INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

EMILIO PALACIO URRUTIA, CÉSAR ENRIQUE PÉREZ BARRIGA, CARLOS NICOLÁS PÉREZ LAPENTTI, Y CARLOS EDUARDO PÉREZ BARRIGA, Petitioners, -against- REPÚBLICA DEL ECUADOR, Respondent.	:	CASE NO. P-1436-11

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF EMILIO PALACIO URRUTIA, CÉSAR ENRIQUE PÉREZ BARRIGA, CARLOS NICOLÁS PÉREZ LAPENTTI, Y CARLOS EDUARDO PÉREZ BARRIGA

Jonathan Donnellan
Chair, Communications and Media Law Committee
Association of the Bar of the City of New York
42 West 44th Street
New York, New York 10036
USA

Of Counsel:
Edward Copeland
Butzel Long, a professional corporation

Itai Maytal
Miller Korzenik Sommers LLP

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INTRODUCTION AND STATEMENT OF INTEREST

The Association of the Bar of the City of New York (the "New York City Bar"), founded in 1870, is a voluntary association of lawyers and law students. Today, the New York City Bar has over 23,000 members. Among its purposes are "cultivating the science of jurisprudence, promoting reforms in the law, facilitating and improving the administration of justice." The New York City Bar has 150 committees that focus on legal practice areas and issues. This brief was prepared by the Communications and Media Law Committee which addresses issues surrounding media law such as the law of defamation, access to government information, legislative proposals, and the roles of the courts in promoting the free and uninhibited discussion and exchanges of information and ideas. Through the Cyrus R. Vance Center for International Justice (the "Vance Center") the New York City Bar seeks to strengthen democratic traditions by engaging lawyers across borders to advance the rule of law and equal access to justice in countries undertaking legal and institutional reform.

The New York City Bar and the Vance Center recognize that central to trust in government and the development and strengthening of democratic traditions is the role played by the press in society. The experience in the United States has long been that the press serves a major and substantial role in promoting democratic values. Over the years, the courts of the United States have recognized that its constitutional guarantees of free speech and a free press embodied in the First Amendment to the Constitution of the United States require a series of rules designed to promote a vigorous press and a vigorous democratic tradition particularly when a claim for defamation asserted by a public official comes before the courts. These constitutionally mandated rules are deemed to be critical and provide an area of protection from liability that encourages the values that lie at the core of the First Amendment.

This case raises important issues about the legal rules that should apply when a public official sues over press coverage of, and commentary about, his activities. *Amicus curiae* Bar of the City of New York urges the Commission to accept jurisdiction of the case because of the importance of these issues and to adopt safeguards for the press and commentators against libel suits brought by public officials over coverage of official actions. We submit this memorandum to bring to the Commission's attention three important safeguards found in United States law: (i) the requirement that a public official who sues for libel show, in addition to the traditional elements of the tort, that a false statement was made with knowledge of its falsity or with reckless disregard for whether it was false; (ii) the limits on punitive or presumed damages in libel lawsuits and the principle that damages awards are subject to a searching review to guard against excessive damage awards in libel lawsuits; and (iii) the imposition of high evidentiary and procedural burdens on, if not the wholesale rejection of, the use of the criminal law to address libel matters. Although we do not address any of the jurisdictional issues in this memorandum, we believe that the importance of the issues weighs in favor of the Commission accepting the case. We urge the Commission to do so and to adopt standards similar to the United States safeguards to protect the free speech and press rights embodied in Article 13 (1) of the American Convention On Human Rights.

SUMMARY OF FACTS

President Rafael Correa of Ecuador filed a criminal defamation action against Emilio Palacio Urrutia, the editors of the newspaper *El Universo*, Carlos Eduardo Pérez Barriga, César Enrique Pérez Barriga, Carlos Nicolás Pérez Lapentti and El Universo Corporation, the commercial company that prints and edits *El Universo*. The action complains of Emilio Palacio's column "No More Lies" published in *El Universo* on February 6, 2011. The column addressed events on September 30, 2010 when a group of policemen apparently refused to patrol

the street that day because they were dissatisfied with a legal reform that was being discussed in the Assembly which dealt with the salaries and benefits of public servants.

After a trial, Mr. Palacio and his fellow editors were sentenced to 3 years in prison and the individuals were ordered to pay the equivalent of US $30,000,000. *El Universo* was ordered to pay the equivalent of US $10,000.00. After the trial and after the defendants exhausted their appeals, at the instance of President Correa the prison sentences and fines were forgiven. On October 3, 2011, Mr. Palacio and the three editors of *El Universo* filed a petition against the Republic of Ecuador with the Inter-American Commission of Human Rights.

SUMMARY OF ARGUMENT

Nearly fifty years ago, the Supreme Court of the United States recognized that lawsuits brought by public officials for alleged harm to their reputation against those who criticize them threaten the core values and principles underlying the rights to free speech and press embodied in the First Amendment to the Constitution of the United States. A public official seeking to hold a defendant civilly liable for an alleged defamation must meet an exacting standard to show not only that the statement was false, but also that it was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). Time and time again the United States courts have recognized that without these protections, media and individual self-censorship is unavoidable, the public will suffer as a result of the loss of information and debate, and, in the end, society will suffer from the curtailment of the type of free exchange and criticism that is necessary to a free and democratic society.

We urge the Commission to accept this case and adopt a similar standard to vouchsafe to the press and other citizens the rights and interests embodied in Article 13 (1) of the American Convention On Human Rights – which protects similar rights and interests as the First

Amendment to the Constitution of the United States – in order to assure that debate on public issues is uninhibited, robust and vigorous. *See* Point I, *infra.*

The United States courts recognize that these freedoms are impacted not only by the imposition of liability but also by the remedies that may be available. Thus, for example, a growing majority of United States courts and legislatures have abandoned criminal sanctions for libel within their jurisdictions out of concern for the chilling effect on protected speech. In accord with prevailing international norms, criminal libel statutes are rarely invoked in the United States even in jurisdictions where such laws remain in force. *See* Point II, *infra.* In the end, the steady dwindling of such laws in the United States and their otherwise marginal enforcement where they do exist leads to the inevitable conclusion that the criminal libel statutes that remain are relics from another time and are particularly unlikely to survive scrutiny if ever pursued based on criticism of public officials conducting their public duties.

