom of expression, thereby undermining the Covenant and the right.[124] Under the Commission's view, freedom of expression

119. COUNCIL OF EUROPE PRESS, *supra* note 14, at 19.

120. *See generally* Universal Declaration, *supra* note 113.

121. UNITED NATIONS, HIGH COMMISSIONER FOR HUMAN RIGHTS, COMMISSION ON HUMAN RIGHTS, RIGHT TO FREEDOM OF OPINION AND EXPRESSION (1996) [hereinafter RIGHT TO FREEDOM OF EXPRESSION].

122. *Id.*

123. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT; REPORT OF THE SPECIAL RAPPORTEUR, MR. ABID HUSSAIN, PURSUANT TO COMMISSION ON HUMAN RIGHTS, Res. 1996/53, U.N. DOC. E/CN.4/1997/31 [hereinafter U.N. IMPRISONMENT REPORT].

124. *Id.* at Intro.

should be restricted by a State only if it is necessary, which essentially means that restrictions should be narrowly construed.[125] The Commission goes even further, saying that "[a]s a general rule, States should not invoke any custom, tradition or religious considerations to avoid meeting their obligations with respect to the safeguarding of the right to freedom of expression."[126] In short, the Commission's interpretation of the ICCPR and, undoubtedly, other documents with similar language concerning expression favors individual expression.

The signatories of these treaties conduct their own interpretations as well. Some of these countries stress the importance of curtailing freedom of expression to maintain democratic stability.[127] For example, in the Seventh Ibero-American Summit[128] in November 1997, Latin American countries stated that journalists should avoid disseminating untruthful information as it tends to destabilize their nascent democracies.[129] In addition, fourteen Latin American countries have desacato laws to prevent journalists from destabilizing their governments.[130] Argentina and Colombia also attempt to rein in journalists' abusing their right to freedom of expression.[131] These two countries try to control the dissemination of misinformation in the media by actively enforcing laws that prohibit defamation of government officials.[132] Their interpretations provide another option for the Inter-American Court.

C. Conclusion to Part IV

The foregoing international treaties provide a framework for the Inter-American Court as it develops its own approach to

---

125. *Id.* at 2.

126. *Id.*

127. *See generally* Declaracion de Margarita, VII Cumbre, Nov. 8, 1997, *available at* <http:www.cumbreiberoamericana.com/> (visited Feb. 4, 1999).

128. *See* discussion *infra* Part VII.

129. Declaracion de Margarita, *supra* note 127, at ch. 6.

130. Desacato laws are a class of legislation that criminalize expression which offends, insults, or threatens a public official in their official capacity. *Inter-American Commission Annual Report*, *supra* note 12, at 201. The fourteen countries that have desacato laws are Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Paraguay, Peru, Uruguay, and Venezuela. *Id.*

131. *See generally* Declaracion de Margarita, *supra* note 127.

132. *See* IAPA REPORT, *supra* note 1, at 5, 23.

defamation. There are two principal positions within this framework. First is a belief in a virtually unfettered right to express oneself publicly.[133] The desire to protect free expression from almost all restrictions is the touchstone of this position.[134] The U.S. Supreme Court and the Commission exemplify the extreme end of this view. A second position, at the other end of the spectrum, is that expression should be carefully circumscribed to conform to the needs and mores of society.[135] Latin American countries that have desacato laws exemplify this view. Between these two extremes lies a carefully crafted model that attempts to curtail egregious behavior. This model, which reflects most of the international treaties, is exemplified by the European Court.[136] The European model, by attempting to avoid egregious abuses of governmental control and abuses of freedom of expression, could be one that the Inter-American Court chooses to adopt because limited expression is a well-established international norm embodied in the American Convention.

V. THE INTER-AMERICAN COURT'S PROBABLE COURSE OF ACTION

Given the contributions made by foreign courts and institutions, the Inter-American Court is likely to craft a defamation doctrine protective of the press' right to disseminate information, a right protected by Article 13.[137] In using a doctrine similar to the one developed by the European Court, the Inter-American Court will likely find desacato laws to be in violation of Article 13 and will narrowly construe defamation laws as they pertain to political and government officials.

---

133. This assertion is based on an analysis of the U.S. Supreme Court's treatment of defamation and the U.N.'s position as expressed by the U.N. Commission on Human Rights. *See* discussion *supra* Part III. *See also* RIGHT TO FREEDOM OF EXPRESSION, *supra* note 121.

