Regional Protection of Freedom of Expression:

The Americas and Europe

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Spring 2011

General University Honors

School of International Service, International Studies

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Abstract:

This paper investigates how the regional systems in Europe and the Americas protect freedom of expression. The European and the Inter-American systems have upheld similar pillars for freedom of expression, particularly regarding limitations due to democratic and social needs. In the case of freedom of expression, the European system provided a strong foundation for the Inter-American system through its decisions in cases like *the Sunday Times v. United Kingdom (No.1)*. However, in the past fifteen years, the Inter-American system has highlighted freedom of expression as a priority through an increased caseload and the creation of a special rapporteur. On the other hand, the European system has had a recent trend of constrictive decisions, limiting the freedom of expression. For these and other reasons, the Inter-American system has, in the last decade, protected freedom of expression more assiduously than its European counterpart, although it has depended on previous European case law in doing so.

The term "human rights" is a rather new one in the history of the world. The twentieth century concept was born in the 1940s and gained momentum in the 1970s, although it has roots in natural rights from Aristotle to the French Revolution to the present day. Human rights are often discussed in the context of a universal system for protection and promotion, which includes the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. However, regional human rights systems have emerged in the past half-century to promote and protect human rights. These regional systems have investigative powers and can make legally binding decisions. The Inter-American and European systems are the two most developed of the regional systems although an African system is evolving. The European system began shortly before the Inter-American system; in many ways, Europe provided a model for the Americas, in terms of structure and interpretation. There has been much debate over the merits of regional organizations for human rights as opposed to universal or international organizations. In

my investigation, I will argue, in part, the merits of regional systems in the protection of freedom of expression. Freedom of expression is heavily influenced by cultural interpretation, and thus may be better protected by regional systems rather than a universal system. Mainly, this paper will focus on one human right, the right to freedom of expression, and how it is interpreted and protected in the different regions.

This paper will analyze how these two regional systems promote and protect the right to freedom of expression through declarations, rapporteurs, and, most importantly, court decisions. I will analyze the two regional systems with the following question in mind: which region protects the right to freedom of expression more assiduously? Through my research, I have found that, despite a slow start, the Inter-American system has developed quickly in the past fifteen years, while the European system has stalled in the area of freedom of expression in the same time period. However, it is important to note that the Inter-American system has used European rulings, particularly from the 1970s, as a foundation for their own interpretation of freedom of expression. The relationship between the two reveals that although these human rights systems are regional, the Americas and Europe have found similar ground to stand on in the protection of freedom of expression.

FREEDOM OF EXPRESSION

Freedom of expression is, generally speaking, the right to hold opinions and the right to seek, receive, and impart knowledge and information freely, without censorship or unreasonable restriction. But this is a very generalized definition; countries vary. In the United States, for example, freedom of expression is encompassed in the right to freedom of speech, which does not include the right to receive information. Moreover, freedom of expression is not an absolute

right in any society. Different societies and cultures place different emphasis on this right; but all countries recognize the importance of regulating freedom of expression to some degree.

Culturally speaking, European attitudes towards freedom of expression were doubtlessly shaped by World War II. The rise of Hitler demonstrated that speech could have extremely dangerous consequences. It is also important to note that the rise of the human rights system in Europe coincided with the end of World War II, which will be discussed in more detail later. While the Inter-American system was also born shortly after World War II, the area was less affected by the war than Europe.

For the purpose of comparing the Inter-American and European human rights systems, the two definitions of freedom of expression from these systems are important, though other definitions exist.[1] Article 13 of the American Convention on Human Rights (hereafter referred to as Article 13) defines freedom of expression in the following provision:

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

[1] See the American Declaration on the Rights and Duties of Man, Article IV; the Universal Declaration of Human Rights, Article 19; and the International Covenant on Civil and Political Rights, Article 19.

person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Article IV of the American Declaration on the Rights and Duties of Man also details the right to freedom of expression. However, declarations are not generally viewed as binding and the definition is rather vague. Similar to the American Convention, Article 10 of the European Convention on Human (hereafter referred to as Article 10) defines freedom of expression as follows:

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

These two articles contain the same broad idea of freedom of expression: people have the right to impart, seek and receive information as well as hold opinions. Each article also specifies the authority of states to place limitations on citizens' freedoms. The European and Inter-American definitions emphasize that freedom of expression transcends internationally recognized boundaries through the phrase "regardless of frontiers," which was included in both regional provisions. Thus information must be allowed to flow freely around the world.

Although each article uses different phrases, they both specify the need for limitations. Both articles mention public health and morals, public order, national security, and reputation as reasons for limitations. Article 13 is longer and more detailed than Article 10. According to the Inter-American Court, in an advisory opinion, "the form in which Article 13 of the American Convention is drafted differs very significantly from Article 10 of the European Convention,

which is formulated in very general terms. Without the specific reference in the latter to 'necessary in a democratic society,' it would have been extremely difficult to delimit the long list of permissible restrictions."[2] Given the similarities and the shift from general terms to more specific terms, it is reasonable to assume that the drafters of the Inter-American system used the European Convention as a reference point, along with other international instruments; just as the Inter-American system would later use European interpretation and precedent as a foundation (as will be discussed later). Among its details, Article 13 includes explicit restrictions for the sake of adolescence, children, and morality's sake. This may reflect the cultural emphasis that Latin America places on children and family; the American Convention has an entire section on the rights of the child, which is not present in the European Convention, although both have sections on the right to a family. Article 10 links restrictions to those "necessary to a democratic society." We can infer from both of these phrases that order and stability are objectives that trump the guarantee of freedom of expression, and that this right may be limited in certain cases.

Freedom of expression has only really become a recognized right with the creation of the concept of human rights in the 1940s. However, limitations on the flow of information (whether facts or opinions) have been around much longer. Early modern history was characterized by censorship (it was particularly popular in France in the eighteenth century). In his book *On Liberty*, John Stuart Mill promoted the "harm principle," arguing that the flow of information (or what we now consider freedom of expression) cannot be at the price of harm to others.[3] Some modern limitations on freedom of expression are varied and can be found in the form of hate

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[2] *Compulsory membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No.5, para 45

[3] Raphael Cohen-Almagor, *Speech, Media and Ethics: the Limits of Freedom of Expression, Critical Studies on Freedom of Expression, Freedom of the Press and the Public's Right to Know,* 5 (Palgrave).

speech laws and *desacato* laws (insult laws), although the latier are becoming increasingly archaic. *Desacato* laws lack a strong English translation, but the concept is similar to contempt; they generally are laws that protect authority figures against insults. *Desacato* laws "penalize offensive expressions directed at public officials."[4] Other examples of limitations also include variations of the harm principle (such as the illegality of screaming fire in a crowded theater, when there is, in fact, no fire). Hate speech refers to speech that belittles a person or group due to some characteristic such as race, religion, or sexual orientation. Hate speech laws are fairly common in Europe and are considered a valid form of limitation. The Inter-American system basically obligates the states to criminalize hate speech that may incite violence in paragraph 5 of Article 13. As Article 10 and Article 13 also make clear, modern limitations may be implemented for a variety of reasons including national security and public order.

STRUCTURE OF REGIONAL SYSTEMS

When researching how Europe and the Americas approach freedom of expression, the structure of these systems is as important as the definitions they use. These two regions have fairly complex and intricate systems. However, the structure is not the focus of the paper; therefore, I will do my best to be brief and draw attention to how some structural aspects speak to freedom of expression.

