THIRD INTER-AMERICAN HUMAN RIGHTS MOOT COURT
BENCH MEMORANDUM

Rómulo Estrada v. Ithaka

I. Procedural questions: preliminary exceptions

A. General considerations regarding the jurisdiction of the Inter-American Court

The Inter-American Court of Human Rights has jurisdiction to hear the instant case. The State of Ithaka became a party to the American Convention on Human Rights on April 14, 1986. Pursuant to Article 62, Ithaka declared at that time that it recognized as binding the jurisdiction of the Inter-American Court of Human Rights with respect to all cases concerning the interpretation and application of the Convention. All facts at issue in the present case fall within the time period during which Ithaka has been subject to the binding jurisdiction of the Court.

The Inter-American Commission decided to submit the instant case against the State of Ithaka in accordance with Article 51 of the American Convention on Human Rights. The case was processed before the Commission and submitted to the Court in accordance with the applicable procedural requirements, and these facts are not at issue. The case is submitted before the Inter-American Court of Human Rights in accordance with the guidelines established in Article 26 et seq. of the Court's Rules of Procedure. The terms and definitions referred to conform to the glossary appearing in Article 2 of those Rules of Procedure.

46(2).[1]

Arguments for the State

Petitioners did not exhaust the available domestic remedies for their claim that the Press Association's disciplinary proceedings violated the impartiality requirement for tribunals prescribed in Article 8(1) of the Convention. The Court should reject this claim because Petitioners did not recuse Former President Ortiz's brother-in-law, who was one of the members of the Press Association panel and who allegedly was not impartial. This action was adequate and available and would have remedied the alleged lack of impartiality at the domestic level.

II. Facts concerning the seizure of *Cronos* magazine: Did the governmental measure constitute a violation of the American Convention?

A. Applicable norms and general considerations

Article 13 of the American Convention provides that the right to freedom of thought and expression includes "freedom to seek, receive, and impart information of all kinds . . ." The Inter-American Court of Human Rights has indicated that "when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that it is being violated, but also the right of all others to 'receive' information and ideas."[2] Also, Article 13 ensures the right to convey information "regardless of frontiers, either orally, in writing, in print . . . or through any other medium . . . ." In this regard, the Inter-American Court has pointed out that the Convention "emphasizes the fact that the expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measureepresenlc2Ilig5nD9 s4n of th regard, the In/iBDC /TT0 1 Tf0.raA in7s

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been a State Party to the International Covenant on Civil and Political Rights[9] since June 19, 1986. Article 19 of the Covenant establishes that the exercise of the right to freedom of expression carries with it special duties and responsibilities and may, therefore, be subject to restrictions provided that certain conditions are met. The language of the Article, therefore, does not expressly prohibit prior censorship.

Although Article 19 of the Covenant may authorize the application of prior censorship, Ithaka could not avail itself of this provision to justify before the Inter-American Court the measures adopted in the facts of the present case. Article 29 of the American Convention stipulates that no provision of that treaty may be interpreted as restricting the exercise of a right recognized under domestic law or by virtue of another international convention to which the State concerned is a party. Interpreting this provision, the Court has indicated that:

> if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.[10]

Finally, freedom of thought and expression is one of the rights that could be subject to derogation under Article 27(2) of the American Convention. The application of this Article, however, may only be triggered when certain specific conditions are present, specifically: 1) existence of a war, public danger, or other emergency that threatens the independence or security of the country; and 2) measures of derogation may be applied only to the extent and for the period of time strictly required by the exigencies of the situation. International case law, however, including decisions adopted by the bodies of the Inter-American System, shows that the above- mentioned conditions have been restrictively interpreted.

B. Can an exception to the prohibition of prior censorship can be justified under Article 32(2) when the imminent revelation of the names of current intelligence agents and the location of military bases is at stake? If so, can the measure adopted by Ithaka comply with the requirements of Article 13(2)?

Under international human rights treaties, only a limited number of rights are considered

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[9]Mar. 23, 1976, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, *reprinted in* 6 I.L.M. 368 (1967).

[10]*See Compulsory Membership, supra* note 2, ¶ 52.

absolute.[11] In general terms, the rights ensured by these instruments may be subject to restrictions. These may be expressly authorized or may arise out of the language of the treaties or the articulation of the right. Another basis for limitation, though hotly disputed, is the doctrine of "inherent limitations." This doctrine, as articulated in the case law of the European System, "maintains that states may restrict the scope of rights and freedoms . . . on the grounds of 'implied limitations' as well as express restrictions, without falling foul of the [European] Convention."[12] This doctrine was originally applied in broad terms, primarily to persons in a special legal situation such as detained persons or mentally ill persons.[13] Later, the European Court of Human Rights reformulated the scope of the inherent limitations doctrine by rejecting its applicability to Articles that expressly authorize restrictions; the Court, however, appears to allow the application of limitations by implication to Articles that do not provide for restrictions.[14]

Article 13 of the American Convention may be subject to restrictions at any time provided that certain requirements are met. Subsequent liability is, in principle, one such authorized limitations. Prior restraint or censorship is prohibited, with the express exception of Article 13(4).