Not surprisingly, the availability of excessive and unpredictable damage awards, whether presumed or punitive, have also been limited in the United States because such awards can chill core speech protected by the First Amendment. Well-settled precedent now requires libel plaintiffs to prove by clear and convincing evidence that a defendant acted with constitutionally required "actual malice" – a high evidentiary and procedural hurdle – before a plaintiff may be awarded such damages, at least in any case involving a matter of public concern. In addition, United States courts will apply a searching review of large libel judgments out of recognition that they often reflect the fury of an outraged jury and not necessarily the actual harm incurred by a plaintiff from the statements at issue. In such cases, United States courts have not been slow to reverse libel awards in order to prevent the chilling effect on protected speech. *See* Point III, *infra.*

ARGUMENT

I. THE UNITED STATES CONSTITUTION PROHIBITS A PUBLIC OFFICIAL FROM RECOVERING DAMAGES FOR A CLAIM OF DEFAMATION RELATED TO CRITICISM OF THE INDIVIDUAL'S OFFICIAL CONDUCT EXCEPT BASED ON A CLEAR SHOWING THAT THE STATEMENT WAS MADE WITH KNOWLEDGE THAT IT WAS FALSE OR WITH RECKLESS DISREGARD OF WHETHER IT WAS FALSE

Under the First Amendment to the Constitution of the United States actions for defamation brought by public officials based on statements concerning the official's performance or activity as a public official are highly limited because of the impact such lawsuits have on freedom of speech and the press. The First Amendment provides in pertinent part that "Congress shall make no law ...abridging the freedom of speech, or of the press...." U.S. CONST. AMEND. I. Similarly, the American Convention On Human Rights, Article 13 (1)[1] protects these same fundamental rights: "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 ... either orally, in writing, in print, in the form of art, or through any other medium of one's choice." American Convention on Human Rights, Art. 13(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.[2] Insofar as the First Amendment and Article 13 address the same fundamental rights and

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[1] The same fundamental rights are recognized in other international treaties and conventions. *See* European Convention on Human Rights, Art. 15, Sept. 4, 1950, 213 U.N.T.S. 222; International Covenant on Civil and Political Rights, Art. 10, Dec. 16, 1966, 996 U.N.T.S. 171, Universal Declaration of Human Rights, Art. 19, Dec. 10, 1948, G.A. Res. 217, U.N. Doc. A/810; African Charter on Human and People's Rights, Art. 9, June 27, 1981, 21 I.L.M. 58; and Canadian Charter of Rights and Freedoms, Art. 9, The Constitution Act, 1982, Schedule B to the Canada Act 1982, §2(b).

[2] The full text of Article 13 of The American Convention on Human Rights is as follows:

> 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.

interests, the rules developed under the First Amendment are informative as to the breadth of the protection and the contours of these protections when applied to a libel action brought by a government official.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (hereinafter "*New York Times*") and its progeny have established safeguards vital to assure that these rights and interests have the breathing space they need to survive. Safeguards such as these are necessary to protect these rights and we urge the Commission to adopt similar safeguards to protect the rights guaranteed in Article 13. *See* Jo M. Pasqualucci, *Criminal Defamation and the Evolution of the Doctrine of Freedom of Expression in International Law: Comparative Jurisprudence of the Inter-American Court of Human Rights*, 39 VAND. J. TRANSNAT'L L. 379 (2006) (Stating that "it would benefit international jurisprudence on freedom of expression and assist domestic courts if the Inter-American Court were to set forth a test to be applied in defamation cases, especially when the complainant is a person engaged in public activities" and urging adoption of the "actual malice" test developed in the United States as one alternative.)

In *New York Times*, the Supreme Court of the United States considered for the first time the "extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." Prior to this decision, various states were free to develop their own understandings of

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3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

the elements of a libel claim. *See e.g.* Restatement (First) of Torts §558 (1938)(describing prevailing perspective on the elements of the cause of action for defamation prior to the *New York Times* decision). Although the tension between free debate and the law of libel had been long recognized, the tensions had, until *New York Times*, remained essentially unresolved by the courts.[3] S*ee e.g. Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942) ("Whatever is added to the field of libel is taken from the field of free debate."). In *New York Times*, the Supreme Court held that the First Amendment prohibits an award of damages for defamation unless, in addition to proving all the elements of the tort, the official proves that a false statement was made with knowledge of its falsity or reckless disregard for whether it was false. 376 U.S. at 279.

The *New York Times* case arose out of a difficult period in the United States when the civil rights movement was met by resistance in many areas of the country, including Montgomery, Alabama. *Id.* at 256. An advertisement was placed in the *New York Times* entitled "Heed Their Voices" seeking support for the civil rights workers, the voting rights campaign and its leaders. *Id.* The advertisement described various events in and around Montgomery Alabama, and the plaintiff – who was the Commissioner of Public Affairs in Montgomery - asserted that two particular passages of the advertisement were defamatory as applied to him. In the first passage, the advertisement asserted that after a student protest "truckloads of armed police" ringed a college campus and after further protest by the students to state authorities, the dining hall was locked "to starve them into submission." *Id.* at 257. In the second passage, the advertisement asserted that in response to the peaceful protests led by Dr. Martin Luther King, Jr., his home had been bombed, he had been assaulted, arrested seven times, and charged with

[3] A number of doctrines evolved to ameliorate some of the impact on free speech. For example, the doctrine of fair comment allows statements of opinion about matters of public interest to be made as long as the statements are reasonable and are based on facts fairly stated or known to the party receiving the statement. *See e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 15 (1990). Others were of the view that the defense of truth was an adequate safeguard. *See e.g.*, Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949). The Supreme Court found the protection of these rules insufficient. *New York Times,* 376 U.S. at 278-279.

perjury. *Id.* at 258. The Supreme Court accepted that at least some of the factual statements in the two passages were not true. *Id.*

Against this background, the Supreme Court viewed the advertisement as a clear example of the type of "expression of grievance and protest" that lies at the heart of, and is protected by, the First Amendment and the

> [p]rofound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials

New York Times, 376 U.S. at 271. *See also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."). *See also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-504 (1985) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole.")

The critical question for the Supreme Court was whether the two passages in the advertisement lost their protection because of the falsity of some of the statements and the alleged defamation of the plaintiff. 376 U.S. at 271. To the Supreme Court, the answer was a resounding no and an affirmation that speech on matters of public concern and concerning public officials in their official duties, even if the statements are false, were protected to assure the robust public debate that is fundamental to a democratic government: "the truth, popularity or social utility of the ideas and beliefs which are offered" does not control whether the expression is constitutionally protected. 376 U.S. at 271.

The Supreme Court emphasized that imposing liability for the speech at issue directly threatened the scope, vitality and breadth of public debate on issues lying at the core of a

democratic society. Imposing liability for speech critical of public officials – even false speech – creates a danger of self-censorship from the fear of possible civil liability and the detrimental impact of self-censorship on public debate. *Id.* at 271-272. If a critic is required to be a guarantor of the truth of his criticism, he is more likely to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958), *quoted in New York Times*, 376 U.S. at 279. A rule that effectively compels a critic of official conduct to "guarantee the truth of all of his factual assertions on the pain of libel judgments – and to do so on pain of libel judgments virtually unlimited in amount" – would lead to self censorship, whether out of fear of the expense of proving the truth or doubt as to whether it can be proved to the standards applied in court. 376 U.S. at 279. Such a rule would, by the Supreme Court's estimation, dampen "the vigor and limits the variety of public debate." *Id.* at 279.