The European system is rooted in the international organization of the Council of Europe, which promulgated the European Convention of Human Rights (hereafter the European Convention) in 1950. The European Convention, in addition to enumerating the human rights of European citizens, established the European Court of Human Rights and the now defunct European Commission of Human Rights. For the purpose of this paper, the evolution of the

[4] Inter-American Commission on Human Rights, *Inter-American Declaration on the Principles of Freedom of Expression*, Article 11, during the 108th regular session.

system from a court and commission to a new court and a commissioner is not relevant, but it did occur in the late 1990s. It is only important that all of these arms of the Council of Europe exist or have existed. The European Court hears cases and interprets Article 10 (in addition to the rest of the European Convention). The European Commission, and later the European Commissioner, investigated the states of human rights in member states and issued reports. In order to join the Council of Europe, members must ratify the European Convention and thus recognize the European Court (see Appendix A for a list of members).

The Council of Europe was born from the ashes of a Europe that had been torn apart by two world wars. World War II, in particular, was characterized by human rights violations. As mentioned above, World War II made it clear that speech can be dangerous. The rise of Hitler can be linked, in part, to his impressive oratory skills.

Europe is a continent striving for integration; as such, the Council of Europe is not the only regional organization. However, it is the only one whose mandate is explicitly focused on the promotion of human rights and is thus the most relevant to the scope of this essay. The European Union has been expanding its focus to include a greater emphasis on human rights, particularly with the creation of the Charter of the Fundamental Rights of the European Union, which came into force in 2009. The strength of this Charter has yet to be seen. In addition, the Organization for Security and Cooperation in Europe (OSCE) also has a regional mandate to promote human rights. In terms of freedom of expression, the OSCE Representative on Freedom of the Media acts as a watchdog for violations that particularly relate to the media.

Like the European system, the Inter-American system grew out of an international organization—the Organization of American States (OAS). The European system provided a model for the new Inter-American system. There are two main organizations for human rights

protection in the OAS: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The foundational document of the system is the American Convention on Human Rights, which provided for the creation of the Inter-American Commission and the Inter-American Court.

The tasks of the Inter-American Commission and the Inter-American Court are similar to those of their European counterparts. The Inter-American Commission investigates and analyzes individual petitions, conducts visits to member states, makes recommendations to member states, and monitors the overall status of human rights in OAS states, among other tasks. The Inter-American Commission also refers cases to the Inter-American Court. The Inter-American Court is both adjudicatory and advisory depending on the case before it. It interprets Article 13 and the rest of the American Convention, along with other OAS documents. For the Inter-American Court to hear cases, signatories of the American Convention must recognize its contentious jurisdiction (see Appendix A for a list of these countries).

The structure of the Inter-American human rights system has reflected the system's emphasis on freedom of expression. The Inter-American Commission created the Office of the Special Rapporteur for Freedom of Expression (hereafter referred to as the Special Rapporteur) in 1997. The Special Rapporteur has functional autonomy. The office is investigatory; its tasks include visiting member states, holding public hearings, making recommendations, producing reports (both thematic and country), and providing technical assistance in individual cases. Similarly, the Inter-American Commission also issued the Declaration on the Principles of Freedom of Expression in 2000, further emphasizing the importance of this particular human right.

These two systems emerged in different ways, though the international organizations that encompass them were similar in their goals. The Council of Europe was a response, in part, to the destructive nature of the world wars of the first half of the twentieth century. European integration had been a pipe dream for centuries, but without any real progress. The Council of Europe focused in European integration specifically through human rights protection. The OAS was the culmination of an idea of pan-Americanism that had existed since colonialism. Just as the Council of Europe failed to unite Europe (though the European Union proved successful), the OAS goal of pan-Americanism was never really achieved. While the Council of Europe's purpose was to promote and protect human rights, the OAS did not have the same mandate. Rather, the Inter-American system evolved with the OAS, while the European system was the specific goal from the start of the Council of Europe. The human rights system of the OAS came to be in a time of limited democracies and questionable rule of law throughout the American continents, while the Council of Europe initially consisted strictly of Western European countries with generally strong democracies and established rule of law.

Many more cases have been presented before the European Court than the Inter-American Court. In its nascence, the Inter-American Court did not receive referrals from the Inter-American Commission. This difference is even more striking when one looks specifically at cases relating to freedom of expression. The European Court ruled on its first case in 1976 with *Engel and others v. the Netherlands* (there was a case in 1962, *DeBecker v. Belgium*, but it was struck off the list after a change in Belgian law made the case unnecessary). On the other hand, the Inter-American Court's first contentious case that focused on freedom of expression was in 2001 with *Olmedo-Bustos et al v. Chile*. The Inter-American Court did submit an advisory opinion in 1985, *Compulsory membership in an Association Prescribed by Law for the*

Practice of Journalism. This advisory opinion provided the basis for the Inter-American Court in its future rulings, beginning around 2001. The gap in time between the creation of the Inter-American Court and first adjudicatory decision suggests the priorities of the Court. In its infancy, the Inter-American Court focused its energies on violations of rights like the right to life, which were all too common in the military dictatorships that characterized the region in the 1970s and 1980s.

INTERPRETATION OF FREEDOM OF EXPRESSION BY REGIONAL COURTS

Europe has a much longer history of case law regarding freedom of expression than the Inter-American system. While the Inter-American Court did not issue its first advisory opinion until 1985, its first adjudicatory decision was in 2001. The European Court, on the other hand, decided its first case in 1976. However, both systems have had a variety of results, with the courts finding violation in some and no violations in others. The Inter-American Court has found violations in roughly half of its cases regarding freedom of expression. However, in a few of the cases, the Inter-American Court argued that freedom of expression was partially espoused in other articles (such as Article 7 on the right to personal liberty and Article 25 on the right to judicial protection) and therefore, the Inter-American Court did not rule on Article 13.[5]

There have been a number of similarities between the two regions particularly on the main issue of how to determine whether a limitation is necessary or not. The following comparison of European and Inter-American case law is by no means exhaustive. I have selected the cases that I believe are most relevant to the comparison of the two systems. These cases are the ones most commonly cited in other decisions, thus revealing their importance. Moreover, the European cases, as I shall discuss, provided a strong foundation for the Inter-American system,

[5] I/A Court H.R., *Case of Heliodoro-Portugal v. Panama. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of August 12, 2008. Series C No. 186.

as well as the European one. The European Court has heard over two hundred and forty cases; this does not even include anything that the now defunct European Commission heard before its end. The Inter-American Court, on the other hand, has ruled on roughly twenty adjudicatory cases (through 2009). Similarly, this count does not include advisory opinions and Inter-American Commission decisions. It would be impossible to compare the entire history of both courts, as well as other human rights bodies, in any meaningful way in a brief essay.

Europe

The wording of Article 10 led the European Court to ask three questions when determining whether a violation did or did not occur. First, was the interference with freedom of expression "prescribed by law"? Second, did the interference have aims consistent with paragraph 2 of Article 10? And finally, was the interference "necessary in a democratic society"?

Two cases serve as the foundation for the European Court's interpretation of freedom of expression: *Handyside v. United Kingdom* and *Sunday Times v. United Kingdom (No. 1)*. These were two of the earliest cases that the European Court heard on Article 10 violations and provided precedent for future decisions. The case of *Handyside v. United Kingdom* is particularly interesting because the European Court found no violation, and yet this case is the basis for freedom of expression in Europe.

In the case of *Handyside v. United Kingdom*, Mr. Richard Handyside published a book titled The Little Red Schoolbook, which was controversial, in part, because of its chapter on "Sex." Handyside was charged in UK courts with possession of obscene materials, with the intent to publish. The European Court held that no violation occurred because the UK law had legitimate aim and was necessary in a democratic society. Despite this, the case remains important precedent for the European Court, as well as for the fact that it used the national

margin of appreciation doctrine, which permits the European Court to take into account that different cultures have different interpretations of the European Convention.[6] In part due to the national margin of appreciation doctrine, the European Court agreed with the national courts in England that because the book was aimed at children and youths, it presented a threat to public morals.[7] Thus, no violation of freedom of expression was found, although the case provided groundwork for future decisions.