134. RIGHT TO FREEDOM OF EXPRESSION, *supra* note 121.

135. This conclusion is based on an analysis of the African Charter, the European Convention, and the study conducted by the U.N. Commission on Human Rights. *See* African Charter, *supra* note 110; COUNCIL OF EUROPE PRESS, *supra* note 14; U.N. IMPRISONMENT REPORT, *supra* note 123. These documents indicate that numerous countries believe that citizens do not have an unfettered right to free expression and that the right to free expression ceases when harm to society occurs.

136. This statement is a conclusion based on an analysis of Parts II-IV of this Comment.

137. For the full text of Article 13, see *supra* text accompanying note 9.

There are a number of reasons why the Inter-American Court is likely to choose this deferential approach. First, this approach is consistent with that of other prominent courts and institutions. The Inter-American Court has acknowledged that this consistency is relevant in considering how to analyze freedom of expression.[138] Second, according to the Inter-American Court, the American Convention is slightly more protective of expression than most of the international instruments discussed in Part IV.[139] Third, the Inter-American Commission has already followed the European Court's analysis regarding desacato laws.[140] Last, the Inter-American Court's analysis in a 1985 advisory opinion relating to expression is similar to the European Court's analysis.[141]

In its 1985 advisory opinion, the Inter-American Court emphasized that the country imposing limitations on expression must show that the restriction imposed is proportionate to the country's objective.[142] The Inter-American Court has gone so far as to say that it is not sufficient for a government to cite one of the permissible limitations on freedom of expression alone; rather, the limitation must also be "necessary" in a democratic society.[143] This is the crux of the analysis. The Inter-American Court states that "necessary" must be more than "useful," "reasonable," or "desirable."[144] The Inter-American Court's standard is that a restriction is "'necessary when it can be shown that the measure cannot reasonably be achieved through a means less restrictive."[145] This interpretation is similar to that of the European Court.[146] Given this similarity and the other reasons discussed above, the Inter-American Court is likely to follow the path hewn by the European Court.

---

138. Advisory Opinion, *supra* note 11, para. 51.

139. *Id.*

140. *See generally Inter-American Commission Annual Report*, *supra* note 12, ch. V.

141. *Id.* at 205.

142. *Id.* at 209-10.

143. *Id.*

144. *Id.* at 209-10. The Inter-American Commission suggests that "necessary" should imply the standard "pressing social need" used in The Sunday Times v. United Kingdom. *See Inter-American Commission Annual Report*, *supra* note 12, at 209-10; The Sunday Times v. United Kingdom (No. 2), 14 Eur. Ct. H.R. (ser. A) para. 59 (1991).

145. Advisory Opinion, *supra* note 11, para. 79.

146. Prager and Oberschlick v. Austria, 21 Eur. Ct. H.R. (ser. A) 1 (1995); Castell v. Spain, 14 Eur. Ct. H.R. (ser. A) 445 (1992); Oberschlick v. Austria, 19 Eur. Ct. H.R. (ser. A) 389 (1991); Barfod v. Denmark, 13 Eur. Ct. H.R. (ser. A) 493 (1989); Lingens v. Austria, 8 Eur. Ct. H.R. (ser. A) 407 (1986).

Given the likelihood of the Inter-American Court's direction, the development of its defamation doctrine will likely proceed as follows. First, regarding desacato laws, the Inter-American Court is likely to follow the lead of the Commission, which ruled strongly against the laws, principally because desacato laws would be viewed as disproportionate to the ends desired.[147] In addition, desacato laws are not necessary in a democratic society; in fact, they inhibit democracy.[148] Second, regarding the issue of who is defined as a "public figure," the Inter-American Court is likely to extend this definition to include at least political and governmental figures because this has been the focus of defamation analysis in the European Court and the U.S. Supreme Court.[149] However, the Inter-American Court will probably not extend the definition as far as the U.S. Supreme Court[150] because doing so is beyond the scope of the debate of this issue in Latin America.[151] The Latin American debate concerning free expression of the press has been focused on information related to government officials and politicians.[152] Finally, regarding the types of statements the press may publish, the Inter-American Court will likely condone the publication of truthful information but not opinions that are presented as truthful information. The Inter-American Court is not likely to accept the U.S. Supreme Court's standard (information which is not known to be false can be printed) because the European standard, more accurately than the U.S. Court, captures the type of defamation currently at issue in Latin America.

