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# FREEDOM OF EXPRESSION AND THE RIGHT TO REPUTATION: HUMAN RIGHTS IN CONFLICT\*

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## INTRODUCTION

Based on fundamental values of freedom and equality, human rights represent a constitutive element of any democratic society. In their original conception, human rights are granted to every individual as—to use Ronald Dworkin’s metaphor—trumps over state interests.<sup>1</sup> They are designed to protect the individual from unwarranted interferences in crucial aspects of her life. Only in specific circumstances, when strict requirements of necessity and proportionality are met, can a state limit human rights to protect, for instance, public order or national security.<sup>2</sup> Different concerns manifest when parties to a horizontal conflict<sup>3</sup> invoke a human right to protect their interests. In such situations, where two human rights conflict with one another, the principle of the indivisibility of human

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1. See Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 152, 153-67 (Jeremy Waldron ed., 1984) (arguing that rights have priority over considerations of utility).

2. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 29(2), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“[E]veryone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

(1) Everyone has the right to freedom of thought, conscience and religion; . . . (2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

*Id.*

3. In this context, a horizontal conflict—one between individuals—is distinguished from a vertical conflict—one between an individual and the State. While the latter pits a human right against a State interest, the former involves the opposition of two human rights.

rights requires that both rights carry equal weight.<sup>4</sup> Neither right can be used as a trump over the other and alternative means must be employed to resolve the conflict.

When a conflict between human rights reaches a court, the matter necessarily involves a claim that the plaintiff's rights have been violated. The defendant's human rights will normally come before the court in an indirect manner—as part of her defense. The court will consequently be tempted to address the issue from the perspective of the directly invoked right. This is particularly true at the European Court of Human Rights (“ECtHR”), since the counterparty to a claim at the Court is always the government of the contracting State in question. This is also the case when the original conflict in domestic proceedings was one between two individuals. At the international level, a formerly horizontal conflict will have transformed, as it were, to a vertical one between the applicant and the State. The other individual—the domestic defendant whose human rights are also at stake—disappears to the background. The resulting approach, in which the Court addresses only the right invoked by the applicant and disregards to a lesser or greater extent the other right(s) involved, will be referred to as “preferential framing.” Preferential framing is problematic since it can lead to an unsatisfactory resolution of the conflict whereby an overemphasis on the right invoked causes the Court to decide the conflict in favor of that right to the detriment of the other neglected right. This disparity points us toward two basic requirements for building a constructive approach to conflicts between human rights, namely the correct identification of the conflict by the Court, followed by its resolution through transparent and coherent reasoning that avoids considering one party's rights to the exclusion of the other's.

From this angle, this work will examine the conflict between

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4. See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) (“All human rights are universal, indivisible, and interdependent and interrelated.”); Eva Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 27 *HUM. RTS. Q.* 294, 303 (2005) (noting that some scholars have attempted to hierarchically list core rights, but that no consensus exists on the subject, and therefore “it seems impossible to determine priority rules for conflicting human rights in the abstract”).

freedom of expression and the right to reputation. Building on previous research,<sup>5</sup> it will analyze the legal reasoning of the ECtHR with regard to the conflict between those human rights. While previous research on conflicts between human rights has been largely limited to narrow selections of case law,<sup>6</sup> this paper will take a more systematic approach—presenting a comprehensive study of one particular conflict through extensive, if not exhaustive, analysis of ECtHR case law.<sup>7</sup>

Although other authors have discerned certain lines of reasoning employed by the ECtHR with regard to conflicts between human rights, the Court has yet to develop a general doctrine for the resolution of such conflicts.<sup>8</sup> The research conducted for this paper

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5. See, e.g., CONFLICTS BETWEEN FUNDAMENTAL RIGHTS (Eva Brems ed., 2008) (including a collection of papers presented by human rights scholars at the International Conference on Conflicts Between Fundamental Rights in Belgium in 2006); Eric Barendt, *Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court*, 1 J. MEDIA L. 49 (2009) (analyzing the decisions of the European Court of Human Rights that balanced privacy rights and the rights to life and reputation with the freedom of expression); Dan Kozlowski, "For the Protection of the Reputation or Rights of Others:" *The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10(2)*, 11 COMM. L. & POL'Y 133, 133 (2006) (evaluating the European Court of Human Rights' defamation jurisprudence which has "developed a hierarchy of protected expression that leaves other expression vulnerable to restriction"); Gavin Millar, *Whither the Spirit of Lingens?*, 3 EUR. HUM. RTS. L. REV. 277 (2009) (charting the shift in the Strasbourg jurisprudence from stringently protecting free speech to permitting more restrictions on speech, especially in privacy cases). See generally Janneke H. Gerards, *Conflicterende rechten*, in EUROPEES VERDRAG VOOR DE RECHTEN VAN DE MENS, RECHTSPRAAK & COMMENTAAR [EUROPEAN CONVENTION ON HUMAN RIGHTS, JURISPRUDENCE & COMMENTARY] 1 (Janneke H. Gerards et al. eds., 2009).

6. A notable exception, offering an excellent in-depth analysis of the jurisprudence of the European Court of Human Rights on conflicts between fundamental rights, as well as proposing an alternative approach to such conflicts, is Peggy Ducoulombier, *Les Conflits de Droits Fondamentaux devant la Cour Européenne des Droits de l'Homme* [Fundamental Rights Conflicts Before the European Court of Human Rights] 351-69 (Nov. 13, 2008) (unpublished Ph.D. dissertation, Université Strasbourg) (on file with the American University International Law Review)

7. A total of 125 judgments and admissibility decisions of the European Court of Human Rights have been analyzed for the purpose of this paper. This analysis of the Court's jurisprudence is up to date until January 2010.

8. See Gerards, *supra* note 5, at 1 (concluding that while the Court introduced a tentative theoretical approach to conflicts between human rights in *Chassagnou v. France*, App. Nos. 25088/94, 28331/95, & 28443/95 (Eur. Ct. H.R. Apr. 29,

revealed that in cases involving a conflict between freedom of expression and the right to reputation, the Court's legal reasoning suffers from a lack of clarity, consistency, and transparency. To address these issues, the paper will first present a theoretical model that could be an invaluable tool for the development of transparent and coherent reasoning in these cases. This article applies this model to the Court's defamation case law, and offers concrete insights into how the model might assist in improving the Court's legal reasoning. However, because the scope of the research is limited to the specific conflict between freedom of expression and the right to reputation, any conclusions drawn as to the practicability of the model will be limited to that specific conflict. Whether or not the model can also be used for the resolution of other conflicts between human rights will need to be examined in further research.

## I. A MODEL FOR THE RESOLUTION OF CONFLICTS BETWEEN HUMAN RIGHTS

The model presented in this paper is the result of previous research and is in the process of being developed.<sup>9</sup> The model was originally launched by Eva Brems,<sup>10</sup> but has already been slightly adapted for the purposes of this paper. The research conducted in preparation for this and other works support the further examination of the model's practicality, with an eye toward either improving it or developing an alternative model. The current paper thus also serves as a testing ground for the model.

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1999) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, it has not applied this theory in its subsequent case law); Ducoulombier, *supra* note 6 (noting the peculiar nature of conflicts between rights and the Court's complex and varied approaches to their resolution).

9. For its latest application, see Eva Brems et al., *Les droits fondamentaux conflictuels [Conflicting Fundamental Rights]*, in *LES DROITS CONSTITUTIONNELS EN BELGIQUE—LES ENSEIGNEMENTS JURISPRUDENTIELS DE LA COUR CONSTITUTIONNELLE, DU CONSEIL D'ETAT ET DE LA COUR DE CASSATION [CONSTITUTIONAL RIGHTS IN BELGIUM—THE JURISPRUDENTIAL TEACHINGS OF THE CONSTITUTIONAL COURT, THE COUNCIL OF STATE, AND THE COURT OF CASSATION]* (Marc Verdussen & Nicolas Bonbled eds., forthcoming Spring 2011).

10. See Eva Brems, *Introduction to CONFLICTS BETWEEN FUNDAMENTAL RIGHTS*, *supra* note 5, at 1, 4-6 (referencing lines of reasoning that may be useful for developing a "polyvalent" model for legislators and judges dealing with conflicting human rights: eliminating fake conflicts, preferring compromise, and developing criteria and modalities for prioritizing rights).

Under the proposed model for the resolution of conflicts between human rights, three possibilities can be distinguished. First, the conflict before the Court might not be genuine one, but a so-called “fake conflict.” This is the case where the prima facie conflict is merely the result of the manner in which it is presented, and an alternative approach to the conflict would allow for a solution that leaves both human rights completely intact. A classic example of a fake conflict—as presented by Brems—is the situation in which procedural limits are imposed on the accused during a criminal trial, but not on the prosecutor, in order to guarantee the delivery of a judgment within a reasonable time.<sup>11</sup> In this situation, an apparent conflict arises between the right to equality of arms and the right to a trial within a reasonable time, which are both elements of the right to a fair trial as recognized in Article 6 of the European Convention on Human Rights.<sup>12</sup> However, in *Wynen v. Belgium*, the ECtHR defused the conflict by holding that the reasonable time objective should be realized without impinging on the equality of arms.<sup>13</sup> Hence, both human rights were left intact and the situation was defused as a fake conflict. Naturally, wherever possible, this is the preferred solution to “conflicts” between human rights.

In most situations, however, the Court will be confronted with a genuine conflict rendering the above solution impossible. In such cases, a course of action that upholds both human rights to the extent possible should be preferred over a situation in which one right is sacrificed for the sake of the other. In this context, several authors have identified the possible value of the doctrine of *Praktische Konkordanz*, developed by the German Constitutional Court (*Bundesverfassungsgericht*) for the resolution of conflicts between human rights.<sup>14</sup> This doctrine involves a judicial search for a

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11. *Id.* at 4.

12. Compare European Convention on Human Rights, *supra* note 2, art. 6(1) (“everyone is entitled to a fair and public hearing within a reasonable time”), with *id.* art. 6(3)(b) (“[e]veryone charged with a criminal offense has [the right to] adequate time and facilities for the preparation of his defence”).

13. See 2002-VIII Eur. Ct. H.R. 217, 231-32 (holding that, while the Court is sensitive to the need to ensure that proceedings are not prolonged unnecessarily, the principle of equality of arms does not prevent the achievement of such an objective, provided that one party is not placed at a clear disadvantage).

14. See Brems, *supra* note 10, at 4 (singling out the German Constitutional Court for its development of a general approach to solving conflicts of rights rather

compromise in which both human rights give way to each other and a solution is reached that keeps both rights intact to the greatest extent possible.<sup>15</sup>

Yet, in the majority of cases, a compromise solution will not be achievable and the Court will need to undertake the difficult exercise of determining which right deserves preference over the other. In that respect the model offers guidance by presenting several criteria under which the human rights in question can be “weighed” against each other, taking all the circumstances of the specific case into account.

The first criterion is the impact, or the seriousness, of the infringement. This “impact criterion” could be used to determine the extent to which both rights would be impaired by allowing the opposing right to take preference. The logic behind this criterion is the following: Presume a conflict arises between two individuals. Individual A invokes right X and claims his right should prevail, while individual B does the same, invoking right Y. If the exercise of right X by A would lead to a serious impairment of right Y of B, while the exercise of right Y by B would have only minor consequences for right X of A, protection of right Y could be more advisable.

A second criterion is that of the core/periphery. In applying the “core/periphery criterion,” the Court could determine whether the aspects of the rights that enter into conflict belong to the core or the periphery of the human right in question. Using the above example, the rationale is that where a conflict arises between a core aspect of right X and a periphery aspect of right Y, right X would<sup>16</sup> deserve

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than the more common ad hoc approach taken by many other courts and legislatures).

15. See Olivier De Schutter & Françoise Tulkens, *Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution*, in CONFLICTS BETWEEN FUNDAMENTAL RIGHTS, *supra* note 5, at 203 (clarifying that “*Praktische Konkordanz*,” or “practical concordance,” achieves a compromise between conflicting rights by “optimizing” each right against the other).

16. Unlike under the third and fourth criterion, the stronger assertion “would” is used instead of the weaker “could” to indicate that the core of a human right should receive strong protection over peripheral aspects of other rights. Allowing infringement of the core of a right in order to protect the peripheral aspect of another right would rob the former right of its very essence, which should arguably receive (near) absolute protection. See, e.g., *B. v. The United Kingdom*, App. No.

more protection.

A third criterion is the involvement of additional rights. When the conflict is not limited to two human rights, but also involves other rights, the “additional rights criterion” could be used to assess the strength of both parties’ positions, taking into account the additional rights involved. Suppose the conflict between A and B is not limited to rights X and Y. Suppose that the exercise of right X by A would not only affect right Y of B, but would also negatively impact right Z, also belonging to B. In that case, B’s legal position could be strengthened by the involvement of right Z.<sup>17</sup>

A fourth criterion is the close involvement of a general interest, which could strengthen the position of one of the human rights in the conflict. The “general interest criterion” could work as follows: If the exercise by A of right X would not only impair right Y of B, but would also have negative effects for a general interest, while the same would not hold true for the exercise of right Y by B, then protection of right Y could prove to be more prudent.<sup>18</sup>

A fifth criterion is the “purpose criterion.” This criterion can be used when a right is exercised in a manner contrary to the very aim it is designed to achieve. In those circumstances, that right is to be accorded lesser weight. In our example this would be the case if the exercise of right X by A is specifically linked to the exercise of right Y by B in that they both serve the same purpose of protecting an interest of B. This criterion can for instance be applied in the context of a conflict between the right to education of a child and the right of parents to freely choose the education of their children. When the

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36536/02, ¶ 34 (Eur. Ct. H.R. Sept. 13, 2005) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (holding that limitations on the right to marry “must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired”); *A. v. The United Kingdom*, App. No. 35373/97, ¶ 74 (Eur. Ct. H.R. Dec. 17, 2002) (holding that limitations on the right of access to court cannot “restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired”).

17. Whether or not such a conclusion is justified will depend on the particular circumstances of the case. It is well possible that protection of right X of A will remain more important than protection of rights Y and Z of B.

18. A remark similar to the one mentioned in footnote 17 is made here. The involvement of a general interest can by itself not determine the outcome of the case. It is well possible that right X would also prevail over the general interest.



exercise of the parental rights would undermine the child's right to education, the application of the purpose criterion would lead to Court protection of the child's right because the parental rights are closely linked to—and a condition for—the fulfillment of the child's right.<sup>19</sup>

A sixth and final useful element of the model is the “responsibility criterion.” This criterion, based on a criterion suggested by Olivier De Schutter,<sup>20</sup> implies that a person choosing to exercise her right bears the responsibility for the manner in which she chooses to exercise it. This criterion does not call for a direct comparison between rights, but instead offers flexibility to determine whether one right has been exercised responsibly. In that sense, the criterion plays an important role in the conflict between freedom of expression and the right to reputation, in light of the “duties and responsibilities” referred to in Article 10(2) of the European Convention on Human Rights (“ECHR”).<sup>21</sup> Where the freedom of expression is exercised irresponsibly, preference might be given to the right to reputation.