In the case of *Sunday Times v. United Kingdom (No.1)* the newspaper, *the Sunday Times*, published articles on deformed children. The articles included criticisms of Distillers, the company responsible for the pollution that caused the health problems. Distillers made a complaint to the Attorney General, claiming that *Sunday Times*' interference with the justice process (through its criticisms) constituted contempt.[8] The European Court determined that although the interference was prescribed by law and had legitimate aims, it was not necessary in a democratic society because the limitation was not proportionate. In this instance, the European Court maintained that public interest outweighed the issue of contempt.[9] After all, people ought to know why children are becoming deformed and be able to prevent it.

Probably the most important phrase in Article 10 is "necessary in a democratic society." The word "necessary" is entirely subjective. The European Court took the opportunity in *Handyside v. United Kingdom* to clarify the meaning. While "necessary" does not have the same tight parameters as words like "absolute" and "strict," it is by no means as flexible as terms such as "desirable" (all of which are found in other articles of the European Convention).[10] This

[6] *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A), para. 57 (1976)
[7] *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A), para. 52 (1976)
[8] *The Sunday Times v. the United Kingdom (No. 1),* 30 Eur. Ct. H.R. (ser. A), para. 8-17 (1979)
[9] *The Sunday Times v. the United Kingdom (No. 1),* 30 Eur. Ct. H.R. (ser. A), para. 67 (1979)
[10] *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A), para. 48 (1976)

opinion was upheld in *Sunday Times v. United Kingdom (No. 1)*, where "necessary in a democratic society" was deemed synonymous with implying "pressing social need."[11] The European Court further stated that while domestic courts and legislatures have the ability to interpret the level of necessity of freedom of expression laws, the ultimate authority lies in the Court and the Commission (now just the Court) once the case reaches that level.[12] However, the European Court did place limitations on its own jurisprudence when it maintained that, "State authorities are in principle in a better position than the international judge to give an opinion on the…'necessity' of a 'restriction.'"[13]

While the European system has determined that limitations ought to be judged based on necessity in a democratic society, the European Court has also determined that freedom of expression is essential to creating and continuing a democratic society.[14] Freedom of expression fosters the exchange of ideas and opinions, as well as information in general. The existence of contradictory opinions is a foundational characteristic of democracy. The European system further stressed the link between freedom of expression and democracy in a protocol to the European Convention. Article 3 of its Protocol on Enforcement of Certain Rights and Freedoms Not Included in Section I of the Convention states that:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure *the free expression of the opinion of the people in the choice of the legislature*. (Emphasis added)

Another pillar to the European interpretation of freedom of expression is that it applies to unpopular ideas. The European Court has ruled that freedom of expression "is applicable not

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[11] *The Sunday Times v. the United Kingdom (No. 1),* 30 Eur. Ct. H.R. (ser. A), para. 59 (1979)
[12] *Handyside v. United Kingdom,* 24 Eur. Ct. H.R. (ser. A), para 48 (1976), *The Sunday Times v. the United Kingdom (No. 1),* 30 Eur. Ct. H.R. (ser. A), para. 59 (1979)
[13] *Handyside v. United Kingdom,* 24 Eur. Ct. H.R. (ser. A), para 48 (1976),
[14] *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A), para. 49 (1976); *Lingens v. Austria,* 103 Eur. Ct. H.R. (ser. A), para. 41 (1986)

only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."[15] This defense of speech that may upset members of a group demonstrates the fine line between hate speech and freedom of expression. Decades later, the Council of Europe defined hate speech as "covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."[16] Thus freedom of expression should allow unpopular or offensive ideas to be conveyed, but not at the price of inciting hatred. These two interpretations are slightly contradictory because of the general vagueness. It is unclear at what point speech goes from being unpopular to inciting hatred.

Similarly, the case of *Lingens v. Austria* led the European Court to emphasize freedom of expression as it relates to opinions about political figures. The petitioner was fined for publishing negative comments about the Austrian Chancellor. The Court determined that because freedom of expression fosters political debate, which is necessary to a democratic society, the "limits of acceptable criticism are accordingly wider" [17] for politicians as opposed to private citizens. In addition, the European Court noted that there is a difference between facts and value judgments, which do not require proof but must be in good faith.

These cases provided a wide degree of protection for freedom of expression. However, as we shall see below, recent cases before the European Court have shown that these previously

[15] *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A), para. 49 (1976).
[16] Council of Europe, Committee of Ministers, *Recommendation R (97) 20 of the Committee of Ministers to Member States on "Hate Speech*," 607th meeting of the Minister's Deputies (30 October 1997).
[17] *Lingens v. Austria,* 103 Eur. Ct. H.R. (ser. A), para. 42 (1986)

determined pillars to freedom of expression might be uprooted and that the term "necessary in a democratic society" has been interpreted more narrowly in recent cases.

The Americas

"Freedom of expression is a cornerstone upon which the very existence of a democratic society rests."[18] With that statement in 1985, the Inter-American Court announced the relevance of freedom of expression to the very preservation of democracy (just as its European counterpart had already done). The Inter-American system also shares similarities with the European system in terms of its views on limitations of freedom of expression. In addition to its advisory opinion and the case law from the European system, two cases have provided the groundwork for future freedom of expression cases in Inter-American system: *Olmedo Bustos et al. v. Chile (the Last Temptation of Christ)* and *Herrera-Ulloa v. Costa Rica.*

In the case of *Olmedo-Bustos et al. v Chile*, the film The Last Temptation of Christ was censored and not screened in Chile because of its depiction of Christ as a victim of humanity with fears, lusts, and doubts. The national courts censored the film on the grounds of protecting public morals; the petitioners argued that this was a violation of Article 13. The Inter-American Court agreed with the petitioners and found this to be a violation because the prohibition limited the dissemination of information and the exchange of ideas, despite the fact that Chile was in the process of amending its laws on censorship. The Inter-American Court determined that the prohibition constituted prior censorship and did not meet the exceptions of Article 13 (4). The film was an interpretation and as such it was an opinion, which is protected by Article 13.

[18] *Compulsory membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No.5, para 70

In the case of *Herrera-Ulloa v. Costa Rica*, the petitioner had been charged with four counts of defamation for writing and publishing insults towards a public official. The articles, which appeared in *La Nación* and had partially mirrored similar Belgian reports, accused the Costa Rican honorary representative to the International Atomic Energy Agency, Félix Przedborski, or illegal activities. Because of this, the petitioner was charged with and convicted of defamation. The Inter-American Court's task was not to determine whether Mr. Herrera-Ulloa broke the law, but whether the conviction was compatible with Article 13. In this case, the Inter-American Court had to look particularly at Article 13 (2) (1), which allows for restrictions based on protection of reputation. However, the Court held that there is a clear difference between a private individual and public official (discussed in more detail below). The Inter-American Court found a violation of Article 13 because the restrictions on journalists were inconsistent with the aims of that article. These two cases laid the foundation for the Inter-American Court's interpretation of the right to freedom of expression.

