The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards

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Reprinted from **European Human Law Review**
Issue 3, 2009

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

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The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards

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LT Access to information; Case law; Censorship; Defamation; European Court of Human Rights; Freedom of expression; International courts

A little over 10 years ago, art.13 of the American Convention on Human Rights was scarcely interpreted by the Inter-American Court of Human Rights. It was only in 2001 that the Court began to rule on contentious freedom of expression cases. This article[1] examines the 10 freedom of expression decisions rendered in the last decade. This article also discusses to what extent the jurisprudence of the European Court of Human Rights has influenced the decisions of its American counterpart, concluding that the impact of the European Court's jurisprudence has been significant. Finally, this article highlights that some influence of Inter-American decisions can also be detected in European case law.

Introduction

A little over 10 years ago, art.13[2] of the American Convention on Human Rights (the Convention)[3] was scarcely interpreted by the Inter-American Court of Human Rights (the Inter-American Court or the Court); no decisions had been rendered on individual cases and the Court had only addressed specifically the right to freedom of

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[1] This article is an edited version of a paper originally presented at the *Seminar on the European Protection of Freedom of Expression: Reflections on Some Recent Restrictive Trends,* Strasbourg, October 10, 2008, at the European Court of Human Rights. I would like to thank Bernard Duhaime, Peter Noorlander, Dirk Voorhoof, and Carlos J. Zelada for their helpful comments and suggestions. I would also like to thank Gabriela Haymes who contributed to the translation of some of the paragraphs of the decisions cited here.

[2] "Article 13. Freedom of Thought and Expression.

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

expression in two Advisory Opinions (OC-5 and OC-7); and even in the exercise of its advisory function, the Court had only engaged in an elaborate interpretation of art.13 in OC-5.[4]

It was only in 2001 that the Inter-American Court began to rule on contentious freedom of expression cases.[5] And although little more than a decade ago the jurisprudence of the Court was virtually non-existent, today we may venture to say that the progress achieved looks very promising. Newly emerging jurisprudence within the Inter-American system has certainly had local impact, as evidenced by changes in domestic legislation (even at constitutional level) as well as by judicial decisions in compliance with international standards.

This article examines the 10 freedom of expression decisions rendered by the Inter-American Court in the last decade or so. They will be grouped under four headings:

- prior censorship;
- the erosion of freedom of expression by indirect means and the importance that context plays in finding a violation;
- the issue of criminal defamation and insult laws as unacceptable instances of subsequent imposition of liability under the inter-American system; and
- the right of access to public information.[6]

In each of the contentious cases before it, the Court has relied on two standards that it developed in OC-5: the ''democratic standard'' and the ''dual protection standard''. This

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

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

[4] I.A. Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A, No.5 [hereinafter OC-5 or ''Compulsory membership''].

[5] I am referring specifically to cases where violations of art.13 have been addressed to some extent by the Court.

[6] These ideas were further developed in Eduardo Bertoni, *Libertad de Expresión en el Estado de Derecho*, 2nd edn (Editores Del Puerto, 2008).

reasoning has been crucial and warrants a brief review of OC-5, although the purpose of this paper is not to discuss it at length, but rather to describe how these standards have influenced the jurisprudence of the Inter-American Court.

Lastly, this article will discuss to what extent the jurisprudence of the European Court of Human Rights has influenced the decisions of its American counterpart.

The beginning

By note of July 8, 1985, the Government of Costa Rica submitted to the Inter-American Court a request for an advisory opinion regarding the interpretation of arts 13 and 29[7] of the Convention as they affected compulsory licensing in an association prescribed by law for the practice of journalism. Costa Rica argued that the compulsory licensing of journalists could be justified as a way to ensure public order (art.13.2b) as a just demand of the general welfare in a democratic society (art.32.2). On the concept of public order, the Court said that:

> ''It is possible to understand the meaning of public order as a reference to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles. In that sense, restrictions on the exercise of certain rights and freedoms can be justified on the ground that they assure public order.''[8]

However, on the same concept, the Court also said,

> ''that that same concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole''.[9]

The Court considered that both concepts (public order and general welfare) could be used either to affirm the rights of the individual against the exercise of governmental power or to justify the imposition of limitations on the exercise of those rights in the name of collective interests. Following this rationale, the Court observed that:

> '''Public order' or 'general welfare' may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content. (See Art. 29(a) of the Convention).''[10]

It followed that,

> ''reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the association to make full use of the rights that Article 13 of the Convention grants to each

[7] Article 29 of the Convention establishes rules for the interpretation of the Convention.
[8] I.A. Court H.R., Compulsory membership, para.64.
[9] I.A. Court H.R., Compulsory membership, para.69.
[10] I.A. Court H.R., Compulsory membership, para.67.

> individual. Hence, it would violate the basic principles of a democratic public order on which the Convention itself is based.''[11]

The Court expanded the analysis of art.13 by highlighting the importance of freedom of expression in a democratic system, which shall be referred to in this article as the ''democratic standard'', as well as by reaffirming the dual content of freedom of expression, which has been referred to as ''the two dimensions of freedom of expression''.

Both the Inter-American Commission and the Inter-American Court have recognised the connection between freedom of expression and democracy in all cases dealing with violations of art.13 of the Convention. In the Court's words:

> ''Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.''[12]

The other argument developed by the Court in OC-5 concerned the two dimensions of freedom of expression. This argument claims that the components of freedom of expression shall not be associated exclusively with the individual aspect of such right but that a collective dimension should also be acknowledged. According to the Court:

> ''. . . [T]hose to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to 'receive' information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.''[13]

Prior censorship

Following its judgment in OC-5, it took 15 years for a freedom of expression case to work its way through the Inter-American system and up to the Court. In 2001, the Inter-American Court entered judgment in the case known as *The Last Temptation of Christ*,[14] concerning the Martin Scorsese movie of the same name.