On the other hand, Article 32(2) of the Convention provides that "[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society." In interpreting this provision, the Inter-American Court has stated that:

> Article 32.2 is [not] automatically and equally applicable to all the rights which the Convention protects, including especially those rights in which the restrictions or limitations that may be legitimately imposed on the exercise of a certain right are specified in the provision itself. Article 32.2 contains a general statement that is designed for those cases in particular in which the Convention, in proclaiming a right, makes no especial reference to possible legitimate restrictions.[15]

Even though the Court appears to have adopted a very restrictive interpretation of this clause, a closer analysis of its language shows that it did not construe the scope of the clause in absolute terms. In fact, by stating that Article 32(2) is not "*automatically and equally applicable to all the rights*" and that it is "designed for those cases *in particular* in which the Convention . .

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[11]For example, the right not to be subjected to torture or other inhuman or degrading, treatment or punishment.

[12]Donna Gomien et al., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 210 (1996).

[13]*See id.*

[14]*See* Euro. Ct. H.R., *Golder Case*, Judgment of 21 February 1975, Series A No. 18, ¶ 44.

[15]*Compulsory Membership*, *supra* note 1, ¶ 65.

. makes no special reference to possible legitimate restrictions," the Court appears to leave room for an exceptional application of this provision to rights that expressly provide for limitations. In the *X e Y Case*,[16] the Inter-American Commission provided a broader interpretation to the scope of Article 32(2), but it ultimately used this holding to determine that it is legitimate to apply restrictions to rights that do not expressly authorize limitations.[17]

In construing the language of Article 32(2), the Court has indicated that limitations under that provision must be strictly interpreted. In defining limitations like "public order" and "general welfare," the Court has stated that:

> [they] may under no circumstances be invoked as a means of denying [in Spanish "suppress"] a right guaranteed by the Convention or to impair or deprive it of its true content. (*See* Art. 29(a) of the Convention.) Those concepts, when they are invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the "just demands" of a "democratic society," which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention.[18]

The same interpretation should be applied when analyzing other grounds for limitation prescribed in Article 32(2), such as "rights of others" and "security of all."

In the *X e Y Case*, the Inter-American Commission set forth the requirements needed to legitimately apply a restriction under the general clause of Article 32(2).[19] Arguably, in the present case, the Court could also apply the requirements prescribed by Article 13(2) given the fact that the right subjected to restriction is the right to freedom of thought and expression. In general terms, the requirements set out in both Articles and the limitations permitted by them are essentially the same.

Restrictions on the right to freedom of thought and expression "must meet certain requirements of form, which depend upon the manner in which they are expressed. They must also meet certain substantive conditions, which depend upon the legitimacy of the ends that such

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[16]I/A Ct. H.R., Report 38/96, Case 10506, (Argentina), Annual Report 1996.

[17]*See id.* ¶ 54.

[18]*Compulsory Membership*, *supra* note 1, ¶ 67.

[19]*See X e Y Case*, *supra* note 15, ¶ 60. The Commission stated that any restrictions "should necessarily: 1) be prescribed by law; 2) be necessary for the security of all and in accordance with the just demands of a democratic society; 3) and its application must be strictly confined to the specific circumstances present in Article 32.2 and be proportionate and reasonable in order to accomplish those objectives".

needs for the full enjoyment of the right Article 13 guarantees." Moreover, the Court stated that " [i]mplicit in this standard . . . is the notion that the restriction, even justified by a compelling governmental interest must be so framed as not to limit the right protected by Article 13 more than is necessary . . . the restriction must be proportional and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.[24]

Arguments for the Petitioner

First, Article 13 of the American Convention expressly prohibits prior restraint or censorship. The case law of the Inter-American Court and Commission clearly establishes that this prohibition is nearly absolute, with the only exception provided in Article 13(4). Under the American Convention, apart from the above mentioned exception, the only legitimate restriction that can be applied to this clause is the derogation of the right, according to Article 27 of the same instrument. To derogate from this right, however, certain conditions have to be met which are not present in the case under analysis.

Second, Article 32(2) is not applicable to this case because the Court, following the case law of the European System on inherent limitations, has held that this general clause is designed for those rights that do not themselves authorize permissible restrictions. The case law of the Inter-American Commission is consistent with this interpretation. Since the right to freedom of thought and expression protected in Article 13 provides for express limitations, including the exception to the prohibition of censorship, the general clause of Article 32(2) can not be applied to create new restrictions not prescribed in the text of the Convention. Moreover, allowing a restriction on the prohibition of prior censorship to stand on the basis of Article 32(2) would be incompatible with Article 29(a) of the American Convention. This article states that no provision of the Convention may be interpreted to suppress rights and freedoms recognized therein or to restrict them to a greater extent than provided. The case law of the Court provided a similar interpretation by holding that the Article 32(2) grounds of limitation may under no circumstances be invoked to deny, impair, or deprive a right of its true content as protected by the American Convention.