The Inter-American system has emphasized the importance of a necessity standard for limitations on freedom of expression. "Any restriction on freedom of expression must be intended to serve some pressing social need. When faced with a number of alternatives, the one chosen must be the one least restrictive of the protected right."[19] While the European system has adopted the term "necessary in a democratic society" as a vague measurement, the Inter-American system repeatedly focuses on "some pressing social need" as its guidelines for limitations. Oddly enough, the Inter-American Court used European case law to come to this

[19] I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of July 2, 2004. Series C No. 107. para. 101 (1) (b)

standard.[20] The Inter-American Court has looked on European precedent, specifically in the *Handyside v. United Kingdom* and *Sunday Times v. United Kingdom (Number 1)*, to create a necessity standard (the term "pressing social need" is actually present in the latter case). The Inter-American system has also looked to the African Commission on Human and Peoples' Rights as well as the United Nations Human Rights Committee.[21] The Inter-American Court further interpreted Article 13's reference to "public order" as "conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles."[22]

"Necessary in a democratic society" and serving "some pressing social need" are both rather vague terms that leave room for interpretation. It is noteworthy that the European term emphasizes the political while the Inter-American emphasizes the social, perhaps reflecting a cultural difference between the two regions. However, this cultural difference has been partially diminished by the fact that the two systems have used these terms interchangeably to a certain degree. Nonetheless, it is an important distinction because it demonstrates regional interpretation of a right that is universal (insomuch as it is promulgated in the Universal Declaration of Human Rights).

While the European interpretation of freedom of expression is shaped through case law, the Office of the Special Rapporteur for Freedom of Expression has streamlined the Inter-American view on how limitations should be determined. The limitations should 1) be clearly

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[20] *Compulsory membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No.5, para. 46

[21] I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of July 2, 2004. Series C No. 107. para. 114

[22] *Compulsory membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No.5, para. 64

and precisely defined in the law; 2) pursue the objectives of the American Convention; 3) be "necessary for democratic society."[23] However, the Special Rapporteur does not dictate law but rather has an advisory role. The Special Rapporteur's specific use of the final phrase is noteworthy because it is the exact phrase that has shaped the European system.

The Inter-American Commission and Court have interpreted the right to freedom of expression as having two dimensions: the individual and the collective. Freedom of expression "requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others."[24] The individual and collective dimensions have been upheld in Inter-American case law.[25] The Inter-American emphasis on individual and collective rights reflects cultural differences between Europe and the Americas. Collective structures like communities and families tend to be more important in the Americas (with the United States as a notable exception), though the role of collective structures does vary drastically according to country and culture. Europe has certainly made clear that there is a "public interest in freedom of expression,"[26] but this has not been as emphatic as in the Americas. The Inter-American emphasis on the collective right to receive information has also been linked to the recent history

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[23] Office of the Special Rapporteur for Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2008, Volume II: Report of the Office of the Special Rapporteur for Freedom of Expression,* OEA/Ser.L/V/II.134, Doc. 5, February 25, 2009, Chapter IV (B) (4) para 24

[24] *Compulsory membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No.5, para. 30.

[25] I/A Court. H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs.* Judgment of February 5, 2001. Series C No. 73. para. 65-67; I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of July 2, 2004. Series C No. 107. para. 101 (1) (a)

[26] *The Sunday Times v. the United Kingdom (No. 1),* 30 Eur. Ct. H.R. (ser. A), para. 67 (1979)

of the Americas. In the 1970s and 1980s, forced disappearances were an unfortunately common occurrence. Disappearances terrorize the public because, in addition to losing family member, there is the added terror of the unknown. Similarly, the dictatorships that characterized the Americas in the early years of the Inter-American system discouraged open debate and transparency of government, two features of freedom of expression. The connection between disappearances and freedom of expression will be discussed below in more detail.

The "pressing social need" standard and the dual dimension of individual and collective are the two pillars of Inter-American interpretation of freedom of expression that I have emphasized. However, in the past ten to fifteen years, the Inter-American system has written a great deal on how freedom of expression should be interpreted and protected. The Special Rapporteur has made particular use of Mill's harm principle, but the office has interpreted causing harm as the equivalent of violating "the rights of others."[27] In addition, the "lack of freedom of expression is a cause that 'contributes to lack of respect for the other human rights.'"[28] Thus, freedom of expression is deemed necessary to the promotion of other human rights, but not so essential that one may violate the rights of others while expressing him/herself. In addition to fostering other human rights, freedom of expression fosters democracy.[29] Following this logic, ideas and information that are unpopular or shocking deserve just as much protection as other forms of expression (with this interpretation coming directly from the

[27] Office of the Special Rapporteur for Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2009: Report of the Special Rapporteur for Freedom of Expression*, OEA/Ser.L/V/II, Doc. 51, 30 December 2009, Chapter III (B)(3)(18)
[28] Hugo Bustios Saavedra v. Peru, Case 10.548, Inter-Am. C.H.R., Report No. 38/97, OEA/Ser.L/V/II.98, doc. 6 rev. para 72 (1997)
[29] I/A Court. H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs.* Judgment of February 5, 2001. Series C No. 73. para. 69 (citing, *inter alia*, Sunday Times v. United Kingdom, 2 Eur. H.R. Rep. at paras. 59, 65).

European case law).[30] The Inter-American system has also followed the European system in its interpretation of the rights afforded to public officials in regards to freedom of expression. Citing the case of *Lingens v. Austria,* the Inter-American Court has determined that "[t]hose individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate."[31]

The Inter-American system had focused a great deal of energy on freedom of expression over the past decade or so. This is due, in part, to the relationship of freedom of expression to other human rights, particularly the right to life. The Office of the Special Rapporteur has underscored the link between human rights and to democracy. Between 1995 and 2005, 157 journalist or other media professionals were killed in the Americas, apparently due to their professional work.[32] As previously mentioned, the Inter-American system did not begin to emphasize freedom of expression until the last fifteen years; before this, the focus was on the right to life, particularly as it related to disappearances. "The murder, kidnapping, torture or disappearance of journalists is the most radical, violent and effective form of censorship."[33]

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[30] I/A Court. H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs.* Judgment of February 5, 2001. Series C No. 73. para. 69; I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of July 2, 2004. Series C No. 107. para. 113 and 126

[31] I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of July 2, 2004. Series C No. 107. para 129

[32] Office of the Special Rapporteur for Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2008, Volume II: Report of the Office of the Special Rapporteur for Freedom of Expression,* OEA/Ser.L/V/II.134, Doc. 5, February 25, 2009, Chapter IV (C) (1) para 45

[33] Office of the Special Rapporteur for Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2008, Volume II: Report of the Office of the Special*

However, Inter-American case law pertaining to freedom of expression does not relate to extrajudicial forms of censorship but rather focuses on state laws as they pertain to this particular human right. In a sense, Inter-American case law regarding freedom of expression can be dated back to *Velasquez Rodriguez v. Honduras,* rather than *Olmedo Bustos et al v. Chile*. The right to freedom of expression is linked the right to life. One must be alive to exercise freedom of expression. This may seem obvious, but the Inter-American Commission found it to be worth emphasizing. *Velasquez Rodriguez v. Honduras* also set the basis for state obligations. States have positive, as well as negative, obligations to ensure that the right to freedom of expression exists. Moreover, case law is not the only way to interpret freedom of expression (or any human right, for that matter) in the Inter-American system. The Inter-American Commission, in the case of Hugo Bustios Saavedra, a Peruvian journalist who was killed, determined that his right to freedom of expression had been violated by Peru due to his death.[34] However, the Inter-American Court, in 2008, presented a challenge to this interpretation in the case of *Heliodoro-Portugal v. Panama.* In this case of a forced disappearance, the petitioners argued that Mr. Heliodoro-Portugal was disappeared because of his opinions and that the family of the disappeared was denied the right to freedom of expression because they did not have access to information about the case. The Inter-American Court decided that it did not have competence to determine whether Mr. Heliodoro-Portugal's right hade been violated and that other articles better suited the allegations of the family.[35] This ruling stands in stark contrast to the Inter-American Commission's decision in the case of Hugo Bustios Saavedra; the Commission

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Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.134, Doc. 5, February 25, 2009, Chapter IV (C) (1) para 46

[34] Hugo Bustios Saavedra v. Peru, Case 10.548, Inter-Am. C.H.R., Report No. 38/97, OEA/Ser.L/V/II.98, doc. 6 rev. (1997)

[35] I/A Court H.R., *Case of Heliodoro-Portugal v. Panama. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of August 12, 2008. Series C No. 186, para 121-122.

willingly connected freedom of expression to disappearance, while the Court did not have the same zeal.