[11] I.A. Court H.R., Compulsory membership, para.76.
[12] I.A. Court H.R., Compulsory membership, para.70.
[13] I.A. Court H.R., Compulsory membership, para.30.
[14] I.A. Court H.R., *The Last Temptation of Christ Case* (*Olmedo Bustos et al v Chile*), judgment of February 5, 2001, Series C, No.73.

On November 29, 1988 the Chilean Cinematographic Classification Council (Consejo Nacional de Calificación Cinematográfica) rejected the showing of the film *The Last Temptation of Christ*. The decision was confirmed by an appeals court in March 1989. In November 1996, in response to a new request by the film's distributors, the Cinematographic Classification Council reviewed the ban and authorised the film's showing for audiences of 18 and over. However, in January 1997, the Santiago Court of Appeals granted a Motion for Protection filed by several people for and in the name of Jesus Christ, the Catholic Church and themselves, and annulled the decision of the Cinematographic Classification Council. This judgment was confirmed by the Supreme Court of Chile.

In its ruling on the case, the Inter-American Court first went over the arguments presented in OC-5, reaffirming the two dimensions of freedom of expression and insisting on the ''democratic standard''. What was new was the Court's interpretation of the concept of prior censorship in the Convention. The Court held that:

> ''Article 13(4) of the Convention establishes an exception to prior censorship, since it allows it in the case of public entertainment, but only in order to regulate access for the moral protection of children and adolescents. In all other cases, any preventive measure implies the impairment of freedom of thought and expression.''[15]

The Court considered that the Chilean system, which allowed for the general prior scrutiny of all films and which resulted in the eventual ban on the movie, went beyond the extent permitted under art.13(4) and therefore violated the Convention:

> ''. . . [T]he Cinematographic Classification Council prohibited exhibition of the film 'The Last Temptation of Christ' and, reclassifying it, permitted it to be exhibited to persons over 18 years of age (supra para. 60 a, c and d). Subsequently, the Court of Appeal of Santiago decided to annul the November 1996 decision of the Cinematographic Classification Council, owing to a remedy for protection . . . 'for and in the name of [°] Jesus Christ, the Catholic Church. . .'; a decision that was confirmed by the Supreme Court of Justice of Chile. Therefore, this Court considers that the prohibition of the exhibition of the film 'The Last Temptation of Christ' constitutes prior censorship in violation of Article 13 of the Convention.''[16]

Erosion of freedom of expression by indirect means, and the importance that context plays in identifying them

The day after the judgment in *The Last Temptation of Christ* was given, the Inter-American Court entered its judgment in the *Ivcher* case,[17] which concerned an indirect violation of the right to freedom of expression. The importance of the *Ivcher* case is its illustration that although the Convention does prohibit indirect restrictions on freedom of expression, identifying such restrictions is not easy.

[15] I.A. Court H.R., *The Last Temptation of Christ Case*, para.70.
[16] I.A. Court H.R., *The Last Temptation of Christ Case*, para.71.
[17] I.A. Court H.R., *Case of Ivcher Bronstein v Peru*, judgment of February 6, 2001, Series C, No.74.

The Inter-American Court had already provided guidelines to distinguish between direct and indirect means. In OC-5, the Court had held that:

> ''Article 13 may be violated under two different circumstances, depending on whether the violation results in the denial of freedom of expression or whether it results from the imposition of restrictions that are not authorized or legitimate.''

The Court distinguished ''extreme'' suppressions from the rest:

> ''In truth, not every breach of Article 13 of the Convention constitutes an extreme violation of the right to freedom of expression, which occurs when governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news. Examples of this type of violation are prior censorship, the seizing or barring of publications and, generally, any procedure that subjects the expression or dissemination of information to governmental control.''

With regard to suppressions that were not extreme, the Court held that:

> ''Suppression of freedom of expression as described in the preceding paragraph, even though it constitutes the most serious violation possible of Article 13, is not the only way in which that provision can be violated. In effect, any governmental action that involves a restriction of the right to seek, receive and impart information and ideas to a greater extent or by means other than those authorized by the Convention, would also be contrary to it. This is true whether or not such restrictions benefit the government.''[18]
>
> The Inter-American Court, however, had never heard any specific case involving the determination of an indirect or ''non-extreme'' violation.

The facts of the case were as follows. In 1997, Peruvian law provided that owners of broadcasting companies in Peru should be Peruvian nationals. Baruch Ivcher Bronstein, an Israeli citizen, had acquired Peruvian citizenship in November 1984, after renouncing his Israeli nationality. Ivcher had been the majority shareholder in the Company which operated Channel 2 on Peruvian television. He was also Director and Chairman of the Board of the Company, and was authorised to take editorial decisions with regard to Channel 2's programming.

One of the programmes aired by Channel 2 was *Contrapunto*. Since 1997, *Contrapunto* had broadcast several in-depth investigative reports involving, for example, allegations of torture committed by members of the Army Intelligence Service, and corruption in the Peruvian Intelligence Service. In May 1997, the Peruvian Government issued regulations providing for the possibility of withdrawing the nationality of naturalised Peruvians. In the same month, Ivcher was denounced for conducting a ''campaign of defamation'' against the Peruvian Armed Forces. Then, in July 1997, Channel 2 broadcast a report on the unlawful recording of telephone conversations involving candidates of opposition parties, judges and journalists. The same day, the Director

[18] I.A. Court H.R., Compulsory membership, paras 53–55.

General of the National Police Force initiated proceedings for the withdrawal of Ivcher's Peruvian nationality, claiming that there was no evidence that he had renounced his Israeli nationality. Ivcher's Peruvian nationality was subsequently annulled. Channel 2's other shareholders then filed actions to annul Mr Ivcher's purchase of the company's shares—given that he was no longer a national—and suspended him as Director and Chairman of the company. In September 1997, the other shareholders took control of Channel 2, and prohibited the journalists who worked on *Contrapunto* from entering the premises and modifying Channel 2's editorial line.