147. *See generally Inter-American Commission Annual Report*, *supra* note 12, at 206-12.

148. *Id.* at 209.

149. This conclusion is based on the analyses *supra* Parts II and III.

150. *See* relevant U.S. cases cited *supra* Part III.

151. *See generally* IAPA REPORT, *supra* note 1; Advisory Opinion, *supra* note 11; Andres Oppenheimer *Summit Will Take Up Ethics of the Press*, MIAMI HERALD, Nov. 3, 1997, at A10.

152. *See generally* IAPA REPORT, *supra* note 1; Advisory Opinion, *supra* note 11; Oppenheimer, *supra* note 151, at A10.

VI. WHAT THE COURT SHOULD DO

A. *Introduction*

This Comment presents two principle recommendations for the Inter-American Court. First, it recommends deference to members of the Organization of American States (OAS), allowing them to craft a defamation doctrine suitable to their needs in all but the most egregious cases. Second, it recommends that the Inter-American Court and member nations craft defamation doctrine in such a way as to permit the press to publish substantiated information about public figures while prohibiting the printing of information which the journalist knows to be false or the printing of opinion based only on facts that are misrepresented as true.

B. *The Experiences of Europe and the United States*

This Comment recommends deference based on the principle that different countries have contrasting experiences which necessitate crafting distinct solutions. Regarding defamation, both Europe and the U.S. exemplify this principle and have forged systems for dealing with defamation with the aid of the European Convention and the U.S. Constitution, respectively.[153] The road, however, has been neither simple nor direct.[154]

Both Europe and the U.S. adhere to the belief that a system must have the capacity to allow law to evolve. To be viable, a

153. *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Andreson v. Liberty Lobby Inc., 477 U.S. 242 (1986); Bose Corp. v. Consumer's Union, 466 U.S. 485 (1984); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Cantrell v. Forest City Pub. Co., 419 U.S. 245 (1974); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Ginzburg v. Goldwater, 396 U.S. 1049 (1970); St. Amant v. Thompson, 390 U.S. 727 (1968); Rosenblatt v. Baer, 383 U.S. 75 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Beauharnais v. Illinois, 343 U.S. 250 (1952); Green v. Alton Telegraph, 438 N.E.2d 203 (1982). *See also* cases cited, *supra* note 19.

154. *See* discussion *supra* Parts II and III.

system must be fluid and must consider more than mere idealism. Fluidity is clearly demonstrable in the European and U.S. Courts where defamation law has undergone considerable change in the last several decades.

In Latin America as well, malleability is critical as it allows for adaptation essential to dynamic Latin American societies.[155] Whereas the U.S. Supreme Court has the ability to create the law, without significant threat from either its coequal branches or the states, the Inter-American Court is not vested with the same degree of power.[156] The U.S. Supreme Court is an old court, well established and respected. It has attained a degree of legitimacy in the U.S. that the Inter-American Court has never attained in Latin America.[157] Thus, the approach the U.S. Supreme Court takes cannot be the same approach used by the Inter-American Court. Rather, the Inter-American Court must be considerably more deferential to its member countries for a viable system of defamation law to develop.[158] However, the Inter-American Court has a measure of political clout,[159] so it need only be deferential to a degree.[160]

While adhering to the underlying theory of deference, the Inter-American Court should adopt a multi-step approach in dealing with defamation cases.[161]

---

155. Latin America, because of the emergence of new democracies, is in a state of flux and setting any law in stone when a country is in transition is not only unrealistic but untenable. Specifically with regard to free press and defamation in countries who have histories littered with repression of speech and press, this could create disarray and anarchy in the crucial evolutionary period for a country.

156. INTER-AMERICAN COURT ANNUAL REPORT, *supra* note 2, at 7-10.

157. *Id.*

158. *Id.*

159. Several member countries require the Inter-American Court's intervention in other matters; thus, the Court has some degree of leverage. *See* Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 AM J. INT'L L. 233 (1982).

160. The parallel here between the proposed four-step approach and the history of the U.S. Supreme Court warrants some discussion. The U.S. Supreme Court, early in its history, elected a deferential route and allowed the President and Congress considerable latitude while it established for itself the power of judicial review. *See* Marbury v. Madison 5 U.S. 137 (1803). Because the Inter-American Court does not enjoy the same power, it must first establish its legitimacy before taking on an assertive role. The Inter-American Court can slowly legitimize itself as a power in the shaping of justice in the region through incremental steps. In this regard, it is perhaps a good thing that the Inter-American Court has not taken a defamation case yet, for it, like the early Supreme Court may not have been ready to broach the subject of criticism of public officials before strengthening its own legitimacy.