This points to another key difference between Europe and the Americas. European interpretation of freedom of expression does not emphasize extrajudicial forms of censorship. The Americas have obviously been shaped by a history of dictatorial regimes with questionable rules of law. While this influence is more heavily felt in the Inter-American system's approach toward the right to life, it is evident in the promotion of freedom of expression as well. Dictatorships in Latin America, and the forced disappearances that accompanied them, created an atmosphere in which information was a privilege for the few and a right for none. While the Inter-American Court has been reluctant to interpret the influence of forced disappearances on freedom of expression and instead has chosen to emphasize other rights, the Inter-American Commission has connected the two.

REGIONAL INTERACTION AND COOPERATION

As we have seen above, the Inter-American system has looked to the European system for guidance. Freedom of expression has been upheld through a dialogue between the two regional systems. To see the influence of the European Court on the Inter-American system, one only needs to glance through the decision of *Olmedo Bustos et al v. Chile* or *Herrera-Ulloa v. Costa Rica* or *Ricardo Canese v. Paraguay*, which are rife with notes from European cases. The cases of *Handyside v. United Kingdom* and *Sunday Times v. United Kingdom (No. 1)* have been particularly influential in Inter-American decisions. These two decisions were among the first that the European Court heard. Moreover, they were heard in the ten years before the Inter-American Court issued its advisory opinion in 1985. The advisory opinion of 1985 served as a foundation for future Inter-American Court decision because it had a certain level of precedent

(although it was advisory and not adjudicatory). To some extent, the European decisions were at the right time to impact the Inter-American system. This demonstrates the dialogue that has helped to solidify international human rights law. The European and Inter-American systems have created necessity standards around the phrases "necessary in a democratic society" and "pressing social need"; however, both regional systems have recognized that these terms are basically equal.

In addition to the necessity standards, both systems have interpreted freedom of expression to protect unpopular or shocking ideas; to promote democracy; and to promote other human rights. While necessity standards serve the purpose of determining how freedom of expression may be limited, these three concepts demonstrate the importance of this particular human right.

Similarly, while the Council of Europe does not have a special rapporteur, the OAS Special Rapporteur and the OSCE Special Rapporteur issue joint declarations on the subject of freedom of expression, along with the UN Special Rapporteur. These joint declarations have been released annually since 1999; in 2005, the African Commission on Human and Peoples' Rights joined the declarations with its own special rapporteur. These four special rapporteurs or representatives constitute "International Mechanisms for Promoting Freedom of Expression," and refer to themselves as "special mechanisms." The Joint Declaration about Censorship by Killing and Defamation was released in 2000. Although this topic is of particular importance in the Americas, the OSCE recognized it as significant. On the other hand, the European Court has not approached it as such. Other topics of joint declarations include terrorism, elections, Internet and criminal defamation among others. In 2010, the annual joint declaration listed the ten most important challenges to freedom of expression for the next decade. Among the challenges were:

criminal defamation, violence against journalists, limits on the right to information, discrimination in the enjoyment of freedom of expression, and freedom of expression and the Internet.[36] Judging from the list of topics, these declarations focus on problems that are not explicitly handled by the conventions, which are over half a century old. Issues like the Internet, terrorism, and the role of the media have developed over the past fifty years (the Internet was not even around when the regional courts began). These joint declarations tend to focus on broad issues and often focus on the scope of the problem rather than the solution. Although the breadth limits the actual power of the declarations (which are also non-binding and merely advisory), the joint declarations are important because they demonstrate a dialogue that is occurring worldwide about this particular right. The three regional systems (Europe, the Americas, and Africa) as well as the universal system (of the United Nations) recognize keys factors that impact freedom of expression worldwide, but allows each region to focus its own attentions on particular issues.

Joint declarations are not the only way the European community interacts with the Inter-American system. In addition, the European Commission (of the European Union, not to be confused with the defunct arm of the Council of Europe) has provided funding for the OAS Special Rapporteur, as have other European states. It is important to note that the OSCE special rapporteur does the joint declarations and the European Union provides funding. This shows the complexity of the European system, which is not strictly limited to the Council of Europe and its court. Moreover, the OSCE is an organization focused on Europe, but its membership is not limited to only European countries. Thus, the OSCE, when making decisions on actions like joint declarations, is influenced by non-European voices.

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[36] *Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade*, Organization of American States, 2010, available at http://www.cidh.oas.org/relatoria/showarticle.asp?artID=784&lID=1

Former Special Rapporteur for Freedom of Expression Eduardo Bertoni has argued that the Inter-American system owes a great deal to the European system; however, the European system now has much to learn and gain from looking to its Inter-American counterpart.[37] The Inter-American system has been clear that "[g]uarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas."[38] Thus, as Bertoni argues, "interpretation of [article 10] by the European Court may provide a minimum standard for the interpretation of [article] 13, but never a ceiling."[39]

ASSIDIOUSNESS

While the Inter-American system has used European decisions as a guideline for interpretation, it has not been at all similar in terms of implementation. The Inter-American Court began its protection of freedom of expression with a bang. In the case of *Olmedo Bustos et al v. Chile*, the very first adjudicatory case the Inter-American Court heard on freedom of expression, the Court determined that Chile must amend its laws to allow the film The Last Temptation of Christ to be seen.[40] This is one noteworthy way in which the Inter-American

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[37] Eduardo Andres Bertoni, Former Special Rapporteur on Freedom of Expression of the Organization of American States (OAS), The Inter-American Court of Human Rights and the European Court of Human Rights: a dialogue on freedom of expression standards (October 10, 2008) available at http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Interventions_IV_Bertoni-Strasbourg_FINAL.pdf

[38] *Compulsory membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No.5. para. 50

[39] Eduardo Andres Bertoni, Former Special Rapporteur on Freedom of Expression of the Organization of American States (OAS), The Inter-American Court of Human Rights and the European Court of Human Rights: a dialogue on freedom of expression standards (October 10, 2008) available at http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Interventions_IV_Bertoni-Strasbourg_FINAL.pdf

[40] I/A Court. H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs.* Judgment of February 5, 2001. Series C No. 73. para. 103 (4)

system did not use the European system as a model. The European system, as a general rule, does not require states to amend laws as part of its reparations. This type of reparation was also used in other freedom of expression cases such as *Kimel v. Argentina.*[41] In the case of *Kimel v. Argentina*, the petitioner published a book on a murder of several clergymen. In his book, he criticized the investigation and, in particular, a judge involved in the investigation. The petitioner was charged with libel due to defamation of the judge, for which the petitioner was convicted. In accordance with the reparations required by the Inter-American Court, Argentina amended its Criminal Code and the Press Law of Argentina, decriminalizing speech of public interest.[42]