Ivcher brought a complaint before the Inter-American Commission which then went to the Court, which again noted the double dimension of the right to freedom of expression, and, in this content, recognised the importance of protecting and ensuring the independence of journalists. The Court stated:

> ''. . . [I]t is essential that the journalists who work in the media should enjoy the necessary protection and independence to exercise their functions comprehensively, because it is they who keep society informed, and this is an indispensable requirement to enable society to enjoy full freedom.''[19]

The Inter-American Court went on to clarify the criteria for distinguishing between legitimate and illegitimate indirect restrictions on freedom of expression. The Court considered:

> ''When evaluating an alleged restriction or limitation to freedom of expression, the Court should not restrict itself to examining the act in question, but should also examine this act in the light of the facts of the case as a whole, including the circumstances and context in which they occurred.''[20]

The Court decided that,

> ''the resolution that annulled Mr. Ivcher's nationality title constituted an indirect means of restricting his freedom of expression, as well as that of the journalists who worked and conducted investigations for Contrapunto of Peruvian television's Channel 2''

and that,

> ''[b]y separating Mr. Ivcher from the control of Channel 2 and excluding the Contrapunto journalists, the State not only restricted their right to circulate news, ideas and opinions, but also affected the right of all Peruvians to receive information, thus limiting their freedom to exercise political options and develop fully in a democratic society''.[21]

[19] I.A. Court H.R., *Ivcher Bronstein Case*, para.150.
[20] I.A. Court H.R., *Ivcher Bronstein Case*, para.154.
[21] I.A. Court H.R., *Ivcher Bronstein Case*, paras 162–163.

In 2009, the Court considered two further cases involving allegations of indirect restrictions on the right to freedom of expression: *Rios*[22] and *Perozo*.[23] In both cases, the Inter-American Commission on Human Rights—a body that operates in a similar fashion to the now-defunct European Commission on Human Rights—had found that the journalists and workers of two Venezuelan TV stations (RCTV, in *Rios*, and Globovision, in *Perozo*) had been the target of threats, harassment, and verbal and physical aggression, including injuries caused by firearms, and that there had been attacks against the premises of RCTV and Globovision's facilities. The Commission also noted the lack of due diligence in the investigation of these events and the State's failure to take any preventive action.

The Inter-American Court considered these cases under art.13.3 of the Convention, which enumerates the permissible restrictions that may be placed on the right to freedom of expression, as well as under arts 1 and 13.1 of the Convention, which established an obligation on authorities to create an environment in which freedom of expression can flourish and under art.5.1, which protects the right to personal integrity.

As regards art.13.3, the Court held that art.13.3 of the Convention prohibits only actual restrictions on the communication and circulation of ideas and opinions, whether imposed directly or indirectly.[24] The Court found that the statements by public officials criticising the media outlets, in the context in which they were made, included opinions on the participation by Globovision and RCTV, or their representatives, in events that took place at a time of intense political polarisation and social conflict in Venezuela. Given the vulnerable position of the alleged victims and their relation to the media outlets in question, some of these statements may have been perceived as threats and had an inhibiting or self-censorship effect on the former.[25] However, the Court found that these were germane to a finding of a violation of art.13.1 of the Convention, together with art.1.1, and should not be considered as ''indirect restrictions'' under art.13.3.[26]

In both cases,[27] the Court found that the complainants had been obstructed, blocked and hindered in the free exercise of their journalism, and that they had suffered attacks or threats to their personal integrity. This constituted a breach not of art.13.3, but of Venezuela's obligation under art.1.1 of the American Convention on Human Rights to ensure the exercise of the freedom to seek, receive and impart information and the right to personal integrity protected under arts 13.1 and 5.1 of the Convention.[28]

[22] I.A. Court H.R., *Case of Rios et al. v Venezuela*, judgment of January 28, 2009. Official translation to English pending at the time this article was written.

[23] I.A. Court H.R., *Case of Perozo et al. v Venezuela*, judgment of January 28, 2009. Official translation to English pending at the time this article was written.

[24] I.A. Court H.R., *Rios Case*, paras 339–340; *Perozo Case*, paras 367–368.

[25] I.A. Court H.R., *Rios Case*, para.341; *Perozo Case*, para.369.

[26] The Court also considered that there was not enough evidence to conclude that such statements indicated or revealed per se the existence of a state policy.

[27] I.A. Court H.R., *Rios Case*, para.334; *Perozo Case*, para.362.

[28] I.A. Court H.R., *Rios Case*, para.416; *Perozo Case*, para.426. It is important to highlight that many of the facts alleged by the Inter-American Commission and the representatives of the victims were not considered violations of freedom of expression by the Court. In both cases, the Court found that there was not enough evidence to support the allegations. As both cases involved a great number of victims and facts, difficulties were to be expected in handling the

The Court held that the right to freedom of expression may be illegally restricted by administrative or normative acts by the State as well as by de facto conditions which, either directly or indirectly, pose a risk to those who exercise or attempt to exercise this right, and also by acts and omissions of state agents or other individuals. The Court emphasised that the State should not act in ways that promote, encourage, favour or increase risk to individuals wishing to exercise their right to freedom of expression. The Court also held that the State should take reasonable steps to prevent and protect the rights of individuals affected, and investigate any circumstances which may prejudice their position.[29]

Subsequent imposition of liability: criminal defamation cases and insult laws

Criminal defamation cases

The first defamation case decided by the Inter-American Court was the case of *Herrera Ulloa*.[30] This case concerned the prosecution and criminal conviction of the journalist Mauricio Herrera Ulloa as well as the civil sanctions imposed on Herrera Ulloa and his newspaper's owner, for partially reproducing reports that had appeared in the European press and that attributed certain illegal acts to Mr Felix Przedborski, Costa Rica's honorary representative to the International Atomic Energy Agency. Mr Przedborski brought two criminal actions, and Herrera Ulloa was found guilty on four counts of publishing insults constituting defamation, which carried criminal and civil penalties. His newspaper, *La Nación*, was found jointly and severally liable as well.[31]

In its judgment in the case, the Inter-American Court held that,

> ''statements concerning public officials and other individuals who exercise functions of a public nature should be accorded, in the terms of Article 13(2) of the Convention, a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system. The foregoing considerations do not, by any means, signify that the honor of public officials or public figures should not be legally protected, but that it should be protected in accordance with the principles of democratic pluralism.''