161. This sort of analysis will help legitimize the Inter-American Court as an objective body that follows norms, not countries.

C. *Step One: Evaluation of the Law*

The first step of the Inter-American Court's analysis should be an evaluation of the law in question to determine whether the law comports facially with the American Convention. There are two types of laws that are a per se violation of the Convention. Such laws require prison time (i.e. desacato laws) and prohibit in any manner the printing of substantiated information, even if it harms the dignity of the public figure or government, except in cases of national security.

The Inter-American Court should eliminate desacato laws because such laws violate the American Convention for several reasons. First, these clauses have a substantial chilling effect on the dissemination of information that facially contrasts the American Convention.[162] In addition, desacato laws are disproportionate because they provide for a penal remedy, whereas the American Convention only permits civil remedies for Article 13 cases.[163] Second, deterring public discussion and debate of government and politics undermines a core premise of the democratic process. Anything as drastic as sentencing someone to prison for disseminating opinions or ideas is contrary to the sort of robust debate paramount in a democratic system envisioned by the U.S. Supreme Court and the European Court. The European and U.S. Courts concur and note that restrictive regulations should only be applied when necessary.[164] This is particularly important in emerging democracies as there is a great need to encourage rather than discourage robust debate. The U.N. notes that freedom of expression interrelates with and enhances all other human rights and that deterring freedom of expression has a far-reaching impact.[165] Finally, desacato laws simply do not work. For example, Argentina and Egypt had very strict insult laws that called for imprisonment and heavy fines.[166] These laws did not deter journalists in either country; rather, journalists continued to take risks to exercise their right to dis-

162. *Inter-American Commission Annual Report*, *supra* note 12, at 208-09.

163. American Convention, *supra* note 8.

164. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Lingens v. Austria, 8 Eur. Ct. H.R. (ser. A) 407 (1986).

165. RIGHT TO FREEDOM OF EXPRESSION, *supra* note 121.

166. INTER AMERICAN PRESS ASSOCIATION, DESACATO LAWS 6 (1996).

seminate substantiated information.[167] In essence, desacato laws are not effective for the intended purpose.

Further, the Court should eliminate laws that prohibit the printing of a public official's substantiated violation of the law.[168] Because these are substantiated pieces of information, the public should be allowed access to them as a right guaranteed by Article 13. One of the defining characteristics of a democratic system is that the citizenry has a voice in crafting national interest. To participate intelligently in politics, the arena that forges national policy, the citizenry needs to be aware of its public officials' activities. For these reasons, this proposed first step (evaluating the law in question) provides a better vehicle to promote the ideals of the American Convention than the Inter-American Court's present use of its first two steps of analysis.

Presently, the Inter-American Court's analysis begins with whether there is a law justifying the government's infringement on the individual's freedom of expression (step one) and whether there are "express and precise" definitions for the grounds of the law (step two.)[169] The Inter-American Court assumes that there has been an infringement if the act in question is associated with imparting or receiving information.[170] This, however, is an inappropriate place to begin defamation analysis because the American Convention establishes limitations on freedom of expression. Because the American Convention allows for limitations, one cannot assume that the curtailing of a journalist's ability to impart information represents the indicia requisite for a violation of Article 13. In other words, the Inter-American Court presupposes that a government has necessarily infringed upon a journalist's right to impart information, without regard to whether such a right exists as to the information in question. Assuming that any action taken by a journalist is a right protected by Article 13 is a misinterpretation because Article 13 places limits on expression. For example, harming a person's reputation by misrepresenting the facts is not freedom of expression protected by Article 13. The Inter-American Court's analysis should be replaced by an evaluation of the law in question without an assumption that a right has been violated

167. *Id.*
168. The one exception is in national security situations.
169. Advisory Opinion, *supra* note 11.
170. *Id.*

and with an eye towards whether the government's actions comport with Article 13.

To conclude, the proposed first step has two purposes. One, it is designed to eliminate egregious laws which have a substantial chilling effect on the dissemination of information essential in a democracy, i.e. information pertaining to government and politics. By eliminating desacato laws and laws which prohibit printing substantiated information, except in cases of national security, this step fosters the kind of robust debate envisioned by the U.S. Supreme Court.[171] Two, this step reorients the focus of defamation law to the proper meaning of Article 13 of the American Convention.