The cases of *Olmedo Bustos et al v. Chile* and *Kimel v. Argentina* are two exemplary cases of compliance. In each case, the Inter-American Court required, through its reparations process, that national laws be changed to better reflect the Inter-American interpretation of freedom of expression. While these cases demonstrate a particular assiduousness on the part of the Inter-American Court, the overall record for compliance is fairly strong. There have been roughly ten cases between 2001 and 2009 in which the Inter-American Court has found a violation of Article 13. Of these ten cases, nine have issued reports on compliance monitoring.[43]

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[41] I/A Court H.R., *Case of Kimel v. Argentina. Merits, Reparations and Costs.* Judgment of May 3, 2008. Series C No. 177. para. 127-128

[42] The Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, *Inter-American Legal Framework Regarding the Right to Freedom of Expression: National Incorporation of the Inter-American Standards on Freedom of Expression during 2009*, OEA/Ser.L/V/II, para. 30-32

[43] I/A Court H.R., Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of November 28, 2003; I/A Court H.R., Case of Herrera-Ulloa v. Costa Rica. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 22, 2010; I/A Court H.R., Case of Tristán-Donoso v. Panama. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of September 01, 2010; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of August 06, 2008; I/A Court H.R., Case of Kimel v. Argentina. Monitoring Compliance with Judgment. Order of the Inter-American Court

In five of the cases, the states have fully complied with the reparations, which range from monetary compensation to erasure of criminal convictions to changing national laws. Three other cases have been classified as partial compliance, while one case is considered pending (in terms of compliance). Admittedly in some of these cases, full compliance has taken several years to complete; however, asking a country to change its laws is no small task.

In addition to the changes of specific laws in accordance with Inter-American Court decision, other tangible, general changes have occurred. It is not only the countries before the Inter-American Court that have changed their laws. Following the *Kimel v. Argentina* decision, Uruguay amended its laws to protect speech concerning public interest, citing the Inter-American system and its history as impetus for the change.[44] In the Americas today, *desacato* laws and criminal defamation laws have been reduced greatly, particularly in Argentina, Paraguay, Costa Rica, Peru, Panama, El Salvador, Honduras, Guatemala, Mexico, and Panama.[45] Similarly, states like Chile, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, the Dominican

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of Human Rights of November 15, 2010; I/A Court H.R., Case of Claude-Reyes et al. v. Chile. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 24, 2008; I/A Court H.R., Case of López-Álvarez v. Honduras. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of February 6, 2008; I/A Court H.R., Case of Palamara-Iribarne v. Chile. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of September 21, 2009; I/A Court H.R., Case of Ivcher-Bronstein v. Peru. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of August 27, 2010.

[44] The Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, *Inter-American Legal Framework Regarding the Right to Freedom of Expression: National Incorporation of the Inter-American Standards on Freedom of Expression during 2009*, OEA/Ser.L/V/II, 2010, para. 25-29

[45] Office of the Special Rapporteur for Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2008, Volume II: Report of the Office of the Special Rapporteur for Freedom of Expression,* OEA/Ser.L/V/II.134, Doc. 5, February 25, 2009, Chapter IV (A) para. 7.

Republic, Trinidad and Tobago, and Uruguay had created access to information laws.[46] Thus the Inter-American system has proven itself ready to focus its energies on issues like freedom of expression.

Through an increased caseload, the creation of a Special Rapporteur, and the adoption of the Declaration on the Principles of Freedom of Expression, the Americas have highlighted this human right as fundamental in today's society. Moreover, as discussed above, the Inter-American system has adapted its interpretation to apply to both judicial and extrajudicial forms of limitations on freedom of expression. However, the same zeal has not been found in the European human rights system.

In cases of freedom of expression, the European Court, unlike the Inter-American counterpart, tends to limit itself to monetary relief and declaratory statements regarding a violation or lack thereof, which are likely to be complied with. The limited range of reparations makes it a much simpler process to comply with European Court decision than Inter-American Court decisions. While one might think this would weaken the influence of the European Court, the Court has pushed through and interpreted freedom of expression widely. But this is changing. In the past few years, the European Court has backtracked on its previous rulings—the same rulings that served as a basis for the Inter-American system. I will now take a moment to discuss a few recent cases in which the European Court has not found violations. This is by no means an exhaustive list, but merely a variety of different types of freedom of expression cases that have all resulted in non-violation rulings, much to the chagrin of even some judges.

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[46] Office of the Special Rapporteur for Freedom of Expression, *Annual Report of the Inter-American Commission on Human Rights 2008, Volume II: Report of the Office of the Special Rapporteur for Freedom of Expression,* OEA/Ser.L/V/II.134, Doc. 5, February 25, 2009, Chapter IV (A) para. 7.

The dissent opinion in *Flux v. Moldova* stated, "[t]his judgment has thrown the protection of freedom of expression as far back as it possibly could."[47] In this case, a magazine, *Flux*, published an article accusing a school principal of corruption on the basis of an anonymous letter. The magazine was then convicted of criminal defamation. The majority opinion cited, in part, that the "unprofessional behavior" of the applicant and the "modest award of damages" that the applicant was required to pay.[48] Thus, the European Court maintained that professionalism is more important than uncovering corruption, particularly if the price is not too high. Politeness is rather irrelevant to the protection of human rights.

There may be any number of reasons for this shift in European thinking, including fear of terrorism, anti-Islam sentiment, and reactionary responses to events of the 1990s. Moreover, it may be too early to adequately determine the cause. Europe, in recent years, has seen a rise in a number of more extreme right wing parties, particularly in Belgium and Austria. Similarly, the attacks of September 11, 2001 were the first of three major attacks on the Western world (the Madrid bombing of March 11, 2004 and the London bombing of July 7, 2005). While the United States may fall under the category of the Americas, Madrid and London certainly do not. The influence of terrorism on freedom of expression was further highlighted by the Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation (another joint declaration by the special rapporteurs of the OAS, the OSCE, the UN, and the African Commission). In this declaration, the offices announced their concern "about the proliferation of anti-terrorism and anti-extremism laws in the 21st Century, in particular following the atrocious attacks of September 2001, which unduly restrict freedom of expression and access to

[47] *Flux v. Moldova (No. 6),* No. 22823/04, Eur. Ct. H.R., Dissenting Opinion of Judge Bonello, Joined by Judges David Thor Bjorgvinsson and Sikuta, para 17, July 29, 2008.
[48] *Flux v. Moldova (No. 6),* No. 22824/04 Eur. Ct. H.R., para 32, July 29, 2008.

information."[49] This declaration, while nonbinding, was ferocious in its defense of freedom of expression. The special mechanisms argued that freedom of expression is essential to combating terrorism but also held that speech regarding terrorism should be restricted on in cases in which it intentionally aims to incite terrorism. While affirming the concept of hate speech, the special offices also asserted that religions, unlike individuals, do not have reputation and thus may be defamed. In addition to the rise of terrorism, Europe had a different experience in the 1990s than Latin America. While the 1990s was a time of rebirth for Latin America and the end of authoritarian governments, Europe faced new problems. The genocides in the former Yugoslavia and Rwanda were major events of the decade. Although Rwanda is not in Europe, the conflict involved European peacekeepers and ultimately led to an intervention by France. Author D.D. Guttenplan points out that free speech was a factor in both of these events: "Sticks and stones my break bones but name-calling can clear a path to genocide."[50]

The 2008 European Court decision in *Leroy v. France* was directly related to the attacks of September 11; a cartoonist depicted the attacks and featured the line, "We have all dreamt it…Hamas did it" (meant to parody an advertising slogan). This cartoon, according to the artist, was meant to be a critique of anti-American imperialism. Leroy, the artist, was charged and convicted under French law for condoning terrorism. The European Court ruled that the cartoonist's freedom of expression was not violated by the conviction and asserted that the

[49] International Mechanisms for Promoting Freedom of Expression, *Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation*, Organization of American States, 2008, available at http://www.cidh.oas.org/relatoria/showarticle.asp?artID=735&lID=1

[50] Emily Messner, *The Debate: Not-So-Free Speech in Europe*, Washington Post, February 21, 2006, available at http://blogs.washingtonpost.com/thedebate/2006/02/notsofreespeech.html

drawing did condone terrorism.[51] It would appear from this ruling that the European Court had a better grasp of what the artist was depicting than even the artist himself.