The presented model, naturally, should not be seen as static. It does not offer absolute solutions to abstract conflicts. Rather, it is flexible in that its application will be entirely dependent on the

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19. It is not yet entirely clear whether the purpose criterion could play a separate role in this example because the parents/child rights conflict also implicates the core/periphery criterion. However, this paper suggests that according it a separate place might be justified.

20. For Olivier De Schutter's comments in the round table discussion “Recente Ontwikkelingen in de Rechtspraak van het Europees Hof voor de Rechten van de Mens” [Recent developments in the jurisprudence of the European Court of Human Rights], held on May 22, 2002 in Ghent, Belgium, see Eva Brems, *Recente Ontwikkelingen in de Rechtspraak van het Europees Hof voor de Rechten van de Mens* [Recent Developments in the Jurisprudence of the European Court of Human Rights], in *EN TOCH BEWEEGT HET RECHT [AND YET THE LAW MOVES]* 237, 244 (Willem Debeuckelaere and Dirk Voorhoof eds., 2003).

21. European Convention on Human Rights, *supra* note 2, art. 10.

Everyone has the right to freedom of expression . . . . 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.

*Id.* (emphasis added).

circumstances of the case, to which certain criteria might not be relevant or fail to offer a clear solution. For example, consider a situation where both A's and B's position could be strengthened by general interests of equal importance:  $\alpha$  for B and  $\beta$  for A. The model's flexibility ensures that judges applying it will retain their freedom to decide the particular case without being constrained by a rigid, checklist-like analysis. Additionally, adhering to the logic underlying the model will allow for the delivery of more consistent and transparent jurisprudence.

## II. THE LEGAL REASONING OF THE EUROPEAN COURT OF HUMAN RIGHTS

While Article 10 of the ECHR guarantees the right to freedom of expression, its second paragraph expressly refers to “the protection of the reputation or the rights of others” as one of the legitimate grounds for restricting that right.<sup>22</sup> However, in its first leading defamation case, *Lingens v. Austria*, the ECtHR categorically denied the existence of a conflict between freedom of expression and right to reputation, stating that there was no need to read Article 10 in light of Article 8—the right to respect for private life—of the ECHR.<sup>23</sup> The reason for this finding was simple: based on a literal reading of Article 10(2), the Court did not recognize the existence of a separate right to reputation, instead treating it as a mere private interest to be protected.<sup>24</sup> However, following *Lingens*, the ECtHR slowly began to recognize the existence of a genuine conflict between freedom of expression and the right to reputation in defamation cases. The Court's evolution in this direction became apparent in the Article 10 cases of *Feldek v. Slovakia*,<sup>25</sup> *Lesnik v. Slovakia*,<sup>26</sup> and *Radio France*

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22. *Id.*

23. *See* 103 Eur. Ct. H.R. (ser. A) 14, 25 (1986) (clarifying that the adjective “necessary” in Article 10(2) implies that the freedom of expression can be infringed only in exceptional circumstances, and that public condemnations of political figures do not fall within the exception).

24. *See id.* (noting that the defamatory statements, which concerned comments made about certain public figures, did not trigger any conflicts with privacy rights).

25. *See* 2001-VIII Eur. Ct. H.R. 91, 110 (acknowledging that the prioritization of a public figure's personality rights is not “necessary in a democratic society” as provided under Article 10(2), and therefore is not a sufficient and relevant justification for interfering with the applicant's Article 10 rights).

26. *See* 2003-IV Eur. Ct. H.R. 169, 179 (ruling that it was necessary and

*v. France*, the latter being the first case in which the Court expressly stated that “the right to protection of one’s reputation is . . . one of the rights guaranteed by [Article 8], as one element of the right to respect for private life.”<sup>27</sup>

This jurisprudential evolution culminated with *Chauvy v. France*, an Article 10 case in which the Court for the first time identified the existence of a conflict between two ECHR rights in defamation cases.<sup>28</sup> *Chauvy* represented a classic example of a defamation case. The applicants had published a book on the arrest of the French Resistance’s leader, Jean Moulin, by the Nazis during World War II.<sup>29</sup> The book raised the possibility that Mr. and Mrs. Aubrac, former members of the Resistance, had “betrayed Jean Moulin and had thereby been responsible for his arrest, suffering and death.”<sup>30</sup> Mr. and Mrs. Aubrac instituted libel proceedings against the author and publisher of the book.<sup>31</sup> The domestic courts found them guilty of defamation and sentenced them to a fine.<sup>32</sup> They were also ordered to publish a warning in each book, indicating the conviction, and to pay damages to Mr. and Mrs. Aubrac.<sup>33</sup> The applicants consequently complained of a violation of their freedom of expression at the ECtHR.<sup>34</sup> In assessing their application, the Court balanced the public’s interest in being informed and the need to protect the reputation of Mr. and Mrs. Aubrac.<sup>35</sup>

[T]he Court must verify whether the authorities struck a fair balance when

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sufficient under Article 10(2) to interfere with the applicant’s Article 10(1) right to freedom of expression because the applicant’s statements of fact, which contained accusations of unlawful and abusive conduct, were unsubstantiated by evidence and were capable of insulting the public prosecutor and affecting him in the performance of his duties).

27. 2004-II Eur. Ct. H.R. 125, 148.

28. See 2004-VI Eur. Ct. H.R. 211, 229-30 (recognizing that a duty of the Court is to verify the proper balance of conflicting rights, such as Article 10’s guarantee of freedom of expression and Article 8’s guarantee of protection of reputation and private life).

29. *Id.* at 212.

30. *Id.* at 229.

31. *Id.* at 213.

32. *Id.* at 218 (stating that the French court fined the author 100,000 Francs and the chair of the publishing company 60,000 Francs).

33. *Id.*

34. *Id.* at 218, 220.

35. *Id.* at 229.

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protecting two values guaranteed by the Convention which may come into conflict with each other in this type of case, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right of the persons . . . to protect their reputation, a right which is protected by Article 8 of the Convention as part of the right to respect for private life.<sup>36</sup>

In resolving the conflict, the ECtHR underlined the importance of both rights involved. While the Court emphasized the crucial role of the press in a democratic society, it attached more weight to the domestic courts' findings that the author had made particularly grave insinuations for which he could not rely on the defence of good faith, since he "had failed to respect the fundamental rules of historical method in the book."<sup>37</sup> The Court consequently found that the domestic court's ruling struck a fair balance between both rights involved because it had not construed the "principle of freedom of expression too restrictively or the aim of protecting the reputation of others too extensively."<sup>38</sup> Having further established that the sanctions imposed on the applicants in the domestic proceedings were not unreasonable and not unduly restrictive of their freedom of expression, the Court found that there had been no violation of Article 10.<sup>39</sup>

This case and others like it, by confirming that the right to reputation is protected under Article 8, paved the way for defamation plaintiffs, who had failed to obtain satisfaction in domestic proceedings, to claim a violation of Article 8 at the ECtHR.<sup>40</sup> In addition to dozens of cases in which the conflict between freedom of expression and the right to protection of reputation is examined

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36. *Id.* at 229-30.

37. *Id.* at 231 (agreeing with the French court's decision to convict the applicant and to reject his plea of good faith because he had made grave insinuations and had failed to exercise appropriate and sufficient caution, which in this case would have required a critical analysis of sources).

38. *Id.* (determining that the infringement on the applicants' right to freedom of expression was not impermissibly severe, given the facts that the book remained in publication and that the fines imposed were "relatively modest").

39. *Id.* at 232 (finding that the state's interference with the right was proportionate to the legitimate aim pursued).

40. *Cf.* Stijn Smet, *Of Rights and Interests*, STRASBOURG OBSERVERS, April 28, 2010, <http://strasbourgobservers.com/2010/04/28/of-rights-and-interests/> (noting that the ECtHR generally recognizes a conflict between the right to freedom of expression and the right to reputation, even if the Court does not specifically identify or resolve the conflict).

under Article 10, this jurisprudential development gave rise to several Article 8 cases addressing the conflict, including the leading case of *Pfeifer v. Austria*.<sup>41</sup>

A closer examination of all Court judgments and relevant admissibility decisions in defamation cases since *Chauvy* shows that the Court has explicitly identified the conflict between freedom of expression and the right to reputation in twenty-four of the ninety relevant cases.<sup>42</sup> However, there are also two Article 8 cases that are

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41. App. No. 12556/03 (Eur. Ct. H.R. Nov. 15, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>. For a discussion of this case, see *infra* text accompanying notes 215-18.

42. In the following cases, the Court identified a tension between Article 8's guarantee of protection of right to private life and reputation, and Article 10's guarantee of freedom of expression, categorizing the tension as a conflict between rights, competing interests or values, or in need of a fair balance between Article 8 and Article 10 rights. Those citations with the reference "(HUDOC Database)" can be found online at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>. See, e.g., *Europapress Holding D.O.O. v. Croatia*, App. No. 25333/06, ¶ 58 (Eur. Ct. H.R. Oct. 22, 2009) (HUDOC Database); *Romanenko v. Russia*, App. No. 11751/03, ¶ 42 (Eur. Ct. H.R. Oct. 8, 2009) (HUDOC Database); *Bodrožić v. Serbia*, App. No. 32550/05, ¶ 55 (Eur. Ct. H.R. June 23, 2009) (HUDOC Database); *Standard Verlags GmbH v. Austria (no. 2)*, App. No. 21277/05, ¶¶ 46, 52 (Eur. Ct. H.R. June 4, 2009) (HUDOC Database); *A. v. Norway*, App. No. 28070/06, ¶¶ 65, 66 (Eur. Ct. H.R. Apr. 9, 2009) (HUDOC Database); *Times Newspapers Ltd. v. The United Kingdom (nos. 1 and 2)*, App. Nos. 3002/03 & 23676/03, ¶¶ 45-46 (Eur. Ct. H.R. Mar. 10, 2009) (HUDOC Database); *Mahmudov v. Azerbaijan*, App. No. 35877/04, ¶ 49 (Eur. Ct. H.R. Dec. 18, 2008) (HUDOC Database); *Petrina v. Romania*, App. No. 78060/01, ¶ 36 (Eur. Ct. H.R. Oct. 14, 2008) (HUDOC Database); *Pfeifer v. Austria*, App. No. 12556/03, ¶¶ 38, 49 (Eur. Ct. H.R. Nov. 15, 2007) (HUDOC Database); *Leempoel v. Belgium*, App. No. 64772/01, ¶¶ 67, 78 (Eur. Ct. H.R. Nov. 9, 2006) (HUDOC Database); *White v. Sweden*, App. No. 42435/02, ¶¶ 21, 26 (Eur. Ct. H.R. Sept. 19, 2006) (HUDOC Database); *Malisiewicz-Gasior v. Poland*, App. No. 43797/98, ¶ 60 (Eur. Ct. H.R. Apr. 6, 2006) (HUDOC Database); *Minelli v. Switzerland (dec.)*, App. No. 14991/02, ¶ 2 (Eur. Ct. H.R. June 14, 2005) (HUDOC Database); *Pedersen v. Denmark*, App. No. 49017/99, ¶ 91 (Eur. Ct. H.R. Dec. 17, 2004) (HUDOC Database); *Cumpănă v. Romania [GC]*, 2004-XI Eur. Ct. H.R. 69, 89; *Karhuvaara v. Finland*, 2004-X Eur. Ct. H.R. 263, 274; *Abeberry v. France (dec.)*, App. No. 58729/00 (Eur. Ct. H.R. Sept. 21, 2004) (HUDOC Database); *Chauvy v. France*, 2004-VI Eur. Ct. H.R. 211, 229. Compare *Kuliś v. Poland*, App. No. 15601/01, ¶ 54 (Eur. Ct. H.R. Mar. 18, 2008) (HUDOC Database) (acknowledging that the domestic courts failed to strike a balance between the competing interests), and *Kwiecień v. Poland*, App. No. 51744/99, ¶ 52 (Eur. Ct. H.R. Jan. 9, 2007) (HUDOC Database) (indicating that the domestic courts failed to recognize a conflict between the right to freedom of expression and the protection of reputation), with *Ivanova v. Bulgaria*, App. No. 36207/03, ¶ 67 (Eur. Ct. H.R. Feb.

difficult to square with the findings in the *Chauvy* case.<sup>43</sup> Most interesting in this respect are the Court's considerations in *Karakó v. Hungary*.<sup>44</sup> This case involved a flyer distributed during an election campaign in which the applicant, a politician standing in the elections, was accused of having exercised his parliamentary functions to the detriment of his country of origin.<sup>45</sup> In assessing the application, the Court denied the existence of a conflict between freedom of expression and the right to reputation.

The Court is satisfied that the purported conflict between Articles 8 and 10 of the Convention, as argued by the applicant, in matters of protection of reputation, is one of appearance only. To hold otherwise would result in a situation where . . . the outcome of the Court's scrutiny would be determined by whichever of the supposedly competing provisions was invoked by an applicant.<sup>46</sup>

In order to support this argument, the Court reassessed the question of whether the notion of private life should be extended to include reputation and concluded that the Court's prior case law had only recognized the existence of such a right sporadically, and mostly in cases involving serious allegations which had an inevitable direct effect on the applicant's private life.<sup>47</sup>

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14, 2008) (HUDOC Database) (noting that the domestic courts fully recognized the conflict). *See generally* Flux v. Moldova (no. 6), App. No. 22824/04 (Eur. Ct. H.R. July 29, 2008) (HUDOC Database); Riolo v. Italy, App. No. 42211/07 (Eur. Ct. H.R. July 17, 2008) (HUDOC Database); Alithia Publ'g Co. v. Cyprus, App. No. 17550/03 (Eur. Ct. H.R. May 22, 2008) (HUDOC Database).

43. *See* Karakó v. Hungary, App. No. 39311/05, ¶¶ 22-24 (Eur. Ct. H.R. Apr. 28, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (finding that, because the applicant did not show that the publication affected his reputation or caused serious interference with his private life, there had not been an Article 8 violation); Gunnarsson v. Iceland (dec.), App. No. 4591/04 (Eur. Ct. H.R. Oct. 20, 2005) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (declining to find any Article 8 violation where a newspaper published unsubstantiated allegations insinuating that a bank director had made potentially unethical business decisions based on personal motives).

