



Human Rights Foundation

# *The Case of Emilio Palacio Urrutia*

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The Human Rights Foundation (HRF) is a nonprofit nonpartisan organization that promotes and protects human rights globally, with an expertise in the Americas. HRF unites people in the common cause of defending human rights and promoting liberal democracy. Our mission is to ensure that freedom is both preserved and promoted around the world.

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## Table of Contents

<b>Executive Summary</b>	iv
<b>A. Background</b>	1
a. Who is Emilio Palacio Urrutia?	1
b. The state of freedom of expression in Ecuador	2
<b>B. Description of facts</b>	6
<b>C. International standard for the protection of freedom of expression</b>	10
a. The right to freely express opinions and ideas, even when those opinions may be offensive, shocking, or disturbing	10
b. Prohibition against the criminalization of speech	12
i. General prohibition against the criminalization of speech	12
ii. Special prohibition against the criminalization of speech directed at public officials	12
iii. Prohibition against the criminalization of subjective opinions or value judgments	14
iv. Prohibition against the criminalization of the faithful reproduction of information and publication of information provided by third parties	15
v. Prohibition against the criminalization of the reproduction or publication of information with actual malice	15
vi. Sole exception to the prohibition against the criminalization of speech: hate speech or incitement to violence that gravely affected the fundamental rights of others	16

c. Prohibition against the restriction of freedom of expression through the application of <i>desacato</i> laws	16
d. Prohibition against the imposition of disproportionate civil sanctions for exercising the right to freedom of expression	18
<b>D. Analysis of the conduct of the Ecuadorean State in relation to the international standard for the protection of freedom of expression</b>	19
a. Violation of the right of Emilio Palacio Urrutia to freely express opinions and ideas, even when they may be offensive, shocking, or disturbing. Violation of the especial prohibition against criminalizing expressions directed at public officials	19
b. Violation of the prohibition against the criminalization of expressions deemed subjective opinions or value judgments	21
c. Violation of the prohibition against the criminalization of expressions that constitute faithful reproduction of information or publication of information provided by third parties	21
d. Violation of the prohibition against the criminalization of the reproduction or publication of information with actual malice	23
e. Violation of the prohibition against the restriction of freedom of expression through the application of <i>desacato</i> laws	24
f. Violation of the prohibition against the imposition of disproportionate civil sanctions for exercising the right to freedom of expression	24
<b>E. Conclusion</b>	25

## Executive Summary

Emilio Palacio Urrutia is an Ecuadorean journalist and columnist, known for his critical views regarding the policies of President Rafael Correa and his government. Palacio was a columnist, opinion editor, and head of the editorial page of *El Universo* newspaper.

On February 6, 2011, Palacio published the article “No to lies” (“*NO a las mentiras*”), in which he criticized President Correa.

In response to these opinions, on March 21, 2011, President Correa filed a criminal suit for the crime of “slandorous libel” against Palacio, three executives of *El Universo* (Carlos, César, and Nicolás Pérez), and El Universo C.A., the company that owns the paper.

On July 20, 2011, the Pro Tem Criminal Magistrate Judge of Guayas, Juan Paredes Fernandez, convicted and sentenced Palacio and the executives of *El Universo* to three years in prison and ordered them to pay USD 30 million in damages to President Correa. In addition to this, El Universo C.A. was ordered to pay USD 10 million in damages to the president.

On September 20, 2011, the Second Criminal, Collusive, and Transit Chamber of Guayas confirmed the ruling of the lower court.

The opinions expressed by Palacio were published in the opinion section of *El Universo*, not in a news section. Their goal was not to report news in a journalistic or documentary manner, but to express the point of view of the journalist. According to international human rights law, subjective opinions and value judgments published through any means cannot be criminalized.

Many of Palacio’s statements are based on reports previously published in several news outlets; hence, they constitute a faithful reproduction of information or the publication of information provided by third parties. According to international human rights law, the faithful reproduction of information or the publication of information provided by third parties cannot be criminalized.

Palacio was accused and convicted of “slandorous libel,” a crime in the Ecuadorean criminal code that criminalizes critical opinions. According to international human rights law, this provision is a *desacato* (or disrespect) law—laws that violate the international standard for the protection of freedom of expression.

The multimillion-dollar civil sanctions imposed by the Ecuadorean State on Palacio, the executives of *El Universo*, and *El Universo C.A.*, produce an inhibitory effect because they are aimed at punishing the defendants and compensating the alleged victim—not at restoring his reputation. According to international human rights law, civil sanctions for defamation should

not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed—not to compensate the plaintiff or to punish the defendant.

Emilio Palacio and the three executives of *El Universo* were accused, tried, and convicted to three years in prison solely for writing and publishing, respectively, an opinion piece critical of President Correa and his government. The Ecuadorean district court's decision found the four defendants vicariously liable, and ordered them to USD 30 million in damages to President Correa. In addition to this, El Universo C.A. was also ordered to pay USD 10 million in damages to the president.

The actions of the authorities of the Ecuadorean State (President Correa, the Pro Tem Criminal Magistrate Judge of Guayas, and the Second Criminal, Collusive, and Transit Chamber) that participated in the accusation, trial, and conviction of Palacio and the executives of *El Universo*, violate the international standard for the protection of freedom expression.

For the abovementioned reasons, the State of Ecuador violated the international standard of protection of freedom of expression.

Specifically, the Ecuadorean State violated article 13 of the American Convention on Human Rights, and principles 1, 10, and 11 of the Declaration of Principles on Freedom of Expression, pursuant to the jurisprudence of the Inter-American Court of Human Rights.

## A. Background

### a. Who is Emilio Palacio Urrutia?

Emilio Palacio Urrutia is an Ecuadorean journalist and columnist, known for his critical views regarding the policies of President Rafael Correa and his government. Palacio was a columnist, opinion editor, and head of the editorial page of *El Universo* newspaper.<sup>1</sup>

On May 19, 2007, during a dialogue at the presidential palace with Ecuadorean journalists regarding freedom of the press, President Correa expelled Palacio from the room for interrupting him several times during his address. On that occasion, President Correa—who also interrupted Palacio several times—stated that Palacio was a “fool.”<sup>2</sup>

On September 3, 2009, Palacio was accused of libel, days after publishing an opinion piece critical of Camilo Saman, the president of the National Financial Corporation, a state institution.<sup>3</sup> The suit, filed by Saman himself, requested that the judge sentence Palacio to three

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<sup>1</sup> *El Universo* is a daily Ecuadorean newspaper, founded on September 16, 1921, in the city of Guayaquil. Currently, it is the most important paper in the city of Guayaquil and one of the largest in the country. *El Universo* is owned by the Public Limited Company El Universo, and it is edited by the El Universo Group. The current director of the company is Carlos Perez Barriga, whose family has had control of the newspaper since its foundation. *El Universo* was founded by Ismael Perez Pazmiño. Currently, the paper is part of the Inter American Press Association (IAPA) and the Ecuadorean Association of Newspaper Editors (AEDEP, in Spanish), among other organizations.

<sup>2</sup> The dialogue was held in the session hall of the presidential palace (Carondelet Palace) as part of the radio and television show sponsored by President Correa, *Enlace Ciudadano* (Citizen Connection), with freedom of the press in Ecuador as the central topic. Several journalists, communicators, and students from the Luciano Andrade Marin School were present at the program. During his address, Palacio questioned the president for saying that the press did not speak up during the banking crisis of 1999. Palacio said, “If you review the newspapers you will see that they mention everything about the AGD [...] I think that you have not seen that and [...] instead you get angry at the newspapers, because they are not saying that you are smart, that you are wise, which is what you like to hear.” Palacio also mentioned the suit against the newspaper *La Hora*. When Palacio finished, the president started his rebuttal of the points made by the journalist. Palacio interrupted the president while he was saying, “Even though we have been fighting this banking hold-up for seven or eight years, suppose that we had not done anything—was it our duty to say something? It was the duty of the press to do so, and they remained silent. Nobody said that it was the biggest hold-up in the world.” Palacio interrupted the president and stated, “The universities don’t just have the right to denounce a hold-up, they have the obligation to do so.” While Palacio was speaking, President Correa said, “Don’t interrupt me, don’t interrupt me. One more time Emilio, and I am going to have to have you removed.” Palacio then said, “But you interrupted me!” Immediately, Correa ordered that the person in charge of the hall’s door “get this man out of here.” Palacio got up and walked to the door, escorted by two people. He left the room without putting up any resistance. Once the journalist left the hall, the president said, “Nobody here is against being questioned, but we are against not telling the truth and we are against *fools* like this man. You have seen the quality of the journalists we have.” (The Spanish word used by President Correa was “*majadero*.”)