According to the Court:

> ''A different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a specific individual. Those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more

evidence. However, in terms of the impact that these decisions will have on future cases in the Inter-American system, both rulings underscore the importance of providing strong and enough supporting evidence to prove the facts alleged.

[29] I.A. Court H.R., *Rios Case*, para.107.

[30] I.A. Court H.R., *Case of Herrera Ulloa v Costa Rica*, judgment of July 2, 2004. Series C No.107.

[31] The journalist reported that Belgian and German newspapers had published various reports alleging corruption on the part of Mr Przedborski.

> intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate.''[32]

It followed that Costa Rica had violated the right to freedom of expression protected under art.13 of the American Convention on Human Rights, since the criminal and civil penalties imposed on Mr Herrera Ulloa overstepped the permissible boundaries set in that article.

It is important to note the concurring opinion of the President of the Court, arguing against the use of criminal law to sanction journalists.[33] The President stated,

> ''one . . . has to decide whether the criminal law avenue is the one best suited to getting at the crux of the problem—in a manner consistent with the conflicting rights and interests and with the implications of the alternatives available to the lawmaker—or whether some other avenue, such as administrative or civil law, for example, might be the better juridical response. Indeed most infractions are not addressed as matters of criminal law or through criminal courts, but through measures of other kinds.''

This question was followed by a strong theoretical analysis:

> ''. . . [I]t is worth recalling that as a rule, save for some digressions into authoritarianism -all too many and unfortunately not yet on the decline, the current thinking favors the so-called minimalist approach to criminal law. In other words, moderate, restricted, marginal use of the criminal-law apparatus, reserving it instead for only those cases when less extreme solutions are either out of the question or frankly inadequate. The power to punish is the most awesome weapon that the State—and society, for that matter—has in its arsenal, deploying its monopoly over the use of force to thwart behaviors that seriously—very seriously—threaten the life of the community and the fundamental rights of its members.''[34]

The Court's second defamation case was the *Canese*[35] case. Ricardo Canese was prosecuted and convicted for slander for statements made in August 1992, during the electoral campaign for the presidency of Paraguay. Ricardo Canese questioned the suitability and integrity of Juan Carlos Wasmosy, a presidential candidate, stating that the latter ''was the Stroessner family's front man in CONEMPA'' (a private company which had been doing business with the Government). A number of CONEMPA's stakeholders and directors initiated criminal proceedings for slander and defamation, and Mr Canese was sentenced to two months' imprisonment together with a fine. He was also prohibited from leaving the country for a period of more than eight years.

[32] I.A. Court H.R., *Herrera Ulloa Case*, paras 128–129.
[33] See the concurring opinion of the President of the Court, Judge Sergio García Ramírez.
[34] I.A. Court H.R., *Herrera Ulloa Case*, Concurring Vote of Sergio García Ramírez, paras 14–15.
[35] I.A. Court H.R., Case of *Ricardo Canese v Paraguay,* judgment of August 31, 2004.

While the Court's eventual judgment in the case makes some important observations on the importance of freedom of expression in the context of elections,[36] its main importance lies in its discussion of subsequent imposition of liability. The Court's interpretation of the criminal procedure instituted against Canese as a separate violation of freedom of expression, reinforces and consolidates the jurisprudence developed in the *Herrera Ulloa* case.

The Court first points to the restrictions that are permissible in a democratic society, and resorts to the ''necessity'' standard developed in Advisory Opinion OC-5. Secondly, the Court notes the greater tolerance that must exist towards statements and opinions expressed in public debates or regarding public interest issues,[37] and, in this regard, holds that public officials and individuals who carry out activities subject to public scrutiny must tolerate greater criticism. The Court goes on to stress, in line with the Herrera Ulloa judgment, that,

> ''in the case of public officials, individuals who exercise functions of a public nature, and politicians, a different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a specific individual''.

The Inter-American Court then emphasises that the domestic courts should have taken into account that Canese's statements were made in the context of an electoral campaign; therefore,

> ''the judge should have weighed respect for the rights or reputations of others against the value for a democratic society of an open debate on topics of public interest or concern''.[38]

The Court then makes an important finding; that the entirety of the criminal proceedings against Canese constitute a violation of his right to freedom of expression—not just the conviction:

> ''The criminal *proceeding*, the subsequent sentence imposed on Mr. Canese for more than eight years, and the restriction to leave the country applied during almost eight years and four months, facts which are the grounds for this case, constitute an unnecessary and excessive punishment for the statements that the alleged victim made in the context of the electoral campaign concerning another candidate to the presidency of the Republic on matters of public interest. They also limited the open debate on topics of public interest or concern and restricted Mr. Canese's exercise of freedom of thought and expression to emit his opinions for the remainder of the electoral campaign. . . . Furthermore, the Court considers that, in this case, *the criminal proceeding*, the consequent sentence imposed on Mr. Canese for more than eight years, and the restrictions to leave the country during almost eight years and four months constituted indirect means of restricting his freedom of thought and expression. In this respect, after his criminal conviction, Mr. Canese was dismissed

[36] I.A. Court H.R., *Canese Case*, paras 88 and 90.
[37] I.A. Court H.R., *Canese Case*, para.97.
[38] I.A. Court H.R., *Canese Case*, para.105.