Even if a limitation to the prohibition of prior censorship is permitted on the basis of Article 32(2), the seizure of *Cronos* magazine is not a legitimate restriction for the purposes of Article 13(2). Firstly, although the authority of the Executive Power to order the contested measure is grounded on law 2001, this law is not formulated with sufficient precision to enable individuals to foresee, to a degree of reasonable certainty, when a publication may be subject to

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scrutinized to determine whether they fall within the scope of this restriction. Even assuming that information to be published in *Cronos* concerning Ithaka's military bases and intelligence agents could be sufficiently sensitive to fall within the scope of "national security," the historical information related to the 1984 failed military-coup - including the plans, participants, and the negotiations that followed to avert it- clearly falls outside that restriction. Thirdly, the measure of prior restraint was not necessary in a democratic society to protect national security. The facts of the case show that the State cannot demonstrate that the confiscation of the complete issue of *Cronos* was required by any compelling governmental interest. Assuming *arguendo* that the disclosure of certain sensitive information included in the magazine - military bases and covert agents - could have imperiled the national security of Ithaka, the seizure of all the materials contained in that issue of *Cronos* was not required to achieve that information. The State failed to select other less restrictive measures such as requesting that the editorial board of *Cronos* exclude sensitive information from the magazine. The application of such an overreaching measure without balancing the general interest of society in obtaining information was an unnecessary and disproportionate reaction to the objective of preventing the disclosure of the military information.

Arguments for the State

The general clause of Article 32(2) can be applied in order to impose limitations on the freedom of thought and expression, even though this right provides for express restrictions. The case law of the Inter-American Court shows that the scope of Article 32(2) must not be construed in absolute terms, but instead allows exceptional applications of this clause if the particular circumstances of a case so justify. This interpretation is permitted by jurisprudence of the Court that indicates that the provisions of the American Convention may never be construed so as to weaken the basis of the system established by that treaty. In determining if the circumstances of the present case justify the application of Article 32(2) to restrict Petitioner's right to freedom of expression, the Court must strike a proper and fair balance between the objective of ensuring individual rights and Ithaka's need to protect the security and integrity of the country. In that regard, the threat of an imminent disclosure of extremely sensitive military information containing the number and location of military bases, as well as the identification of intelligence agents currently operating in and outside the country, clearly justifies the exceptional application of the general limitation clause of Article 32(2) to restrict Petitioner's right under Article 13.

Additionally, under the extreme circumstances of the present case, the measure ordering the confiscation of the entire issue of *Cronos* magazine is a legitimate restriction for purposes of Article 13(2). First, the limitation is expressly prescribed by law 2001 and is defined in precise terms that allow any individual to foresee with certainty that publications that constitute a clear and imminent threat to national security may be subject to seizure. Moreover, to ensure a restrictive application of that provision, the legality of any measure adopted under law 2001 is subject to judicial review. Second, "national security" is a permissible ground for limitation under Article 13(2). Although "national security" may be considered too broad a concept, law 2001 expressly and clearly defines its scope of application by establishing that seizure or

confiscation is allowed only when a publication would gravely imperil the nation's security. By limiting its application to extreme situations, the law only interferes with a very limited range of publications that disclose sensitive military information. Third, the seizure of the entire issue of *Cronos* was absolutely necessary to protect the integrity and security of Ithaka. The threat of disclosure of information about the location and number of military bases, as well as the identification of intelligence agents currently operating in and outside the country, was a sufficiently compelling interest to justify the contested restriction. Given the imminence of the publication, the State could not apply less restrictive measures that the one adopted; any alternative measure was not sufficient in the particular circumstances of the case to prevent the release of this crucial information. In the context of the case, the seizure of *Cronos* was not a disproportionate measure to accomplish the need to protect Ithaka's integrity and security because it only targeted the issue containing the critical information. The Petitioner has always remained free to publish the other information about the historical events of the country in a separate issue of *Cronos*.

C. Does Article 13(5) authorize an exception to the prohibition of prior censorship, when a publication advocates national or racial hatred that constitute incitements to lawless violence? If so, does the information contained in *Cronos* magazine constitute the sort of speech prohibited by that provision?

In general terms, Article 13(5) prohibits war propaganda and the advocacy of national, racial, and religious hatred that incites lawless violence. The application of this provision to a factual situation raises several problems of interpretation. First, there is a discrepancy between the Spanish and English text of this Article. While the Spanish version provides that "law will prohibit any propaganda . . ." [Estará prohibida por la ley, toda propaganda], the English version establishes that "[a]ny propaganda . . . shall be considered as offences punishable by the law." This discrepancy creates uncertainty as to whether this provision allows only for the establishment of subsequent criminal liability or if it also authorizes prior censorship. Second, the scope of this provision's application is not clearly defined in the language of the Article and there is not relevant case law of the Inter-American System interpreting it. Some parameters for construing the extent of its application, however, can be established.

The Inter-American Court, drawing from the general rules of interpretation of the Vienna Convention on the Law of the Treaties, has stated that when a treaty has been authenticated in two languages, the treaty is equally authoritative in each language. Moreover, if differences appear to exist between the two authenticated texts, the meaning which best reconciles the texts, considering the object and purpose of the treaty, will be adopted.[25] The Court has consistently held that the object and purpose of the American Convention is to protect the fundamental rights

[25] *See* I/A Court H.R., *Neira Alegría Case et al*, Order of June 29, 1992, ¶ 11.

compatibility of "desacato laws"[30] with the American Convention, stated that

> [t]he Convention requires that [the] threshold [of State intervention] be raised even higher when the State brings to bear the coercive power of its criminal justice system to curtail expression. Considering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances when there is an obvious and direct threat of lawless violence.[31]

In this interpretation, the Commission appears to accept the restrictive standard adopted by the U.S. Supreme Court; the Commission, however, has never ruled on an individual case applying this standard. The Inter-American Court, on the other hand, has never ruled on this issue.