Available in Spanish only at:

[http://www.youtube.com/watch?v=7GgUpz\\_ITa4&NR=1;](http://www.youtube.com/watch?v=7GgUpz_ITa4&NR=1;)

<http://www.youtube.com/watch?v=vANBg7fYIQE&feature=related>.

See news report by *El Universo*. Available in Spanish only at:

<http://www.eluniverso.com/2007/05/20/0001/8/22A9947719D94A21ACAB15770517B06A.html>

<sup>3</sup> The opinion piece, titled “Camilo, the thug,” was published on August 27, 2009, in response to a protest held outside the offices of *El Universo* by beneficiaries of the CFN. They protested against the newspaper for publishing an article titled “The CFN has a high level of delinquency on microcredits.” According to Palacio, Saman sent the

years in prison.<sup>4</sup> On March 26, 2010, Judge Carmen Argüello declared Palacio guilty of libel, sentenced him to three years in prison, and ordered him to pay USD 10,000 for legal costs.<sup>5</sup> Both parties appealed the decision. On June 4, 2010, Saman pardoned Palacio during the appeal hearing. Pursuant to Ecuador's criminal procedure provisions, the complaint's withdrawal automatically terminated the proceedings and all penalties imposed on Palacio were lifted as a result.<sup>6</sup>

## **b. The state of freedom of expression in Ecuador**

In the last few years, the Ecuadorean State has systematically restricted the right to freedom of expression of the people inside its territory. This is evident in the constant attacks on independent or critical media by the Ecuadorean government. These attacks range from insults made by President Correa himself against journalists and the media, to the indictment of journalists and media executives, to the closing of media sources, or the imposition of an official editorial line.

Since 2007, Ecuador has been repeatedly condemned by the Inter-American Commission on Human Rights (IACHR)—and other international organizations dedicated to the defense of freedom of the press—for implementing policies that violate freedom of the press and for criminally prosecuting journalists who exercised their right to freedom of expression.<sup>7</sup>

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protesters to the newspaper: “That’s why the thug Saman did not go to the offices of this newspaper to protest yesterday. He sent his thugs. He sent those from the lower ranks, ladies who had no idea what they were doing there. So he, as a good *pelucon* (slang for someone wealthy and powerful), kept himself safe, waiting on the phone for a report. But, what is behind all this? You already know. It is the desperation of a man who became a prosperous revolutionary overnight and, of course, is annoyed by the press telling him the truth. [...] If we keep quiet, if we get scared, if we drop our pants, if we hypocritically adopt a neutral position, the mafias will continue and then Camilo the thug and the Correa family will have a free pass to continue making use of the millions of the CFN.”

See article “Camilo, the thug” from August 27, 2009. Available in Spanish only at:

<http://www.eluniverso.com/2009/08/27/1/1363/camilo-maton.html>

<sup>4</sup> See Criminal Code. Art 489 and 491. The criminal complaint was filed before the Second Criminal Magistrate Judge of Guayas. Available in Spanish only at:

<http://www.hoy.com.ec/noticias-ecuador/saman-pide-carcel-para-emilio-palacio-371628.html>

The criminal complaint states that Palacio’s article “strays far from the truth and journalistic ethics, making me a victim of dishonor; damaging my reputation, undermining of my honor, my morality, my name, and my ethical dimension with a series of insults.” Available in Spanish only at: <http://www.hoy.com.ec/noticias-ecuador/saman-pide-carcel-para-emilio-palacio-371628.html>

<sup>5</sup> See news report by “Tu Guayaquil.” 3/27/10. Available in Spanish only at:

<http://www.tuguayaquil.com/ecuador/247-emilio-palacio-es-condenado-a-3-anos-de-prision-por-supuestas-injurias>;

See news report by *Andes*. 3/26/10. Available in Spanish only at: <http://andes.info.ec/actualidad/jueza-sentencia-a-tres-anos-de-prision-a-articulista-emilio-palacio-9454.html>

<sup>6</sup> See news report by “ecuadorinmediato.com.” 06/04/10. Available in Spanish only at:

[http://www.ecuadorinmediato.com/Noticias/news\\_user\\_view/camilo\\_saman\\_retira\\_demanda\\_en\\_contra\\_de\\_emilio\\_palacio--127830](http://www.ecuadorinmediato.com/Noticias/news_user_view/camilo_saman_retira_demanda_en_contra_de_emilio_palacio--127830)

See Criminal Code Art 113, “A pardon by the offended party lifts all penalties in the cases of adultery and libel.”

<sup>7</sup> For example, in its annual report of 2007, the Office of the Special Rapporteur for Freedom of Expression of the IACHR stated that: “The Office of the Rapporteur has noted setbacks in Ecuador in different areas related to the right to freedom of thought and expression in 2007. Particularly noteworthy are the alerts related to the use of

On April 15, 2011, the Office of Special Rapporteur for Freedom of Expression of the IACHR expressed concern regarding the existence and application of criminal defamation and contempt laws, as well as civil laws that could lead to the imposition of disproportionate penalties on individuals who publicly express criticism of high-ranking public officials in Ecuador.<sup>8</sup>

The use of insult laws or laws that punish offensive speech against public servants, in all of their forms, are contrary to inter-American standards on freedom of expression. [...] In light of the foregoing considerations, the Office of the Special Rapporteur recommends that the State of Ecuador adapt its domestic legislation and practice to the doctrine and jurisprudence on freedom of expression of the inter-American system for the protection of human rights.

Since 2007, Reporters Without Borders (RSF) has also denounced violations of the right to freedom of expression of the people of Ecuador.<sup>9</sup>

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criminal law to the detriment of freedom of expression, as well as the willingness to impose sanctions by reforming a law through presidential decree.” Available at:

[http://www.cidh.oas.org/annualrep/2007eng/Annual\\_Report\\_2007.VOL.II%20ENG.pdf](http://www.cidh.oas.org/annualrep/2007eng/Annual_Report_2007.VOL.II%20ENG.pdf)

- In its annual report of 2008, the Office of the Special Rapporteur for Freedom of Expression of the IACHR stated that: “During 2008, the Office of the Special Rapporteur received information on several cases of attacks against journalists. [...] The Office of the Special Rapporteur is especially concerned about the cases of journalists convicted and sentenced to terms of imprisonment for the offense of criminal defamation against public officials. [...] the Special Rapporteurship expresses its concern about public statements made by the president of Ecuador in June of 2008, when he asked that a criminal case be reopened against journalist Francisco Vivanco, editor of the Quito newspaper *La Hora*. In May of 2007, the president filed a criminal complaint against Vivanco because of the publication of an editorial piece entitled ‘Official Vandalism’.” Available at:

<http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

- On July 21, 2009, the Office of the Special Rapporteur for Freedom of Expression of the IACHR expressed its profound concern over the criminal conviction against Milton Nelson Chacaguasay, editor and director of the weekly *La Verdad* in the province of El Oro, Ecuador, and over the prison sentence handed down by the judge in the case. “The Office of the Special Rapporteur considers that the various verdicts issued against the journalist Chacaguasay represent a setback in the progress made in the region, under which it is understood that authorities of the States of the Americas must not use criminal law to punish those who carry out investigations or voice personal opinions about issues of public interest or about public officials.” Press Release R51/09. Available at:

<http://www.cidh.oas.org/relatoria/showarticle.asp?artID=756&IID=1>

- On March 31, 2010, the Office of the Special Rapporteur for Freedom of Expression of the IACHR expressed its deep concern over the three-year prison sentence issued against Palacio: “The Office of the Special Rapporteur believes that this judicial decision represents a serious setback in the regional process advanced by several States which have reformed their legal frameworks with the goal of not using criminal law to sanction those who investigate or issue personal opinions about public officials, even if they are offensive, disturbing, or unfounded.” Press Release R40/10. Available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=792&IID=1>

<sup>8</sup> Press Release R32/11. Available at : <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=837&IID=1>

<sup>9</sup> For example, on May 21, 2007, Reporters Without Borders (RSF), in an open letter to President Correa, urged him to drop the “insult” complaint presented against Francisco Vivanco, director of the newspaper *La Hora*. Available at: <http://en.rsf.org/ecuador-president-urged-to-drop-insults-21-05-2007.22238.html>

- On July 9, 2008, RSF condemned the seizures of the private television channels Gamavisión and TC Televisión on July 8, 2008, in Quito, and the station Radio Sucre the same day in Guayaquil: “The owners of Gamavisión and TC Televisión may well be suspected of bankruptcy and embezzlement and subject to judicial proceedings, but was it really necessary to send in the police and to disrupt their programming?” Available at: <http://en.rsf.org/ecuador-seizures-of-a-radio-station-and-09-07-2008.27797.html>

According to RSF's Press Freedom Index, in 2010 Ecuador suffered a drop in its ranking, from 84 to 102, among the 178 countries monitored:<sup>10</sup>

[The situation] is becoming critical again in the Andean countries. Bolivia's and Ecuador's rankings have lost ground because of the violent acts, intimidations, and blocked activities fostered by a pervasive climate of media-related political polarization. The situation is affecting the state-owned, as well as privately owned, media.