> from the newspaper where he worked and, for some time, did not publish his articles in any other newspaper.''[39]

These two judgments allowed me to claim—until the 2009 decision in *Tristan Donoso v Panama*,[40] which is discussed below—that the Inter-American Court had begun to formulate an argument that questions the compatibility of the use of the criminal law to impose subsequent liability with the right to freedom of expression as guaranteed under the ACHR. In *Canese*, the Court stated:

> ''. . . [T]he Court will decide whether, in this case, the subsequent imposition of criminal liability with regard to the alleged abusive exercise of the right to freedom of thought and expression by statements on matters of public interest, may be considered to comply with the requirement of necessity in a democratic society. In this respect, it should be recalled that penal laws are the most restrictive and severest means of establishing liability for an unlawful conduct.''[41]

The question common to both cases (*Canese* and *Herrera Ulloa*) is identical, and the theoretical conclusion is similar: in cases like these, the use of criminal law would be incompatible with the right to freedom of expression.

Next came the *Kimel* decision. In 1989, Eduardo Kimel, an Argentinean journalist and writer, published the book *La Masacre de San Patricio* (*The Massacre of Saint Patrick*). The book tells of the killing of five clerics in 1976 during Argentina's last dictatorship. In one of the paragraphs, Kimel criticises the role of investigative judges—*jueces de instruccion*— during the dictatorship, noting specifically the actions of the judge who was entrusted with the investigation of the case. The judge criticised by Kimel lodged a complaint and criminal proceedings were initiated, resulting in the imposition of a one-year prison sentence and award of damages of US$20,000. After a lengthy domestic appeals process, Kimel brought his case to the Inter-American Commission on Human Rights, which referred the case to the Inter-American Court of Human Rights in 2007.

Kimel found relief on May 2, 2008, almost two decades after the unjust conviction had been imposed on him, when the Inter-American Court established that criminal defamation laws in Argentina run counter to the American Convention on Human Rights.

In its decision, the Inter-American Court analyses the criminal defamation provisions in Argentina's Penal Code and concludes that they are incompatible with arts 9 (principle of legality) and 13(1) (freedom of expression), as read with arts 1(1) (duty of states to respect human rights) and 2 (duty of states to adopt means to bring the internal legal system in line with international standards) of the American Convention.

The Inter-American Court then orders Argentina not only to revoke Kimel's criminal and civil sentences, but also to repeal or change its criminal defamation laws. The Court held:

[39] I.A. Court H.R., *Canese Case*, paras 106–107 (emphasis added).

[40] I.A. Court H.R., *Case of Tristan Donoso v Panama*, judgment of January 27, 2009. Official translation to English pending at the time this article was written.

[41] I.A. Court H.R., *Canese Case*, para.104.

> ''Criminal Law is the most restrictive and harshest means to establish liability for an illegal conduct. The broad definition of the crime of defamation might be contrary to the principle of minimum, necessary, appropriate, and last resort or ultima ratio intervention of criminal law. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State.''

The difference between *Kimel* and its predecessor decisions is in that in *Kimel*, the Inter-American Court ordered the state to modify its criminal defamation legislation. Since many of the criminal defamation laws in Latin America are similar to the Argentinean law, it is expected that the Court's decision will have an impact not only on Argentina, but also on the rest of the region.

The decision, however, indicates that criminal libel laws may be viable under more protective standards. In obiter remarks at [78], the Court notes that the use of criminal law against certain expressions and opinions may not be contrary to the Convention, and signals that the introduction of an actual malice doctrine and shifting of the burden of proof may be sufficient to ''cure'' criminal libel laws. This obiter dictum is unfortunate because it could be read as contradicting the rest of the decision. Nevertheless, until the Court's early 2009 decision in the *Tristan Donoso* case, it was possible to interpret the obiter dictum in the best possible light by saying that the Court wanted to leave open the possibility of using criminal law against hate speech and the incitement of violence.[42]

But the obiter dictum in *Kimel* also indicates tension between different judges. Judge García Sayán, in a concurring opinion, emphasised that it is possible to use criminal law against certain expressions that could damage the honour of public officials. García Sayán's opinion should not be interpreted as indicating the opinion of the Court, but rather his own, which differs from that of other judges. The former President of the Court, Judge García Ramírez, clearly endorsed the opinion that the Court had begun to develop in its previous decisions, which is that the state should not apply criminal law in those cases.

Then, in early 2009, the Court delivered judgment in the case of *Donoso*. Tristan Donoso, a Panamanian attorney, was convicted on criminal defamation charges in 2005. In 1999, during a press conference, he claimed that the Attorney General of Panama had taped a telephone conversation between Donoso and one of his clients. The next day, the Attorney General denounced Tristan Donoso for criminal defamation, claiming that Donoso had accused him of illegally recording the telephone conversation. Donoso exhausted the domestic remedies and brought the case to the Inter-American Commission.

The Court held that Panama, by disclosing the telephone conversation, had violated the right to privacy, as well as the right to honour and reputation protected under arts 11.1 and 11.2 of the American Convention, as read with art.1.1 thereof.[43] The Court also

[42] See Eduardo Bertoni, ''Hate speech under the American Convention on Human Rights'' (2006) 12 *ILSA Journal of International and Comparative Law* 569.