44. App. No. 39311/05.

45. *Id.* ¶ 7 (recounting the offensive portions of the flyer, which declared that the applicant voted against the interests of his county and inflicted the gravest of harm on his own electoral district).

46. *Id.* ¶ 17.

47. *See id.* ¶¶ 22-23 (distinguishing between the concept of personal integrity, as inalienable and protected under human rights law, and reputation, as an external

This judgment ignores an abundance of case law explicitly recognizing an individual's reputation as an element of her private life protected under Article 8.<sup>48</sup> However, *Karakó* does have the important value of highlighting the problem of preferential framing in the context of the conflict between freedom of expression and the right to reputation. Several authors—one of whom is the President of the Chamber that delivered the judgment in *Karakó*—have warned about this problem, claiming that the Court's ruling is influenced by the right invoked by the applicant.<sup>49</sup> An examination of the results in the seventy-nine judgments since *Chauvy*, both under Article 8 and Article 10, shows that there is some strength to this argument, although it is too soon to draw a definitive conclusion on this issue because of the relatively few number of Article 8 cases.<sup>50</sup> The issue of preferential framing will be addressed in more detail later in this paper. However, assuming for now that a problem of preferential framing indeed exists in the context of the conflict between freedom of expression and the right to reputation, this does not excuse the reasoning used in the *Karakó* case. What the Court suggests in *Karakó* is that the conflict does not exist because its solution would be predetermined.<sup>51</sup> Rather than avoiding the conflict, the Court's

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social evaluation protected under defamation law).

48. See *infra* notes 57, 202 and accompanying text. For a detailed analysis of the role of the right to reputation in the case law of the ECtHR, see Dean Spielmann & Leto Cariolou, *The Right to Protection of Reputation Under The European Convention on Human Rights*, in TEISE BESIKEICIANCIOJE EUROPOJE: LIBER AMICORUM PRANAS KURIS [LAW IN A CHANGING EUROPE: LIBER AMICORUM PRANAS KURIS] 401-424 (Saulius Katuoka ed., 2008).

49. See, e.g., De Schutter & Tulkens, *supra* note 15, at 190 (identifying the Court's tendency to view the rule that the applicant invoked as the only right at stake and to view the government's measure interfering with that right as an exception or limitation, rather than as involving protection of a separate, conflicting right).

50. This author's examination yields the following results. Of the seventy-four Article 10 cases, fifty-nine led to the finding of a violation by the Court and fifteen led to the finding of no violation, while of the five Article 8 cases, three led to the finding of a violation and two to the finding of no violation. Detailed figures (violation: no violation) according to the status of the plaintiff in the defamation proceedings are as follows—Article 10: politician: 31-4; public official: 12-5; public figure: 7-2; private individual: 7-3; company: 2-1—Article 8: politician: 1-1; public figure: 0-1; private individual: 2-0.

51. See App. No. 39311/05 at ¶ 17 (concluding that any supposed conflict must exist in appearance only because the outcome of any actual conflict would be determined predominantly by which right the applicant invoked).

aim should be to address the supposed problem of preferential framing. The model presented in Part II could be extremely helpful in this respect, most notably because the suggested criteria force the Court to look at the conflict from the perspective of both rights.<sup>52</sup> This is required by the core/periphery criterion, the impact criterion, the additional rights criterion, and the general interest criterion.<sup>53</sup> The purpose and the responsibility criteria likewise counterbalance the preferential framing issue by introducing boundaries for the manner in which human rights can be exercised when they enter into conflict with other human rights.<sup>54</sup>

The following sub-sections present an analysis of the case law of the ECtHR on the conflict between freedom of expression and the right to reputation. The intention of this analysis is not to determine a substantive solution to the conflict, nor to indicate which right should prevail. Instead, the aim is to identify interesting lines of legal reasoning used by the Court and to assess the Court's consistency and transparency under both Article 10 and Article 8, in light of the model presented above.

#### A. THE LEGAL REASONING OF THE COURT UNDER ARTICLE 10 OF THE ECHR

In theory, there should be many interesting opportunities to compare pre- and post-*Chauvy* case law, given that the nature of the conflict between freedom of expression and right to reputation has shifted from one between a Convention right and a private interest (at best, protected at the international level and/or as a fundamental right in domestic constitutions)<sup>55</sup> to one between two Convention rights with *a priori* equal value. When the Court is confronted by a

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52. See *supra* notes 9–21 and accompanying text.

53. See *supra* notes 15–18 and accompanying text.

54. See *supra* notes 19–21 and accompanying text.

55. The right to reputation is protected by the International Covenant on Civil and Political Rights, art. 17, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“No one shall be subjected to . . . unlawful attacks on his honour and reputation . . . [and] [e]veryone has the right to the protection of the law against such . . . attacks.”). Furthermore, several national Constitutions protect a right to reputation or honor. See, e.g., KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION], Apr. 2, 1997, art. 47 (Pol.) (“Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.”).



situation in which a Convention right is opposed by a private interest not protected by the Convention, the situation is relatively straightforward. Whatever the decision in the concrete case might be, the Convention right receives greater weight in the abstract relationship with the private interest. The Court will thus apply the classic proportionality test to determine whether the interference with the applicant's freedom of expression is proportionate to the legitimate aim pursued. However, matters change when two Convention rights conflict. Neither right has preference over the other, at least not in abstract terms.<sup>56</sup> In such circumstances one would expect to see changes in the Court's reasoning. Due to the presence of two Convention rights, the Court can reasonably be expected to take both human rights into account on an equal footing. This position is justified by the fact that, if the conflict cannot be defused as a fake conflict and if no practical concordance can be found, the decision of the Court will have inescapable negative consequences for a right protected under the Convention. Particular attention to the identification of the conflict and full transparency and consistency in the Court's reasoning are thus crucial.

It is, therefore, all the more striking that the Court has failed to consistently identify the conflict between freedom of expression and the right to reputation in post-*Chauvy* defamation cases. While the Court has taken an explicit stance on the conflict in its Article 8 cases, as of the date of this publication it has only explicitly identified the conflict in nineteen of eighty-three relevant Article 10 cases since *Chauvy*.<sup>57</sup> A partial explanation for the lack of

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56. Compare European Convention on Human Rights, *supra* note 2, art. 2 ("Everyone's right to life shall be protected by law."), with *id.* art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."). Other than by stating which rights are derogable and which are not, the ECHR does not indicate the relative importance of its rights provisions.

57. In the following cases, the Court directly addressed the tension between the right to freedom of expression and the right to protection of one's reputation. Those citations with the reference "(HUDOC Database)" can be found online at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>. See, e.g., *Europapress Holding D.O.O. v. Croatia*, App. No. 25333/06, ¶ 58 (Eur. Ct. H.R. Oct. 22, 2009) (HUDOC Database); *Romanenko v. Russia*, App. No. 11751/03, ¶ 42 (Eur. Ct. H.R. Oct. 8, 2009) (HUDOC Database); *Bodrožić v. Serbia*, App. No. 32550/05, ¶ 45 (Eur. Ct. H.R. June 23, 2009) (HUDOC Database); *Standard Verlags GmbH v. Austria* (no. 2), App. No. 21277/05, ¶¶ 46, 52 (Eur. Ct. H.R. June 4, 2009) (HUDOC Database); *Mahmudov v. Azerbaijan*, App. No. 35877/04, ¶ 49 (Eur. Ct.

identification might be found in the fact that the Court has refrained from developing a distinctive test to tackle the conflict. On the contrary, even after recognizing the existence of a conflict between two human rights in the *Chauvy* case, the Court has continued to apply the proportionality test, as developed under its Article 10 case law prior to *Chauvy*, in an identical manner in subsequent cases.<sup>58</sup> As a result, it is often unclear to what extent the Court has taken the presence of two Convention rights into account when ruling on the particular case before it.

The conclusion that the Court has only minimally changed its legal reasoning after *Chauvy* is not only contrary to expectations but also reveals a worrisome problem of principle. If conflicts between the freedom of expression and the right to reputation are resolved in a

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H.R. Dec. 18, 2008) (HUDOC Database); *Flux v. Moldova* (no. 6), App. No. 22824/04, ¶ 25 (Eur. Ct. H.R. July 29, 2008) (HUDOC Database); *Riolo v. Italy*, App. No. 42211/07, ¶ 62 (Eur. Ct. H.R. July 17, 2008) (HUDOC Database); *Alithia Publ'g Co. v. Cyprus*, App. No. 17550/03, ¶ 63 (Eur. Ct. H.R. May 22, 2008) (HUDOC Database); *Kuliś v. Poland*, App. No. 15601/01, ¶ 54 (Eur. Ct. H.R. Mar. 18, 2008) (HUDOC Database); *Times Newspapers Ltd. v. The United Kingdom* (nos. 1 and 2), App. Nos. 3002/03 & 23676/03, ¶¶ 45-46 (Eur. Ct. H.R. Mar. 10, 2009) (HUDOC Database); *Ivanova v. Bulgaria*, App. No. 36207/03, ¶ 67 (Eur. Ct. H.R. Feb. 14, 2008) (HUDOC Database); *Kwieceń v. Poland*, App. No. 51744/99, ¶ 52 (Eur. Ct. H.R. Jan. 9, 2007) (HUDOC Database); *Leempoel v. Belgium*, App. No. 64772/01, ¶¶ 67, 78 (Eur. Ct. H.R. Nov. 9, 2006) (HUDOC Database); *Malisiewicz-Gąsior v. Poland*, App. No. 43797/98, ¶ 60 (Eur. Ct. H.R. Apr. 6, 2006) (HUDOC Database); *Pedersen v. Denmark*, App. No. 49017/99, ¶ 91 (Eur. Ct. H.R. Dec. 17, 2004) (HUDOC Database); *Cumpănă v. Romania* [GC], 2004-XI Eur. Ct. H.R. 69, 89; *Karhuvaara v. Finland*, 2004-X Eur. Ct. H.R. 263, 274; *Abeberry v. France* (dec.), App. No. 58729/00 (Eur. Ct. H.R. Sept. 21, 2004) (HUDOC Database).

58. In doing so, the Court assesses the proportionality of the interference by looking at a wide variety of factors, including the status of the applicant; the status of the plaintiff in the defamation proceedings; the existence of a public interest; the content, tone and form of the statement; the distinction between statements of fact and value judgments; the duties and responsibilities referred to in Article 10(2); and the nature and severity of the penalty. *See, e.g., Porubova*, App. No. 8237/03 at ¶¶ 49-50 (emphasizing the nature and severity of the penalty in its holding); *Öztürk v. Turkey*, App. No. 17095/03, ¶ 32 (Eur. Ct. H.R. June 9, 2009) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (criticizing the domestic court for not considering the applicant's contribution to a matter of public interest); *Chauvy v. France*, 2004-VI Eur. Ct. H.R. 211, 230 (focusing on the content, tone, and form of the statement); *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 14, 26 (1986) (holding that because politicians open themselves to public scrutiny, they must exhibit a greater tolerance for criticism).

near identical manner to situations where the freedom of expression conflicts with a mere private interest—the reputation of the plaintiff, this offers a strong indication that in the view of the Court there exists little difference between a Convention right to reputation and a private interest in one’s reputation, not protected by the Convention. This reasoning is problematic because it either raises the level of importance of a mere private interest to that of a Convention right or demotes the importance of a Convention right to that of a mere interest.<sup>59</sup> In both cases, the principled higher value of human rights protected by the ECHR, serving as a trump over interests, is damaged.<sup>60</sup> This observation provides further justification for the use of a different reasoning which is specifically tailored to resolve the conflict between freedom of expression and the right to reputation. Such a reasoning can fit naturally into the classic proportionality test, but the presented elements argue against applying the test in the same way it was applied prior to *Chauvy*.

The following subsections offer an analysis of the Court’s defamation case law under the criteria of the model developed above to assess if, how, and to what extent the Court applies these criteria in the post-*Chauvy* era. More crucially, these subsections consider the post-*Chauvy* case law in order to determine how the Court could

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59. However, it must be noted that, looking beyond the confines of the ECHR, the right to reputation is protected by Article 17 of the ICCPR, *supra* note 55, and that national Constitutions, like that of Poland, may also protect a right to reputation or honor. *E.g.*, KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION], Apr. 2, 1997, art. 47 (Pol.). Referring to reputation as a mere private interest prior to *Chauvy* may thus hide the fact that it actually received protection at the international and/or national level. However, the fact remains that reputation was not recognized as a human right under the ECHR prior to *Chauvy* and *Pfeifer*.

60. *Cf. supra* note 56. The conclusion drawn is thus contingent on the acceptance that, for the purposes of application of the ECHR, Convention rights should also receive *a priori* greater weight than interests protected by a fundamental right at the national or international level, but not recognized as a Convention right. Support for this argument may be found in *Chassagnou v. France*, App. Nos. 25088/94, 28331/95, & 28443/95, ¶ 113 (Eur. Ct. H.R. Apr. 29, 1999) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (“Where restrictions are imposed on a right guaranteed by the Convention in order to protect ‘rights and freedoms’ not . . . enunciated therein[,] . . . only indisputable imperatives can justify interference with enjoyment of a Convention right.”).

improve the consistency and transparency of its legal reasoning. Finally, where pertinent, the minimal changes in the Court's case law will be indicated.

### *1. The Impact Criterion*

The ECtHR has relied on arguments that are closely linked to the impact criterion—or the extent to which both rights would be impaired by allowing the opposing right to take preference—in several aspects of its post-*Chauvy* defamation case law.

#### *a. Nature and Severity of the Penalty*

In many defamation cases, the Court has attached particular weight to the role of the press as a “public watchdog” and its contribution to ensuring the proper functioning of a democracy.<sup>61</sup> In this respect the Court has implicitly considered the impact criterion by referring to the “chilling effect” that would result from restrictions on the exercise of freedom of expression by members of the press or applicants with similar functions.<sup>62</sup> *Cumpănă v. Romania* provides a good example of the application of this argument.<sup>63</sup> In this case, journalists were criminally convicted for publishing newspaper articles alleging that a civil servant had behaved unlawfully in awarding private contracts for the towing of illegally parked vehicles.<sup>64</sup> The journalists were sentenced to prison for seven months and prohibited from working as journalists for one year. In assessing

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61. See, e.g., *Porubova*, App. No. 8237/03 at ¶ 42 (reiterating the importance of the press in a political democracy); *Lingens*, 103 Eur. Ct. H.R. at 26 (“Freedom of the press . . . [and more generally of political debate] . . . is at the very core of the concept of a democratic society.”).