The Supreme Court was also well aware, as reflected in its later decisions, that some speakers who make even false factual statements would have to be shielded from liability in order to assure that vital rights to expression were not circumscribed for everyone: "[r]ealistically ... some error is inevitable; and the difficulties of separating fact from fiction convinced the [Supreme] Court in *New York Times*, *Butts*, *Gertz* and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material." *Herbert v. Lando*, 441 U.S. 153 (1979). *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). In the arena of political debate and free expression, some false statements are inevitable and must be protected if the "freedoms of expression are to have the 'breathing space' that they need *** to survive ... ." *New York Times*, 376 U.S. at 271-272, *quoting N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). *See also Cantwell v. Connecticut*, 310

U.S. 296, 310 (1940). Indeed, the Supreme Court in *New York Times* recognized that a false statement may make a valuable contribution to public debate, since it may bring about "'the clearer perception and livelier impression of truth, produced by its collision with error.'" 376 U.S. at 279 n. 19 *quoting* John Stuart Mill, On Liberty (Oxford: Blackwell, 1947), at 15 and *citing* John Milton, Areopagitica, Prose Works (Yale 1959), Vol. II, at 561.

The principles articulated in *New York Times* are rooted in the concept of a government in which the "people, not the government, possess the absolute sovereignty." 376 U.S. at 274 *quoting* 4 Elliot's Debates on the Federal Constitution 569-570 (1876). The freedom of the press and citizens to criticize public officials is embedded in the model of democratic self-government that the First Amendment helps protect: "[t]he right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." *Id.* at 275.

For these reasons, the Supreme Court held that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279–280. Over the years since the decision, the essential rule has been reaffirmed, clarified and strengthened.

Thus, in order to preserve the necessary breathing space, the Supreme Court insisted that when a public official sues for defamation, the showing of actual malice must be made by "clear and convincing proof," *Gertz*, 418 U.S. at 342, or as it said in *New York Times*, with "convincing clarity," 376 U.S. at 285–286. Moreover, it carefully calibrated what constitutionally required actual malice means, so as to avoid any confusion with its United States common law

counterpart.[4] Constitutionally required actual malice requires a showing that a defendant publisher made a false statement with "knowing falsehood" or "a high degree of awareness of probable falsity." *Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964). The libel defendant must in fact have "entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See also Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (noting actual malice standard is "subjective."). In addition, neither a failure to investigate, even in circumstances where a reasonable person would, *St. Amant v. Thompson,* 390 U.S. at 731, nor "a showing of ill will or 'malice' in the ordinary sense of the term," *Harte-Hanks Communications, Inc.* 491 U.S. at 666, satisfies the standard. However, to avoid liability, a defendant must show that the challenged statements were made in good faith. *St. Amant v. Thompson,* 390 U.S. at 732.[5]

Mindful that the interests promoted by the First Amendment could be undermined by the process of assessing the underlying facts, the Supreme Court later ruled that in libel cases the appellate courts have a heightened role in assessing the facts. *Bose Corp. v. Consumers Union of United States, Inc.* 466 U.S. at 511. The appellate courts have a duty to exercise independent judgment and determine whether the record establishes the constitutionally required actual malice with the requisite convincing clarity. *Id. See also Harte-Hanks Communications, Inc.* 491 U.S. at 685-686; *Greenbelt Cooperative Pub's. Ass'n. v. Bresler*, 398 U.S. 6 (1970).

Without these rules and protections, the vitality of the public debate in the United States would likely be diminished and society would suffer from the curtailment of the type of free

[4] It is a pure semantic peculiarity of libel law in the United States that the term "actual malice" endures to describe the constitutional standard because it is a very different concept from common law malice which generally only requires a showing of spite, ill will or hostility toward a plaintiff. *See Gertz*, 418 U.S. at 334 n.6.

[5] The good faith requirement is a means of assuring that a defendant cannot simply assert that he or she published the statement believing that is true. Thus, assertions that the statement was made in good faith would be undermined where a statement was "so inherently improbable that only a reckless man would have put them in circulation." *St. Amant v. Thompson,* 390 U.S. at 732.

exchange and criticism that are necessary to a free and democratic society. Without these protections a plaintiff "seeking to use libel as a means to hide the truth would likely have had a greater chance of winning a verdict and defending it on appeal ... ." David Kohler, *Forty Years After New York Times v. Sullivan: The Good, The Bad And The Ugly*, 83 OR. L. REV. 1203 (2004) (discussing how the law without the protections of *New York Times* and its progeny might have deterred the early stages of the reporting and investigation of the Watergate scandal which led the late President Richard Nixon to resign.) And even in situations where a plaintiff is not seeking to hide the truth, in "many areas which are at the center of public debate 'truth' is not a readily identifiable concept." *Time, Inc. v. Hill*, 385 U.S. at 406 (Harlan, J. concurring in part and dissenting in part). *See e.g.*; *Kohler,* 83 OR. L. REV. at 1209-1211 (discussing the potential impact of different rules on the difficulty of proving or disproving the allegedly defamatory statements at issue in the well known United States libel case *Westmoreland v. CBS*, 601 F. Supp. 66, 67 (S.D.N.Y. 1984).

The *New York Times* decision and its progeny serve to promote and protect the type of public discussion, debate and criticism that are a fundamental part of a system of democratic self-government. Many of the very same interests and policies which led to the *New York Times* decision have been recognized in decisions of the Inter-American Court of Human Rights. *See* Pasqualucci, 39 VAND. J. TRANSNAT'L L. at 396-403 (discussing cases and protection of freedom of expression and consistent decisions that criminal sanctions for defamation violate the right to freedom of expression when the statement at issue concerns a person engaged in public activities because such sanctions are unnecessary and disproportionate.)[6] We urge the Commission to

[6] The United States decisions and the Inter-American court decisions are also consistent with the jurisprudence of a number of other international bodies. *See e.g., Novaya Gazeta v Voronezhe v. Russia*, No. 27570/03 Eur. Ct. H.R. (June 20, 2011) (Libel judgment against newspaper based on article accusing local officials of abuses and irregularities violated Article 10 of European Convention on Human Rights); *Chemodurov v. Russia*, No. 72683/01 at 18, 19, 20 Eur. Ct. H.R. (Oct. 31, 2007) (Holding that defamation

adopt similar standards in this case to promote and protect the same interests that are embodied in Article 13 (1) of the American Convention On Human Rights.