The Committee to Protect Journalists (CPJ) has also repeatedly condemned the criminal complaints filed by the government of President Correa against journalists.<sup>11</sup> In its "Attacks on the Press in 2010: Americas Analysis," CPJ stated:<sup>12</sup>

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- On December 5, 2008, RSF denounced the legal harassment suffered by Freddy Aponte Aponte of the local private radio station *Luz y Vida*. He was given a six-month jail sentence on September 25 for "slander." "Aponte is known for his impetuosity and loose tongue, but the imposition of a six-month prison sentence on a slander charge already posed a serious problem, especially as he was convicted despite a lack of evidence and despite having first been acquitted. The fact that he is now being prosecuted a second time for the same alleged offense violates a basic principle of law." Available at: <http://en.rsf.org/ecuador-journalist-serving-six-month-05-12-2008.29571.html>

- On December 28, 2010, RSF announced that on December 17, an armed commando unit broke into the offices of the weekly *Vanguardia* in Quito, with orders to confiscate equipment and evict the tenants. This order was issued by the Trust Management Unit AGF-CFN, pursuant to 13 months of unpaid rent the magazine owed to the state. Available in Spanish only at: <http://es.rsf.org/ecuador-embargo-abusivo-de-la-revista-28-12-2010.39170.html>

<sup>10</sup> Reporters Without Borders (RSF) Press Freedom Index 2010. Available at: <http://en.rsf.org/press-freedom-index-2010.1034.html>

<sup>11</sup> On May 15, 2007, the Committee for the Protection of Journalists (CPJ) stated that President Correa should immediately drop a criminal defamation complaint filed against a top newspaper executive over a critical editorial, and he should help bring the country's press laws into compliance with international standards on free expression. Available at: <http://cpj.org/2007/05/ecuadoran-president-correa-should-drop-libel-suit.php>

- On December 11, 2008, CPJ wrote a letter to President Correa expressing its concern over the jailing of two Ecuadorean journalists and called for their immediate and unconditional release. Furthermore, it urged him to use the authority of his office to reform Ecuador's archaic defamation laws, which are incompatible with international standards of freedom of expression and rulings by the Inter-American Court of Human Rights. Available at: <http://www.cpj.org/2008/12/cpj-to-correa-release-journalists-jailed-for-defam.php>

- On June 4, 2009, CPJ announced that two government investigations into the private television network Teleamazonas and threats of legal action by President Correa against critical media outlets are an attempt by the government to stifle dissent. Available at: <http://www.cpj.org/2009/06/ecuadoran-president-threatens-action-against-criti.php>

- On October 1, 2010, CPJ condemned the government of President Correa for ordering local radio and TV stations to interrupt programming and carry out state news broadcasts. It also condemned the government's censorship of broadcast media and called on local authorities to investigate and prosecute those responsible for attacks on journalists. Available at: <http://www.cpj.org/2010/10/ecuador-facing-police-revolt-censors-news-coverage.php>

<sup>12</sup> On October 12, for example, the government ordered Quito-based *Teleamazonas* to interrupt its political news program, "*Los Desayunos*," to air an official rebuttal to comments made on a previous show that suggested the ruling party's congressmen were irrelevant. María Josefa Coronel, the show's host, laughed at the remarks. The government notified *Teleamazonas*, a network known for its harsh opposition views, that it had to air a rebuttal on the show's next edition, and an official from the president's communications office arrived at the station's doorstep with an audiotape. In the rebuttal, a male voiceover disparaged Coronel and vilified the show's panelists and guests, the Guayaquil-based daily *El Universo* reported. Former president Lucio Gutiérrez, leader of the political opposition, was among the guests present. Available at:

<http://www.cpj.org/2011/02/attacks-on-the-press-2010-ecuador.php>

President Rafael Correa's administration used censorship powers throughout the year to supplant independent news and commentary. Authorities compelled critical broadcasters to interrupt news shows to air official rebuttals.

[...]

Correa has made no secret of his contempt for much of the news media, calling critical journalists "ignorant," "trash-talking," and "liars." [...] The administration went further in 2010, using the broadcast law that authorizes *cadenas* to interrupt independent news shows and impose its views. Local press advocates said that the government was misusing the broadcast law and coercing speech.

The Inter American Press Association (IAPA) has also repeatedly condemned the sanctions imposed by the government of Ecuador against the media,<sup>13</sup> and Freedom House documented the deterioration of freedom of the press in Ecuador in its 2008 and 2010 annual reports on freedom of the press:<sup>14</sup>

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<sup>13</sup> On May 11, 2007, the Inter American Press Association (IAPA) protested the contempt charge made by President Correa against Francisco Vivanco Riofrio, president of the editorial council of the newspaper *La Hora*. Gonzalo Marroquín, chairman of the IAPA's Committee on Freedom of the Press and Information, declared that it was "a clumsy step on the part of the Ecuadorean president to file criminal charges against a news outlet, accusing it of contempt, an archaic concept in a modern democracy and outmoded in Latin America, and which should be eliminated from penal codes, as the IAPA has been insisting." Marroquín pointed out that "preferential treatment of public officials is contrary to the equal treatment of all citizens and goes against the principle of public scrutiny of government actions in a democracy." Available at:

[http://www.sipiapa.org/v4/index.php?page=cont\\_comunicados&seccion=detalles&id=707&idioma=us](http://www.sipiapa.org/v4/index.php?page=cont_comunicados&seccion=detalles&id=707&idioma=us)

• On June 4, 2007, the IAPA expressed concern regarding the dispute between state and private shareholders of *El Telégrafo*, Ecuador, requesting that the dispute be resolved in an environment of transparency and due process. The director of *El Telégrafo*, Carlos Navarrete Castillo, denounced irregularities on the part of the state, which allegedly served to strip private shareholders of their property, making irrelevant the capital increases in 2002, 2004, and 2007 that made him a majority shareholder. Available at:

<http://www.sipiapa.org/pressreleases/srchcountrydetail.cfm?PressReleaseID=1928>

• On July 9, 2008, the IAPA expressed alarm and serious concern regarding Ecuador's confiscation of two television channels followed by government imposition of official editorial control over them, calling the acts "a serious violation of the public's right to information." According to IAPA, on July 8, 2008, police seized privately-owned channels *Gamavisión* and *TC Televisión* and cable TV affiliate *CN3*. Gonzalo Marroquín, chairman of the IAPA's Committee on Freedom of the Press and Information, declared that "what cannot be condoned in any way whatsoever is that the action taken against the companies also involved taking over editorial policy under a government-appointed news director." Marroquín argued, "That action does nothing more than disguise a censorship policy as if it were legal." He said that IAPA policy in such cases is to respectfully request transparency and due process, "but not at the expense of a news outlet's editorial policy being subjugated." He continued, "It is obvious that the new director will have a different editorial view and he will not be at all independent of the government's position. That much is very clear." He added that apart from the political fear in the country, it could very well be a political move by President Correa destined to undermine the independence of the media for the coming constituent assembly, saying "What we do fear is that these acts are like those we condemned by the Fujimori government and the current Chávez administration, where all types of excuses were used to silence and shut down news media." Available at:

<http://www.sipiapa.org/pressreleases/chronologicaldetail.cfm?PressReleaseID=2147>

<sup>14</sup> See Freedom House, Freedom of the Press 2008 Ecuador, published on April 29, 2009. Available at:

<http://www.freedomhouse.org/template.cfm?page=251&country=7386&year=2008>

See also its 2009 and 2010 reports. Available at:

Ecuadorean journalists were subjected to frequent rhetorical lacerations from the president, [...] Correa used an array of colorful descriptors, calling the press “savage beasts,” mediocre, corrupt, mafiosi, and “more unpleasant than pancreatic cancer.”

## **B. Description of facts**

On February 6, 2011, Palacio published the article “No to lies” in the opinion section of *El Universo* and on the daily’s website. The article criticized President Correa for considering the pardon of a group of policemen who rioted in Ecuador, and accused him of allegedly having “ordered troops to fire at will and without warning on a hospital full of civilians and innocent people.” Among other things, the article stated:

The Dictatorship announced through one of his spokespeople that the Dictator is entertaining the possibility of forgiving the criminals who rose up against him on September 30, 2010. He is looking into granting pardons.