D. Step Two: Deference to Member Nations

After completing step one, the second step is a good faith determination. The Inter-American Court should follow the margin of appreciation doctrine by giving a great degree of deference to its member nations when they interpret defamation doctrine and make individual rulings on defamation cases. At the same time, the Inter-American Court should determine whether its members exercised good faith in their interpretation and ruling. A key assumption of this proposed second step is that there is more than one interpretation of defamation doctrine that comports with the American Convention. For the Inter-American Court, acceptance of the member nation's interpretation should turn on whether the national authorities exercise good faith in evaluating the case. If the answer to this question is affirmative, then the Inter-American Court should let stand the ruling made by its members' national court.

In determining whether the national court has acted in good faith, the Inter-American Court should consider, but not confine itself to, the following considerations: (1) whether the national court has followed the duly enacted laws; (2) whether the judge in the case is a known supporter/sympathizer of the public figure in question; (3) the party who appointed the judge; (4) the party responsible for compensating the judge; (5) the extent to which other methods are available for the government to curtail press

171. *See generally* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

speech; and (6) the presence or absence of a vibrant press in the country.[172]

Adjudication by the national court can still be in good faith regardless of the answers to these pertinent questions, but suspicion will be raised if, for instance, the party in question appointed the judge to the bench and the same party is responsible for the judge's compensation. If the country has not exercised good faith or the facts are such that there is reasonable uncertainty as to whether the national court acted in good faith, then the Inter-American Court should engage in the third and fourth steps of the analysis.[173] If the country has acted in good faith, then the analysis should end here, and the Inter-American Court should accept the national court's ruling. At this stage, the Inter-American Court will already have evaluated the law, determined its consistency with the American Convention, and determined that the country has acted with good faith and in accordance with its own laws.

E. Step Three: Definition of "Public Figure"

The purpose of the third step is to construct a narrow definition of "public figure" that is consistent with the margin of appreciation doctrine and to determine whether an alleged defamatory act relates to a public figure.

The Court should define a "public figure" as a person who:

a. works / worked for a local, municipal, or national government in an official capacity;

b. works / worked for the government but who is / was not officially employed for the government;

c. participates / participated in politics; or

d. falls into either a, b, or c above and, in his or her private capacity, violates or allegedly violates a law (whether found by a court to have breached the law or not).[174]

---

172. If the press is vibrant, the law may be doing no harm.

173. The third and fourth steps of the analysis will appear later in the text.

174. This definition was created as a result of the analysis of both U.S. and European cases. Most of the cases dealt with individuals who were public officials at some level. *See* discussion *supra* Part III; *see also* European cases cited *supra* note 19.

This definition does several things. It gives the press an unlimited right to publish substantiated facts (except in cases of national security) about individuals who participate in politics and government. In so doing, it provides members of the press the right to comment freely about issues critical to the preservation of democracy. At the same time, this definition recognizes that there are limits to expression and allows each member nation to determine what those limits should be. Thus, this definition is consistent with the margin of appreciation[175] because it does not permit the Inter-American Court to define the limits of expression in all cases, only those critical to the preservation of democracy. Further, this definition focuses on public activity that egregiously impedes democracy. It is designed to encourage investigative journalism in which the public has a vested interest, while discouraging the press from publishing stories that do not have a bearing on the preservation of democracy, such as activities in a person's private life.

A closer analysis of the public figure definition is useful to understand its scope. The first part[176] of the definition recognizes that the press should aggressively cover and publish stories about illegal or questionable activities. This rests on the theory that government officials have a significant amount of power at their disposal to corrupt the government and stifle democracy; consequently, transparency of officials is essential. Further, to ensure transparency, this definition extends to someone whose illegal activity was not uncovered while that individual was working in government or politics. Mere lapse of time should not cleanse a dirty rag.

The second part of the public figure definition[177] encourages the press to report clandestine behavior. At times, corrupt officials and politicians pay individuals who do not work for the

175. The margin of appreciation doctrine in the European Court has changed over time. The position taken in this Comment is similar to the European margin of appreciation doctrine expressed in Handyside v. United Kingdom, 1 Eur. Ct. H.R. (ser. A) 737 (1976). Under *Handyside*, the European Court adopted a position of deference. *Id.* Since *Handyside*, the European Court has moved away from its position of deference and toward a position of activism. See YOUROW, *supra* note 16, at 110-36 for a full discussion of the *Handyside* case and the development of the margin of appreciation as it relates to freedom of expression in the European Court.