II. CRIMINAL PENALTIES FOR LIBEL HAVE BEEN ELIMINATED IN MOST UNITED STATES JURISDICTIONS OVER THE PAST HALF-CENTURY AND IN THE FEW REMAINING STATES ARE ON THE WANE AND RARELY ENFORCED

A growing majority of United States jurisdictions recognize that libel law should remain solely a question of the civil law and have either repealed their criminal libel statutes or the statutes have been invalidated as unconstitutional by the courts. This national movement against criminal libel in the United States, which began over 50 years ago, has been driven in large part by a rejection of the outmoded notion that criminal libel statutes are needed to prevent public disorder and breaches of the peace. United States courts and legislatures have found that, under modern economic and social conditions, vigilantism and other forms of self-help, once used regularly in response to private defamation, are rare and no longer need to be discouraged by the availability of criminal prosecution for libel. Likewise, United States courts and legislatures, in conformity with international norms, now accept that criminal libel laws are unnecessary to protect the dignity of the defamed, given the availability of civil remedies to plaintiffs. Certainly the public humiliation of an arrest, potential imprisonment, the stigma of a criminal record and the profound chill this casts on one's willingness to engage in coverage or debate on public issues or public officials are completely disproportionate to the alleged harm from any libelous statement.

Understandably, even in the small and dwindling number of jurisdictions of the United States where criminal libel statutes still exist, such statutes are rarely enforced, as they are decidedly out of step with the times given that the rationales for these laws have been completely

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judgment in action by regional governor was not justified and noting that "the press fulfills an essential function in a democratic society"); *De Haes and Gijsels v. Belgium*, No. 19983/92 Eur. Ct. H.R. (Feb. 24, 1997) (Libel judgment based on criticism of members of judiciary violated freedom of expression).

debunked. When such statutes are enforced in the United States, typically in a capricious or abusive manner by local officials with the authority to invoke criminal sanctions, the Supreme Court has imposed upon them carefully and clearly demarcated evidentiary and procedural safeguards, required by the First Amendment, that are intended to ensure that such prosecutions do not chill speech that is vital to the well-being of civil and political institutions.

In light of the prevailing international attitudes and practices towards criminal libel, we urge the Commission to conclude that Ecuador's criminal libel laws are fundamentally incompatible with the right to free expression.

A. A Consensus Has Emerged In The United States Against Criminal Libel Laws.

Criminal libel is a vanishing vestige of seditious libel, which arose in England prior to the American Revolution and was notoriously used to silence criticism.[7] Not long after it won its independence, the United States adopted this legal concept as its own – despite firsthand exposure to it under English rule – through the passage of the Alien and Sedition Act in 1798. *See,* Alien and Sedition Act, 1 Stat 596-597 (1798).[8] After only three years, the Act was allowed

[7] "The history of libel law leaves little doubt that it originated in soil entirely different from that which nurtured these constitutional values [of the U.S.]." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 151 (1967). *See also Fitts v. Kolb*, 779 F. Supp. 1502, 1506 (D. S.C. 1991) ("The notion that expression may be penalized goes back at least as far as 880 A.D. when Alfred the Great [King of England] decreed that '[i]f anyone is guilty of public slander, and it is proved against him, it is to be compensated with no lighter penalty than the cutting off of his tongue....'"); Timothy Smith, *Criminal Libel Case, a Legal Throwback, Divides Community*, Wall St. J. (June 29, 1988), 1, at 17 ("[C]riminal libel [in the U.S.] . . . is a historical throwback to pre-Magna Carta England and to the common-law principles the monarchy used to justify keeping its heel on critics' necks... .")

[8] One study found 1,244 prosecutions for seditious speech in the American colonies in the 17th Century. Larry Eldridge, *Before Zenger: Truth and Seditious Speech in Colonial America 1607-1700*, 39 AM. J. LEGAL HIST. 337 (1995). The most famous criminal libel prosecution, which led to an acquittal through jury nullification, was that of the New York printer John Peter Zenger in 1735. *See Record of the Trial of John Peter Zenger*, http://www.courts.state.ny.us/history/zenger.htm (last visited September 1, 2012).

to expire[9] and is, and was, generally understood to be a violation of the First Amendment that was repudiated over 200 years ago.[10] In contrast, state prosecutions for seditious or criminal libel were more sustained, though in relatively small numbers, well into the mid-twentieth century.[11] However, over the last half century, criminal libel laws began facing successful challenges in nearly every United States jurisdiction that considered their constitutionality. *See Garrison v. State of Louisiana*, 379 U.S. 64, 67 (1964); *Ashton v. Kentucky*, 384 U.S. 195 (1966).[12] This emerging consensus in the United States follows from *New York Times* where the Supreme Court viewed laws which criminalize making defamatory, malicious, or false statements against the government or public officials as highly questionable under the First Amendment. *New York Times*, 376 U.S. at 273-274.

Since 1964, more than 35 U.S. jurisdictions have abandoned their criminal libel laws. Legislatures in 23 U.S. states and territories and the District of Columbia have repealed their criminal libel statutes.[13] Meanwhile, courts in more than 17 U.S. states and territories have

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[9] Approximately 24 to 25 people were arrested for violating the Sedition Act, 15 were indicted, and 10 were convicted. *See* John Kelly, *Criminal Libel and Free Speech*, 6 KAN. L. REV. 295 (1958).

[10] The Alien and Sedition Act of 1798 expired in 1801. Sedition Act, 1 Stat 596-597 (1798). The Act made it a federal crime to publish false, scandalous and malicious writings about the U.S. government, either house of the Congress or the President. *Id.* The Act "came to an ignominious end and by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment." *New York Times*, 376 U.S. at 296.

[11] One review of cases found 455 reported criminal libel cases in the U.S. from 1866 to 1925 and then only 100 over the following 40 years (1926 to 1965). Another study found only 30 libel prosecutions in New York from 1805 to 1942. *See* J. Stevens, *et al.*, *Criminal Libel as Seditious Libel 1916-65* 43 JOURNALISM QUARTERLY 110 (1966) and David Riesman, *Democracy and Defamation* 42 COLUM. L. REV. 734 (1942).

[12] This strong trend in the United States is consistent with the decisions of the Inter-American Court on Human Rights which has found in at least criminal cases for "defaming a public official or person involved in activities of public interest" that "criminal defamation was not the least restrictive means of limiting freedom of expression so as to protect other rights, and therefore, the State had violated the rights of the person convicted ... ." Pasqualucci, 39 VAND. J. TRANSNAT'L L. at 396.