[...]

I understand that the Dictator (a devout Christian, a man of peace) does not want to give up the opportunity to forgive criminals. He pardoned drug trafficking mules, he felt compassion for the murderers incarcerated in the coastal penitentiary, he begged citizens to stop robbing each other so there would be no more victims, and he cultivated a great friendship with land invaders and turned them into members of the legislative assembly, until they betrayed him.

[...]

What is really happening is that the Dictator finally understood (or his lawyers made him understand) that he has no way to prove the alleged crimes of September 30, since everything went according to an improvised script, amidst hurried actors, to hide the Dictator’s own irresponsibility in deciding to enter mutinied barracks, open up his shirt and taunt them to kill him, like some desperate wrestler who puts an exaggerated effort into his second-rate circus act in some forgotten town.

At this point, all the “proof” to accuse the “coup leaders” has unraveled.

[...]

The bullets that killed the policemen have disappeared, not in Fidel Araujo’s offices, but in a precinct guarded by forces loyal to the Dictatorship.

[...]

Why, when the Dictator could propose amnesty for the “*pelucones*” Gustavo Noboa and Alberto Dahik, does he instead want to pardon the “*cholo*” police officers?

Finally, the Dictator would do well to remember—and this is very important—that with a pardon, in the future, a new president (perhaps an enemy of his) could drag him before a criminal court for ordering troops to fire at will and without warning on a hospital full of civilians and innocent people.

Crimes against humanity, lest he forget, do not prescribe.

On March 21, 2011, President Correa filed a criminal suit against Palacio and three executives of *El Universo* for the crime of slanderous libel. The suit asked the criminal judge:<sup>15</sup>

To dictate sentences against Emilio Palacio Urrutia, Carlos Nicolas Perez Lapentti, Carlos Eduardo Perez Barriga, and Cesar Enrique Perez Barriga, declaring them responsible for the crime established in article 489, in accordance to articles 491 and 493 of the Criminal Code.<sup>[16]</sup>

[...]

Consequently, the penalty for the defendants is the maximum sentence of 3 years in prison,

[...] I would also like to request, respectfully, that according to the provisions established in art. 31.1, section c) of the Criminal Procedure Code<sup>[17]</sup> [...] the damages caused upon me be declared in the sentence [...] damages that cannot be less than USD 50,000,000 and must be paid by the defendants.

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<sup>15</sup> “I hereby accuse Emilio Palacio Urrutia, Carlos Nicolas Perez Lapentti, Carlos Eduardo Perez Barriga, and Cesar Enrique Perez Barriga, for committing the crime of slanderous libel.” See Complete text of the complaint. Available in Spanish only at:

<http://www.eluniverso.com/data/recursos/documentos/demenadaaldiariopdf.pdf>

<sup>16</sup> See Criminal Code. Art. 489. – Libel is “slanderous” when it consists of the false imputation of a crime; and it is “non-slanderous” when it consists of all other statements to discredit, dishonor, or disparage another person, or any other action performed with the same aim.

• Art. 491. A person convicted of slanderous libel will be penalized with six months to two years in jail and a fine of USD 6-25, when the offenses were committed: a) During meetings or in public places; b) In the presence of ten or more individuals; c) In writings, print or otherwise, images or fixed emblems, distributed or sold, made available for sale or exposed to view of the general public; d) In non-published writings, but directed at or informing other people, including letters.

• Art. 493. Those who engage in slanderous libel against an authority will be penalized with one to three years in jail and a fine of USD 6-25. If the offense against the authorities are not slanderous but serious, the punishment will be six months to two years in jail and a fine of USD 6-19.

<sup>17</sup> Article 31. Competence in compensation trials. To determine the jurisdiction in proceedings of compensation trials, the following rules apply: 1. Damages caused by the offense: c) If the offense was private, the jurisdiction belongs to the criminal judge who issued the sentence.

[...] that the sentence also declares that the damages caused to the claimant by *El Universo*, C.A., cannot be less than USD 30,000,000.

On April 15, 2011, the Office of the Special Rapporteur for Freedom of Expression of the IACHR expressed its concern regarding this case:<sup>18</sup>

The use of insult laws or laws that punish offensive speech against public servants, in all of their forms, are contrary to inter-American standards on freedom of expression. In this respect, Principle 11 of the Declaration of Principles on Freedom of Expression, adopted by the IACHR in October 2000, maintains that “laws that penalize offensive expressions directed at public officials, generally known as *desacato* laws, restrict freedom of expression and the right to information.”

[...]

In light of the foregoing considerations, the Office of the Special Rapporteur recommends that the State of Ecuador adapt its domestic legislation and practice to the doctrine and jurisprudence on freedom of expression of the inter-American system for the protection of human rights.

On July 7, 2011, Palacio submitted his resignation to the directors of *El Universo*. His resignation letter states:<sup>19</sup>

[...] the source of employment and livelihood of about 1000 employees of the institution and their families is in great danger today, and under these conditions we must all face reality. It is my belief that common welfare, if it were up to me, could never come before personal guarantees.

I declare, once again, that the decision to publish the article that motivated the lawsuit was entirely and only mine. Neither the executives of the newspaper nor I would have openly admitted to a violation of the permanent editorial policy of *El Universo* to refrain from interfering with articles published in the opinion section.

The president is asking the newspaper and its directors for rectification. With this, I understand, he refers to my complete separation from the newspaper—not only from my position as op-ed director, but also from my role as columnist, and, in an extended manner, from any direct or indirect participation in this company or any other media outlet or company connected to it.

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<sup>18</sup> Press release 32/11. Available at: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=837&IID=1>

<sup>19</sup> Complete text of the resignation letter. Available in Spanish only at: <http://www.eluniverso.com/2011/07/10/1/1355/emilio-palacio-renuncio-universo.html>

I hope that this decision will lead the president to withdraw his lawsuit against *El Universo* and against Carlos, César, and Nicolas Pérez.

On July 20, 2011, a pro tem criminal magistrate judge of Guayas, Juan Paredes Fernandez, issued a sentence convicting the four defendants and El Universo, C.A., on the following terms:<sup>20</sup>

...given that the existence of the crime is proven and the defendants are responsible for it, I hereby declare the defendants (a) Emilio Palacio Urrutia, (b) Carlos Nicolas Perez Lapentti, (c) Carlos Eduardo Perez Barriga, and (d) César Enrique Pérez Barriga, guilty of the crime of Article 489 of the Criminal Code, in connection with Articles 491 and 493.

[...]

The defendants are hereby ordered to pay the claimant damages in the following manner: a) All natural persons are vicariously liable and must pay the claimant USD 30,000,000; and b) El Universo, C.A., must pay the claimant USD 10,000,000.

On July 21, 2011, the Office of the Special Rapporteur for Freedom of Expression of the IACHR expressed its concern over the sentence of July 20:<sup>21</sup>

The Office of the Special Rapporteur considers this decision contrary to regional freedom of expression standards and believes that it generates self-censorship and a notable chilling effect that impacts not only the individuals convicted, but Ecuadorean society as a whole. [...] For these reasons, the Office of the Special Rapporteur calls on the State of Ecuador to adapt its domestic legislation and practice to existing doctrine and jurisprudence in the area of freedom of expression, and calls on the competent judicial authorities to resolve the case of *El Universo*, its board members, and the journalist Emilio Palacio in conformity with such international human rights standards.

On July 21, 2011, Gonzalo Marroquin, president of the IAPA, said that the court's decision against Palacio and *El Universo* was a "serious blow to the most essential principles of freedom of information." He also stated that "this confirms to us once again that the federal government continues with its systematic and hostile campaign to do away with the independent press and establish, by law or through the courts, ownership of the truth that all the Ecuadorean people must swallow."

On July 22, 2011, President Correa appealed the sentence passed by Judge Paredes because he considered the monetary penalty inadequate compensation, stating that "it must be

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<sup>20</sup> Complete text of the sentence. Available in Spanish only at: [http://www.secom.gov.ec/audios/sentencia\\_casouniverso.pdf](http://www.secom.gov.ec/audios/sentencia_casouniverso.pdf)

<sup>21</sup> Press Release R72/11. Available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=857&IID=1>

considered that the damage caused upon the claimant (Correa) is irreparable,” since the op-ed “will remain in the annals of history, in the libraries of the country and the world; it will remain forever on the internet.” The appeal also pointed out that the compensation should “even extend to the personal property of the defendants and their heirs.”<sup>22</sup>

On that same day, the attorneys of *El Universo* filed an appeal of annulment and an appeal against the sentence passed by Judge Paredes before the Fifteenth Criminal Magistrate Court of Guayas.<sup>23</sup>

On July 23, 2011, President Correa, on the official website of the presidency of the Republic of Ecuador, stated:<sup>24</sup>

...citizens, let's react, let's sue not only the slanderer, the instrument, but also the head, the one who allows those attacks, [...] I would have been willing to talk, but after this attack, what else is left to do for a person with principles and honor? Fight until the end, like Alfaro or Bolivar would have done in the face of such abuse and lies, [...] *if it (El Universo) goes bankrupt, it is their fault, they have to take responsibility* [...] in this case the culprits are those irresponsible people who used a newspaper to spread lies and slander; let's assign responsibilities so that things don't get confused.