[43] In considering this violation, the Court held that: ''75. The Court understands that the telephone conversation between Mr. Adel Zayed and Mr. Tristan Donoso was of a private nature

decided that Panama, by imposing a criminal sanction, violated the right to freedom of expression protected under art.13 of the American Convention, in relation to art.1(1) thereof.[44]

The Court reiterated its conclusions in *Herrera Ulloa*, *Canese* and *Kimel*: public officials and individuals who exercise activities subject to public scrutiny must be more tolerant and open to criticism. The Court insisted once more on the different threshold of protection that should be applied to certain individuals, which should not be based on their personal characteristics but rather on what the statements made about them may entail.[45]

The Court further considered that,

> ''although the day-fines imposed as a criminal sanction in this case do not appear to be excessive, the subsequent imposition of criminal liability is unnecessary. Additionally, ... the fear of a civil sanction ... may clearly have an intimidating or inhibiting effect on freedom of expression which could be as strong or even stronger than that of a criminal sanction, as it may compromise the personal and family life of the person who denounces a public official, leading to an undesirable self-censorship not only by the affected party but also by other individuals who may criticize the performance of a public official.''[46]

The ''chilling effect'' argument considered not only in relation to criminal sanctions but also as a consequence of civil defamation cases is an important one that could positively impact on future cases. However, the decision does not go so far as to state that criminal defamation per se violates the Convention, even when the expression concerned constitutes criticism of public officials or involves matters of public interest. The Court departs from its approach in *Herrera Ulloa* and *Canese*, the first two criminal defamation cases, when it questioned the use of criminal defamation laws in circumstances like those in *Donoso*. The *Donoso* decision leaves open the possibility that, subject to safeguards, the use of criminal defamation laws is permissible even in cases concerning statements regarding the duties of public officials or expressions on matters of public interest. If the Court recognised the chilling effect of both criminal and civil sanctions, why then did it not also hold that criminal defamation laws, because of the chilling effect they have, should be considered incompatible with the Convention? I do not know the answer to

and that none of them agreed to disclose the communication to third parties. Also, given that such conversation was held between the alleged victim and one of his clients, it should have been further protected by the obligation of professional secrecy. 76. The disclosure of the telephone conversation by the public official constituted interference in the private life of Mr. Tristan Donoso. The Court must consider if such interference is arbitrary or abusive pursuant to the provisions of article 11.2 of the Convention, or if it is consistent with the Convention. As we have previously noted (supra para.56), in order to be compatible with the American Convention an interference must meet the following conditions: it must be previously established by law, it must pursue a legitimate aim, and it must be suitable, necessary and proportionate. Therefore, if any of the above conditions are not met the measure will be contrary to the Convention.''

[44] I.A. Court H.R., *Tristan Donoso Case*, paras 223.3 and 223.5.

[45] I.A. Court H.R., *Tristan Donoso Case*, para.115.

[46] I.A. Court H.R., *Tristan Donoso Case*, paras 129–130.

this question. Perhaps the tension between the judges that became evident in the *Kimel* case also influenced the *Donoso* decision.

Insult (desacato) laws

Before the *Kimel* case, in 2005, the Inter-American Court delivered judgment in the *Palamara*[47] case. The case arose from the prohibition in March 1993 of publication of a book authored by the applicant which discussed issues related to military intelligence. The applicant, a retired Chilean Navy officer, was a civil servant and had been hired by the Chilean Navy. Following the prohibition and Palamara's subsequent conviction for ''disobedience'', Palamara called a press conference at his residence, resulting in further charges being levelled against him for contempt of authority (*desacato*). The Court had to decide two issues: first, whether the prohibition of prior censorship in art.13(2) is only limited by art.13(4), and secondly, whether Panama's insult laws are consistent with art.13.

On the first issue, the Court avoided stating openly that prior censorship is permitted exclusively in the circumstances provided in art.13(4). As noted above, this was the rationale in *The Last Temptation of Christ* decision. The facts in the *Palamara* case are far more complex, involving a civilian with potential access to legitimate state secrets. However, the Court is able to side-step the principled question before it by holding that the book concerned a matter of public interest and that it was not based on knowledge that Mr Palamara-Iribarne had acquired by reason of his position in the Navy. The question to be asked is: what would have happened had the case been different? Would prior censorship have been possible? In my opinion, despite the confusion that may be caused by the Court's claim that it will not examine the duty of confidentiality (actually, if censorship is not permitted even in such cases, the reader will be confused by the Court's comment), the answer may be found in the Court's statement that the duty of confidentiality may result in the subsequent imposition of liability, without making any reference to prior restriction or censorship.[48]

As for the insult (*desacato*) law question, the *Palamara* decision is in line with Inter-American Commission's opinions since 1994.[49] When reading the decision, one notices that the Court repeatedly makes reference to ''the instant case'' and to the ''disproportionate'' nature of the State's reaction; and up until [88], the judgment follows the line established in *Herrera Ulloa* and *Canese*. However, at [89], the Court begins to change its argument and eventually requires Chile to repeal whatever insult provisions it still has in force. At [95], the Court concludes with the most illuminating sentence in the judgment:

[47] I.A. Court H.R., *Case of Humberto Palamara Iribarne v Chile*, judgment of November 22, 2005.

[48] See I.A. Court H.R., *Palamara Case*, para.77.

[49] In 1994 the Inter-American Commission issued a report considering that *desacato* laws were against the Convention (see Inter-American Commission, *Annual Report 1994*, ''Report on the Compatibility of *'Desacato'* Laws with the American Convention on Human Rights'', OEA/Ser.L/V/II.88, Doc. 9 rev. (1995)). For an explanation of this report, see Bertoni, *Libertad de expresión en el Estado de derecho* (2008), p.78.

> ''In addition, Chile has failed to comply with the general obligation to adopt domestic laws laid out in Article 2 of the Convention insofar as it included *contempt provisions* in its domestic legislation, some of which are still in force, which are contrary to Article 13 of the Convention.'' (Emphasis added.)

Access to public information

The Inter-American Commission has long regarded access to public information as one of the rights in the catalogue of civil and political rights protected under art.13 of the Convention.[50] However, it was not until 2006 that the Court had the opportunity to rule on the issue. In the case of *Marcel Claude Reyes et al. v Chile*, the Court confirmed that:

> ''Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case.''[51]

With this historic decision, the Inter-American Court became the first international court to declare access to information a fundamental human right. It emphasised that information ''should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied''[52] and that ''State authorities [must be guided] by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a limited system of exceptions''.[53]

Although the Court acknowledges that the right may be subject to restrictions,

> ''they must have been established by law to ensure that they are not at the discretion of public authorities. Such laws should be enacted 'for reasons of general interest and in accordance with the purpose for which such restrictions have been established'''.[54]

The Court also states that,

> ''the restriction established by law should respond to a purpose allowed by the American Convention. In this respect, Article 13(2) of the Convention permits

[50] See in particular the Commission's Inter-American Declaration of Principles on Freedom of Expression, adopted during 108th Regular Session of the Inter-American Commission, October 19, 2000. See also the annual reports of the Office of the Special Rapporteur for Freedom of Expression.