[13] *Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan and Garrison*, MLRC Bulletin (Media Law Resource Center), March 2003, at 12 (States that repealed their

struck down their criminal libel statutes as facially unconstitutional due to their vagueness, overbreadth or for otherwise failing to protect the free speech rights guaranteed by the First Amendment. *See, e.g., Parmelee v. O'Neel*, 145 Wash. App. 223, 228 (Wash. Ct. App. 2008) (Washington State criminal libel statute "facially unconstitutional for overbreadth and vagueness") (later repealed); *Williamson v. State*, 249 Ga. 851, 295 S.E.2d 305, 306 (Ga. 1982) (holding that the Georgia criminal libel statute was "vague and overbroad under the First and Fourteenth Amendments to the U.S. Constitution"); *Boydstun v. Mississippi*, 249 So. 2d 411, 413 (Miss. 1971) (Mississippi state statute making it a crime to "publish any libel" was too vague to be enforceable under First Amendment jurisprudence).[14]

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criminal libel statutes include: "Arizona; Connecticut; District of Columbia; Hawaii; Illinois; Indiana; Iowa; Maine; Missouri; Nebraska; New Jersey; New York; Ohio; Oregon; South Dakota; Tennessee; Texas; Wyoming. Four more states formally repealed their statutes following decisions striking down the laws – Alaska; Arkansas; California; Pennsylvania."). *See also An Act Concerning the Repeal of the Crime of Colorado Criminal Libel*, 2012 Colo. Legis. Serv. Ch. 113 (S.B. 12-102)(repealing C.R.S.A. §18-13-105) (finding it unconstitutional); P.R.R. §§ 4101-4104. Repealed. Act June 18, 2004, No. 149, art. 307, eff. May 1, 2005. (Puerto Rico repeals its criminal defamation statute when it adopted its new penal code).

[14] Numerous other state and federal courts have held criminal libel statutes to be unconstitutional. *See, e.g., State v. Mata*, No. M-47-MR-20050028 (N.M. Dist. Ct. April 4, 2006)(trial court rules New Mexico criminal libel statute unconstitutional); *de Jesus-Mangual v. Rodriguez*, 383 F.3d 1 (1st Cir. 2004)(Puerto Rico criminal libel statute violated First Amendment); *Eakins v. Nevada*, 219 F. Supp. 2d 1113 (D. Nev. 2002) (finding that Nevada statute which criminalized the filing of false allegations against peace officers, violated the First Amendment); *I.M.L. v. State*, 61 P.3d 1038 (Utah 2002) (Utah criminal libel statute was deemed overbroad and unconstitutional) (statute later amended and in force); *Ivey v. Alabama*, 821 So. 2d 937 (Ala. 2001) (Alabama criminal libel statute unconstitutional on its face since it failed to meet First Amendment evidentiary standards); *Nevada Press Ass'n v. Del Papa*, No. CVS-98-00991-JBR (D. Nev. 1998) (Nevada criminal libel law struck down as unconstitutionally broad and violating the First Amendment); *State v. Helfrich*, 922 P.2d 1159 (Mont. 1996) (Montana criminal libel statute constitutionally overbroad); *Fitts v. Kolb*, 779 F. Supp. 1502 (D. S.C. 1991) (South Carolina statute unconstitutional on its face for failure to meet First Amendment standards); *State v. Defley*, 395 So. 2d 759 (La. 1981) (prosecution under the Louisiana criminal libel statute is unconstitutional insofar as it failed to protect the "constitutional guarantees of the First Amendment to the U.S. Constitution."); *Gottschalk v. Alaska*, 575 P.2d 289 (Alaska 1978) (Alaska criminal libel statute was invalid on its face since it failed to meet First Amendment evidentiary standards); *Eberle v. Municipal Court for Los Angeles Judicial Dist.*, 127 Cal. Rptr. 594 (Cal. App. 1976) (same as to California criminal libel statute); *Weston v. Arkansas*, 528 S.W.2d 412 (Ark. 1975) (Arkansas criminal libel statute was unconstitutional); *U.S. v. Handler*, 383 F. Supp. 1267 (D. Ct. Md. 1974)(Maryland defamation statute overbroad); *Pennsylvania v. Armao*, 446 Pa. 325 (Pa. 1972) (Pennsylvania criminal libel statute was invalid on its face as it failed to incorporate constitutional requirements under the First Amendment); *State v. Brown*,

This widespread repudiation of criminal libel laws reflects the consensus among a growing majority of U.S. states and territories that "criminal libel laws serve little, if any, purpose." *State v. Powell*, 839 P.2d 139, 143 (N.M. Ct. App. 1992). *See also Tollett v. U.S.*, 485 F.2d 1087, 1094 (8th Cir. 1973) ("A strong argument may be made that there remains little constitutional vitality to criminal libel laws.") Moreover, where criminal libel laws still exist in the U.S., their enforcement is rare, and they are subject to clear set limits when they pertain to "criticism of the official conduct of public officials." *Garrison*, 379 U.S. at 67.

Indeed, as illustrated by the comments of the California legislature upon repeal of its criminal slander laws, many United States legislatures believe criminal libel laws are antithetical to fundamental free speech rights:

> The Legislature finds and declares that every person has the right to speak out, to poke fun, and to stir up controversy without fear of criminal prosecution. The Legislature finds and declares that the continued existence of vague laws on the books is an invitation to their unconstitutional use, at the peril of civil liberties.

1991 Cal. Stat. 186 § 1.

B. United States Courts Reject Criminal Libel Laws Because Their Underlying Rationales Are Archaic And Do Not Justify The Chilling Effect These Laws Have On Protected Speech.

In *Garrison v. Louisiana*, decided nearly fifty years ago, the Supreme Court first struck down a criminal libel statute as unconstitutional and in its wake, criminal defamation laws have either been repealed or fallen into near disuse in most U.S. jurisdictions. *Garrison* involved an appeal by a District Attorney of his conviction for criminal defamation under a Louisiana statute for comments that he made during a press conference that allegedly disparaged the judicial

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206 A.2d 591 (N.J. App. Div. 1965) (criminal libel indictments under the prevailing New Jersey law dismissed as constitutionally unsupportable).

In addition, the Supreme Court's decision in *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966) effectively eliminated criminal libel in Kentucky and seven other jurisdictions that recognized libel as a common law crime. *See also* MLRC Bulletin 2003 at 13 n.29 (Delaware eliminated all common law libel crimes in 1973; Maryland eliminated all common law libel crimes in 1997).

conduct of eight judges of the Parish's Criminal District Court. *Garrison*, 379 U.S. at 65. Deciding that the criminal libel law under which the District Attorney was prosecuted was unconstitutional, the Supreme Court found the old rationales for criminal libel laws no longer persuasive. *Id.* at 69-71. The Supreme Court then held that, on its face, the statute violated the Constitution because it permitted liability (i) for speech that was true, or (ii) for a false statement made without constitutionally required "actual malice," *i.e.*, knowledge of the statement's falsity or reckless disregard for whether it was false. *Id.* at 74. Two years later, in *Ashton v. Kentucky*, 384 U.S. 195 (1966), the Supreme Court reversed another criminal defamation conviction on the ground that the elements of the offense of criminal defamation were inherently too vague and uncertain to constitute a criminal offense. Thus, the Supreme Court stated:

> [S]ince the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as penal offense in Kentucky.

Ashton v. Kentucky, 384 U.S. at 198. [15]

In the years since these decisions, the courts in the United States have recognized that the rationales previously used to justify criminal libel laws are no longer convincing, particularly in light of the impact of such laws on freedom of speech and the press.