I will discuss one more recent case before the European Court: *Stoll v. Switzerland.* In this case, a Swiss journalist published a confidential government paper (by the United States' ambassador to Switzerland) and was convicted under Swiss law of "Publication of secret official deliberations."[52] Upon reading the European Court's decision, it appears that the decision will be that of a violation; a great deal of energy is spent extolling the virtues of the press as a watchdog. However, in the end, the European principle of requiring justification for interference by the government was pushed aside; the European Court recognized that "the Government did not succeed in demonstrating that the articles in question actually prevented the Swiss Government and Swiss banks from finding a solution to [their] problems."[53] Rather than emphasize the issue of national security or public safety, which are explicitly espoused in Article 10, the European Court cited protection of secret information as the key to its decision and determined that "journalists cannot, in principle, be released from their duty to obey ordinary criminal law on the basis that Article 10 affords them protection.'[54] This idea certainly has validity; a journalist cannot stab and kill someone in an attempt to publish an article. However, is it really just to punish the publication of confidential papers in a society that promotes freedom of expression and transparency of government? The Swiss journalist maintained that he did not steal the confidential papers and came about them legally (because obviously stealing someone else' property is a justifiable crime). *Stoll v. Switzerland* resulted in a relatively large minority that dissented from the judgment. The dissenting opinion called the majority decision "a dangerous

[51] *Leroy v. France*, No. 36109/03, Eur. Ct. H.R., October 2, 2008.
[52] *Stoll v. Switzerland*, No. 69698/01, Eur. Ct. H.R., December 10, 2007
[53] *Stoll v. Switzerland*, No. 69698/01, Eur. Ct. H.R., para. 130, December 10, 2007
[54] *Stoll v. Switzerland*, No. 69698/01, Eur. Ct. H.R., para 102, December 10, 2007.

and unjustified departure from the Court's well-established case-law concerning the nature and vital importance of freedom of expression in democratic societies."[55]

These are three examples of cases that demonstrate an emerging trend in the European system regarding freedom of expression. Other cases include: *Lindon, Otchakovsky-Laurens and July v. France* (2007); *Rumyana Ivanova v. Bulgaria* (2008); *Alithia Publishing Company Ltd. & Constantinides v. Cyprus* (2008); *Backes v. Luxembourg* (2008); *Soulas a.o. v. France* (2008); *Cuc Pasco v. Romania* (2008). But it remains that the reason for this new trend is unclear; it may simply be too early to determine the root cause. Since the 1990s, the Council of Europe has become more inclusive as non-Western European and former Soviet bloc countries have entered the organization. Some scholars have argued that these additions have presented challenges to the European Court because these new countries do not have the same level of rule of law as established Western European states.[56] However, if one looks at the nine recent cases mentioned or discussed, in which the European Court demonstrated its growing restrictions in protecting freedom of expression, only four of the nine cases involve recent addition countries (Cyprus, Moldova, Bulgaria, and Romania). Three of the nine cases are against France.

In its earliest cases, the European Court judges determined that they alone have the authority to determine the validity of interferences with freedom of expression, once a case reaches that level. In essence, the Inter-American Court determined the same in *Olmedo Bustos et al v. Chile* when domestic courts had already supported the censorship of a film. This is the problem with a vague standard such as "necessary in a democratic society." There is no black

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[55] *Stoll v. Switzerland*, No. 69698/01, Eur. Ct. H.R., Dissenting Opinion of Judge Zagrebselsky Joined by Judges Lorenzen, Fura-Sandstrom, Jaeger and Popovic, December 10, 2007.
[56] James L. Cavallaro and Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 The American Journal of International Law 768, 803.

and white, only shades gray. The decision may be influenced by who is sitting on the bench and what is going on in the world and specifically what is going on the region. This problem of vagueness is, in part, combated by recognizing that the European Court and the Inter-American Court are the ultimate authority on freedom of expression standards. However, the position of these regional courts is still tenuous. In the case of the Inter-American system, the Court has asserted its power by requiring the change of domestic laws. On the other hand, the European Court has, in some ways, limited itself with the margin of appreciation doctrine and its deference to national courts.[57]

Dirk Voorhoof, a European freedom of the media specialist, recently lamented the emergence of restrictive trends in the European human rights system, specifically in the European Court and specifically regarding media. However, "[h]esitations and doubts have been created around the Court's 'new' approach in Article 10 cases, at the very moment that the Court's 'classical' case law has been increasingly influencing national courts and national authorities, creating added value for freedom of expression in a democracy."[58] Thus, according to Voorhoof, the legacy of *Handyside v. United Kingdom* and *Sunday Times v. United Kingdom (Number 1)* continues to thrive in the member states of the Council of Europe, if not within the Council itself. Despite Voorhoof's assertion, as of 2005, the majority of states in the Council of Europe continued to have criminal defamation laws and particular criminal defamation laws that protect government officials.[59] However, the application of freedom of expression in national

[57] *Handyside v. United Kingdom,* 24 Eur. Ct. H.R. (ser. A), para 48 (1976),
[58] Dirk Voorhoof, "Seminar on the European Protection of Freedom of Expression: Reflections on Some Recent Restrictive Trends," (October 10, 2008) available at http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Voorhoof_Final_conclusions.pdf
[59] Organization for Security and Cooperation in Europe [OSCE], The Representative on Freedom of the Media, *Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like to Achieve*, Vienna 2005, available at http://www.osce.org/fom/41958

courts is not the crux of this paper, though it is a relevant factor to determining assiduousness. Because of this, I will focus particularly on the case of the United Kingdom and its promotion of freedom of expression at the national level. As the Council of Europe has 47 member states, it would not be plausible to discuss each country. The United Kingdom is a good example because it is one of the oldest members of the Council of Europe, it was party to the two European Court cases I have discussed (*Handyside v. United Kingdom* and *Sunday Times v. United Kingdom (No.1)*), and because a similar shift has been seen in the past few years concerning freedom of expression.

United Kingdom codified the European Convention into its own laws with the Human Rights Act of 1998. In 2009, the House of Lords repealed laws on criminal, seditious and obscene libel, most of which had not been used in decades.[60] Indeed, the last criminal defamation case that made it all the way to the House of Lords was in 1980.[61] The United Kingdom has a strong history of free speech; it is the home of the famed Speaker's Corner in London, where anyone may voice an opinion. However, there is reason to be concerned on the individual national level of Europe. In 2009, the United Kingdom refused entry to Dutch Member of Parliament Geert Wilders, a politician known for anti-Islam rhetoric. Philip Johnston, a columnist for *Telegraph*, argued that this marked a major shift for free speech in the United Kingdom.[62] While twenty years ago the UK actually broke diplomatic relations with Iran over a book insulting the Prophet Mohammed (The Satanic Verses), today the government will not

[60] Jonathan Heawood, *Let's cheer the demise of criminal libel*, The Guardian, October 27, 2009, available at http://www.guardian.co.uk/commentisfree/libertycentral/2009/oct/27/criminal-libel-free-speech

[61] Agnes Callamard and Toby Mendel, *Word crime*, The Guardian, May 4, 2007, available at http://www.guardian.co.uk/commentisfree/2007/may/04/wordcrime