62. See *Selistö v. Finland*, App. No. 56767/00, ¶ 53 (Eur. Ct. H.R. Nov. 16, 2004) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (requiring careful scrutiny of State measures that are “capable of discouraging the press from disseminating information on matters of legitimate public concern”); *Cumpănă*, 2004-XI Eur. Ct. H.R. at 95 (expressing that the “chilling effect” of sanctions on journalistic freedom is a factor in determining the proportionality of such sanctions); *Nikula v. Finland*, 2002-II Eur. Ct. H.R. 297, 312 (noting the “potential ‘chilling effect’” of even minor criminal penalties on freedom of expression).

63. See 2004-XI Eur. Ct. H.R. at 95 (declaring that the fear of imprisonment has a chilling effect on the freedom of expression and “works to the detriment of society as a whole”).

64. *Id.* at 73, 75-76.

the application, the Court established that although states parties are permitted, or even required by their positive obligations under Article 8, to regulate freedom of expression to ensure adequate protection of an individual's reputation, they must not do so in a manner that has a "chilling effect" on the media.<sup>65</sup> The Court found a violation of Article 10 in the instant case because it considered the measures taken to protect the reputation of the plaintiff to be "manifestly disproportionate," since the imposition of prison sentences and/or a prohibition on exercising their profession may inhibit journalists from reporting on matters of general interest.<sup>66</sup>

The Court's reasoning in *Cumpănă* offers great potential. It used the impact criterion to determine that, even if the right to reputation takes precedence over the freedom of expression in certain cases, the resulting penalty for the exercise of the freedom of expression should not be an excessive reaction.<sup>67</sup> In other words, the Court used the impact criterion to determine that a *Praktische Konkordanz* should be found at the level of the penalty.

Unfortunately, *Cumpănă* appears to be a rather exceptional case. The only other case in which the Court relied on this line of reasoning is *Mahmudov v. Azerbaijan*.<sup>68</sup> An analysis of the entire case law gives the impression that the Court has applied the factor of the nature and severity of the penalty in an ambiguous manner. The Court sometimes found even a minor sanction to be disproportionate when no relevant or sufficient reasons were presented for the restriction,<sup>69</sup> while in cases where those reasons were asserted, it held

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65. *See id.* at 90, 94-95 (warning that authorities must not undermine or deter the media from playing their "vital role of 'public watchdog'" in a democratic society—alerting the public to the suspected misuse of government power).

66. *Id.* at 96.

67. *See id.* at 94, 96 (asserting that the nature and severity of the punishment are factors that the Court considers when determining whether the state action is a necessary restriction on the applicant's rights, and holding that the penalty in the case before it was excessive).

68. *See* App. No. 35877/04, ¶¶ 37, 49 (Eur. Ct. H.R. Dec. 18, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (quoting extensively from *Cumpănă* regarding the role of media as a watchdog, the factors to consider for proportionality, and the chilling effect that State measures can have on freedom of the press).

69. *See, e.g.,* Standard Verlags GmbH v. Austria, App. No. 19710/02, ¶ 59 (Eur. Ct. H.R. Nov. 2, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (noting that even the "modest fine

much more severe sanctions to not be excessive.<sup>70</sup> This ambiguity could be interpreted in two ways—either as an indication that the Court is struggling with the conflict between freedom of expression and the right to reputation, not knowing where to fit the nature and severity of the penalty into the equation, or as a result of a lack of transparency in its reasoning. Without having the benefit of insight into the Judges' minds, it is impossible to know with certainty which interpretation is correct.<sup>71</sup> Whatever the case may be, the Court's reasoning would benefit from increased and explicit attention to the

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suspended on probation" was disproportionate because the applicant should not have been convicted at all); *Brasilier v. France*, App. No. 71343/01, ¶ 43 (Eur. Ct. H.R. Apr. 11, 2006) (HUDOC Databse), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (ruling that the sanction of paying symbolic damages of one French Franc was excessive, and therefore constituted a violation of Article 10).

70. The following cases involved a criminal conviction of the applicant, with imposition of a fine and an order to pay damages, where the Court held that the very imposition of a criminal penalty does not itself violate Article 10. See *Ivanova v. Bulgaria*, App. No. 36207/03, ¶ 68 (Eur. Ct. H.R. Feb. 14, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> ("In view of the margin of appreciation left to Contracting States by that provision, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued."); *Lindon v. France* [GC], App. Nos. 21279/02 & 36448/02, ¶ 59 (Eur. Ct. H.R. Oct. 22, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (concluding that the fine was appropriate, as were the civil damages, because they were both moderate); *Ivanciuc v. Romania* (dec.), 2005-XI Eur. Ct. H.R. 251, 259 (concluding that the penalty was proportionate, despite the fact that the applicant's criminal conviction was "very serious," because the fine and civil damages were modest and the applicant showed a manifest lack of interest during the criminal proceeding).

71. Much of the confusion is arguably also caused by the fact that the Court rules on the proportionality of the sanction in cases where it has already established that there are no relevant and sufficient reasons for the restriction of freedom of expression. In the vast majority of those cases, the Court appears to be determined to find the sanctions applied to be disproportionate, no matter what their nature or severity might be. Naturally, this leads to apparent contradiction in other cases, where the Court is of the opinion that the right to reputation should take precedence, thus leading it to find that more severe sanctions are not disproportionate and thus not violative of the Convention. Compare *Standard Verlags GmbH*, App. No. 19719/02 at ¶ 59 (holding that the fine was disproportionate because the conviction was not justified, given the domestic court's failure to make a factual finding as to the truth of the statement), with *Ivanciuc*, 2005-XI Eur. Ct. H.R. at 258 (acknowledging that the fine was proportionate because the assertions had not been made in good faith and lacked a factual basis).

rationales developed in *Cumpănă* and *Mahmudov*.<sup>72</sup>

*b. Status of the Plaintiff*

Ever since *Lingens v. Austria*, the ECtHR has distinguished between several categories of plaintiffs in defamation proceedings and established the limits of acceptable criticism against them.<sup>73</sup> Politicians are required to demonstrate a greater degree of tolerance to criticism than ordinary citizens, since a politician “inevitably and knowingly lays himself open to close scrutiny of his every word and deed.”<sup>74</sup> The level of acceptable criticism is also more expansive for public servants than private individuals.<sup>75</sup> However, because they do not knowingly and willingly lay themselves open to close scrutiny to the same extent as politicians do, and because they “must enjoy public confidence . . . free of undue perturbation if they are to be successful in performing their tasks,” the range of acceptable criticism against public servants will be less broad than it is for politicians.<sup>76</sup> With regard to public figures, the Court has consistently held that when private individuals enter the public arena they lay themselves open to public scrutiny and should therefore display a greater degree of tolerance to criticism.<sup>77</sup> Finally, the Court reasons

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72. Naturally, this line of reasoning will be most useful in a case where the Court finds that relevant and sufficient reasons exist to award precedence to the right to reputation over the freedom of expression, which would set aside the matter of the proportionality of the sanction in determining whether Article 10 has been violated.

73. See *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 14, 25-26 (1986) (describing the level of acceptable criticism for politicians as higher than that for a private individual).

74. See *id.* at 26 (acknowledging that politicians too have a right to the protection of their reputation, but that the protections must be balanced with the interests of open debate in a democratic society).

75. E.g., *Nikula v. Finland*, 2002-II Eur. Ct. H.R. 297, 310-11.

76. See *Lesnik v. Slovakia*, 2003-IV Eur. Ct. H.R. 169, 178.

77. See *Bodrožić v. Serbia*, App. No. 32550/05, ¶ 54 (Eur. Ct. H.R. June 23, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (noting that the plaintiff had become a public figure after writing a book on a matter of public interest and appearing on television, and was therefore “obliged to display a greater degree of tolerance”); *Karman v. Russia*, App. No. 29372/02, ¶ 35 (Eur. Ct. H.R. Dec. 14, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (noting that since the plaintiff organized and spoke at a public gathering he should be aware of the risk of criticism); *Jerusalem v. Austria*, 2001-II Eur. Ct. H.R. 75, 83 (finding that since the plaintiffs had participated in public debate, they should have

that private individuals should be awarded the largest protection from defamatory statements in Article 10 cases because they have not specifically opened themselves up to public scrutiny.<sup>78</sup>

By creating a division between different categories of plaintiffs and requiring that certain persons should exhibit a greater degree of tolerance to criticism than others, the Court creates an excellent opportunity for the application of the impact criterion. Theoretically speaking and extrapolating from the Court's prior reasoning in this respect, this application could take the following form. Categories of persons who willingly and knowingly lay themselves open to public scrutiny will expect the possibility of criticism. Therefore, the impact of defamatory statements on their reputation is arguably less profound and more easily mitigated. The limits of acceptable criticism are thus wider with regard to these persons. Conversely, the impact of defamatory statements on the reputation of persons who do not lay themselves open to public scrutiny will be greater. Therefore, the level of acceptable criticism with regard to these persons is more limited and their reputation arguably deserves additional protection.

Keeping the above in mind, it is striking that the recognition of the existence of a conflict between freedom of expression and the right to reputation has had virtually no effect on the way the Court addresses the status of the plaintiff in post-*Chauvy* cases. Even more problematic is the Court's one-sided application of the impact criterion.<sup>79</sup> In cases involving defamation of politicians, for instance, the foundation of the Court's reasoning always lies in the finding that the limits of acceptable criticism are wider with regard to politicians.<sup>80</sup> However, in the examined Article 10 cases regarding defamation of a private individual, the Court rarely initiates its analysis from the converse assumption that the level of acceptable

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a higher degree of tolerance for criticism); *Nilsen v. Norway* [GC], 1999-VIII Eur. Ct. H.R. 63, 88-89 (asserting that it was not the individual's capacity as a public servant that opened him to public scrutiny, but instead his choice to contribute and participate in the public debate).

78. *E.g.*, *Tammer v. Estonia*, 2001-I Eur. Ct. H.R. 267, 280.

79. *See De Schutter & Tulkens*, *supra* note 15, at 190 (noting that the Court frames the issue as principally involving the right invoked by the applicant, and only evaluates the impact on a conflicting right if the opposing party raises it as a defense).

80. *See, e.g.*, *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 14, 26 (1986).



criticism is more limited with regard to private individuals.<sup>81</sup> The Court thus succumbs to preferential framing. Rather than looking to factors that both have an impact on the strength of the applicant's argument for freedom of expression and help determine the importance of the plaintiff's right to reputation, the Court focuses its attention on the freedom of expression alone. In order to truly address the conflict, the status of the plaintiff should be used not only to determine the limits of acceptable criticism, but also to assess the importance of the right to reputation. Arguably, the latter should even be the Court's primary function when considering the status of the plaintiff. It makes sense to assess the importance of the right to reputation on the basis of the status of the plaintiff, just as it is logical to determine the breadth of the freedom of expression of the applicant on the basis of her status.

*c. Content, Tone, and Form of the Statement*

An important element to consider when assessing the content of the statement is the use of insulting or offensive terms.<sup>82</sup> The Court has exhibited great tolerance for such terms, especially prior to *Chauvy*, pointing to the extensive protections provided even to insulting speech under Article 10. The Court has ruled that the use of terms such as "racist agitation," "idiot," "Nazi," "Neo-Nazi," and "fascist" does not automatically justify restriction of the freedom of expression.<sup>83</sup> Accordingly, the Court has almost always found a violation of Article 10, particularly when the terms are used in the

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81. *But see Tammer*, 2001-I Eur. Ct. H.R. at 280-81 (describing the limits of acceptable criticism for private individuals as narrow, but nonetheless comparing those limits to those of a politician or government without ever determining if the plaintiff, a former politician, was a public or private figure).

82. *Cf. Chauvy v. France*, 2004-VI Eur. Ct. H.R. 211, 231 (reaching the conclusion that the conviction of the defendants was well-reasoned and deserved in part because they made "grave insinuations" in their book).

83. *See, e.g., Scharsach v. Austria*, 2003-XI Eur. Ct. H.R. 127, 137 (holding that the term "Nazi" did not *ipso facto* support a conviction just because of the special stigma attached to it); *Unabhängige Initiative Informationsvielfalt v. Austria*, 2002-I Eur. Ct. H.R. 275, 283 (finding that accusing a politician of "racist agitation" was not a gratuitous personal attack in part because it contributed to a political discussion about subjects of general interest to the public); *Oberschlick v. Austria* (no. 2), 1997-IV Eur. Ct. H.R. 1268, 1274-75 (concluding that the use of the term "Trottel" ("idiot") did not constitute a gratuitous personal attack because the author provided an objective explanation for the word's use).

context of a public debate as a reaction to indignation knowingly aroused by others—usually extreme right-wing politicians.<sup>84</sup>

*Oberschlick v. Austria (no. 2)*, for instance, concerned a newspaper publication in which extreme right-wing politician Jörg Haider was referred to as an “idiot” in reaction to a speech in which he glorified the role of all soldiers, including those in the German army, who had taken part in World War II.<sup>85</sup> The applicant subsequently published a newspaper article containing the following sentence: “I will say of Jörg Haider, firstly, that he is not a Nazi and, secondly, that he is, however, an idiot.”<sup>86</sup> The applicant was consequently convicted and ordered to pay a fine for having used the insulting term to describe Mr. Haider.<sup>87</sup> The domestic courts also ordered the seizure of the newspaper issue, which was later retracted, and required the newspaper to publish news of the conviction.<sup>88</sup> In finding an Article 10 violation, the ECtHR relied heavily on the fact that the term “idiot” was used in the context of a political discussion provoked by Mr. Haider’s speech.<sup>89</sup> The Court deemed that the term may have been offensive, but not excessively so, in light of the indignation Mr. Haider knowingly aroused.<sup>90</sup>

Cases in which the terms “Nazi,” “Neo-Nazi,” and “fascist” are used often also involve a charge of criminal behavior, because many

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84. See, e.g., *Scharsach*, 2003-XI Eur. Ct. H.R. at 138 (holding that Article 10(2) provides little support for restrictions on debate over questions of public interest); *Unabhängige Initiative*, 2002-I Eur. Ct. H.R. at 283 (noting that a charge of “racist agitation” directed toward a politician did not necessitate government intervention); *Oberschlick (no. 2)*, 1997-IV Eur. Ct. H.R. at 1274-75 (describing Article 10 as protective of both the substance of the ideas conveyed and the form of conveyance). But see *Constantinescu v. Romania*, 2000-VIII Eur. Ct. H.R. 31, 43 (finding that the applicant’s use of the term “delapidatori”, which refers to persons found guilty of fraudulent conversion, was offensive because the subjects had not been convicted by a court, and thus there were “relevant and sufficient” reasons for government interference with the applicant’s speech).