(1) United States Courts Reject the "Avoidance of Breaches of the Peace" Rationale as a Justification for Criminal Libel Laws.

The primary justification for common law criminal libel laws in the United States was "the avoidance of public disorders and breaches of peace," often triggered by the defamed or his family or friends seeking revenge on the alleged defamer. *Tollett*, 485 F.2d at 1095. Common

[15] In *Ashton v. Kentucky* the Supreme Court emphasized that where laws impinge on First Amendment rights, "we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Id.* at 200.

law criminal libel "was designed [then] to avert the possibility that the utterance would provoke an enraged victim to a breach of peace," regardless of whether the utterance was true. *Garrison*, 379 U.S. at 68 (noting that criminalizing defamation was previously deemed essential under the belief that people would otherwise resort to vigilantism to seek satisfaction for affronts to their honor or dignity).

In *Garrison*, the Supreme Court recognized that because dueling and other forms of vigilantism are no longer a realistic threat in the United States, coupled with the general availability of civil remedies, "the breach of the peace justification for criminal libel laws" was no longer sound. *Garrison*, 379 U.S. at 69. Rather, the "economic and social environment" in the United States, which allows for contentious public or political debates, had made such libel actions "unwanted and unneeded."[16] Criminal defamation laws, adopted to avoid the "chivalrous satisfaction" of duels, began to erode. *Id. quoting* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) ("Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.")

(2) The Courts Reject the "Protecting the Dignity of Reputation" Rationale as a Justification for Criminal Libel Laws.

The other justification often invoked in the past for criminalizing libel in the United States was that it had served as a "supplement to the civil libel laws to protect the dignity of reputation of the individual." *Tollett*, 485 F.2d at 1096. But courts in the United States,

[16] "Wild words were thoughtless flung, and politics was a lusty game. American officialdom became accustomed to take, and to give, vigorous derogation. Resort to prosecution rather than vituperation seemed ridiculous and cowardly." John Kelly, *Criminal Libel and Free Speech*, 6 KAN. L. REV. 295, 317 (1958).

following the Supreme Court's guidance, have found that "this, too is a weak and questionable basis for governmental intrusion into the delicate area of regulating expression." *See e.g., Ivey v. State*, 821 So. 2d 937, 942 (Ala. 2001); *People v. Ryan*, 806 P.2d 935, 942 (Colo. 1991). The high costs of criminal defamation prosecutions – which, include, among other things, the cost of investigation, arrest and litigation -- and the capricious manner in which these cases are often prosecuted, often against political opponents who "made disagreeable statements about persons firmly entrenched in public office," are simply perceived by most United States jurisdictions as unjustified given that civil defamation claims can adequately provide redress for attacks on personal reputation or for harassment. *Gottschalk*, 575 P.2d at 294 ("One evil of a vague statute is that it creates the potential for arbitrary, uneven and selective enforcement. Nowhere is this more evident than in the area of criminal defamation..."). *See also Morrison v. Olson*, 487 U.S. 654, 727 (1988) ("Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation.").[17]

As Justice William J. Brennan observed in *Garrison*:

> It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. . . . It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control . . .

Garrison, 379 U.S. at 69-70 (quoting Model Penal Code, Tent. Draft No. 13, 1961, § 250.7, Comments, at 44). Reputational damages are better compensated or deterred by civil remedies than by the more authoritarian and arbitrary relief afforded through criminal libel.

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[17] "The prosecution of a criminal libel thus involves the misuse and abuse of power. It could be blatant; or it could be as subtle as a prosecutor's choice of whether criminal charges should be brought and, if so, what they should be. This is the ignominious history of the law surrounding criminal libel." Gregory C. Lisby, *No Place In The Law: The Ignominy of Criminal Libel in American Jurisprudence,* 9 COMM. L. POL'Y 433 (2004).

(3) Criminal Libel Laws Are Antithetical to the First Amendment.

In rejecting the usual rationales offered to support criminal libel laws, the Supreme Court in *Garrison*, held that there was no substantial state interest that outweighed the substantial chilling effect such laws have on criticism of public officials. *Garrison*, 379 U.S. at 74. *See also Mangual v. Rotger-Sabat*, 317 F.3d 45, 58 (1st Cir. 2003) (agreeing with plaintiff's assertion that the "threat of criminal prosecution" for defamation has a chilling effect on free speech.) As the Supreme Court explained, "[i]t would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." *Id.* at 74 (citing *New York Times*, 376 U.S. at 282-83). The Supreme Court in *Garrison* viewed speech that informs debate about public officials as vital to the functioning of the country's public institutions, going to the core of what the First Amendment was designed to protect. 379 U.S. at 74-75. As the Supreme Court noted, "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* *See also Snyder v. Phelps*, ___ U.S. ____, 131 S. Ct. 1207, 1215 (2011) ("Speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection").

By allowing for a "free flow of information to the people concerning their public officials, their servants," the Supreme Court observed that the public is better equipped to assess an "official's fitness for office." *Garrison*, 379 U.S. at 76 ("Manifestly, a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office.") A unanimous Supreme Court held that "[w]here criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations." *Garrison*, 379 U.S. at 67 (citing *New York Times*, 376 U.S. at 279). Thus, the

Supreme Court ruled that Louisiana's criminal libel statute was unconstitutional, reversing the conviction of the Parish District Attorney for criminal defamation of judges. *Id.* at 78.

After *Garrison*, states and territories can no longer criminalize false and defamatory statements about public figures or matters of public concern unless they prove actual malice, as defined in *New York Times*. *Id.* at 74 (Actual malice applies "with no less force merely because the remedy is criminal.... [O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions.")(citing *New York Times*, 376 U.S. at 270).

In addition, United States jurisdictions can no longer make truth "the subject of either civil or criminal sanctions where discussion of public affairs is concerned," even if the true statements at issue were made without good motives or justifiable ends to be protected. *Garrison*, 379 U.S. at 74. *See also I.M.L. v. State*, 61 P.3d 1038 (Utah 2002)("[Garrison] further held that a statute is manifestly unconstitutional if it fails to provide truth as an absolute defense to criminal or civil liability.")(internal citations omitted).