On September 20, 2011, the Second Criminal, Collusive, and Transit Chamber of Guayas confirmed the ruling of the lower court fully.<sup>25</sup>

### **C. International standard for the protection of freedom of expression**

#### **a. The right to freely express opinions and ideas, even when these opinions are offensive, shocking, or disturbing**

International human rights law<sup>26</sup> establishes that “everyone shall have the right to hold opinions without interference” and that “everyone shall have the right to freedom of expression.”

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<sup>22</sup> See news report by “Vistazo.com.” July 23, 2011. Available in Spanish only at:

<http://www.vistazo.com/webpages/pais/?id=16512>

<sup>23</sup> See news report by “Ecuadorenvivo.com.” July 22, 2011. Available in Spanish only at:

[http://www.ecuadorenvivo.com/2011072275890/sociedad/abogados\\_de\\_el\\_universo\\_presentaron\\_recursos\\_de\\_nulidad\\_y\\_apelacion\\_de\\_sentencia\\_contra\\_el\\_rotativo.html](http://www.ecuadorenvivo.com/2011072275890/sociedad/abogados_de_el_universo_presentaron_recursos_de_nulidad_y_apelacion_de_sentencia_contra_el_rotativo.html).

<sup>24</sup> Complete text. Available in Spanish only at:

[http://www.presidencia.gov.ec/index.php?option=com\\_content&view=article&id=1110:presidente-correa-afirma-que-libertad-de-expresion-no-contempla-manchar-honra-ajena-&catid=39:noticias-importantes&Itemid=98](http://www.presidencia.gov.ec/index.php?option=com_content&view=article&id=1110:presidente-correa-afirma-que-libertad-de-expresion-no-contempla-manchar-honra-ajena-&catid=39:noticias-importantes&Itemid=98)

<sup>25</sup> Read the full sentence, available Spanish only at:

<http://rafaelcorreacontraeluniverso.eluniverso.com/2011/09/28/sentencia-de-la-segunda-sala-de-lo-penal/>

<sup>26</sup> See American Convention on Human Rights. Art. 13(1) (“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.”) The Ecuadorean State ratified the American Convention on Human Rights on December 8, 1977. See International Covenant on Civil and Political Rights. Art. 19(2). (“Everyone shall have the right to freedom of expression; this

Freedom of expression includes “the freedom to seek, receive, and impart information and ideas of all kinds, regardless of borders, either orally, in writing, in print, or in the form of art.” This right also includes the right of individuals to “transmit” and “receive” all sorts of opinions or information from the media. This right extends not only to favorable information or ideas, but also to statements that shock, irritate, or disturb public officials or any sector of society, because “such are the demands of pluralism, tolerance, and broadmindedness, without which there is no democratic society.”<sup>27</sup>

The preamble and the first principle of the Inter-American Declaration on Principles on Freedom of Expression establish that “the right to freedom of expression is not a concession by the states but a fundamental right;” that “[the] consolidation and development of democracy depends upon the existence of freedom of expression;” that “freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals;” and that “[freedom of expression] is an indispensable requirement for the very existence of a democratic society.”<sup>28</sup>

The Inter-American Court of Human Rights (IACtHR) set a legal precedent, explaining the reasons underlying the necessity of this exchange of ideas:<sup>29</sup>

In the domain of political debate on issues of great public interest, not only is the expression of statements that are well-received by the public opinion and those that are deemed to be harmless protected, but also the expression of statements that shock, irritate, or disturb public officials or any sector of society.”

Democratic checks and balances, exercised by society through public opinion, encourage transparency in state activities, and promote accountability of public officials for their administration. This is why there should be more tolerance and openness to criticism, in the face of statements and opinions advanced by individuals in the exercise of said democratic mechanism. [...] Moreover, said democratic mechanism of checks and balances promotes greater participation among people in matters of social interest.<sup>30</sup>

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right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other media of his choice.”) The Ecuadorean State ratified the International Covenant on Civil and Political Rights, and its Optional Protocol, on March 6, 1969.

<sup>27</sup> See Inter-American Commission on Human Rights, referring to the case of *Castells v. Spain*, before the European Court of Human Rights, Judgment of April 23, 1992, Series A, N1 236, paragraph 20, in the Background and Interpretation of the Declaration of Principles: “[The IACHR], Citing a decision of the European Court, has declared that protection of freedom of expression must encompass not only favorable information or ideas, but also those that ‘offend, shock, or disturb’ because ‘such are the demands of pluralism, tolerance, and broadmindedness without which there is no democratic society.’”

<sup>28</sup> Inter-American Declaration on Principles on Freedom of Expression, available at:

<http://www.iachr.org/declaration.htm>

<sup>29</sup> Case of *Kimel v. Argentina*. Judgment of May 2, 2008. Merits, Reparations and Costs. Series C No. 117. Paragraph 88.

<sup>30</sup> IACHR Court. Case of *Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Merits, Reparations and Costs. Series C No. 135, paragraph 83.

## **b. Prohibition against the criminalization of speech**

### **i. General prohibition against the criminalization of speech**

Article 13 of the American Convention on Human Rights, in accordance with principle 10 of the Inter-American Declaration on Principles on Freedom of Expression of the IACHR, establishes that:<sup>31</sup>

#### *Principle 10*

Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person, or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.

### **ii. Special prohibition against the criminalization of speech directed at public officials**

In the "Background" and "Interpretation" sections of the Inter-American Declaration on Principles on Freedom of Expression, the IACHR explained that the prohibition against criminalization of speech applies, in particular, in the case of public officials:

43. The Inter-American Commission stated that the criminalization of speech directed toward public officials or private individuals voluntarily engaged in matters of public interest is a disproportionate punishment compared to the important role that freedom of expression and information plays in a democratic system. "Such sanctions clearly cannot be justified, particularly in light of the adequacy of non-criminal sanctions in redressing any harm to individuals' reputations." In a representative democracy, public officials, or anyone involved in matters of public interest, must be held accountable to the men and women they represent. The individuals who make up a democratic society confer upon their representatives the task of managing matters of interest to society as a whole. However, society retains ownership of these matters and must enjoy a broad right, with the fewest restrictions possible, to exercise control over the management of public affairs by their representatives. In this regard, the IACHR stated that: "A law that targets speech considered critical of public administration by virtue of the individual who is the object of the expression, strikes at the very essence and content of freedom of expression.

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<sup>31</sup> See the 2002 Annual Report of the Office of the Special Rapporteur for Freedom of Expression of the IACHR. ("The Declaration is meant to be a definitive interpretation of Article 13 of the Convention.") See Declaration of Principles of Freedom of Expression. Available at: <http://www.iachr.org/declaration.htm>.

44. Thorough and effective oversight of public management as a tool to guarantee the existence of a democratic society requires a different type of protection for those responsible for public affairs than that accorded to an individual not involved in matters of public interest. In this regard, the Inter-American Commission stated that the application of laws protecting the honor of public officials acting in an official capacity unjustifiably grants them a right to protection that other members of society lack. This distinction indirectly inverts the fundamental principle of a democratic system in which the government is subject to controls, including public scrutiny, to prevent or check abuses of its coercive power.

Moreover, the fact that public officials and public figures generally have easy access to the mass media, allowing them to respond to attacks on their honor and personal reputation, is also a reason to provide for a lower level of legal protection of their honor.

The IACHR also stressed that the use of criminal laws to sanction expressions directed at public officials violates article 13 of the Convention:

[...] there is no imperative social interest that justifies the punitive measure, or because the restriction is disproportionate or constitutes an indirect restriction. It should be established that statements made in the context of matters of public interest, such as an electoral campaign, are not punishable.<sup>32</sup>

[the state's] use of its coercive powers to restrict speech lends itself to abuse as a means to silence unpopular ideas and opinions, thereby repressing debate that is critical to the effective functioning of democratic institutions. Laws that criminalize speech that does not incite lawless violence are not compatible with freedom of expression and thought guaranteed in article 13, nor with the fundamental purpose of the American Convention to allow and protect a pluralistic, democratic way of life.<sup>33</sup>

According to the IACHR:

... society [...] must enjoy a broad right, with the fewest restrictions possible, to exercise control over the management of public affairs by their representatives. [...] Thorough and effective oversight of public management as a tool to guarantee the existence of a democratic society requires a different type of protection for those responsible for public affairs than that accorded an individual not involved in matters of public interest.