85. *Oberschlick (no. 2)*, 1997-IV Eur. Ct. H.R. at 1270.

86. *Id.*

87. *Id.* at 1271 (specifying twenty day-fines of 200 Austrian schillings, each carrying ten days imprisonment upon default).

88. *Id.* at 1270-71.

89. See *id.* at 1276 (reasoning further that the insult was an opinion, or value judgment, “whose truth is not susceptible of proof”).

90. See *id.* (characterizing the insult as “polemical,” but not as a gratuitous attack given the author’s “objectively understandable explanation” that he was merely responding to Mr. Haider’s incendiary speech).

European countries treat propagating and defending National-Socialist ideas as a criminal offense.<sup>91</sup> However, in its case law prior to *Chauvy*, the Court has stated on many occasions that this element alone does not justify a conviction for defamation since “the degree of precision for establishing the well-foundedness of a criminal charge by a competent court can hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern.”<sup>92</sup> In only one case prior to *Chauvy* did the Court find that the use of an insulting term related to Nazism justified a domestic finding of defamation. However, this case—*Wabl v. Austria*—did not involve use of the term by a member of the press to describe a politician or public official, unlike the other above-referenced cases where the Court found a violation of Article 10.<sup>93</sup> Instead, it concerned the opposite situation—a politician reacted to a newspaper article about him by referring to it as “Nazi-journalism.”<sup>94</sup>

In its case law after *Chauvy*, the Court appears to be less forgiving of the use of insulting terms. Although in several cases it has continued to rule that the use of terms such as “Nazi,” “insane,” or “neofascist” does not automatically justify a restriction for the reasons set out above,<sup>95</sup> it has on other occasions found that the use

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91. See, e.g., STRAFGESETZBUCH [STGB] [CRIMINAL CODE], Nov. 13, 1998, REICHSGESETZBLATT [RGLB.] I, §§ 86, 130 (Ger.), available at <http://www.iuscomp.org/gla/statutes/StGB.htm> (prohibiting the incitement of hatred against segments of the population, the distribution or display of materials which incite such hatred, and the public approval of the Nazi party’s acts or denial of the heinousness of those acts).

92. E.g., *Unabhängige Initiative Informationsvielfalt v. Austria*, 2002-I Eur. Ct. H.R. 275, 284; *Scharsach v. Austria*, 2003-XI Eur. Ct. H.R. 127, 137.

93. App. No. 24773/94, ¶¶ 22-23 (Eur. Ct. H.R. Mar. 21, 2000) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (explaining the Austrian Supreme Court’s decision that the politician’s indignation about defamatory reporting did not justify his retort—characterized as a value judgment attacking the journalist’s reputation, not as political speech intending to shock or provoke).

94. *Id.* ¶ 42 (finding both the original article and the politician’s response to be defamatory, but upholding the order enjoining the politician’s public use of the offensive phrase).

95. See, e.g., *Brunet-Lecomte v. France*, App. No. 13327/04, ¶ 35 (Eur. Ct. H.R. Nov. 20, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (asserting that the word “énergumène” (“fanatic”) is polemical, but does not exceed normal press provocation); *Karman v. Russia*, App. No. 29372/02, ¶ 39 (Eur. Ct. H.R. Dec. 14, 2006) (HUDOC Database),

of terms such as “executioner” or “chief of a gang of killers” exceeds the allowed limits of exaggeration and provocation.<sup>96</sup> These cases are some of the few instances where the Court has assessed the impact of the statement on the reputation of the plaintiff. In *Lindon v. France*, the Court also pointed out that the use of certain terms or statements is not necessary for the exercise of one’s freedom of expression in bringing across an idea or opinion.<sup>97</sup> *Lindon* involved a series of criminal convictions related to the publication of a book entitled “Jean-Marie Le Pen on Trial.”<sup>98</sup> The book was a fictional work with real life elements about the murder of a North African man by a *Front National* (“FN”) militant.<sup>99</sup> The FN is an extreme right-wing political party led by Mr. Le Pen, and the book raised questions as to Mr. Le Pen’s ultimate responsibility for the militant’s violent

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*available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (reiterating that the stigma attached to the words “Nazi” or “neo-fascist” does not support a conviction for defamation on its own); *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, App. No. 58547/00, ¶ 38 (Eur. Ct. H.R. Oct. 27, 2005) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (determining that use of the term “punishment camps” did not belittle the heinousness of Nazi concentration camps).

96. See *Lindon v. France* [GC], App. Nos. 21279/02 & 36448/02, ¶¶ 57, 66 (Eur. Ct. H.R. Oct. 22, 2007) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (agreeing with the state court’s determination that the terms “chief of a gang of killers” and “vampire” were unacceptable because they were not just value judgments but allegations of fact); *Ivanciuc v. Romania* (dec.), 2005-XI Eur. Ct. H.R. 251, 258 (affirming a state court ruling that use of the term “executioner” was defamatory when made in reference to a person who had been tried and acquitted of homicide while driving under the influence of alcohol); see also *Aguilera Jiménez v. Spain*, App. Nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06, & 28964/06 (Eur. Ct. H.R. Dec. 8, 2009) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (holding that the domestic court was within its margin of appreciation to sanction various rude statements).

97. App. No. 21279/02 at ¶ 66; cf. *Backes v. Luxembourg*, App. No. 24261/05, ¶ 49 (Eur. Ct. H.R. July 8, 2008) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (holding that the applicant could have contributed to an open discussion on a matter of public interest without recourse to accusations that the plaintiff was suspected of involvement in organized crime). Another example, but pre-*Chauvy*, can be found in *Constantinescu v. Romania*, 2000-VIII Eur. Ct. H.R. 43 (concluding that the defendant could have expressed his opinion and criticism in the context of a public debate without using an offensive term).

98. App. No. 21279/02 at ¶¶ 10-12.

99. *Id.*

actions.<sup>100</sup> The book referred to Mr. Le Pen as the “chief of a gang of killers” and a “vampire who thrives on the bitterness of his electorate, but sometimes also on their blood.”<sup>101</sup> These excerpts were reproduced in a newspaper article, which was written in reaction to the conviction of the authors of the book;<sup>102</sup> the newspaper was subsequently charged and convicted for this reproduction.<sup>103</sup> The ECtHR considered the content of the statements, among other factors, in reaching the conclusion that the conviction had not violated Article 10.<sup>104</sup> The Court established that, because the defamatory remarks had a potential impact on the public and because their reproduction was not necessary to give a full account of the prior conviction, the applicant had overstepped the limits of permissible provocation by reproducing them.<sup>105</sup> Without taking a stance on the results of the Court’s reasoning in the instant case, the above clearly constitutes a good example of the Court having fully applied the impact criterion. Unfortunately, it is also one of the few to be found in the Court’s post-*Chauvy* case law.

The Court also considers the tone of the statement in question—consistently awarding additional protection to freedom of expression when the defamatory statement is uttered in an ironic or satirical manner. Since ironic and satirical statements—like parodies—by their very nature involve exaggeration and provocation, the Court views them more leniently.<sup>106</sup> The Court does not draw an explicit

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100. *Id.*

101. *Id.* ¶ 57.

102. *Id.* ¶ 21.

103. *Id.* ¶ 22.

104. *Id.* ¶ 66.

105. *Id.*

106. See, e.g., *Da Silva v. Portugal*, App. No. 41665/07, ¶ 29 (Eur. Ct. H.R. Oct. 20, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (commenting that satirical commentary plays an important role in free debate on questions of general interest); *Öztürk v. Turkey*, App. No. 17095/03, ¶ 26 (Eur. Ct. H.R. June 9, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (referencing the author’s use of irony in his criticism of the plaintiff, and holding that his article conveyed ideas that contributed to the public debate); *Vereinigung Bildener Künstler v. Austria*, App. No. 68354/01, ¶ 33 (Eur. Ct. H.R. Jan. 25, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (noting that the painting was satirical and intended to distort reality and provoke, and therefore interference with such expression must be “examined with particular care”); *Wirtschafts-Trend Zeitschriften-Verlags GmbH*

link between the tone of the statement and the impact on the reputation of the plaintiff, but this is nonetheless a classic example of where the impact criterion could be applied to strengthen the Court's reasoning. Prohibiting an ironic or satirical statement would deprive the applicant of his freedom of expression, while allowing it would arguably have a minor impact on the reputation of the plaintiff, given the clearly humorous tone of the statement.<sup>107</sup>

As to the form of the statement, the Court has occasionally taken into account the fact that the potential damage to the reputation of the plaintiff will be more limited when the statement is not disseminated to the public or when it is published through a medium with a rather limited audience, such as a specialized book, instead of through the general print media.<sup>108</sup> For example, in *Raichinov v. Bulgaria*, the Court had to consider the conviction of a public servant for stating that the deputy Prosecutor-General "is not a clean person" during a

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v. Austria (no. 3), App. Nos. 66298/01 & 15653/02, ¶ 39 (Eur. Ct. H.R. Dec. 13, 2005) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (recalling that a fundamental function of the press is to impart information on matters of public interest and that, to this end, journalists are permitted a degree of exaggeration).

107. See *Nikowitz v. Austria*, App. No. 5266/03, ¶ 25 (Eur. Ct. H.R. Feb. 22, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (making reference to the ironic and satirical style of the article by which the humorous nature of the statement was evident).

108. See, e.g., *Frankowicz v. Poland*, App. No. 53025/99, ¶ 48 (Eur. Ct. H.R. Dec. 16, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (noting that the statements were made in an opinion that the patient requested and that was not subsequently published or made known to a wider audience); *Azevedo v. Portugal*, App. No. 20620/04, ¶ 32 (Eur. Ct. H.R. Mar. 27, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (finding a violation of Article 10 where the allegedly defamatory publication was distributed only to members of the scientific community); *Lindon*, App. No. 21279/02 at ¶ 47 (HUDOC Database) (explaining that the statement was published in a novel with a generally narrow readership, and thus it caused less damage to the complainant's reputation than if the statement were published in a medium that appealed to a larger group of people); *Zakharov v. Russia*, App. No. 14881/03, ¶ 22 (Eur. Ct. H.R. Oct. 5, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (considering allegedly defamatory statements made in a private letter); *Raichinov v. Bulgaria*, App. No. 47579/99, ¶ 48 (Eur. Ct. H.R. Apr. 20, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (involving a statement made to members of a meeting behind closed doors).

meeting of the Supreme Judicial Council.<sup>109</sup> The Court relied on the fact that the statement had been made in front of a limited audience, behind closed doors, and without the presence of the press or any other publicity.<sup>110</sup> In holding that the negative impact on the reputation of the plaintiff was accordingly limited, the Court found that the criminal conviction of the applicant violated Article 10.<sup>111</sup> The Court has also consistently been more lenient on applicants uttering a defamatory statement in the context of an oral exchange or a heated debate, since in these cases the applicant does not have the benefit of forethought and careful consideration otherwise present in written statements.<sup>112</sup> The Court has also applied the impact criterion in these situations to determine that the effect on the reputation of the plaintiff must have been minimal when the oral exchange takes place outside of the presence of the media.<sup>113</sup>

In *Gavrilovici v. Moldova*, a case involving the conviction of a private individual who was sentenced to five days of detention for having supposedly called the president of the regional council a fascist, the Court took into account the particular circumstances in which the insulting remark had allegedly been uttered.<sup>114</sup> The applicant was accused of making the statement during a heated exchange immediately after he was told that the regional council would stop providing financial aid for the medical transportation of

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109. App. No. 47579/99 at ¶ 10.

110. *See id.* ¶ 48 (contrasting this case with another case where two municipal guards were insulted in the street in front of numerous bystanders).

111. *Id.* ¶¶ 48, 53.

112. *See, e.g., Gavrilovici v. Moldova*, App. No. 25464/05, ¶ 58 (Eur. Ct. H.R. Dec. 15, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (concluding that intervention was unnecessary because the statement was made in response to provocation and in a state of anger); *Csanics v. Hungary*, App. No. 12188/06, ¶ 44 (Eur. Ct. H.R. Jan. 20, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (recognizing that statements made in a public debate are often made during a heated dispute, which warrants a high level of protection under Article 10); *Raichinov*, App. No. 47579/99 at ¶ 51 (holding that a criminal conviction in response to an oral statement is a disproportionate response).

113. *Gavrilovici*, App. No. 25464/05 at ¶ 59 (noting that the statements during a council meeting held *in camera* with no media coverage had minimal effect on the plaintiff's reputation, especially because those present were aware of the preexisting tension between the applicant and the complainant).

114. *Id.* ¶ 54.

his chronically ill wife and son.<sup>115</sup> The Court consequently established that, even if the disputed remark had indeed been uttered by the applicant, he was clearly in a state of despair and anger—circumstances where the effect on the reputation of the plaintiff must have been minimal because all those present at the council meeting were aware of the tension and had heard the unspecified provoking statements made by the plaintiff.<sup>116</sup> The Court therefore ruled that the criminal conviction and detention of the applicant violated Article 10.<sup>117</sup>

Although the above considerations regarding the form of the statement appear to indicate that the Court pays careful attention to the impact criterion, it is worth noting that in its post-*Chauvy* case law, the Court only uses this argument in cases where the damage to the reputation is expected to be limited. It hardly ever uses it in the opposite sense—to find a greater potential damage to reputation when statements are made through mass or print media.<sup>118</sup>

#### *d. Statements of Fact versus Value Judgments*

A crucial element in many defamation cases is the question of proof of the impugned statements. In this respect, the Court distinguishes two categories of statements. Statements of fact, in principle, require proof of veracity by the applicant,<sup>119</sup> while value

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115. *Id.* ¶ 9.

116. *Id.* ¶¶ 58-59.

117. *See id.* ¶ 60-61 (“The Court recalls that imposing criminal sanctions on someone who exercises the right to freedom of expression can be considered compatible with Article 10 . . . only in exceptional circumstances, notably where other fundamental rights have been seriously impaired . . .”).

118. *Compare* Pedersen v. Denmark, App. No. 49017/99, ¶ 79 (Eur. Ct. H.R. Dec. 17, 2004) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (acknowledging the relevance of the fact that the statement was made on national television, which has a wider audience than print media), *with* Karhuvaara v. Finland, 2004-X Eur. Ct. H.R. 263, 275 (finding that even though the statements were made on national television, the resulting greater potential for harm did not justify a conviction for defamation).