C. Criminal Libel Statutes That Remain on the Books in the United States are Rarely Enforced.

In the wake of *Garrison*, there remain a dwindling number of criminal libel laws that have not yet been repealed or overturned by the courts.[18] Even within the dwindling number of United States jurisdictions that still have criminal libel statutes that have not yet been declared entirely unconstitutional, the laws are seldom used. Prosecutions under these laws are rare, due

[18] Today, there are only 14 U.S. jurisdictions, 13 states and one U.S. territory, that appear to have criminal defamation statutes that have not yet been declared entirely unconstitutional and are, at least, still partially viable. They include Florida (Fla. Stat. §836.01-11 (2007)), Idaho (Idaho Code § 18-4801 (2005)), Kansas (Kan. Stat. Ann § 21-4004 (2005)), Louisiana (La. Rev. Stat. § 14:47 (2005)), Michigan (Mich. Comp. Law § 750.97 (2005)), Minnesota (Minn. Stat. 609.765 (2011)), Montana (Mont. Code Ann. 45-8-213 (2011)), New Hampshire (NH Rev. Stat. Ann 644:11 (2005)), North Carolina (N.C. Gen. Stat § 14-47 (1993)), Oklahoma (21 Okla. Stat. § 771 (2005)), Utah (Utah Code Ann. § 76-9-404 (1973)), the U.S. Virgin Islands (VI Code Ann. tit. 14, § 59-1172 (2005)), Virginia (VA Code Ann. § 18.2-209 (1960)) and Wisconsin (Wis. Stat. Ann 942.01 (2005)).

in large part, to courts having generally denied such laws any significant state interest. *Garrison*, 379 U.S. at 69 ("[I]n earlier, more violent, times, the civil remedy had virtually pre-empted the field of defamation; except as a weapon against seditious libel, the criminal prosecution fell into virtual desuetude."); *Pennsylvania v. Armao*, 446 Pa. 325, 334-335 (Pa. 1972)(same); *Tollett*, 485 F.2d at 1094 ("[C]ommentators acknowledge that prosecutions under them are extremely rare.").

One reason that criminal libel laws continue to exist is because prosecutors exercise restraint in invoking them and, thus, the constitutionality of these laws remain untested in a court of law. According to one study by the Media Law Resource Center, there were only 100 reported criminal libel cases in the U.S. between 1926 and 1965. MLRC Bulletin (Media Law Resource Center), (2003), at 6 (citing J. Stevens, *et al.*, Criminal Libel as Seditious Libel 1916-65, 43 JOURNALISM QUARTERLY 110 (1966)). Between 1965 and 2007, one study found there were only 99 cases of actual or threatened prosecutions, an average of 2.4 cases nationally per year. Eric Robinson, *Criminal Libel and the Internet*, MLRC Bulletin (Media Law Resource Center), 2007 at p.11. *See also* Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984 (1956) ("Prosecutions for defamation, either libel or slander, are so rare as to be almost nonexistent in our criminal courts."). While any prosecution for criminal libel is contrary to the evolving national attitudes towards such punishment in the United States, the number of criminal libel cases reported remains relatively small, especially considering that there were an estimated 20.5 million incoming criminal cases of all types in state courts throughout the United States in 2009 alone.[19] Moreover, to the extent that criminal libel laws are invoked at all, most prosecutions are threatened but not ultimately pursued. For

[19] National Center for State Courts, State Court Caseload Statistics, 2009, available at http://www.courtstatistics.org/Criminal/CriminalAbate.aspx. (last visited September 1, 2012).

example, of the 11 prosecutions initiated between 2002 and 2004 identified in another MLRC study, more than one third were either never tried or did not reach a conclusion in court. *Developments in Criminal Defamation Law since 2002,* MLRC Bulletin (Media Law Resource Center), December 2004, at 4-9.

However, regardless of the low number of prosecutions, where free speech rights under the First Amendment are concerned, "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P. v. Button*, 371 U.S. at 433. Criminal libel laws that endure, even if few and relatively dormant, do not provide speech with the "breathing space" required by the First Amendment. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). They are antithetical to the prevailing viewpoint among jurists and legislatures in the United States that such laws stifle free discussion which is necessary to ensure "[t]he vitality of civil and political institutions in our society." *Ashton v. Kentucky*, 384 U.S. at 199.

D. Ecuador's Criminal Libel Law Runs Counter To A Growing International Consensus That Criminal Defamation Is An Impermissible Restriction on Free Expression.

As in the United States, there is a growing consensus among international organizations that criminal defamation laws are an unnecessary and unjustifiable restriction on free expression. Thus:

a. *The United Nations Human Rights Committee* has advised countries that are a party to the International Covenant on Civil and Political Rights ("ICCPR") to consider the decriminalization of defamation and require, at a minimum, that defamation laws, whether civil or criminal, "be crafted with care to ensure they comply with . . .[and] do not serve, in practice, to stifle freedom of expression." UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of Opinion and Expression (Sept. 12, 2011), ¶ 47;

b. *The UN Special Rapporteurs on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression* have jointly declared that defamation should be decriminalized. *See* International Mechanism For Promoting Freedom of Expression, U.N. Press Release (Dec. 1, 2000) (stating that member states should consider "the repeal of criminal defamation laws in favour of civil laws.");

c. *The Council of Europe's Parliamentary Assembly* has unequivocally called on its member states subject to the European Convention on Human Rights to "guarantee that there is no misuse of criminal prosecutions for defamation," ¶ 17.2, and advised them to consider decriminalizing defamation completely. *See* Resolution 1577, Towards Decriminalization of Defamation, Eur. Parl. Doc. 1577 (Oct. 4, 2007); and

d. *The Special Rapporteur of the Organization of American States* advised member states to the American Convention on Human Rights to "[p]romote the modification of laws on criminal defamation with the objective of eliminating the use of criminal proceedings to protect honor and reputation when information is disseminated about issues of public interest, about public officials, or about candidates for public office." OAS Special Rapporteur, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II, Chapter VI, Conclusions and Recommendations (Mar. 4, 2011) ¶ 7(b).

Moreover, supranational judicial bodies such as the *European Court of Human Rights* and this Commission have issued strong rulings reflecting that the general commitment of member states to protecting freedom of expression incorporates a preference for civil law remedies over criminal law penalties. *See, e.g., Gavilovici v. Moldova*, Application No. 25464/05, Eur. Ct. H.R. (Dec. 15, 2009) ("imposing criminal sanctions on someone who exercises the right to freedom of expression can only be considered compatible with Article 10 . . . only in exceptional circumstances, notably where other fundamental rights have been seriously impaired."); *Kubaszewski v. Poland*, Application No. 571/04, Eur. Ct. H.R. (Feb. 2, 2010) ¶ 45 ("the party who felt offended had recourse to means of civil law which, in the Court's view, are appropriate in cases of defamation."); *Canese v. Paraguay*, Inter-Am. Comm'n, I.D.H., (Ser. C) No. 111 (Aug. 31, 2004) ¶ 104 ("penal laws are the most restrictive and the severest means of establishing liability for an unlawful conduct."); *Kimel v. Argentina*, Case 720/00, Report No. 5/04, Inter-Am. Comm'n, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (May 2 2008) ¶¶ 86-87 (stating that "the opinions regarding a person's qualifications to hold office or the actions of public officials in the performance of their duties are afforded greater protection, so that debate in a democratic

system is encouraged.")[20]

In sum there is a discernible international movement away from the use of criminal laws and sanctions to protect an individual's reputation and we urge the Commission to follow this emerging consensus. This trend places those countries that continue to criminalize defamation, such as Ecuador, squarely at odds with prevailing international norms.