[...]

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<sup>32</sup> IACHR. Arguments before the Inter-American Court of Human Rights in the case of *Ricardo Canese v. Paraguay*. Included in the Sentence of August 31, 2004, Series C No. 111, paragraph 72.

<sup>33</sup> IACHR, Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights, Available at: <http://www.cidh.oas.org/annualrep/94eng/chap.5.htm>

*The fact that public officials and public figures generally have easy access to the mass media, allowing them to respond to attacks on their honor and personal reputation, is also a reason to provide for a lower level of legal protection of their honor.*

Regarding this subject, the European Court on Human Rights declared:

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, 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 consequently display a greater degree of tolerance.<sup>34</sup>

Regarding this subject, the United Nations Human Rights Committee declared:

Freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their governments without fear of interference or punishment.<sup>35</sup>

The Office of the Special Rapporteur for Freedom of Expression of the IACHR emphasized that high state officials are not only obligated to be more tolerant of criticism, but they also have enormously effective alternative means to express their opinions about information or ideas that they consider unjust or offensive.<sup>36</sup>

### **iii. Prohibition against the criminalization of subjective opinions or value judgment**

In the Background and Interpretation sections of the Inter-American Declaration on Principles on Freedom of Expression, the IACHR states:

47. There should be no liability when the information giving rise to a lawsuit is a value judgment rather than a factual assertion. A prerequisite for establishing liability is the ability to demonstrate that the information was false or to prove that the respondent knowingly published a statement that was false or very likely false. If the information is a value judgment, it is impossible to prove its truth or falsity, since it represents a totally subjective opinion that cannot be proved.

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<sup>34</sup> See *Lingens v. Austria*, July 8, 1991, Application No. 9815/82, EHRR 407, paragraph 42. *Oberschlick Vs. Austria*, May 23, 1991, Application No. 11662/85, paragraph. 59. *Wabl Vs. Austria*, March 21, 2000, Application No. 24773/94, paragraph. 42; y *Lopes Gómez da Silva Vs. Portugal*, September 28, 2000, Application No. 37698/97, paragraph 30.

<sup>35</sup> *Aduayom v. Togo*, Views of the Human Rights Committee, Nos.422/1990, ¶ 7.4, UN Doc. CCPR/C/51/D/422/1990 (1996).

<sup>36</sup> Complete text. Available online at: <http://www.cidh.org/relatoria/showarticle.asp?artID=857&IID=1>

48. The Commission stated that this is particularly the case in the public arena, where criticism is often based on value judgments rather than purely fact-based statements. Since value judgments cannot be proven, it may be impossible to demonstrate the veracity of such declarations. Thus, a rule that compels someone who criticizes public officials to guarantee the veracity of the assertions has a chilling effect on criticism of government conduct. Such rules raise the specter that someone who criticizes the government in good faith may be penalized for his or her criticism.

The IACtHR, citing the European Court of Human Rights,<sup>37</sup> stated that:<sup>38</sup>

An opinion cannot be subjected to sanctions, even more so where it is a value judgment on the actions of a public official in the performance of his duties. In principle, truthfulness or falseness may only be established in respect of facts. Hence, the evidence regarding value judgments may not be examined according to truthfulness requirements.

**iv. Prohibition against the criminalization of the faithful reproduction of information and the publication of information provided by third parties**

In the Background and Interpretation sections of the Inter-American Declaration on Principles on Freedom of Expression, the IACHR stated:

49. Additionally, according to the doctrine of faithful reporting, the faithful reproduction of information does not give rise to responsibility, even in cases in which the information is not correct and could cause harm to the honor of a person. This doctrine arises from the necessity of freedom of expression and information for the existence of a democratic society. In a democratic society, debate must be fluid and open. The publication of information provided by third parties should not be restricted by the threat of responsibility simply for repeating what was stated by another person. This constitutes an unnecessary restriction that limits the right of individuals to be informed.

**v. Prohibition against the criminalization of the reproduction or publication of information with actual malice**

In the Background and Interpretation sections of the Inter-American Declaration on Principles on Freedom of Expression, the IACHR stated:

46. This principle also establishes the standard of “actual malice” as a legal doctrine used to protect the honor of public officials or public figures. In practice, this standard means that only civil sanctions are applied in cases where false information was produced with “actual

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<sup>37</sup> *Cfr. ECHR, Case Lingens v. Austria*, Judgment of 8 July 1986, Series A no. 103, § 46.

<sup>38</sup> *Cf. IAHR Court. Case of Kimel v. Argentina*. Merits, Reparations and Costs. Sentence of May 2, 2008. Series C No. 177, paragraph 93.

malice,”<sup>39</sup>—in other words, produced with the express intention to cause harm, with full knowledge that the information was false or with manifest negligence in the determination of the truth or falsity of the information. The burden of proof is on those who believe they have been affected by the false or inaccurate information to demonstrate that the author of the news item acted with malice.

**vi. Sole exception to the prohibition against the criminalization of speech: hate speech or incitement to violence that “gravely affected” the fundamental rights of others**

In the judgment passed on the case of *Kimel v. Argentina* in 2008, the IACtHR ruled that:<sup>40</sup>

[the] possibility [of a criminal sanction as a result of the expression of information or opinions] should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information that shows the absolute necessity to resort to criminal proceedings as an exception. At all stages, the burden of proof must fall on the party that brings the criminal proceedings.

As examples of what could justify the “possibility of a criminal sanction” against the expression of opinions or information, the court cited only “exceptional circumstances” where other fundamental rights have been “seriously impaired,” as a result of “hate speech or incitement to violence.”

**c. Prohibition against the restriction of freedom of expression through the application of *desacato* laws**

Principle 11 of the Inter-American Declaration on Principles on Freedom of Expression of the IACHR<sup>41</sup> states:

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<sup>39</sup> This doctrine has its origin in a decision by the Supreme Court of the United States in the case of *The New York Times v. Sullivan* in 1964. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). According to this decision, a public official cannot receive reparations after being the subject of an inaccurate and slanderous statement in relation to their official conduct unless it is proven that the statement was made with actual malice; that is, if the person who issued it knew beforehand that it was not true or it was made public with a reckless disregard for its actual truthfulness. The interpretative rule or standard adopted by the Supreme Court demands the claimant of a news report that is fake, abusive, or hurtful to his or her honor, public consideration, or privacy, prove that the medium acted with actual malice.

<sup>40</sup> Cf. IACHR Court. *Case of Kimel v. Argentina*. Merits, Reparations and Costs. Sentence of May 2, 2008. Series C No. 177, paragraph 78.

<sup>41</sup> See 2002 Report, chapter V, paragraph 10 (“The Declaration is meant to be a definitive interpretation of Article 13 of the Convention.”)

### *Principle 11*

Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as *desacato* laws, restrict freedom of expression and the right to information.

In the Background and Interpretation sections of the Inter-American Declaration on Principles on Freedom of Expression, the IACHR explained that:

[...] the full enjoyment of freedom of expression is one of the principal mechanisms available to society to exercise democratic oversight of those responsible for matters of public interest. The IACHR clearly pronounced on the incompatibility of *desacato* [contempt] laws with the American Convention:

The use of *desacato* laws to protect the honor of public functionaries acting in their official capacities unjustifiably grants a right to protection to public officials that is not available to other members of society. This distinction inverts the fundamental principle in a democratic system that holds the government subject to controls, such as public scrutiny, in order to preclude or control abuse of its coercive powers. If we consider that public functionaries acting in their official capacity are the government, for all intents and purposes, then it must be the individual and the public's right to criticize and scrutinize the officials' actions and attitudes in so far as they relate to public office.

*Desacato* laws restrict freedom of expression because they carry with them the threat of imprisonment and/or fines for those who insult or offend a public official. [...] The fear of criminal sanctions necessarily discourages people from voicing their opinions on issues of public concern, particularly when the legislation fails to distinguish between facts and value judgments. Political criticism often involves value judgments.