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not the information that was supposed to be published in the confiscated issue of *Cronos*.

Arguments for the State

Article 13(5) authorizes the application measures that restrain the publication of information that clearly advocates national or racial hatred and incites lawless violence. The language of the Article, while authorizing the imposition of criminal sanctions, does not expressly ban censorship. Assuming *arguendo* that the threshold of State interference with the right of freedom of expression is high, the State submits that the exceptional circumstances of the present case justify the measure adopted by Ithaka. The Court, therefore, when construing

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A. Applicable norms and general considerations

Article 13(2) of the American Convention establishes that imposition of subsequent liability is the only permissible limitation on the right of freedom of expression. As stated in Section II, prior censorship is, in principle, prohibited. By permitting the imposition of subsequent "liability," however, the Convention appears to leave room for the States Parties to decide whether a particular incident of conduct will entail criminal or civil liability, or both. The great majority of the countries in Latin America, for example, criminalize defamation.

The Inter-American Court has ruled that, to be a legitimate restriction under the Convention, the imposition of any liability must meet four requirements: 1) grounds for liability must be previously established; 2) these grounds must be express and precise within the law; 3) the ends sought to be achieved must be legitimate; and 4) the grounds for liability must be necessary to ensure the legitimate end pursued.[32] For an overview of the scope of application of these requirements, see Section II.B.

B. Was the ground for liability imposed on the Estrada brothers, both as a consequence of reproducing an interview in which defamatory statements appeared to be made and as a result of their own statements, a legitimate restriction under 13(2) of the American Convention?

Assuming *arguendo* that a restriction complies with the requirements that it be previously established, expressly and precisely defined by the law, and that it pursues a legitimate aim - such as respect for the rights or reputations of others - the remaining question is whether the limitation is necessary to ensure that legitimate end. As stated in Section II.B., the Inter-American Court has construed "necessary" in the context of a democratic society.[33]

The question concerning a journalist's liability for the reproduction of defamatory statements made by a third person has never been considered by the bodies of the Inter-American System. The European Court in the *Jersild Case*, in which a Danish journalist was fined for disseminating through his broadcast an interview where racial remarks were made by third persons, held that:

> News reporting based on interviews . . . constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog." . . . The punishment of a journalist for assisting in the dissemination of statements by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons

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[32] *See Compulsory Measures*, *supra* note 2, ¶ 39; *see also "Desacato" Laws*, *supra* note 30, at 207.

[33] *See Compulsory Measures*, *supra* note 2, ¶ 46.

for doing so.[34]

On the issue of liabilities imposed as a result of statements made by journalists against individuals, there appears to be a consensus in the international and comparative case law that a distinction must be drawn between public and private persons. In its *Report on the Compatibility of "Desacato" Laws with the American Convention*, the Inter-American Commission emphasized that freedom of expression fosters an open political debate which is essential to the existence of a democratic society. Accordingly, it concluded that critical and even offensive speech directed against "those who hold public office or are intimately involved in the formation of public policy" must be afforded a higher protection, as long as the criticism relates to the public office. In that regard, the Commission stated that

> in democratic societies political and public figures must be more . . . open to public scrutiny and criticism. The open and wide-ranging public debate, which is at the core of democratic society necessarily involves those persons who are involved in devising and implementing public policy. Since these persons are at the center of public debate, they knowingly expose themselves to public scrutiny and thus must display a greater degree of tolerance for criticism.[35]

Any criticism that is not related to the officials' position or is directed at a private individual, however, may be subject to defamation actions.[36]

In the same vein, the European Court in *Lingens v. Austria* held that freedom of expression "affords the public one of the best means of discovering and forming and opinion of the ideas and attitudes of political leaders . . . [therefore, t]he limits of acceptable criticism are . . . wider as regards as a politician as such than as regards a private individual."[37]

The U.S. Court has also afforded higher protection to speech aimed at criticizing public officials in the context of their public functions. In the landmark decision *New York Times v. Sullivan*, the Court held that a public official, in order to sustain an action for defamation, must prove that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not -*"actual malice"*-."[38]

Finally, both the Inter-American Commission and the European Court have held that, in the context of political criticism, a distinction must be drawn between purely fact-based

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[34]Euro. Ct. H.R., *Jersild v. Austria*, Judgement of 23 September 1994, Series A No. 298, ¶ 31.

[35]*"Desacato" Laws*, *supra* note 30, at 210-11.

[36]*See id.*

[37]Euro. Ct. H.R., *Lingens v. Austria*, Judgement of 8 July 1986, Series A No. 103, ¶ 42.

[38]376 U.S. 254 (1964).

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statements and value judgments. When the contested speech involves value judgements, the requirement of proving the truth of the statements in an action for defamation is of impossible fulfilment because value judgements are not susceptible of proof. Therefore, this situation raises the possibility that a good-faith critic of the actions of public officials or politicians may be punished for his or her opinions.