119. However, in certain cases, including very recent ones, the Court merely requires a factual basis for statements of fact instead of full proof. *See, e.g.,* Ieremeiov v. Romania (no. 2), App. No. 4637/02, ¶ 43 (Eur. Ct. H.R. Nov. 24, 2009) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (concluding that because the applicant had received information from two known witnesses, there was a factual basis for his defamatory remarks, and that this factual basis precluded a finding of bad faith



judgments or statements of opinion are not capable of being proven.<sup>120</sup> Requiring the delivery of proof of a value judgment consequently infringes the freedom of opinion itself.<sup>121</sup> Nonetheless, value judgments should be founded on a sufficient factual basis.<sup>122</sup> The distinction between statements of fact and value judgments is relevant for procedural and evidentiary reasons.<sup>123</sup> Further, some elements connected to the standards of proof have a direct bearing on the conflict between freedom of expression and the right to reputation.

At the most straightforward level, the complete absence of proof for a statement of fact or of any factual basis for a value judgment has often led the Court to find in favor of the right to reputation of the plaintiff.<sup>124</sup> In this context, the Court has ruled that the more

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regardless of whether the remarks were properly characterized as value judgments or statements of fact); *Flux v. Moldova* (no. 7), App. No. 25367/05, ¶ 40 (Eur. Ct. H.R. Nov. 24, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (protecting the media's reporting of public opinion where statements are not devoid of foundation); *Romanenko v. Russia*, App. No. 11751/03, ¶ 47 (Eur. Ct. H.R. Oct. 8, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (requiring only a sufficient and reliable factual basis, not proof of veracity, scaled in proportion to the nature of allegation); *Pedersen*, App. No. 49017/99 at ¶ 76 (insisting on a showing of sufficient factual basis for the factual accusation made against a named chief superintendent).

120. *E.g.*, *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 14, 28 (1986).

121. *See id.* (stating that it would be impossible to verify a value judgment, as it is an opinion, and therefore fundamentally protected by Article 10).

122. *See Oberschlick v. Austria* (no. 1), 204 Eur. Ct. H.R. (ser. A) 4, 27 (1991) (noting that the applicant published a true statement of facts before making an unsubstantiated "value-judgment as to those facts").

123. *See* NORMAN J. SINGER & JD SHAMBIE SINGER, 2B SUTHERLAND STATUTORY CONSTRUCTION § 56A:4(I)(a) (7th ed. 2010) (theorizing that only statements about the empirical world are meaningful and distinct from value statements, which are opinions that do not represent the world as it is).

124. *See, e.g., Pedersen*, App. No. 49017/99 at ¶¶ 84-85, 87 (holding that a taxi driver's oral statement to the applicant did not provide a sufficient factual basis for the subsequent accusation that the chief superintendent had suppressed the driver's police report because there was no evidence whatsoever that the driver had actually filed a report). *See generally* *Falter Zeitschriften GmbH v. Austria* (dec.), App. No. 13540/04 (Eur. Ct. H.R. Feb. 8, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (exemplifying the Court's view that a lack of facts to support an allegation is a decisive factor); *Keller v. Hungary* (dec.), App. No. 33352/02 (Eur. Ct. H.R. Apr. 4, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (holding for the plaintiff because the applicant's statement was

serious an allegation, the more solid the factual basis must be.<sup>125</sup> However, the Court has applied the standard of proof for showing this basis in a flexible manner—even allowing the necessity of a link between a value judgment and its factual basis to vary from case to case.<sup>126</sup> For example, the need to provide a factual basis is less stringent where the facts are already known to the public.<sup>127</sup> Although the Court has not offered any clarification for this argument, it might well be based on an assumption that in such cases the possible impact on the reputation of the plaintiff is more limited.<sup>128</sup>

Additionally, the Court considers the distinction between statements of facts and value judgments, and thus the accompanying standards of proof, to be less significant in the context of a lively political debate.<sup>129</sup> In these cases, the Court has accorded a wide

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factual but unsubstantiated, and he did not offer proof of the statement's truth); *Abeberry v. France*, App. No. 58728/00 (Eur. Ct. H.R. Sept. 21, 2004) (HUDOC database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (recalling that the proportionality of State interference depends on the existence of a solid factual basis for the offending remark).

125. See *Ivanova v. Bulgaria*, App. No. 36207/03, ¶ 64 (Eur. Ct. H.R. Feb. 14, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (determining that the applicant's allegation required substantial justification because it was very serious and was printed in a popular and widely circulated daily newspaper).

126. See *Feldek v. Slovakia*, 2001-VIII Eur. Ct. H.R. 91, 109 (finding that the Court cannot accept as a matter of principle that a value judgment can only be considered if it is accompanied by the facts on which that judgment was based).

127. *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, App. No. 58547/00, ¶ 35 (Eur. Ct. H.R. Oct. 27, 2005) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

128. See, e.g., *Verlagsgruppe News GmbH v. Austria*, App. No. 76918/01, ¶ 30 (Eur. Ct. H.R. Dec. 14, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (noting that the allegations had already been widely disseminated through another newspaper and the subjects were political figures open to public scrutiny); *Karhuvaara v. Finland*, 2004-X Eur. Ct. H.R. 263, 274-75 (observing that the subject of the allegations had been publicized in popular political satire, and therefore the identity of the parties were already well-known prior to these allegations).

129. See *Lombardo v. Malta*, App. No. 7333/06, ¶ 60 (Eur. Ct. H.R. Apr. 24, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (promoting the view that elected officials and journalists should enjoy broad discretion to criticize during lively political debates, even when their statements lack a solid factual basis); see also *Dyuldin v. Russia*, App. No. 25968/02, ¶ 49 (Eur. Ct. H.R. July 31, 2007) (HUDOC Database), available at

freedom to criticize, even where statements may lack a clear basis in facts. This principle was applied, for instance, in *Dyuldin v. Russia*, a case involving an open letter jointly written by a trade union leader and a journalist in which they accused a regional government of misusing funds and of directing reprisals against the independent media through violence and censorship.<sup>130</sup>

One final example is a case—*Flux v. Moldova*—where the Court found a violation of Article 10 despite there being unproven statements of fact. This case involved members of the press who had been civilly convicted for accusing the Communist Party of having accepted bribes from “big fuel importers” in the form of meals and a lavish party.<sup>131</sup> While the Court conceded that it had not been proven whether the importers’ company actually paid for the event, it concluded that the lengthy passage of time between the event and the initiation of the defamation proceedings was a bar to the applicant’s ability to prove the facts.<sup>132</sup> The Court also pointed out that any damage done to the plaintiff’s reputation had “substantially diminished with the passage of time.”<sup>133</sup> This latter point constitutes a prime example of the Court applying the impact criterion to its fullest extent.

## 2. The Core/Periphery Criterion

The core/periphery criterion has the potential of playing an important role in the Court’s case law on defamation, especially in light of the ongoing debate at the Court regarding the precise place for the protection of reputation within Article 8.<sup>134</sup> Most Article 8 and

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<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (reiterating the holding in *Lombardo*).

130. See *Dyuldin*, No. 25968/02 at ¶¶ 9-11 (noting that the letter was a collective effort by journalists and human rights activists, founded on their first-hand experience working in the media in Russia).

131. *Flux v. Moldova* (no. 1), App. No. 28702/03, ¶ 6-7 (Eur. Ct. H.R. Nov. 20, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

132. See *id.* ¶¶ 31, 35 (considering the applicant’s arguments that it was difficult and near impossible to prove facts from a newspaper article and the damages inflicted one year after the events).

133. *Id.* ¶ 35.

134. See Adam Wagner, *Libel Reform Watch*, U.K. HUM. RTS. BLOG (June 7, 2010), <http://ukhumanrightsblog.com/2010/06/07/libel-reform-watch/> (preserving a forum dedicated to libel reform in the United Kingdom, and discussing the

Article 10 judgments in which the Court has taken a stance simply reiterate that a person's reputation is an element of her private life protected under Article 8. However, the Court established in *Karakó* that the right to reputation only comes into play as an independent right when an attack on a person's reputation reaches a certain level of gravity and causes such a prejudice to the enjoyment of her right to private life as to undermine her personal integrity.<sup>135</sup> While awaiting the future developments of the Court's defamation case law, an argument regarding the status of reputation within Article 8 could be raised on the basis of the Court's Article 8 cases on photographs<sup>136</sup> and press disclosure of a private person's HIV-positive status.<sup>137</sup> The Court explicitly states that both those matters touch the core of the right to respect for private life. Similar statements regarding reputation in general are absent in the Court's defamation case law. It thus seems that reputation in principle does not belong to the core of Article 8.<sup>138</sup>

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protections of Articles 8 and 10 in the context of publications tending to defame notable British citizens).

135. See *Karakó v. Hungary*, App. No. 39311/05, ¶¶ 21, 23 (Eur. Ct. H.R. Apr. 28, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (referencing the *Von Hannover* case and distinguishing between reputation and personal integrity, holding that "personal integrity rights falling within the ambit of Article 8 are unrelated to the external evaluation of the individual, whereas in matters of reputation, that evaluation is decisive: "one may lose the esteem of society—perhaps rightly so—but not one's integrity, which remains inalienable").

136. See, e.g., *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 47, 72-73 (holding, in what is now considered the leading case on the subject, that publishing photographs violated Article 8 where those photographs made no contribution to a debate of general interest, the public had no legitimate interest in the applicant's private life, and the applicant had a "legitimate expectation" of privacy); *Sciacca v. Italy*, 2005-I Eur. Ct. H.R. 63, 68-69 (finding that publishing a photograph of a teacher who was charged with serious crimes was a violation of Article 8 because a person has a privacy right to their image).

137. See, e.g., *Armonienė v. Lithuania*, App. No. 36919/02, ¶ 42 (Eur. Ct. H.R. Nov. 25, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (holding that disclosing a person's HIV-positive status in a publication violates Article 8 because the illness is a purely private matter); *Biriuk v. Lithuania*, App. No. 23373/03, ¶ 41 (Eur. Ct. H.R. Nov. 25, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (deciding that a publication describing an applicant as HIV-positive and detailing her sexual lifestyle contravened protections in Article 8).

138. The cases involving photographs and disclosure of delicate and confidential medical information regarding private individuals raise different issues within the

Certain expressions, on the other hand, do belong to the core of Article 10. The Court attaches great importance to particular aspects of the freedom of expression, including press freedom and political speech, because of their essential importance in a democratic society. The Court also accords a wide freedom of expression to particular categories of people, such as politicians and candidates for elections, because they represent an electorate and defend the interests of the voters.<sup>139</sup> As a result, the Court assesses restrictions on the freedom of expression of politicians with the closest scrutiny.<sup>140</sup> The Court has also awarded extended protection to freedom of expression exercised by union members in the context of labor disputes because these debates concern the core interests of the employees.<sup>141</sup> In the eyes of the Court, limiting the freedom of expression of union members and leaders would deprive the union of its purpose.<sup>142</sup> The above lines of reasoning could be seen as an application of the

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right to private life than “ordinary” defamation cases do. This justifies why the rights involved in those cases touch the core of the right to private life, while reputation in general does not.

139. See, e.g., *Lepojić v. Serbia*, App. No. 13909/05, ¶ 74 (Eur. Ct. H.R. Nov. 6, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (pointing particularly to politicians, political parties, and their members as deserving of wide discretion, especially during election campaigns); *Lombardo v. Malta*, App. No. 7333/06, ¶ 53 (Eur. Ct. H.R. Apr. 24, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (explaining that elected representatives not only represent the electorate, but also draw attention to public interests); *Brasiler v. France*, App. No. 71343/01, ¶ 42 (Eur. Ct. H.R. Apr. 11, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (highlighting the need for increased tolerance of critical speech during a contested election as part of its finding that the domestic court had levied disproportionate penalties on the applicant and thereby violated Article 10).

140. See *Jerusalem v. Austria*, 2001-II Eur. Ct. H.R. 75, 82 (asserting that politicians have broad leeway with regard to the expression of their views). *But see* *Keller v. Hungary* (dec.), App. No. 33352/02 (Eur. Ct. H.R. Apr. 4, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (holding that interference was necessary because the accusation, despite having been made by a politician, had no factual basis).

141. See *Csanics v. Hungary*, App. No. 12188/06, ¶¶ 44-45 (Eur. Ct. H.R. Jan. 20, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (noting that the tone of labor disputes is often heated—yet another reason they require a high level of Article 10 protection).

142. *Aguilera Jiménez v. Spain*, App. Nos. 28389/06, 28955/06, 28959/06, 28961/06, & 28964/06, ¶¶ 32-33 (Eur. Ct. H.R. Dec. 8, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

core/periphery criterion, albeit in a one-sided manner, to provide additional protection to freedom of expression.

### 3. *The Additional Rights Criterion*

The additional rights criterion is especially relevant in the numerous defamation cases involving allegations of criminal conduct. If the Court applied this paper's model, the plaintiff's right to reputation would be strengthened because it is supported by other rights, namely the right to be presumed innocent until proven guilty in court, under ECHR Article 6(2).<sup>143</sup> However, the Court has exhibited an ambiguous approach to the presumption of innocence, especially in its post-*Chauvy* case law. Certain cases indicate that the Court attaches increased importance to this element.<sup>144</sup> This is evident in *Alithia Publishing Company v. Cyprus*, a case involving a civil defamation conviction for publication of newspaper articles alleging that a former Minister of Defense was corrupt.<sup>145</sup> In this case the Court explicitly stated that the right to the presumption of innocence was relevant to the balancing exercise that the Court must undertake.<sup>146</sup> Here, the Court ruled that there was no Article 10 violation because the applicants had not demonstrated good faith when they "acted in flagrant disregard of the duties of responsible journalism . . . [by publishing statements that] undermined the

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143. European Convention on Human Rights, *supra* note 2, art. 6(2) ("Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law.").

144. *See, e.g.*, Flux v. Moldova (no. 6), App. No. 22824/04, ¶¶ 25, 31 (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudocen> (cautioning that newspapers do not have free reign to recklessly publish allegations of criminal acts without allowing the accused to counter the claims, especially where they have not been convicted by a criminal court); *Alithia Publ'g Co. v. Cyprus*, App. No. 17550/03, ¶ 63 (Eur. Ct. H.R. May 22, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudocen> (indicating that the principle of innocence until proven guilty is relevant to determining a fair balance of competing interests); *Falter Zeitschriften GmbH v. Austria* (dec.), App. No. 13540/04 (Eur. Ct. H.R. Feb. 8, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudocen> (acknowledging that even though politicians are subject to wider criticism than private individuals, they are still granted the same right to be innocent until proven guilty).

145. App. No. 17550/04 at ¶¶ 8-9.

146. *Id.* ¶ 63.