Moreover, the Commission notes that, contrary to the rationale underlying *desacato* laws, political and public figures in democratic societies must be more—not less—open to public scrutiny and criticism. 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.<sup>42</sup>

51. The Inter-American Commission stated that “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...” and added that “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

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<sup>42</sup> IACHR, OAS/ser L/V/II.88, Doc. 9 rev (1995)

52. In this context, a crucial distinction must be made between private persons and public persons. The protection accorded public officials under these *desacato* laws directly contravenes these principles. Such laws completely invert the parameters of a democratic society, in which public officials must be subject to greater scrutiny by society. To safeguard democratic principles, these laws must be repealed in countries where they still exist. Because of the way in which they are structured and used, these laws constitute bastions of authoritarianism left over from past eras and must be done away with.

In its annual report of 2002, the Office of the Special Rapporteur for Freedom of Expression of the IAHR stated that:

*Desacato* laws ultimately deter critical speech because individuals will not want to subject themselves to imprisonment or monetary sanctions. Even those laws providing a defense, if the accused can prove that the statements were true, improperly restrict speech because they do not allow for the fact that much criticism is opinion and therefore not susceptible to proof. *Desacato* laws cannot be justified by saying that their purpose is to protect “public order” (a permissible purpose for regulation of speech under article 13), as this contravenes the principle that “a properly functioning democracy is indeed the greatest guarantee of public order.” Moreover, there are other, less-restrictive means besides criminal contempt laws by which governmental officials can defend their reputations from unwarranted attacks—such as replying through the media or bringing a civil action against individuals for libel or slander. For all of these reasons, the Commission concluded that *desacato* laws are incompatible with the Convention and called upon states to repeal these laws.

In its annual report of 2003, the Office of the Special Rapporteur for Freedom of Expression of the IAHR explained that:

Many countries of the hemisphere have demonstrated a clear intention to intimidate journalists by initiating judicial proceedings against them. Many public officials or government leaders use criminal libel, slander, and defamation laws in the same manner as *desacato* laws, with the intention of silencing journalists who have produced articles that criticize the government on matters of public interest.<sup>43</sup>

**d. Prohibition against the imposition of disproportionate civil sanctions for exercising the right to freedom of expression**

The IACtHR established that civil sanctions regarding matters of freedom of expression should be strictly proportionate so that they do not exert a chilling effect on this freedom, since.<sup>44</sup>

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<sup>43</sup> Final Considerations and Recommendations of the Office of the Special Rapporteur for Freedom of Expression on its 2003 Annual Report. Chap. VII, paragraph 6.

<sup>44</sup> Cf. IACHR. *Case of Tristan Donoso v. Panama*. Preliminary objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, paragraph 129.

[...] the fear of a civil penalty, considering the claim [...] for a very steep civil reparation, may be, in any case, equally or more intimidating and inhibiting for the exercise of freedom of expression than a criminal punishment, since it has the potential to [compromise] the personal and family life of an individual who accuses a public official, with the evident [...] result of self-censorship both in the affected party and in other potential critics of the actions taken by a public official.

In their joint declaration of 2002, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression expressed that:<sup>45</sup>

Civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused, and the law should prioritize the use of a range of non-pecuniary remedies.

#### **D. Analysis of the conduct of the State of Ecuador in relation to the international standard for the protection of the right to freedom of expression**

##### **a. Violation of the right of Emilio Palacio Urrutia to freely express opinions and ideas, even when they are offensive, shocking, or disturbing. Violation of the especial prohibition against the criminalization of expressions directed at public officials**

The statements made by Palacio that may have offended, disturbed, or shocked the president of Ecuador and other government officials are:

The Dictator is entertaining the possibility of forgiving the criminals who rose up against him on September 30, 2010. He is looking into granting pardons.

[...] I understand that the Dictator (a devout Christian, a man of peace) does not want to give up the opportunity to forgive criminals. He pardoned drug trafficking mules, he felt compassion for the murderers incarcerated in the coastal penitentiary, he begged citizens to stop robbing each other so there would be no more victims, and he cultivated a great friendship with land invaders and turned them into members of the legislative assembly, until they betrayed him.

[...]

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<sup>45</sup> See Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 2002. Available at: <http://www.iachr.org/relatoria/showarticle.asp?artID=142&IID=1>

What is really happening is that the Dictator finally understood (or his lawyers made him understand) that he has no way to prove the supposed crimes of September 30, since everything went according to an improvised script, amidst hurried actors, to hide the Dictator's own irresponsibility in deciding to enter mutinied barracks, open up his shirt and taunt them to kill him, like some desperate wrestler who puts an exaggerated effort into his second-rate circus act in some forgotten town.

[...]

The bullets that killed the policemen have disappeared, not in Fidel Araujo's offices, but in a precinct guarded by forces loyal to the Dictatorship.

[...]

Finally, the Dictator would do well to remember—and this is very important—that with a pardon, in the future, a new president (perhaps an enemy of his) could drag him before a criminal court for ordering troops to fire at will and without warning on a hospital full of civilians and innocent people.

As stated above, the opinions of any person that may “offend, shock, or disturb” any other individual are protected under the international standard for the protection of freedom of expression, in accordance with international human rights law. For the IACtHR, these opinions are protected because “such are the demands of pluralism, tolerance, and broadmindedness, without which there is no democratic society.”

As stated above, the level of protection of the opinions that “offend, shock, or disturb” is even greater when these opinions are directed toward public officials. Public officials not only have the duty to be more tolerant to criticism, but—due to their position—they also have easy access to mass media and a variety of other tools, allowing them to refute those ideas or information that they consider to be false, unjust, or offensive.

The statements of Palacio that may have offended, shocked, or disturbed President Correa are protected under the international standard for freedom of expression. However, Palacio was accused and convicted for the crime of “slanderous libel” because of his opinions directed at President Correa and his government.

In conclusion, the criminalization of the opinions of Palacio violated his right to freely express opinions and ideas, even if these opinions offended, shocked, or disturbed the president of Ecuador. Therefore, the State of Ecuador is internationally responsible for violating the special prohibition against the criminalization of expressions directed at public officials.

**b. Violation of the prohibition against the criminalization of subjective opinions or value judgments**

As stated above, according to international human rights law, the prohibition of the criminalization of expressions is applicable, with particular emphasis, in cases where these expressions were “subjective opinions” or “value judgments.”

The opinions expressed by Palacio are part of the *opinion* section of *El Universo*—not a news section. Their intent was not to report news events in a journalistic or documentary manner, but to express the point of view of the journalist. Therefore, all of Palacio’s opinions must be considered subjective and value judgments, and they are protected under international human rights law.

The international standard for the protection of freedom of expression allows citizens to freely express their subjective views about their leaders and their system of government. Critical or offensive expressions directed toward public officials cannot be used as justification to repress the free dissemination of ideas and opinions.

Nevertheless, Palacio was accused and convicted of “slandorous libel” for his subjective opinions or value judgments directed at President Correa and his government.

In conclusion, the State of Ecuador is internationally responsible for violating the prohibition against the criminalization of the subjective opinions or value judgments of Palacio.

**c. Violation of the prohibition against the criminalization of expressions that constitute a faithful reproduction of information or the publication of information provided by third parties**

The opinions of Palacio that constituted a faithful reproduction of information or the publication of information provided by third parties were:

[...] the Dictatorship announced through one of his spokespeople that the Dictator is entertaining the possibility of forgiving the criminals who rose up against him on September 30, 2010. He is looking into granting pardons.

[...]

He pardoned drug trafficking mules [...]

[...]

The Dictator is convinced that the former director of the police hospital closed the doors to bar him from entering.

[...]

Why, when the Dictator could propose amnesty for the “*pelucones*” Gustavo Noboa and Alberto Dahik, does he instead want to pardon the “*cholo*” police officers?

According to several news reports, granting a pardon to those responsible for the police mutiny of September 30 is a real possibility for the government of Ecuador. In an interview, Justice Minister Jose Serrano was asked, “Has the idea of a pardon or amnesty for those who participated in the coup matured?” The Minister replied:<sup>46</sup>

This is how President Correa and other members of the government feel about this. One thing is amnesty, because we cannot forgive or forget such an attack on democracy. But once the causes have been addressed, the president will make a decision on eventually granting a pardon.

According to several news reports, on January 15, 2008, President Correa requested the National Constituent Assembly of Ecuador to grant a pardon to those individuals who were in jail for trafficking drugs as “mules.”<sup>47</sup>

Finally, I would like to ask the Assembly to grant a pardon for the hundreds of men and women, those human beings known as mules, absurdly sent to prison for years pursuant to laws imposed from abroad, where the penalty is disproportionate to the offense. Those people, far from being criminals, are mostly just the unemployed, single mothers, brothers, and sisters, punished by the heavy load of misery.