176. Part one states: "a person who works / worked for a local, municipal, or national government in an official capacity."

177. Part two states: "a person who works / worked for the government but who is / was not officially employed for the government."

government to conduct illegal activity. This type of activity has a deleterious effect on democracy because of its potential for abuse. For example, Guillermos Isaza, an editor and publisher in Colombia, was murdered in 1986.[178] This crime remains unsolved.[179] If information surfaces that links the murder to a government official, the press should be encouraged to publish this. Exposing this type of behavior is critical to governmental transparency.

The third part of the public figure definition[180] acknowledges that a key aspect of democracy is the political process. The press must have the ability to comment openly about this aspect of democracy because an open and vigorous debate is essential and pointing out questionable behavior of a candidate, worker, or volunteer furthers this objective.

The last part of the public figure definition[181] addresses the integrity of the public official. It may be relevant for the populace to know whether a public official violated a law in the past. For example, Colombian citizens have a right to know whether a present government official was involved in the murder of Guillermos Isaza even if the official's behavior occurred prior to his or her governmental job.[182] The press should have the discretion to decide which issues are relevant in this area.

Taken as a whole, this public figure definition has several advantages. It draws on treaties and the experiences of both the U.S. and Europe.[183] It recognizes a weakness of the U.S. doctrine and seeks to avoid it.[184] In addition, the definition does not presume that the American Convention mandates only one

178. INTER AMERICAN PRESS ASSOCIATION, UNPUNISHED CRIMES AGAINST JOURNALISTS 20 (1997).

179. *Id.*

180. Part three states: "a person who participates / participated in politics."

181. Part four states: "a person who falls into either a, b, or c above and, in his or her private capacity, violates or allegedly violates a law (whether found by a court to have breached the law or not)."

182. *See* INTER AMERICAN PRESS ASSOCIATION, *supra* note 178, at 20, for further information on the murder of Guillermos Isaza.

183. *See* discussion *supra* Parts I-III.

184. U.S. doctrine makes it easier for the press to mislead the American public, thereby clouding transparency. *See* analysis of the Sullivan case *supra* Part III. In turn, clouding transparency tends to discourage political debate and foster animosity. *See Post-Diana Press Vows to Behave*, MIAMI HERALD, Sept. 26, 1997, at A11.

defamation doctrine for Article 13;[185] rather, it acknowledges that there could be several legitimate viewpoints concerning limits of a free press.[186] Finally, this definition recognizes the bifurcation between one's public and private life and acknowledges that a person has some right to privacy.

In sum, this definition of public figure seeks to restrain government efforts to curtail freedom of the press in areas having a direct bearing on democratic stability but to allow government efforts to rein in irresponsible press reporting in areas outside the scope of this definition. Further, this definition constrains the Inter-American Court, focusing it only on those matters that are critical to the preservation of a democracy and democratic institutions.

F. Step Four: Whether Substantiated Defamation Has Occurred

After having determined that the alleged defamation relates to a public figure, the Inter-American Court should begin the final part of the analysis. The fourth step is an inquiry to determine whether substantiated or unsubstantiated defamation has occurred. The intent of the fourth step is to permit publication of substantiated facts about a story even if publishing those facts harms the reputation of a public official, except in cases of national security. However, the press cannot alter those facts or commingle its opinion among the facts such that a distorted story is created which gives a false impression of the public figure. The principal reason for this standard is that truthful information alone is sufficient to call a public figure's integrity into question without distortions from a journalist because the public has the ability to recognize unscrupulous behavior.

The fourth step distinguishes between two types of written material for purposes of defamation: substantiated and unsubstantiated.[187] If a journalist publishes substantiated

185. There is no such mandate in the American Convention. American Convention, *supra* note 8.

186. In absence of a clear mandate, it is reasonable to assume that there could be more than one permissible interpretation of the American Convention.