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their refusal to reveal the name of the individual who made the contested statements. The State cannot allow editors or journalists who shield the name of individuals who make defamatory remarks under the guise of "unidentified sources" to prevent a private person from restoring his or her reputation. The interest of the State in protecting the rights and reputation of Mr. Ortiz, a private individual, must out weight the right of the Estrada brothers to impart information.

Additionally, the fine imposed on the Estrada brothers for their own statements in the March 12, 1995 publication is justified by the fact that they defamed Mr. Ortiz, a private individual, by accusing him of behavior contrary to good morals and by attributing to him behavior that greatly affected his national reputation. The argument made by the Petitioner that the criticism was directed against a politician or a public leader concerning his public functions is not supported by the facts of the case. First, Mr Ortiz, though a former President of Ithaka, is no longer a public official, a public leader, or even a politician. Since leaving office in 1995, Mr. Ortiz has not actively participated in the formulation of policy or any other political activity of the country. Second, a closer look at the terms used in the publication shows that Estrada's remarks did not refer to any particular activity of former President Ortiz but was instead a broad statement about Mr. Ortiz's moral character and behavior. Third, the Petitioners' remarks were not value judgements but instead related to concrete facts and behaviors of President Ortiz, the truth of which they were unable to verify in court. Finally, on the basis of the arguments submitted, the State request that the Court find that Estrada's conviction was a legitimate restriction on his right to freedom of expression under Article 13(2) of the American Convention.

C. Does the Criminal Code of Ithaka, by making speech that does not incite lawless violence a crime, infringe upon the obligation of Article 2 of the American Convention?

Article 2 of the American Convention provides that:

> [w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States parties undertake to adopt, in accordance with their constitutional processes and the provision of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

In interpreting this provision, the Inter-American Court has held that States Parties to the Convention cannot adopt any measure that infringes upon the rights and freedoms protected therein.[40] In addition, the Inter-American Commission, in construing the restrictions authorized by Article 13(2) of the Convention, has asserted that "[c]onsidering the consequences of criminal sanctions and the inevitable chilling effect that they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances when there is an

[40] *See* I/A Ct. H.R., *Suárez Rosero Case*, Judgement of November 12, 1997, Series A No. 35, ¶ 97.

obvious and direct threat of lawless violence."[41] Accordingly "[l]aws that criminalize speech which does not incite lawless violence are incompatible with the freedom of expression . . . guaranteed in Article 13[.]"[42]

Arguments for the Petitioner

The Petitioner argues that by criminalizing defamatory speech, the provision of the Criminal Code of Ithaka in question is incompatible with Article 13(2) of the American Convention. Ithaka, therefore, is in violation of Article 2 of the same Convention by failing to amend that provision to give full effect to the right to freedom of expression and thought.

Arguments for the State

The State argues the Court, in construing Article 13(2), should not follow the interpretation provided by the Commission because it does arise out of the Article's language. Article 13(2) sets forth that the right to freedom of expression may be subject to subsequent liability and states the requirements according to which these liabilities may be imposed. The provision, however, by permitting "liability," leaves room for the discretion of the States Parties to decide whether a particular conduct will entail criminal or civil liability, or both. On the basis of these considerations, the State contends that Ithakian Criminal Code is not incompatible with Article 13(2) and that Ithaka is not in violation of Article 2.

IV. Facts concerning the Ithakian Press Association measure

A. Whether the application of disciplinary measures by the Ithakian Press Association constitutes a violation of Article 8.

1. Whether the Press Association's ethics proceedings violate Article 8(1) of the Convention.

a. General considerations

Article 8(1) of the American Convention establishes that:

> Article 8. Right to a Fair Trial

. The Ethics Proceedings are also established by law.
. It supervises the conduct of journalists, which may, in fact, be the exercise of police powers related to the supervision and control over a category of persons.
. Membership in the Association does not give any formal or official advantage.

Concerning the issue of impartiality, in the *Report of The Commission of International Jurists on the Administration of Justice in Peru*, known as "*The Goldman Report*," the Commission looked at the following standards for guidance in assessing the Peruvian tribunals:

. Judicial independence requires freedom from interference by the executive or legislative branches in the administration of justice.
. The principle of irremovability of the judiciary and duly regulated security of tenure are indispensable conditions for guaranteeing a judge's personal independence and impartiality.[45]

The European Court has stated that, when determining whether a body satisfies the condition of independence, the Court must examine the manner in which the body's members are appointed and the duration of their terms of office, the existence of guarantees against outside pressures, and whether the body presents an appearance of independence.[46] With respect to the requirement of impartiality, the same Court has expressed that "[]in principle, the personal impartiality of the members of a tribunal will be presumed until there is proof to the contrary."[47] In addition, it has set forth standards about the ways of testing impartiality. In particular, the Court has established that "[a] distinction can be drawn in this context between a subjective approach, which endeavors to ascertain the personal conviction of a given judge in a given case, and an objective approach, which determines whether he offered guarantees sufficient to exclude any legitimate doubt in this respect."[48]

Although not particularly relevant to the present case, judges can give extra credit to participants for their creative use of the following cases of the Inter-American Court on Human Rights on the issue of impartiality:

Loyaza Tamayo Case, Judgment of September 17, 1997, paragraph 60.