[51] I.A. Court H.R., *Case of Marcel Claude Reyes et al. v Chile*, judgment of September 19, 2006, para.77.

[52] I.A. Court H.R., *Claude Reyes Case*, para.77.

[53] I.A. Court H.R., *Claude Reyes Case*, para.92.

[54] I.A. Court H.R., *Claude Reyes Case*, para.89.

> imposing the restrictions necessary to ensure 'respect for the rights or reputations of others' or 'the protection of national security, public order, or public health or morals'.''

And, finally, the Inter-American Court establishes that ''the restrictions imposed must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest''.[55] It is important to note that the Inter-American Court placed the burden of proof regarding possible restrictions to this right on the state.[56]

Finally, the Court issued guidelines on the implementation of the right of access to information. It stressed that laws governing the right of access,

> ''should include a guarantee of the effectiveness of an appropriate administrative procedure for processing and deciding requests for information, which establishes time limits for taking a decision and providing information, and which is administered by duly trained officials''.[57]

In this last regard, that is, the training of public agents in relevant fields, the Court ordered the Chilean Government to,

> ''provide training to public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right; this should incorporate the parameters established in the Convention concerning restrictions to access to this information that must be respected''.[58]

The influence of the European Court of Human Rights case law in the arguments of the Inter-American Court

From the early stages (Advisory Opinion OC-5) to the most recent cases decided by the Inter-American Court, the impact of the European Court of Human Rights jurisprudence has been significant.

In OC-5, the Inter-American Court relied on European precedent to elaborate the concept of public order, stating that,

> ''the Court adheres to the ideas expressed by the European Commission of Human Rights when, basing itself on the Preamble of the European Convention, it stated . . . that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but . . . to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law. (Austria vs.

[55] I.A. Court H.R., *Claude Reyes Case*, paras 90–91.
[56] I.A. Court H.R., *Claude Reyes Case*, para.92.
[57] I.A. Court H.R., *Claude Reyes Case*, para.163.
[58] I.A. Court H.R., *Claude Reyes Case*, para.165.

> Italy, Application No.788/60, 4 European Yearbook of Human Rights 116, at 138 (1961).)''[59]

The Inter-American Court also turned to European precedent to interpret the concept of ''necessity''. The following paragraph was quoted in Advisory Opinion OC-5 as well as in the *Herrera Ulloa* case:

> ''It is important to note that the European Court of Human Rights, in interpreting Article 10 of the European Convention, concluded that 'necessary,' while not synonymous with 'indispensable,' implied 'the existence of a pressing social need' and that for a restriction to be 'necessary' it is not enough to show that it is 'useful,' 'reasonable' or 'desirable.' (Eur. Court H. R., The Sunday Times Case, judgment of 26 April 1979, Series A no. 30, para. 59, pp. 35–36.) This conclusion, which is equally applicable to the American Convention, suggests that the 'necessity' and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest . . . the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary . . . [It must] be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it. (The Sunday Times Case, supra, para. 62, p. 38. See also Eur. Court H. R., Barthold, judgment of 25 March 1985, Series A no. 90, para. 59, p. 26.)''[60]

In *The Last Temptation of Christ* case, in relation to the above-mentioned ''democratic standard'', the Inter-American Court held that:

> ''The European Court of Human Rights has indicated that the supervisory function [of the Court] signifies that [it] must pay great attention to the principles inherent in a 'democratic society'. Freedom of expression constitutes one of the essential bases of such a society, one of the primordial conditions for its progress and for the development of man. Article 10(2) [of the European Convention on Human Rights] is valid not only for the information or ideas that are favorably received or considered inoffensive or indifferent, but also for those that shock, concern or offend the State or any sector of the population. Such are the requirements of pluralism, tolerance and the spirit of openness, without which no 'democratic society' can exist.''[61]

An extended version of this paragraph was later cited in the *Ivcher*, *Herrera Ulloa* and *Canese* cases.

[59] I.A. Court H.R., Compulsory membership, para.69.

[60] I.A. Court H.R., Compulsory membership, para.46.

[61] *Handyside v United Kingdom* (1976) 1 E.H.R.R. 737 ECtHR at [49]; *Sunday Times v United Kingdom* (1979) 2 E.H.R.R. 245 ECtHR at [59] and [65]; *Barthold v Germany* (1985) 7 E.H.R.R. 383 ECtHR at [55]; *Lingens v Austria* (1986) 8 E.H.R.R. 407 ECtHR at [41]; *Muller v Switzerland* (1988) 13 E.H.R.R. 212 ECtHR at [33]; and *Otto-Preminger Institute v Austria* (1994) 19 E.H.R.R. 34 ECtHR at [49].

In the *Ivcher* case, express mention is also made of the European Court's arguments regarding possible restrictions to discussions on matters of public interest. The Inter-American Court states that:

> ''The European Court has emphasized that Article 10(2) of the European Convention, on freedom of expression, leaves a very reduced margin to any restriction of political discussion or discussion of matters of public interest. According to this Court, ... the acceptable limits to criticism are broader with regard to the Government that in relation to the private citizen or even a politician. In a democratic system, the acts or omissions of the Government should be subject to rigorous examination, not only by the legislative and judicial authorities, but also by public opinion.''