Convention rights of others.”<sup>147</sup> However, the importance of the right to the presumption of innocence is tempered by other cases in which the Court has promoted a more careful analysis of the right in order to prevent abusive restrictions on the freedom of expression.<sup>148</sup> Furthermore, the Court has not included an explicit reference to Article 6(2) in every case involving an allegation of criminal conduct.<sup>149</sup> Taken on the whole, the rationale behind the Court’s choice to sometimes incorporate the presumption of innocence into its reasoning and other times leave it unmentioned remains unclear.

#### 4. The General Interest Criterion

In its Article 10 defamation case law, post-*Chauvy*, the Court has made extensive use of the general interest criterion to strengthen the position of one or both rights involved in the conflict.

The relevance of a general interest is evident in every Article 10 case in which the role of the press is a pertinent factor. In such cases, the applicant’s freedom of expression is strengthened by the general interest a democratic society has in guaranteeing a free press and an open debate on matters of public interest.<sup>150</sup> In this respect, the Court has consistently held that the public also has a right to receive such information.<sup>151</sup> The Court has used this argument to limit the margin

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147. *Id.* ¶ 71.

148. See *A/S Diena v. Latvia*, App. No. 16657/03, ¶ 86 (Eur. Ct. H.R. July 12, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (finding a violation of Article 10 despite the applicant’s use of terms with a heavy criminal connotation, such as “cheat” and “steal”).

149. For cases post-*Chauvy* in which the connection is not made, see *Da Silva v. Portugal*, App. No. 16983/06 (Eur. Ct. H.R. Jan. 19, 2010) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>; *Öztürk v. Turkey*, App. No. 17095/03 (Eur. Ct. H.R. June 9, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>; *Cumpănă v. Romania* [GC], 2004-XI Eur. Ct. H.R. 69.

150. See *Radio France v. France*, 2004-II Eur. Ct. H.R. 125, 149 (explaining that, although the press must stay within certain boundaries, it has a duty to disseminate information on matters of social concern).

151. *E.g.*, *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 14, 26 (1986); *Ivanova v. Bulgaria*, App. No. 36207/03, ¶ 58 (Eur. Ct. H.R. Feb. 14, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>. The public’s “right” to receive information falls under the general interest criterion because it involves a “right” that is assigned to the entire population in abstract terms and is thus more akin to a general interest than to a fundamental or human right.

of appreciation accorded to the national authorities and to apply strict scrutiny to restrictions on the freedom of expression exercised by the press.<sup>152</sup> Similar protection has been accorded by the Court to other persons or entities that do not belong to the press, but nonetheless perform a similar function, including audiovisual media companies,<sup>153</sup> NGOs,<sup>154</sup> authors of books on issues of public interest,<sup>155</sup> and specialists publishing in the press.<sup>156</sup>

Another crucial factor in the defamation case law of the ECtHR that is closely linked to the general interest criterion is the existence—or in some cases absence—of a public interest in the allegedly defamatory statements. The Court links any public interest in hearing the statement to the public's right to receive information

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152. See, e.g., *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 26 (weighing the requirements for the protection of privacy against the public interest in open discussion of political issues); *Ivanova*, App. No. 36207/03 at ¶58 (asserting that the press's role as "public watchdog" is "vital" to society).

153. See, e.g., *Radio Twist, A.S. v. Slovakia*, App. No. 62202/00, ¶¶ 57-58 (Eur. Ct. H.R. Dec. 19, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (advancing the argument that Article 10 protections apply to the broadcast of telephone conversations as well to other kinds of commentary); *Pedersen v. Denmark*, App. No. 49017/99, ¶ 71 (Eur. Ct. H.R. Dec. 17, 2004) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (applying stringent Article 10 protections to television programs expressing political speech).

154. See, e.g., *Vides Aizsardzibas Klubs v. Latvia*, App. No. 57829/00, ¶ 42 (Eur. Ct. H.R. May 27, 2004) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (highlighting the capacity for nongovernmental organizations to serve as "watchdogs" against disfunctional local authorities).

155. See, e.g., *Azevedo v. Portugal*, App. No. 20620/04, ¶ 31 (Eur. Ct. H.R. Mar. 27, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (implying that the public interest nature of the publication was a dispositive fact); *Chauvy v. France*, 2004-VI Eur. Ct. H.R. 211, 212 (applying the case law-created principles of Article 10 to a book on the French Resistance movement—a subject that holds substantial public interest).

156. See, e.g., *Öztürk v. Turkey*, App. No. 17095/03, ¶ 27 (Eur. Ct. H.R. June 9, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (noting that even though the applicant is not a journalist, the applicant was still fully protected under Article 10 because of his prominent role in the magazine article); *Riolo v. Italy*, App. No. 42211/07, ¶ 63 (Eur. Ct. H.R. July 17, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (accorded expansive protections—the same as those usually granted to a journalist—to a political science researcher because he had published an article on a subject of public interest).



on matters of general interest.<sup>157</sup> Where the statements are made in the context of a public debate, the Court provides additional protection by stating that there is limited scope for restriction of such speech.<sup>158</sup> An examination of the defamation case law under Article 10 shows that the Court has applied this principle liberally, finding the presence of a public interest very easily and, in some cases, upholding the public's right to be informed even in the absence of a matter of general interest.<sup>159</sup> This occurred in *Karhuvaara v. Finland*, a case where members of the press were convicted for tangentially mentioning the name of a politician in an article focused on a criminal proceeding against her husband.<sup>160</sup> In this case, the Court established that the publication did not pertain to a matter of great

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157. *See, e.g.*, *Romanenko v. Russia*, App. No. 11751/03, ¶ 42 (Eur. Ct. H.R. Oct. 8, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (explaining that the matter was of public concern, and therefore, allegations about the official's public life were protected under Article 10); *Standard Verlags GmbH v. Austria*, App. No. 19710/02, ¶ 56 (Eur. Ct. H.R. Nov. 2, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (holding that a politician's protection of his reputation is outweighed by the public's interest in obtaining information about his credibility).

158. *E.g.*, *Flux v. Moldova* (no. 7), App. No. 25367/05, ¶ 39 (Eur. Ct. H.R. Nov. 24, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>; *see, e.g.*, *Krasulya v. Russia*, App. No. 12365/03, ¶ 38 (Eur. Ct. H.R. Feb. 22, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (reiterating that the Court requires strong justifications for restricting political speech on issues of public interest because without them, general freedoms of expression would be endangered); *Thoma v. Luxembourg*, 2001-III Eur. Ct. H.R. 73, 87 (cautioning the Court to take care in validating restrictions on expression so as not to discourage the press from being involved in issues of interest to the public, especially those issues already being "widely debated").

159. *See, e.g.*, *Azevedo*, App. No. 20620/04 at ¶ 31 (considering the subject of the applicant's publication as "rather specialized," but still within the general interest); *Tønssbergs Blad AS v. Norway*, App. No. 510/04, ¶ 87 (Eur. Ct. H.R. Mar. 1, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (finding that where a public figure may have failed to obey laws, even privately and outside of his official duties, the acts may be of public concern and thus protected under Article 10); *Karhuvaara v. Finland*, 2004-X Eur. Ct. H.R. 263, 275 (stating that even though the matter may not be of great public concern, if it involves the lives of politicians and may influence voting, then it may still fall under the essential right in a democratic society to be informed).

160. 2004-X Eur. Ct. H.R. at 275.

public interest—at least with regard to the politician,<sup>161</sup> but it nevertheless held that the public had a right to be informed about aspects of the private life of politicians.<sup>162</sup> The Court connected the possible effect of the spouse's potential conviction to citizen's voting intentions, and thus found that some degree of public interest was involved.<sup>163</sup> Finally, in several cases the Court has used the above principles to shift the balance in favor of the freedom of expression by finding that the domestic courts failed to consider the importance of free debate when striking a balance between the freedom of expression and the right to reputation.<sup>164</sup>

In cases where there is an absence of public interest, but still a dissemination of information to the public, the Court has used this absence along with the impact criterion to decide in favor of the right to reputation.<sup>165</sup> The Court has held that a distinction must be made between cases in which there exists a right of the public to be informed and those in which the publication merely serves to satisfy the curiosity of a certain readership.<sup>166</sup> The Court applied this principle in *Leempoel v. Belgium*, finding that restrictions on the freedom of expression were justifiable when the publication in question directly criticized a judge's character without offering any

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161. *Id.*

162. *Id.*

163. *Id.*

164. *See, e.g.,* Romanenko v. Russia, App. No. 11751/03, ¶ 47 (Eur. Ct. H.R. Oct. 8, 2009) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (suggesting that regardless of whether they have a clear factual basis, statements made in the course of a “lively debate” should be made freely); Malisiewicz-Gasior v. Poland, App. No. 43797/98, ¶ 67 (Eur. Ct. H.R. Apr. 6, 2006) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (affirming the “crucial importance” of free debate and noting that politicians must be more tolerant of criticism).

165. *See, e.g.,* Tammer v. Estonia, 2001-I Eur. Ct. H.R. 267, 281 (finding in favor of the applicant, a former public official, because the publication referred to aspects of her private life, and thus did not relate to any issue of public concern); De Revenga v. Spain (dec.) 2000-XII Eur. Ct. H.R. 525, 531 (restricting publication of information regarding a love affair, which the Court found to be a “purely private” matter).

166. *See, e.g.,* Standard Verlags GmbH v. Austria (no. 2), App. No. 21277/05, ¶ 52 (Eur. Ct. H.R. June 4, 2009) (HUDOC Database), *available at* <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (distinguishing information about the health of politicians, which is a possible public concern, from gossip about the politician's love life, a private matter).

contribution to a debate on a matter of general interest.<sup>167</sup>

In other cases, the Court has established that certain statements amount to gratuitous personal attacks outside the scope of the freedom of expression.<sup>168</sup> In *Aguilera Jiménez v. Spain*, for example, the court upheld the dismissal of union members who published a suggestive drawing of their company's director and two employees accompanied by rude statements.<sup>169</sup> Despite the fact that the applicants enjoyed additional protection of their freedom of expression as union members, the Court held that their rights had not been violated.<sup>170</sup> The Court based its ruling on the offensive nature of the publication and its impact on the reputation of the two employees, finding that the personal attacks were not necessary for the defense of the union's interests.<sup>171</sup>

The Court has also used the general interest criterion to introduce conditions on the exercise of freedom of expression by applicants who are expected to protect a specific interest. Thus, lawyers are required to respect their special position as intermediaries between the courts and the public, which results in their responsibility to act in a "discrete, honest, and dignified" manner and to contribute to the proper administration of justice and the maintenance of confidence therein.<sup>172</sup> Judges are likewise expected to honor a "duty of loyalty,

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167. App. No. 64772/01, ¶ 77 (Eur. Ct. H.R. Nov. 9, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

168. See, e.g., *Aguilera Jiménez v. Spain*, App. Nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06, & 28964/06, ¶¶ 30, 34 (Eur. Ct. H.R. Dec. 8, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (implying that the Court should apply a lower threshold for proportionality and necessity in a democratic society when the speech at issue has no real societal value); *Shabanov v. Russia*, App. No. 5433/02, ¶¶ 11, 48 (Eur. Ct. H.R. Dec. 14, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (holding that the release of private medical information about a unit commander, who was also accused of being responsible for two hundred men falling ill, was an unnecessary attack rather than part of an issue of public concern).

169. App. No. 28389/06 at ¶ 6.

170. *Id.* ¶¶ 36-37.

171. *Id.* ¶¶ 30, 34.

172. *Veraart v. The Netherlands*, App. No. 10807/04, ¶ 51 (Eur. Ct. H.R. Nov. 30, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>; see *Coutant v. France* (dec.), App. No. 17155/03 (Eur. Ct. H.R. Jan 24, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (referencing the "usual restrictions

reserve, and discretion” owed to their employer—the State.<sup>173</sup> The special nature of the medical profession affects medical practitioners’ freedom of expression in the sense that they possess a high level of public confidence, which implies a need to preserve solidarity among members of the profession by supporting each other’s reputations.<sup>174</sup> Although the Court has yet to directly link these general interests to the right to reputation, this evolution would be prudent. The general interests involved in cases where the applicant relying on her freedom of expression is a lawyer, judge, or medical practitioner should strengthen the plaintiff’s right to reputation<sup>175</sup> just as the general interests advanced by politicians and union members justly expand their freedom of expression.

General interests protected by the plaintiff also have an impact in the Court’s case law. The Court has made a distinction between public officials who are engaged in law enforcement, such as prosecutors and judges, and all other public servants, such as appointed mayors. The Court gives the former group more protection against defamatory speech because of their roles as the guarantors of justice, finding that it may be necessary to protect them against unfounded destructive attacks in order to promote public confidence in the judiciary, while the latter group should tolerate more

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on conduct of members of the Bar” and the fact that lawyers hold “central position[s] in the administration of justice” as support for according lawyers diminished Article 10 protection).

173. See *Kudeshkina v. Russia*, App. No. 29492/05, ¶ 85 (Eur. Ct. H.R. Feb. 26, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (noting that all civil servants are held to a high standard since their positions require the utmost discretion).

174. See *Frankowicz v. Poland*, App. No. 53025/99, ¶ 49 (Eur. Ct. H.R. Dec. 16, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (analogizing to lawyers, who have duties to their clients just as doctors have duties to their patients, as part of the Court’s eventual holding that sanctioning a doctor for giving a disparaging assessment of his patient’s previous health care violated Article 10).

175. One might also argue that the involvement of a general interest should limit the freedom of expression of the applicant. However, the wording used in the above text is preferable, for reasons of principle and clarity. Allowing general interests to bolster the right to reputation means that an applicant’s freedom of expression is not diminished in importance. Furthermore, general interests here play their role in the most logical way—by strengthening the reputation of those protected by such interests.

demanding public scrutiny.<sup>176</sup> On the other hand, the Court has also warned of the possibility of public servants abusing the right to sue for defamation and the negative impact this could have on free and open debate on matters of public interest.<sup>177</sup> For instance, in *Dyuldin v. Russia*, a defamation action had been lodged by dozens of members of a regional government after the applicants had accused the regional authority of misuse of funds and reprisals against the independent media.<sup>178</sup> Here, in finding for the applicants, the Court relied on the legal requirement that the impugned statement refer to a particular person before it can form the basis of a claim for defamation.<sup>179</sup> Allowing one or more state officials to sue for defamation whenever criticism is levied against the government would have an inevitable “chilling effect” on the press in performing its task as “public watchdog.”<sup>180</sup>

### 5. The Purpose Criterion

The research performed in preparation for this article did not reveal any direct applications of the purpose criterion in the Court’s Article 10 defamation case law. However, the limit placed on freedom of expression by the Court in cases involving gratuitous personal attacks could be interpreted as relating to the purpose criterion. When members of the press use their powers to publish articles that have no bearing on a debate of public interest, but only serve to attack a named individual on a personal level, it could be

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176. See *Prager v. Austria*, 313 Eur. Ct. H.R. (ser. A) 17-18 (1995) (noting that members of the judiciary, including law enforcement, are afforded a higher level of protection from public scrutiny than politicians because law enforcement officers depend on public confidence to successfully serve the public). *But see* *Zakharov v. Russia*, App. No. 14881/03, ¶ 25 (Eur. Ct. H.R. Oct. 5, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (remarking that a prosecutor’s ability to handle abusive criticism contributes to the authority of the judiciary).