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[45] *See Report of The Commission of International Jurists on The Administration of Justice in Peru*, November 30, 1993, at 29aph 60.

newspapers.

Arguments for the State

Article 8(1) does not apply because the ethics proceedings are carried out by the Press Association, a private organization, and the actions of private actors like the Association are not imputable to the State of

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2. Whether the Press Association's ethics proceedings were carried out in violation of Article 8(2).

a. General considerations

Article 8(2) establishes minimum guarantees for a person accused of a criminal offense. In particular, subparagraph h of Article 8(2) sets out the right to appeal the judgment to a higher court. In this particular case, another issue must be addressed: whether or not subparagraph h also applies to persons subject to disciplinary proceedings of the Association. To answer that question, it is necessary to determine whether or not a disciplinary sanction issued by an Association such as this one may be characterized as criminal and, consequently, invokes the guarantees specified under Article 8(2).

Although the Inter-American System has not yet considered this issue, the European System of Human Rights has decided several cases about disciplinary proceedings and has set out standards for determining when they have a criminal nature. For instance, the *Engel* case established that:

> it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.
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> The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the court expresses its agreement with the Government.
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> However, supervision by the court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks.[56]

Thus, under the case law of the European System of Human Rights,[57] the following questions must be asked to assess whether exclusion from the Press Association is a criminal sanction:

> . Does the unethical behavior belong to the Ithakian Criminal Law? The question is because the brothers were already judged for violating the Press Code of Ethics.
> . What is the nature of the offense? The sanction was expulsion from the Press Association. Because this punishment is addressed only to journalists, to a specific group of persons and not to all persons, the European Court would say that the expulsion of the journalists is not a criminal sanction.
> . Is the exclusion from the Association so severe as to be criminal? The factors to be considered are that the sanction does not have official consequences but makes it very difficult for the defendant to find work.

Finally, the Inter-American Court has asserted that Article 8(2) does not recognize any judicial guarantees, strictly speaking. Instead, it establishes "the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees under the Convention."[58] Although the Court has declared that the due process guarantees of article 8(2) also apply to the determination of a person's rights and obligations of any nature, the specific applicability of Article 8(2) to the Association's proceedings remain unclear.[59]

b. Whether Article 8(2) is applicable to the Press Association's ethics proceedings.

Arguments for the Petitioner

The guarantees established in Article 8(2) are applicable to the Association's proceedings. As mentioned above, under the American Convention, Ithaka can incur in international responsibility for the acts of the Association in its disciplinary proceedings.[60]

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[57] *See, e.g., id.*; Euro. Ct. H.R., *Ravnsborg v. Sweden*, 21 February 1994, Series A No. 283-B, Application No. 14220/88, (1994) 18 EHRR 38; Euro. Ct. H.R., *Ozturk v. Germany*, 21 February 1984, Series A No. 73, Application No 8544/79, (1984) 6 EHRR 409.

[58] I/A Ct. H.R., *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87 of October 6, 1987, Series A No. 9 (1987), ¶ 27.

[59] *See* I/A Ct. H.R., *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights)*, Advisory Opinion OC-11/90 of August 10, 1990, Series A No. 11 (1990), ¶ 28.

[60] *See infra* part II (discussing international responsibility).

The nature and gravity of sanctions such as suspension or expulsion from a professional association amount to a criminal penalty. The case law of the European Human Rights System, which is considered persuasive in this proceeding, holds that a disciplinary sanction that includes the impossibility of working is criminal in nature. According to the standards set out by the European System of Human Rights, although the offense is classified under the Press Code of Ethics and not under criminal law, exclusion from the Association implies extremely severe consequences: the impossibility of finding a job in the journalist field. Therefore, Article 8(2) of the Convention should apply in order to afford the required due process guarantees for criminal proceedings to the Estrada brothers.

Arguments for the State

Article 8(2) is not applicable to the Association's proceedings against the Estrada brothers. In the proceedings in question, the panel reviewed allegations of professional misconduct and took disciplinary action in the interest of ensuring the observance of professional obligations. Thus the offense charged was clearly of an ethical, not criminal, nature. The State notes that in the present case the Estrada brothers were sanctioned for violating specific rules of journalistic ethics.

In addition, the penalty they received had a fairly mild character. It involved no deprivation of liberty or other measures similar to criminal punishment. It is a typical disciplinary measure provided for by the laws in the Contracting States concerning the maintenance of professional ethics by temporarily excluding the offender or even permanently expelling the journalist from the Association. According to tradition in the Contracting States, such penalty belongs to the ethical or disciplinary sphere and not the criminal sphere. The Government of Ithaka stresses that the decision is not meant to preclude the Estrada brothers from carrying out their journalistic activities. They can do so, but without the endorsement of the Association.

The State of Ithaka understands that the references to domestic law are not decisive. The very nature of the offence in question is of greater importance, as indicated in the above mentioned European case law. However, it is important to note that the Estrada brothers were sanctioned based on the Press Code of Ethics and not the Penal Code or any other criminal provision. The sanction does not require prosecution and is not entered in the criminal register. According to the Ithakian legal system, this type of sanction is considered to be of an ethical rather than a criminal nature.