[62] Philip Johnston, *Whatever happened to free speech?*, The Telegraph, February 12, 2009, available at http://www.telegraph.co.uk/comment/columnists/philipjohnston/4604985/Whatever-happened-to-free-speech.html

allow a right-wing politician to enter the country and screen an anti-Islam film. In both instances (the book and the film), the reactions were that of the executive branches of the government and not of the courts. However, every branch plays a vital role in the promotion of human rights, including freedom of expression. Johnston further writes that, "[s]adly, the past two decades have seen a pusillanimous flight into cowering capitulation. We seem to have forgotten what free speech entails, how hard it was fought for and how important it is to defend. It is the value with which this country is most associated throughout the world. It is why Britain has been home, over the centuries, to so many political dissidents who would have been persecuted elsewhere, and why those who live in autocracies that brook no criticism tune into the BBC World Service."[63]

But Dirk Voorhoof, Philip Johnston, and others are not alone in their concern. In my discussion of recent case law, I noted the dissenting opinions in some of these cases. The severity and strength of language of these dissents and the sizeable number of judges who partook in them is significant. This shift in the general opinion of the European Court is by no means unanimous and so far it is only in infancy. Whether it will grow to adulthood is a question that can only be answered in the future.

The European rulings of the 1970s and 1980s judged that freedom of expression was necessary for a society that promoted open-mindedness and tolerance. This case law determined that all opinions have a place in society and should not be limited unless "necessary in a democratic society." Decisions like those of *Leroy v. France*, *Flux v. Moldova* and *Stoll v. Switzerland* have indicated that the threshold for determining interference may be getting lower

[63] Philip Johnston, *Whatever happened to free speech?*, The Telegraph, February 12, 2009, available at http://www.telegraph.co.uk/comment/columnists/philipjohnston/4604985/Whatever-happened-to-free-speech.html

and lower. On the other hand, Inter-American interpretation has remained steady over the past fifteen years (although before 1997, freedom of expression was not an issue of major importance in the Inter-American system).

CONSEQUENCES FOR A UNIVERSAL SYSTEM

The relationship between these two systems has important consequences for human rights theory. Human rights scholars have debated the merits of a universal system or a culturally relative system of human rights protection. While certain human rights are simply absolute (such as the right to life), others are not so straightforward. Even absolute rights like the right to life have evolved, particularly in respect to its status as a positive, as well as a negative, right. Human rights are evolutionary. As we have seen, freedom of expression is not absolute (particularly not in Europe today). Culturally, the Americas and Europe approach freedom of expression through the lens of their own histories as well as their present circumstances.

The Universal Declaration of Human Rights and the corresponding International Covenants, while impressive documents, fail to provide strong enforcement mechanisms (although complaints may be made before the Human Rights Committee). The above analysis has shown that regional systems for the promotion of human rights have been effective, though to varying degrees. Regional systems have emerged for different reasons depending on the area; however, they are by no means limited by the boundaries of continents. The dialogue between the European system and the Inter-American system regarding freedom of expression demonstrates that a universal system is not particularly necessary. Moreover, it may not be effective. Although I have argued that the Inter-American system has promoted and protected freedom of expression more assiduously than the European system, this should not imply that the

European Court has not been assiduous at all. The European Court has always held freedom of expression as an important right, without signaling it out as such.

The Inter-American system has emphasized the collective and individual aspects of freedom of expression in a way that Europe has not. The Inter-American system has also used its energy to address particular issues like extrajudicial forms of censorship and *desacato*. These actions reflect specific needs of the region, which may not be the same around the world. We have seen that the interpretations of freedom of expression have been similar in the two regions without being identical. Moreover, the Inter-American system has made use of the European system while explicitly declaring such use as discretionary only.

CONCLUSION

In the course of their developments, the Inter-American and European system have interpreted freedom of expression in similar veins This includes setting necessity standards for limitations, upholding the importance of speech of public interest, and linking freedom of expression to growth of democracy and other human rights.

Unlike the European system, the Inter-American system has highlighted freedom of expression as a singularly important right. This is made evident through the increased caseload, the creation of the Office of the Special Rapporteur on Freedom of Expression, and the Declaration on the Principles of Freedom of Expression. The European system, for all intents and purposes, views freedom of expression as one of many important human rights, with no special bodies or declarations to its name. Although all of these changes to the Inter-American system occurred in the past fifteen years, the system has certainly made up for lost time. It has been able to do so, in part, thanks to the rich case history of the European system, which has provided a basis for the Inter-American system.

The European system cemented a strong foundation for the protection of freedom of expression, both in its own region and around the world. While Europe certainly deserves praise for its initial fortitude, the praise must be qualified. The past five years have not been positive for freedom of expression in the European Court of Human Rights. Without explicitly setting new standards, the Court has been less willing to find violations of Article 10, thereby effectively lowering their standards. Admittedly, Europe is facing new challenges; the continent is at a crossroads and must determine where freedom of expression is going in the future.

Moreover, the Inter-American system has set itself apart from the European one through its forms of reparations. The Inter-American Court has required more substantial forms of reparations, such as the adaption of national laws to reflect the Inter-American interpretation of freedom of expression. In spite of the lack of enforcement mechanisms to implement these reparations, the Inter-American system has experienced an impressive rate of compliance.

In conclusion, the Inter-American system, since 1997, has protected the right to freedom of expression more assiduously than its European counterpart. This is, in part, due to the strong foundation set by the European system. However, the Inter-American system has gone above and beyond that of Europe, particularly through its strong reparations and its creation of a special rapporteur. The Inter-American system is also wary of problems that continue to plague the region, particularly the violence against journalists. However, the Inter-American system, despite these challenges, has signaled out freedom of expression as an essential right of the twenty-first century.

Appendix A: Membership

States that Recognize the Inter-American Court of Human Rights:

Argentina (1984)
Barbados (2000)
Bolivia (1993)
Brazil (1998)
Chile (1990)
Colombia (1985)
Costa Rica (1980)
Dominican Republic (1999)
Ecuador (1984)
El Salvador (1995)
Guatemala (1987)
Haiti (1998)
Honduras (1981)
Mexico (1998)
Nicaragua (1991)
Panama (1990)
Paraguay (1993)
Peru (1981)
Suriname (1987)
Trinidad and Tobago (1991)
Uruguay (1985)
Venezuela (1981)

*See http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm for more details about recognition and ratification.

States that Recognize the European Court of Human Rights (member states of the Council of Europe):

Albania (1995)
Andorra (1994)
Armenia (2001)
Austria (1956)
Azerbaijan (2001)
Belgium* (1949)
Bosnia and Herzegovina (2002)
Bulgaria (1992)
Croatia (1996)
Cyprus (1961)
Czech Republic (1993)
Denmark* (1949)
Estonia (1993)

Finland (1989)
France* (1949)
Georgia (1999)
Germany (1950)
Greece (1949)
Hungary (1990)
Iceland (1950)
Ireland* (1949)
Italy* (1949)
Latvia (1995)
Liechtenstein (1978)
Lithuania (1993)
Luxembourg* (1949)
Macedonia/Former Yugoslav Republic of Macedonia (1995)
Malta (1965)
Moldova (1995)
Monaco (2004)
Montenegro (2007)
Netherlands* (1949)
Norway* (1949)
Poland (1991)
Portugal (1976)
Romania (1993)
Russia (1996)
San Marino (1988)
Serbia (2003)
Slovak Republic (1993)
Slovenia (1993)
Spain (1977)
Sweden* (1949)
Switzerland (1963)
Turkey (1949)
Ukraine (1995)
United Kingdom* (1949)

* Indicates founding members
** See http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en for more information on membership