187. This element is drawn from an analysis of four European Court cases. *See* Prager and Oberschlick v. Austria, 21 Eur. Ct. H.R. (ser. A) 1 (1995); Oberschlick v.

information, no defamation occurs.[188] However, if a journalist publishes unsubstantiated information, defamation has occurred. For example, defamation occurs where a journalist publishes opinion and presents it as truth and where a journalist knowingly publishes false information.[189]

Substantiated information is information supported by truthful evidence.[190] Consequently, as long as the substantiated information is consistent with the definition of "public figure," the press should be able to publish the information regardless of whether the information damages the reputation of the public figure in question. This is not defamatory because the source of the damage to the public figure's reputation derives from the public figure's actions, not from the journalist's actions.

There are two types of unsubstantiated information:[191] information presented as fact when it is actually the opinion of the author; and information which is known to be false. The first type of unsubstantiated material tends to be based on incomplete information.[192] The second type of unsubstantiated information is that which is known to be false.

Creating a workable distinction between substantiated and unsubstantiated information can provide the press the opportunity to inform the public while protecting the press from governmental interference. A workable distinction can also help to maintain the integrity of political and governmental debate. Moreover, maintaining transparency of government and encouraging open discussion of politics places duties on both public figures and the press. Surely the American Convention was not designed to negate time-honored duties. To ignore the press' duty to publish truthful information in favor of the press' right to publish information hinders democratic stability.

Austria, 19 Eur. Ct. H.R. (ser. A) 389 (1991); Barfod v. Denmark, 13 Eur. Ct. H.R. (ser. A) 493 (1989); Lingens v. Austria, 8 Eur. Ct. H.R. (ser. A) 407 (1986).

188. This concept is adapted from *Prager and Oberschlick*, 21 Eur. Ct. H.R. 1 and *Barfod*, 13 Eur. Ct. H.R. 13.

189. These concepts are adapted from *Lingens*, 8 Eur. Ct. H.R. 407 and *Oberschlick*, 19 Eur. Ct. H. R. 389.

190. This concept is adapted from *Prager and Oberschlick*, 21 Eur. Ct. H.R. 1 and *Barfod*, 13 Eur. Ct. H.R. 13.

191. The concept of unsubstantiated information is derived from the European analysis of defamation. *See Prager and Oberschlick*, 21 Eur. Ct. H.R. 1 and *Barfod*, 13 Eur. Ct. H.R. 493.

192. *See Prager and Oberschlick*, 21 Eur. Ct. H.R. 1 and *Barfod*, 13 Eur. Ct. H.R. 493.

G. Conclusion to Part VI

This Comment recommends that the Inter-American Court defer to OAS member nations, allowing each nation to craft a defamation doctrine suitable to its needs in all but the most egregious cases. Step one recommends that the Inter-American Court rule that desacato laws and laws which prohibit printing substantiated information, except in cases of national security, violate Article 13 of the Convention. Step two recommends that the Inter-American Court accept the rulings of national courts that are made on a good faith basis because reasonable individuals can have varied and legitimate interpretations of free press which concord with the American Convention. Steps three and four recommend that member nations and the Inter-American Court craft defamation doctrine in such a way as to permit the press to publish substantiated information about public figures, except in cases of national security, and prohibit the printing of either information which the journalist knows to be false or information based on opinion which is misrepresented as factually true. The purpose of these recommendations is to foster balanced public discourse, characterized by governmental and political transparency and responsible press speech while adhering to the principle that balanced public discourse places duties on both public figures and the press.

VII. APPLYING THE FOUR-STEP APPROACH TO THE IBERO-AMERICAN SUMMIT

At the Seventh Ibero-American Summit in November 1997, Latin American leaders discussed the role of the press in their developing democracies, particularly the way in which journalists and editors report and convey information to the public.[193] Numerous Summit participants expressed their view that press reporting presents a risk to their nascent democracies and should be somewhat reined in.[194] Evidence of this view is reflected by the control exercised over the press in a variety of ways in Latin America, from more blatant forms of censorship to the more

193. *Caldera Firm on Media Proposal*, VENEZUELA ONLINE NEWS (visited Nov. 15, 1997) <http://vzlanet.com/news/polsat.htm#top>.