Furthermore, the European Court of Human Rights states that, because expulsion from the Association is a kind of sanction addressed only to journalists, to a specific group of persons and not to all persons, its nature is not criminal.[61] In addition, the measure is not severe because it does not have official consequences. The State cannot impose obligations upon the media to

[61] *See Ozturk*, 6 EHRR 409.

hire specific journalists. They are free to hire the persons that they want. Otherwise, it would be an interference of the rights of the enterprises to choose their workers.

In conclusion, Article 8(2) is not applicable to the current case.

c. Whether the lack of appellate review constitutes a violation of Article 8(2)(h).

Arguments for the Petitioner

The Association's proceedings were carried out in violation of Article 8(2) because the Estrada brothers did not have the right to appeal the decision of exclusion from the Ithakian Press Association to a higher instance or tribunal. The structure of the proceedings does not provide for an appeal within the disciplinary structure, nor does it provide for judicial review of the Panel's decision.

Arguments for the State

As explained before, Article 8(2) is not applicable. Thus, violation of subparagraph h of Article 8(2) is out of question. However, if the Court considers it applicable, the State asserts that the proceedings had the necessary judicial guarantees required for this particular matter. The fact that an appeal was not necessary is supported by the fact that it was a minor charge under the criminal law. As with other lesser charges, it is considered a unique instance, based on the principle of procedural economy.

Furthermore, the Estrada brothers had the opportunity to utilize other avenues of judicial recourse, such as requesting the Panel to reconsider the decision or recuse the allegedly biased member. They could also have resorted to civil actions against the Association for any wrongdoing that took place during the proceedings.

3. Whether the Press Association's ethics proceedings were carried in violation of Article 8(4).

a. General considerations

Article 8(4) of the Convention states the following:

> . . . During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
>
> . . . .
>
> 4. An accused person acquitted by a nonappealable judgment shall not be subjected

to a new trial for the same cause.

The participants can use the *Loayza Tamayo Case*[62] to establish how the Inter-American Court interprets this provision, although in a somewhat different context. Interestingly, the Court referred to the provision as follows:

> This principle is intended to protect the rights of individuals who have been tried for specific facts from being subjected to a new trial for the same cause. Unlike the formula used by other international human rights protection instruments (for example, the United Nations International ”),

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proceedings did not specifically provide for judicial review of the panel's decisions does not necessarily imply that there was no possible availability of judicial action. In fact, the Estrada brothers had the possibility of filing a civil action against the Association for any wrongdoing that occurred during the panel's proceedings.

Furthermore, the Estrada brothers, if they considered it applicable, had the possibility exercising a writ of "Amparo," which they had used previously on March 21, 1995 for other purposes. They refrained, however, from doing so.

V. Facts concerning the death of Rémulo Estrada

A. Whether the State of Ithaka is internationally responsible for the death of Rémulo Estrada.

1. General considerations

The relevant issues regarding the death of Mr. Estrada are those related to the State's obligation to prevent violations and to investigate, prosecute, and punish those responsible.

The two main questions to keep in mind for this section are 1) if the Inter-American Court can review the decisions of domestic courts, when these have reviewed and decided a case and the issues raised deal with evaluation of evidence or interpretation of domestic norms, among others; and 2) if the State of Ithaka failed to exercise due diligence to protect Mr. Estrada (duty to *prevent*) and to investigate the death of Mr. Estrada (duty to *investigate*).

a. Fourth Instance Formula

The Inter-American Commission has stated that:

> The basic premise of this [the Fourth Instance Formula] is that the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved.[67]

However, that formula is not absolute. When the Commission faces an act of a domestic tribunal which was carried out in violation of the American Convention, it is competent to review it. "The Commission has full authority to adjudicate irregularities of domestic judicial proceedings which result in manifest violations of due process or of any of the rights protected by the Convention."[68] For instance, the Inter-American Commission has said that if a petitioner

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[67] I/A Ct. H.R., *Santiago Marzioni v. Argentina*, Case 11.673, Report No. 39/96, OEA/Ser.L/V/II.95,doc. 7 rev. at 76 (1997), ¶ 50.

[68] *Id.* ¶ 61.

determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1(1) of the Convention.[73]

In the present case, the obligations of Article 1.1 specifically apply to Article 4 of the Convention.

2. Whether the Fourth Instance Doctrine applies to the facts related to the death of Mr. Estrada.

Arguments for the Petitioner

The Fourth Instance Formula is a doctrine that applies only when violations of human rights guaranteed by the American Convention are not at stake. In the present case, several violations of human rights took place. The Inter-American Commission found that the State of Ithaka violated the Convention in several of its provisions, including Article 4 in relation to Article 1.1 of the Convention. As a result, it is now up to the Court to decide the merits the claims presented by the Petitioner.

The fact that the State convicted a person who was clearly not the murderer for the death of Rémulo Estrada and punished him with a two-year suspension reflects the reluctance of the State of Ithaka to prosecute, punish, and remedy the violations of Mr. Estrada's right to life. The events surrounding the case, such as criminal prosecutions punishing the exercise of their journalistic activities, disciplinary actions, censorship, and death threats, indicate that Mr. Estrada and his brother had been targeted for harassment with the acquiescence, if not the actual participation, of the Ithakan authorities. Furthermore, a pattern of coverups can be easily identified in the proceedings, with contradictions between witnesses, twisted stories, and soldiers detained and released. All these facts easily override the threshold established in the Fourth Instance Formula: it is manifest and evident that the investigation was flawed and, as a result, the Court has jurisdiction.