Ruling on a similar matter, in the *Herrera Ulloa*[62] case (at [125] and [126]), the Inter-American Court also adheres to arguments of the European Court:

> ''The jurisprudence constante of the European Court of Human Rights with regard to the permissible limits on freedom of expression has been that a distinction must be made between the limits that apply when the restriction is to protect a private individual and those that apply when the restriction is to protect a public figure, such as a politician. That Court has written that,
>
> > 'the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues.[63]
> >
> > Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.'''[64]

In the *Canese* case, concerning statements made in the context of an electoral campaign, the Inter-American Court turns once more to European jurisprudence, repeatedly citing European Court of Human Rights rulings concerning the importance of freedom of expression in political and electoral contexts.[65]

[62] This jurisprudence was also cited in the *Canese Case*.

[63] *Dichand v Austria* App. No.29271/95 judgment of February 26, 2002 ECtHR at [39]; *Lingens* (1986) 8 E.H.R.R. 407 ECtHR at [42].

[64] *Lingens* (1986) 8 E.H.R.R. 407 ECtHR at [42].

[65] Citing *Incal v Turkey* (1998) 29 E.H.R.R. 449 ECtHR at [46]; *Bowman v United Kingdom* (1998) 26 E.H.R.R. 1 ECtHR at [42].

Finally, in the *Kimel* case, and in order to support the argument presented at [78], referred to above, the Inter-American Court cites the European Court of Human Rights and observes that,

> ''the eminent value of freedom of expression, especially in debates on subjects of general concern, cannot take precedence in all circumstances over the need to protect the honour and reputation of others, be they ordinary citizens or public officials''. Cfr. Mamère v France, App. No.12697/03, § 27, ECHR 2006.

Notably, however, there is no reference to any European precedent in the American Court's last three freedom of expression cases: *Tristan Donoso*, *Rios* and *Perozo*.

Conclusion

In comparing the European and American jurisprudence on the right to freedom of expression, it is apparent that some of the matters addressed by the Inter-American Court have not been similarly analysed—or even addressed—by the European Court of Human Rights. For instance, matters concerning compulsory licensing and insult laws[66] have not been interpreted within the meaning of art.10 of the European Convention on Human Rights. One of the reasons for this contrast may lie in the different historical context of Latin American countries.

It is clear, however, that the American jurisprudence overall has been able to draw significantly on the experience of the European Court of Human Rights. But an important question is whether the European Court's jurisprudence sets a maximum or minimum threshold for interpretation by the Inter-American Court of Human Rights. In OC-5, the Inter-American Court considered that the European jurisprudence set a minimum threshold. The Court first compared the language of art.13 of the Convention with that of art.10 of the ECHR, and concluded that the:

> ''Guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.''[67]

Although the Inter-American Court has also stressed that it is often useful to compare the American Convention with other international instruments to discuss specific aspects

[66] Access to public information has only recently been included within the framework of art.10 of the ECHR when the European Court decided the case *Tarsasag A Szabadsagjogokert v Hungary* (App. No.37374/05), judgment of April 14, 2009. Previous developments of the European Court of Human Rights regarding access to public information offered an optimistic perspective that access to information may be regarded as one of the rights in art.10 of the ECHR: see Wouter Hins and Dirk Voorhoof, ''Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights'' (2007) 3 E.C.L. Review 114. The recent decision issued by the Court recognises that art.10 guarantees the ''freedom to receive information'' held by public authorities. The Court also said that states are obliged to ''eliminat[e] barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities''.

[67] I.A. Court H.R., Compulsory membership, para.50.

concerning the manner in which a certain right has been formulated, that approach should never be used to read into the Convention restrictions that are not grounded in its text. The American Court was very emphatic on this issue, saying that ''[t]his is true even if these restrictions exist in another international treaty''.[68]

Judge Pedro Nikken's concurring opinion in OC-5 explained that:

> ''In this respect, I believe to be true what was mentioned in the public hearings in the sense that because the American Convention is broader than the other treaties, what is legitimate under the International Covenant of Civil and Political Rights or under the European Convention on Human Rights may not be legitimate in this hemisphere because it does not conform to the American Convention. One only has to recall the special regulation of the death penalty contained in Article 4 or the right of reply of Article 14 to find evidence of that circumstance. This is not surprising as the establishment of the international regime for the protection of human rights reveals that, frequently, the latest treaties are broader than their predecessors and that it is easier to conclude more advanced treaties where fewer cultural and political differences exist among the States that negotiate them. Nor is it surprising, then, that the American Convention, signed almost twenty years after that of Europe and covering only the American Republics, is more advanced than the latter and also than the Covenant, which aspires to be an instrument that binds all of the governments of the planet.''[69]

In conclusion, art.13 has been designed to be more ''generous'' than art.10. Thus, the interpretation of art.10 by the European Court may provide a minimum standard for the interpretation of art.13, but never a ceiling. The judgments of the Inter-American Court reviewed in this paper also support this contention.

Finally—is there a dialogue? The Inter-American Court's rulings on the right to freedom of expression have clearly been influenced by the decisions of the European Court in many respects. The early decisions referred to in this paper cite European precedent at length. And while on the surface it may appear that the influence of European jurisprudence is on the decrease—in the last three cases (*Tristan Donoso*, *Rios* and *Perozo*) no European precedent was cited at all—in reality European jurisprudence is now embedded in the Inter-American precedents that the Court relies on and cites.

Some influence of Inter-American decisions can also be detected in European case law. In *Stoll v Switzerland*, the European Court for the first time cited Inter-American Court jurisprudence in a freedom of expression case.[70] A ''dialogue'' between the two courts may therefore be developing. Will this dialogue continue? Only time will tell.

[68] I.A. Court H.R., Compulsory membership, para.51.

[69] I.A. Court H.R., Compulsory membership, Declaration of Judge Pedro Nikken, para.5.

[70] The European Court cited the *Claude Reyes* case in its ruling in *Stoll v Switzerland* (2007) 47 E.H.R.R. 59 ECtHR. Although the European Court has increasingly focused its attention on the Inter-American Court's interpretation of other rights, the *Stoll* case marks the beginning of a dialogue on matters of freedom of expression.