194. Declaracion de Margarita, *supra* note 127, para. 38-43.

subtle, e.g. defamation suits.[195] This animus culminated in chapter six, entitled "The Right to Truthful Information," of the Summit's declaration.[196] The purpose of chapter 6 and this aspect of the Summit was to affirm the importance of the press in nascent democracies and to discover ways in which countries can encourage truthful press reporting while discouraging misleading and untruthful reporting, which tends to undermine healthy democratic debate.[197]

This Comment's four-step approach can provide guidance to the Inter-American Court (and OAS member nations) for interpreting chapter six as well as declarations that attempt to regulate expression. Chapter six contains two clauses designed to encourage accurate press reporting.[198] The first clause states that people have the right to truthful information without restriction or censorship.[199] This clause, because it separates information into two categories, should be interpreted as permitting substantiated information and prohibiting unsubstantiated information. The second clause states that journalists should be held to a standard of journalistic ethics and social responsibility.[200] This type of standard should be defined using the constraints adopted by the proposed four-step approach. A journalist has the responsibility to publish substantiated information. It would appear incongruous with ethical principles to permit someone to print material that he or she knows or reasonably should know is inaccurate, assuming the information could materially harm a public figure's reputation.

At first glance, these clauses appear innocuous, but they have been subject to harsh criticism by the press for their ability to be misused.[201] Because there is strident disagreement over the proper measure of restraint a government should exercise over its media outlets, member nations should strive to clarify these and similar clauses. As for the Inter-American Court, as long as

195. *See generally* IAPA REPORT, *supra* note 1, at 4-71.
196. Declaracion de Margarita, *supra* note 127, ch. 6.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Caldera Firm on Media Proposal*, *supra* note 193; Michael Rowan, *Finally, 'Truthful Information,'* VENEZUELA ONLINE NEWS, Nov. 13, 1997 (visited Nov. 15, 1997) <http://vzlanet.com/news/opinion.htm>.

its member nations have adopted clauses consistent with the first step of the proposed four-step approach and have adhered to the standard of good faith, their interpretations of the American Convention, as represented by their rulings in defamation cases, should be upheld.

VIII. CONCLUSION

As a result of the charged nature of the debate and the value placed upon liberty, the free press issue never quite moves out of the public eye. In fact, current examples of the free press debate are readily available. One such example is the Ibero-American Summit. In early November 1997, the Ibero-American Summit in Venezuela marked the gathering of nearly all the principle Latin American countries to discuss press reformation.[202] The Summit yielded a proposition that limits press freedom.[203] The ultimate effect of the Summit is of course not yet known. A second example of the current free press debate in Latin America is the experience of the *La Nación* reporters. Only recently in Costa Rica, the editor-in-chief and two reporters of *La Nación* faced criminal charges for criticizing the government and a former government official.

The time has come for the Inter-American Court to take a defamation case to establish how the American Convention should be read with regard to the defamation issue. The Inter-American Court needs to establish a multi-step and objective approach to analyze defamation so that it can prevent any issue from perpetuating or establishing practices that violate the American Convention. As proposed by this Comment, the steps should be: an evaluation of the law in question; a good faith determination; a defining of what constitutes a "public figure"; and a determination of whether substantiated or unsubstantiated defamation has occurred.

The Inter-American Court, despite having some political clout,[204] needs to be deferential, bearing in mind that it does not have the legitimacy of the U.S. Supreme Court and that it is not the Inter-American Court's function to invalidate differing, though legitimate, interpretations of the American Convention.

202. *Caldera Firm on Media Proposal*, *supra* note 193.
203. Declaracion de Margarita, *supra* note 127, ch. 6.
204. Buergenthal, *supra* note 159.

Rather, it is the Inter-American Court's function to prevent egregious abuses of the American Convention.[205] Free press is immeasurably important but not absolute. The underlying recommendations in this Comment and the multi-step approach adopted herein take these factors and the cultural, political, and socio-economic considerations that create these factors into account in an attempt to create a viable system capable of functioning now and evolving for the future.

EDWARD J. PAUW* AND ARI CHAIM SHAPIRO**

205. INTER-AMERICAN COURT ANNUAL REPORT, *supra* note 2, at 7-10; American Convention, *supra* note 8, ch. VIII.

* J.D. Candidate 1999, University of Miami School of Law. Edward J. Pauw thanks Our Father for His grace and His Son, Jesus, for his sacrifice. He also thanks Ari Shapiro for his encouragement and creativity.

** J.D. Candidate 1999, University of Miami School of Law. Ari Chaim Shapiro dedicates this paper to his grandfather, Dov Rozencwaig, whose love for him is unconditional and whose respect and approval mean more to him than any past, present or future achievements. He thanks his parents and brother for their love and support; they are his strength and source of inspiration. He also thanks his co-author, Ted Pauw, whose persistence and dedication to this project made it all work.

Both authors thank Professor Stephen J. Schnably for his advice on this topic.