III. EXCESSIVE DAMAGE AWARDS IN LIBEL CASES ARE INIMICAL TO FIRST AMENDMENT FREEDOMS GIVEN THEIR TENDENCY TO ENGENDER SELF-CENSORSHIP AND DISCOURAGE SPEECH ON PUBLIC ISSUES

In the United States it is widely accepted that the only threatened punishment for libel that can induce more media-censorship than the prospect of imprisonment is the prospect of large damages awards. The chilling effect of large monetary awards is stronger when journalists pursue stories that challenge the activities of powerful or popular figures, since the likelihood of legal action and substantial damage claims by such figures is that much greater. As Justice Brennan noted in *New York Times v. Sullivan*:

> The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute . . . . Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.

376 U.S. at 277-78.

The gravamen of the concern about damage awards is that presenting largely uncontrolled fact-finders, like juries, with the option of awarding punitive or presumed damages

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[20] As of March 25, 2010, ten countries had fully decriminalized defamation. U.N. Human Rights Council, "Report of the Special Rapporteur on the promotion and protection of the rights to freedom of opinion and expression, Addendum: Tenth anniversary joint declaration: Ten key challenges to freedom of expression in the next decade," (March 25 2010). As of November 2011, fourteen member states of the Organization for Security and Cooperation In Europe ("OSCE") eliminated their criminal defamation laws. OSCE, Press Release, "Russia Should Reject Recriminalizing libel, says OSCE media freedom representative," (July 12, 2012). Russia has since re-criminalized defamation. *See* Committee to Protect Journalists, *Russian parliament votes to recriminalize defamation* (July 11, 2012) available at http://www.cpj.org/2012/07/russian-parliament-votes-to-recriminalize-defamati.php (last visited November 28, 2012).

against publishers and broadcasters, invites them to pass judgment on the value of the story being reported – to punish "unpopular opinion" or "unpopular views" – rather than focusing on whether and how "to compensate individuals for injury sustained by the publication of a false fact." *Gertz*, 418 U.S. at 349. *See, e.g., Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1142 (7th Cir. 1985)(emphasizing the court's responsibility to be "assiduous in protecting the press ... from the fury of outraged juries."); *Kassel v. Gannett Co.*, 875 F.2d 935, 949 (1st Cir. 1989)("Freedom of the press requires that unbounded speculation by juries be discouraged lest other speakers be chilled by the threat which such awards entail."); *Rosenbloom v. Metromedia*, Inc., 403 U.S. 29, 84 (1971) *majority opinion abrogated by Gertz, supra,* (Marshall J., dissenting, Stewart J., joining)("The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments...allows juries to penalize heavily the unorthodox and the unpopular and exact little from others...[and] presents obvious and basic threats to society's interest in freedom of the press.") Not only is the governmental interest in permitting "gratuitous awards and money damages far in excess of any actual injury" substantially less important than compensating libel plaintiffs for actual injuries suffered, *Gertz*, 418 US at 349, but, allowing fact-finders to assess punitive or presumed damages in wholly unpredictable amounts "inhibit[s] the vigorous exercise of First Amendment freedoms" and undermines the "profound national commitment" to free and robust debate on public issues. *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) *quoting New York Times*, 376 U.S. at 270.

The Supreme Court has addressed the chilling effect of a large monetary award on speech by holding that fact-finders cannot award enhanced civil damages for defamation, whether presumed or punitive damages, without first finding that the libel plaintiff has met "the

demanding standard" of *New York Times*. *See Gertz*, 418 U.S. at 348-50. This standard requires plaintiffs, at least in a libel case involving a matter of public concern, to show by clear and convincing evidence that the defendant acted with constitutionally required "actual malice" in order to recover any money damages in excess of actual injury. *Id.* at 350; *Dun & Bradstreet, Inc.*, 472 U.S. at 762. *See also Swengler v. ITT Corp.*, 993 F.2d 1063, 1071 (4th Cir. 1993) (recovering punitive damages requires clear and convincing proof that the defendant made the statements with "actual malice.")

Regardless of these evidentiary and procedural safeguards, United States appellate courts have cautioned trial courts to "give careful attention to excessive damages awards" because of "the threat [they pose] to First Amendment freedoms" in general. *Hunt v. Liberty Lobby*, 720 F.2d 631, 650 (11th Cir. 1983). *See also Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (advising the trial court to evaluate the magnitude of a punitive damage award after noting that the "constitutional guarantee of freedom of speech and press is served by judicial control over excessive jury verdicts..."). Indeed, United States courts have reversed large damage awards in defamation cases explicitly because of the impact of the award on constitutional values. *See, e.g., Tosti v. Ayik*, 394 Mass. 482, 476 N.E.2d 928, 937-938 (1985)("Because First Amendment rights are at stake, we are not slow to pronounce a verdict excessive in defamation cases, even though by doing so we must necessarily substitute our assessment of reasonable damages for that of the jury."); *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983) (setting aside jury verdict and ordering a new trial after finding that the "potential for inhibiting the vigorous exercise of First Amendment freedom in this case because the damage award far exceed[ed] any conceivable damage that might have been done to [the plaintiff's] political reputation or damages suffered as a result of an humiliation or mental suffering brought about by the defamatory material presented."). These decisions underscore the prevailing view in the

United States, which we urge this Commission to adopt, that even where a finding of liability for libel meets all required fault standards, the amount of any judgment must be subject to a searching review to avoid the intolerable and disproportionate impact excessive damages can exact on freedom of speech and the press.

CONCLUSION

The ability of individuals and the press to criticize and comment upon public officials' actions and behavior is essential to the free and robust debate that lies at the heart of a democratic society. In the course of such debate and discussion some statements that are not true are inevitable. The courts of the United States recognize that to allow such statements of fact to form the basis for civil or criminal liability without a high and demanding showing will sacrifice vital speech, particularly when a public official is the subject of the challenged statements and the issue is one of public concern. As illuminated by the United States' evolving experience with libel, substantial safeguards in libel lawsuits brought by public officials, and limits on the remedies that plaintiffs can seek in these lawsuits, assures that defamatory statements can be deterred and victims compensated without inhibiting the freedoms of expression and the press that are critical to the well being of a civil society. We urge this Commission to accept this case and adopt these or similar safeguards in order to protect freedoms of expression that are embodied both in the First Amendment of the Constitution of the United States and Article 13(1) of the American Convention on Human Rights.

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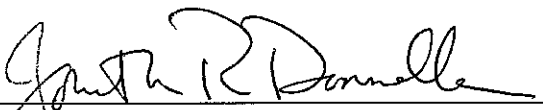
Respectfully submitted,



Jonathan Donnellan
Chair, Communications and Media Law Committee
Association of the Bar of the City of New York
42 West 44th Street
New York, New York 10036
USA

Of Counsel:
Edward Copeland
Butzel Long, a professional corporation

Itai Maytal
Miller Korzenik Sommers LLP