Under these circumstances, the Court is not acting as a fourth instance court but as supervisory body of the obligations established in the American Convention.

Arguments for the State

The State of Ithaka maintains that the type of international protection provided by the supervisory bodies of the Convention is subsidiary. The Preamble to the Convention is clear in this respect because it refers to reinforcing or complementing the protection provided by the

[73] I/A Ct. H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4, ¶ 173; *see* I/A Ct. H.R., *Godínez Cruz Case*, Judgment of January 20, 1989, Series C No. 5, ¶ 183.

because he had given the state notice about the fact that he had received numerous anonymous threats from persons demanding that he end his research. The fact that Rémulo Estrada requested the suspension of the police escort does not excuse the Ithakan State's obligation to protect the life of the persons under its territory. An additional factor to bear in mind is that, when Rémulo Estrada requested police protection because he had been receiving anonymous threats, the Government replied that this was not surprising, as many persons had been deeply offended by his articles. Thus, the Government knew the exact reasons for which Rémulo's life was threatened.

Article 4 of the American Convention sets forth that every person has the right to have his life respected. The State of Ithaka had the obligation guarantee Rémulo Estrada's life by, at the very least, providing him with a police escort that would not interfere with his privacy. The State had the obligation to strike a balance between the need of protecting Mr. Estrada's life and respecting his privacy.

Because the Government of Ithaka withdrew the police escort from Rémulo Estrada and did not provide other measures for protecting his life, it failed to guarantee Rémulo's Estrada right to life.

Arguments for the State

The State of Ithaka exercised due diligence when trying to protect Mr. Estrada. The State of Ithaka wants to highlight that when Rémulo Estrada requested police protection, the Government promptly assigned him with a police escort. Mr. Estrada then complained about the escort because it interfered with his privacy. Based on this, the protection was ended. The Government of Ithaka cannot oblige any person to have a police escort because to do so would be an arbitrary official intrusion into the private life of a person. Therefore, the Government of Ithaka did everything that it was capable of in order to guarantee Mr. Estrada's right to life.

4. Whether the State of Ithaka exercised due diligence in the investigation that followed the death of Rémulo Estrada.

Arguments for the Petitioner

The State of Ithaka did not act diligently during the investigation of Mr. Estrada's death, as required by Article 1.1 in relation to Article 4 of the American Convention. The criminal process did not take into account the declarations of the most reliable witnesses, the four homeless people, and it charged Ramón Angenor, who was clearly not the murder. The failure of the State to ensure prosecution of the real perpetrators effectively laid the foundation for a denial of justice in this case.

The State, when investigating a crime, must not limit itself to the established legal procedures, but it must go further and be creative during the investigation. Due diligence at the

international level is not measured by the procedures prescribed in the domestic law, but by the international standards that are set forth by the international supervisory body. The circumstances of this case--the release of all suspects, a suspended sentence for Ramón Angenor, the rejection of the homeless people's statements, flagrant contradictions between witnesses, the unexplained initial detention of the soldiers who were immediately released--indicate that the courts acted mechanically, without exploring alternative avenues of investigation or making reasonable assumptions that could have taken the court to the true responsible individuals.

Arguments for the State

The State of Ithaka exercised the required due diligence and did everything in its power to investigate his murder during the inquiry into Mr. Estrada's death. Prosecutors followed all necessary procedures as required by the Criminal Code of Procedure. All ballistic tests, fingerprint analysis, and other forensic procedures were carefully followed. In such a case, the fact that a state fails to produce a certain result is not a violation of the Convention[77] as long as it discharged its duty to act diligently.

This has been a complex case to investigate and prosecute. Despite the comprehensive investigation carried out at multiple levels, little factual information has been uncovered. The Petitioner have produced no information to contribute to the process. The fact that it has taken six months to sanction the perpetrator of the crime is an indication of the difficulty of the investigation. The Government of Ithaka is aware of no jurisprudence within any of the human rights systems to support a finding that a process lasting six months constitutes proof of negligence and denial of justice.

The Inter-American Court has recognized that the obligation to investigate may sometimes be very difficult to discharge. As a result, it imposes an obligation of effective "means or conduct," which requires a diligent search for the truth rather than the production of a certain result which may simply be unobtainable. In the instant case, the record reflects that the Government conducted a very comprehensive investigation into the murder of Rémulo Estrada and has charged the person found to be responsible.

The Government of Ithaka does not dispute that Rémulo Estrada was murdered. This was a criminal act in violation of the law of Ithaka, and has accordingly been dealt with as such. The Government gave its best efforts during the investigation, prosecution, and subsequent conviction of Ramón Angenor, who confessed his crime. Furthermore, due to the fact that Ithaka is a democratic system, the Executive Branch cannot interfere in the judicial decisions.

[77] *See* I/A Ct. H.R., *Caballero Delgado and Santana Case*, Judgment of December 8, 1995, ¶ 66.