According to several news reports, on January 15, 2008, President Correa asked the National Constituent Assembly of Ecuador to grant amnesty to former president Gustavo Noboa Bejarano, considering him “a judicial victim of someone who thought he owned the country and sadly still owns some of the courts.”<sup>48</sup>

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<sup>46</sup> See news report from *El Universo*. February 2, 2011. Available in Spanish only at:

<http://www.eluniverso.com/2011/02/02/1/1355/gobierno-madura-idea-indultar-policias-30-s.html>

See news report from *La Hora*. December 30, 2010. Available in Spanish only at:

<http://www.lahora.com.ec/index.php/noticias/show/1101070800>

See news report from [ejercitodelecuador.mil.ec](http://ejercitodelecuador.mil.ec). Available in Spanish only at:

[http://www.ejercitodelecuador.mil.ec/index.php?option=com\\_content&task=view&id=2129&Itemid=1](http://www.ejercitodelecuador.mil.ec/index.php?option=com_content&task=view&id=2129&Itemid=1)

<sup>47</sup> See news report from [ecuadorinmediato.com](http://ecuadorinmediato.com). January 15, 2008. Available in Spanish only at: [http://undermedia.ecuadorinmediato.com/index.php?module=Noticias&func=news\\_user\\_view&id=69169&umt=ecuador\\_correa\\_pide\\_a\\_constituyente\\_ammistias\\_e\\_indultos](http://undermedia.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=69169&umt=ecuador_correa_pide_a_constituyente_ammistias_e_indultos)

See news report from the Ecuadorean Consulate in Miami. January 16, 2008. Available in Spanish only at: [http://www.ecuadormiami.com/rcorrea\\_1er.php](http://www.ecuadormiami.com/rcorrea_1er.php)

See news report from [somosdemocracia.com](http://somosdemocracia.com). January 17, 2008. Available in Spanish only at:

<http://somosdemocracia.org/asambleablog/2008/01/17/de-indultos-y-ammistias/>

<sup>48</sup> See news report from “Cre Satelital.” January 15, 2008. Available in Spanish only at:

According to several news reports, on August 10, 2010, President Correa asked the National Constituent Assembly of Ecuador to grant amnesty to Alberto Dahik:<sup>49</sup>

Alberto Dahik Garzozi [...] for whom I request [...] amnesty for the supposed crimes for which he has been persecuted for about 15 years...

As previously stated, according to international human rights law, the prohibition against the criminalization of speech is especially applicable in cases where these expressions constitute a “faithful reproduction of information” or the “publication of information provided by third parties.”

As demonstrated above, many of Palacio’s statements are based on news reports previously published in several news outlets; hence, they constitute faithful reproduction of information or publication of information provided by third parties.

Palacio was accused and convicted for “slandorous libel” for issuing statements that constituted faithful reproduction of information and the publication of information provided by third parties.

Therefore, the Ecuadorean State is internationally responsible for violating the prohibition against the criminalization of the faithful reproduction of information or the publication of information provided by third parties.

#### **d. Violation of the prohibition against the criminalization of the reproduction or publication of information with actual malice**

As previously stated, the imposition of civil sanctions—never criminal ones—is compatible with the right to freedom of expression only in cases of reproduction or publication of false information with “actual malice.” An expression is considered issued with actual malice when it is made public with a reckless disregard for the truth, fully knowing it is false or with a total disregard, negligence, or indifference to whether this information is true or false.

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<http://www.cre.com.ec/Desktop.aspx?Id=135&e=106250>

See news report from *ecuadorinmediato.com*. January 16, 2008. Available in Spanish only at:

[http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news\\_user\\_view&id=69202&umt=gustavo\\_noboa\\_amnistia\\_es\\_un\\_reconocimiento\\_a\\_una\\_infamia\\_que\\_cometio\\_conmigo\\_psc](http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=69202&umt=gustavo_noboa_amnistia_es_un_reconocimiento_a_una_infamia_que_cometio_conmigo_psc)

<sup>49</sup> See news report from *La Hora* Cotpaxi. August 12, 2010. Available in Spanish only at:

<http://www.lahora.com.ec/index.php/noticias/show/1101001759>

See news report from *hoy.com*. August 11, 2010. Available in Spanish only at: <http://www.hoy.com.ec/noticias-ecuador/el-caso-dahik-todo-un-embrollo-juridico-423869.html>

See news report from *Globedia*. August 10 2010, Available at: <http://gt.globedia.com/pide-correa-amnistia-vicepresidente-ecuadoriano-dahik>

Fragment of the annual report to the National Assembly. Available at:

<http://www.youtube.com/watch?v=BP7hCTHJ7aA>

As thoroughly analyzed above, all of Palacio's statements—even the harshest comments made against President Correa and his government—constituted subjective opinions, value judgments, or the reproduction of information provided by third parties; therefore, they cannot be considered expressed with actual malice. In other words, the opinions of Palacio were not expressed with a reckless disregard for the truth, knowing it was false information, or with a total disregard, negligence, or indifference as to whether they were true or false.

On the contrary, many of Palacio's statements were based on documentary and journalistic evidence that received extensive publicity both in Ecuador and internationally.

Regardless, according to the international standard for the protection of the right to freedom of expression, actual malice can only result in the imposition of civil sanctions. As stated above, in accordance with international law, no opinion can lead to criminal penalties. The protection of reputation must be guaranteed only through civil actions and penalties.

**e. Violation of the prohibition against the restriction of freedom of expression through the application of *desacato* laws**

As previously stated, in accordance with international human rights law, *desacato* (contempt) laws are incompatible with the protection of the right to freedom of expression, since they create a discouraging effect that interferes with the right of the press to disseminate valuable information—as well as the right and the necessity of society to receive that information.

However, Palacio was accused and convicted for committing a crime pursuant to a *desacato* law.

Therefore, the Ecuadorean State is internationally responsible for violating the prohibition against the restriction of freedom of expression through the application of *desacato* laws.

**f. Violation of the prohibition against the imposition of disproportionate civil sanctions for exercising the right to freedom of expression**

As stated above, in accordance with international human rights law, the imposition of civil penalties for issuing and publishing statements can produce an effect of intimidation and self-censorship among individuals and the media when they are disproportionate, and may lead journalists and the media to bankruptcy for exercising their right to freedom of expression.

The defendants in the case were accused, convicted, and ordered to pay USD 30,000,000 in damages to President Correa. In addition to this, El Universo C.A., was also ordered to pay USD 10 million in damages to the president of Ecuador.

The multimillion-dollar civil penalties imposed by the Ecuadorean State on Palacio and the executives of *El Universo* would have been disproportionate even if they were imposed in response to the dissemination of information or news with “actual malice.” This disproportionality is greater given that all of Palacio’s statements constituted subjective opinions, value judgments, faithful reproduction of information, or publication of information provided by third parties.

Therefore, the State of Ecuador is internationally responsible for violating the prohibition against the imposition of disproportionate civil sanctions for exercising the right to freedom of expression.

## **E. Conclusion**

Emilio Palacio and three executives of *El Universo* newspaper (Carlos, César, and Nicolás Pérez) were accused, tried, and convicted to three years in prison solely for writing and publishing, respectively, an opinion piece critical of President Correa and his government. The Ecuadorean district court’s decision also found the four defendants vicariously liable, and ordered them to pay USD 30 million in damages to President Correa. El Universo C.A., the company that owns the newspaper, was also ordered to pay USD 10 million in damages to the president.

With these actions, the Ecuadorean State (1) violated Palacio’s right to freely express opinions and ideas, even if they are offensive, shocking, or disturbing; (2) violated the general prohibition against the criminalization of speech, and, in particular, speech directed at public officials; (3) violated the prohibition against the criminalization of subjective opinions or value judgments; (4) violated the prohibition against the criminalization of expressions that constitute a faithful reproduction of information or the publication of information provided by third parties; and (5) violated the prohibition against the restriction of freedom of expression through the application of *desacato* laws. Likewise, the Ecuadorean State violated the prohibition against the imposition of disproportionate civil sanctions for exercising the right to freedom of expression.

All of the authorities of the Ecuadorean State who participated in the accusation, trial, and conviction of Palacio and the executives of *El Universo* violated the international standard for the protection of freedom expression.<sup>50</sup> This international standard is established by

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<sup>50</sup> Those directly responsible for violating the international standard for the protection of freedom expression are: President Correa; Pro Tem Fifteenth Criminal Magistrate Judge of Guayas, Juan Paredes Fernandez; and the Second Criminal, Collusive, and Transit Chamber of Guayas.

international human rights law, binding in Ecuador since December 8, 1977, when that country ratified the American Convention on Human Rights.

Specifically, the Ecuadorean State violated article 13 of the American Convention on Human Rights, and principles 1, 10, and 11 of the Declaration of Principles on Freedom of Expression, pursuant to the jurisprudence of the Inter-American Court of Human Rights.