177. *Öztürk v. Turkey*, App. No. 17095/03, ¶ 32 (Eur. Ct. H.R. June 9, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>; see *Dyuldin v. Russia*, App. No. 25968/02, ¶ 43 (Eur. Ct. H.R. July 31, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (expressing concern that the press could be involved in an endless series of litigation if public officials were able to sue them over every negative portrayal).

178. *Dyuldin*, App. No. 25968/02 at ¶¶ 10, 12.

179. *Id.* ¶ 43.

180. *Id.*

argued that they exercise their freedom of expression in a manner not consistent with their role in a democratic society—to inform the public on matters of general interest.

### 6. The Responsibility Criterion

The ECtHR's legal reasoning in defamation cases has undergone a noticeable evolution, post-*Chauvy*, with regard to the duties and responsibilities referred to in Article 10(2).<sup>181</sup> Throughout its case law, the Court has specified that these duties and responsibilities require journalists to act in good faith and to provide accurate and reliable information in accordance with the ethics of journalism.<sup>182</sup> Although generally limited to cases involving publications in the press, the Court has also evaluated the good faith of applicants who made allegedly defamatory remarks elsewhere.<sup>183</sup>

In its pre-*Chauvy* case law, the Court referred only sporadically to the duties and responsibilities of Article 10(2), finding that they are liable to take on significance in cases that involve attacking the reputation of a named individual.<sup>184</sup> However, after recognizing reputation as an element of private life protected under Article 8, the

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181. European Convention on Human Rights, *supra* note 2, art. 10(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 . . .”).

182. *See, e.g.*, Pedersen v. Denmark, App. No. 49017/99, ¶ 78 (Eur. Ct. H.R. Dec. 17, 2004) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (noting that journalists are under an ethical obligation to provide “reliable and precise” information, especially when a person’s reputation is being attacked); *Bladet Tromsø v. Norway* [GC], 1999-III Eur. Ct. H.R. 295, 324-25 (discussing the media’s “duties and responsibilities” to verify information that it publishes, particularly if it is defamatory); *cf. Fressoz v. France* [GC], 1999-I Eur. Ct. H.R. 5, 23-24 (cautioning that even though Article 10 provides significant protection to journalists, it does not, in principle, allow them to circumvent criminal laws).

183. *See, e.g.*, Juppala v. Finland, App. No. 18620/03, ¶¶ 42-43 (Eur. Ct. H.R. Dec. 2, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (asserting that a person who tries to protect a child from abuse should not be concerned with violating defamation laws when he shares the information he has obtained).

184. *McVicar v. The United Kingdom*, 2002-III Eur. Ct. H.R. 261, 280; *Bladet Tromsø*, 1999-III Eur. Ct. H.R. at 324-25; *see Fressoz*, 1999-I Eur. Ct. H.R. at 21-22 (indicating that the “duties and responsibilities” of journalists depend on the situation but that information disclosed about a private individual must always relate to a matter of public concern).

Court has relied on these duties and responsibilities in a more systematic manner.<sup>185</sup> In applying the requirement of good faith to concrete cases, the Court has linked it to the standards of proof required for statements of fact and/or value judgments.<sup>186</sup> The Court has thus in several post-*Chauvy* cases found a failure to exhibit good faith when an applicant either had not attempted to verify the reliability of her sources or was not able to substantiate her defamatory statements by providing proof or at least a sufficient factual basis.<sup>187</sup> This was the deciding factor in *Europapress Holding D.O.O. v. Croatia*, in which the applicant could not substantiate her factual accusation, made in a newspaper article, that a certain Minister had threatened to kill a journalist while pointing a gun at her.<sup>188</sup> Here, the Court settled the conflict between freedom of expression and the right to reputation in favor of the latter because the applicant had not upheld her duties and responsibilities in

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185. See, e.g., *Pedersen*, App. No. 49017/99 at ¶ 78 (surmising that special grounds are required before the media can be relieved of their ordinary obligation to verify factual statements that defame private individuals); *Busuioc v. Moldova*, App. No. 61513/00, ¶ 59 (Eur. Ct. H.R. Dec. 21, 2004) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (obliging journalists to act in good faith to provide accurate and reliable information in accordance with the ethics of journalism).

186. See, e.g., *Kwiecień v. Poland*, App. No. 51744/99, ¶ 54 (Eur. Ct. H.R. Jan. 9, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (finding that, though the lower court found that none of the statements had a sufficient factual basis, the applicant was nonetheless acting in good faith and participating in a public debate); *Radio Twist, A.S. v. Slovakia*, App. No. 62202/00, ¶ 63 (Eur. Ct. H.R. Dec. 19, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (basing the Court's judgment in part on the fact that the journalists were not acting in bad faith in their report).

187. See, e.g., *Europapress Holding D.O.O. v. Croatia*, App. No. 25333/06, ¶¶ 66-68 (Eur. Ct. H.R. Oct. 22, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (reiterating that "the more serious the allegation is, the more solid the factual basis should be"); *Mahmudov v. Azerbaijan*, App. No. 35877/04, ¶ 44 (Eur. Ct. H.R. Dec. 18, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (demonstrating that it was not sufficient for the applicant to claim that his assertions were "generally known fact[s] which did not require proof"); *Alithia Publ'g Co. v. Cyprus*, App. No. 17550/03, ¶ 67 (Eur. Ct. H.R. May 22, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (finding that, since the applicants did not practice good faith, there was no reason to determine whether any special circumstances ultimately existed to excuse them from verifying the statements).

188. App. No. 25333/06 at ¶¶ 6, 67.

exercising her freedom of expression.<sup>189</sup> However, the Court has also developed a line of reasoning whereby it considers whether special grounds exist for discharging the press media's ordinary obligations to verify factual statements that defame private individuals.<sup>190</sup> The existence of such special grounds depends on the "nature and degree of defamation at hand" and the reliability of the sources providing the information.<sup>191</sup> These elements are linked, respectively, to the impact and the responsibility criteria of the model.

In a limited number of cases, the Court has relied on this line of "special grounds" reasoning to find that the applicant had acted in good faith despite the absence of sufficient evidence for a statement of fact or value judgment on an issue of public interest.<sup>192</sup> For example, in *Flux v. Moldova (no. 7)*, the Court established that the applicant had acted in good faith, despite there being insufficient evidence to support the allegation, published in a news article, that members of the Communist Party had been granted free housing in a

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189. *Id.* ¶¶ 66-71. Compare *Flux v. Moldova (no. 1)*, App. No. 28702/03, ¶¶ 29, 31 (Eur. Ct. H.R. Nov. 20, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (finding no Article 10 violation even though the journalists were unable to prove the truth of their statements), with *Alithia Publ'g Co.*, App. No. 17550/04 at ¶ 71 (determining that interference with Article 10 rights was justified because applicants lacked good faith and acted in "flagrant disregard of the duties of responsible journalism").

190. See *Pedersen*, App. No. 49017/99 at ¶ 78 (noting that this exception will apply only in a narrow set of circumstances); *Bladet Tromsø v. Norway [GC]*, 1999-III Eur. Ct. H.R. 295, 325 (specifying that the presence of such grounds should be determined "in light of the situation as it presented itself to [the applicant] at the material time, rather than with the benefit of hindsight").

191. *Bladet Tromsø*, 1999-III Eur. Ct. H.R. at 325; see *Flux (no. 1)*, App. No. 28702/03 at ¶¶ 28-32 (providing an example of post-*Chauvy* cases in which an additional element is added—the manner in which the article in question is written).

192. See, e.g., *Flux v. Moldova (no. 7)*, App. No. 25367/05, ¶¶ 41-44 (Eur. Ct. H.R. Nov. 24, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (holding that the applicant acted in good faith by visiting apartments in question to verify information, and that it would be unreasonable to ask for a more complete investigation given the lack of official information about the issue); *Tónsbergs Blad AS v. Norway*, App. No. 510/04, ¶¶ 96, 101 (Eur. Ct. H.R. Mar. 1, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (finding that the applicant acted in good faith, even though he did not verify his sources, because he had worked on the issue for an extensive period of time and possessed official documents regarding the issue).



State-owned warehouse building.<sup>193</sup> The Court came to this conclusion after finding that certain underlying facts were undisputed, thus granting a level of credibility to the allegation, and that the applicant had conducted adequate research in an attempt to verify the information and had acted in a professional manner by stating in the publication that it had not been possible to verify the truth of the allegation.<sup>194</sup>

As a result of the above ambiguity and other factors, such as the absence of a systematic reference to duties and responsibilities in post-*Chauvy* cases and the uncertainty of its impact on the reasoning of the Court, the exact weight of the responsibility criterion in the post-*Chauvy* case law remains unclear. However, the Court's increased number of references to the duties and responsibilities inherent in the exercise of freedom of expression indicates a certain sensitivity for this criterion. The Court would benefit from further exploring the possibility of its systematic application.

An interesting indication of the potential value of the responsibility criterion can be found in *Times Newspapers Ltd v. The United Kingdom (nos. 1 and 2)*.<sup>195</sup> In this case, which involved the archiving of defamatory publications, the Court held that the press has a strict obligation to act within the principles of responsible journalism when maintaining news archives.<sup>196</sup> The Court supported this finding by noting that there is limited urgency to publish such archives.<sup>197</sup> However, the Court agreed with the applicants that defamation victims should move quickly to protect their reputations, otherwise certain rights of the press would be infringed.<sup>198</sup> The Court accordingly encouraged the imposition of statutes of limitation for defamation claims, and suggested that the length of the limitation period should be determined by striking a balance between the need

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193. *Flux (no. 7)*, App. No. 25367/05 at ¶¶ 7, 45.

194. *Id.* ¶ 44.

195. App. Nos. 3002/03 & 23676/03 (Eur. Ct. H.R. Mar. 10, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

196. *Id.* ¶ 45.

197. *Id.*

198. *See id.* ¶ 46 (explaining that a time limitation is necessary to guarantee that newspapers are able to adequately defend themselves, since a lengthy delay could result in the loss of information).

to protect the freedom of expression and the right to reputation.<sup>199</sup> Here the Court combined the responsibility criterion and the additional rights criterion to advocate for a middle ground, or in other words, a practical concordance between both rights.

#### B. THE LEGAL REASONING OF THE COURT UNDER ARTICLE 8 OF THE ECHR

Article 8 defamation cases come before the the ECtHR when a plaintiff, whose domestic defamation proceeding has failed, claims a violation of her right to reputation.<sup>200</sup> The Court addressed this conflict in cases such as *Karakó v. Hungary* and *Gunnarsson v. Iceland*, analyzed above.<sup>201</sup>

An examination of several other Article 8 cases shows that the legal reasoning of the Court in those cases is in some respects more systematic than that employed in its Article 10 case law. First, the Court begins its Article 8 analysis by explicitly identifying the conflict between freedom of expression and the right to reputation, thus paving the way for attention to be paid to both rights.<sup>202</sup> Second, the Court appears to take a more balanced approach to the conflict in Article 8 cases. While it has also relied heavily on the principles developed under its Article 10 case law, it has been more aware of the need to examine the case from the perspective of both rights involved.<sup>203</sup> The Court has thus established that the positive

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199. *Id.* ¶¶ 46, 48.

200. *E.g.*, *Karakó v. Hungary*, App. No. 39311/05, ¶ 18 (Eur. Ct. H.R. Apr. 28, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

201. *See supra* notes 43-51 and accompanying text.

202. *E.g.*, *A. v. Norway*, App. No. 28070/06, ¶ 65 (Eur. Ct. H.R. Apr. 9, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>; *Petrina v. Romania*, App. No. 78060/01 (Eur. Ct. H.R. Oct. 14, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>; *Pfeifer v. Austria*, App. No. 12556/03, ¶ 38 (Eur. Ct. H.R. Nov. 15, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>; *White v. Sweden*, App. No. 42435/02, ¶¶ 20-21 (Eur. Ct. H.R. Sept. 19, 2006) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>; *see Minelli v. Switzerland (dec.)*, App. No. 14991/02, ¶ 21 (Eur. Ct. H.R. June 14, 2005) (HUDOC Database) available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (referring continuously to the “personality” of the applicant, but not to their “reputation”).

203. This is entirely logical, since these principles offer useful guidance when

obligations of Article 8 may arise where defamatory statements exceed the limits of acceptable criticism allowed under Article 10.<sup>204</sup> Third, in certain Article 8 cases, the Court offers additional insight into its view on the relationship between freedom of expression and the right to reputation, thereby offering more transparency in its reasoning. In *Petrina v. Romania*, for example, the Court ruled that statements directly accusing a named individual and completely devoid of a factual basis cannot benefit from the defense of exaggeration or provocation.<sup>205</sup>

Regarding the presumption of innocence in cases involving allegations of criminal conduct, the Court's Article 8 case law offers mixed results, similar to its Article 10 case law. While the Court did not reference Article 6(2) in *Pfeifer v. Austria*,<sup>206</sup> it did consider the right to presumption of innocence in *White v. Sweden*.<sup>207</sup> The latter case arose after newspaper articles ascribed several criminal offenses to the applicant, including the murder of Prime Minister Olaf Palme.<sup>208</sup> The Court ultimately found no violation of Article 8 on these facts, deciding instead that the public interest in being informed outweighed the applicant's right to reputation.<sup>209</sup>

While the Court's reasoning under Article 8 is, in some ways, more coherent and transparent than its reasoning under Article 10, the Court still falls prey to some of the same pitfalls in both sets of case law. Most notably, it continues the one-sided application of the impact criterion and fails to remedy the problematic issue of preferential framing. An example of the former can be found in *A. v. Norway*, a case in which a newspaper article alleged that, due to his prior conviction, the applicant was the prime suspect in a murder

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determining the importance of freedom of expression *in casu*.

204. *E.g.*, *Petrina*, App. No. 78060/01 at ¶ 39; *Pfeifer*, App. No. 12556/03 at ¶ 44.

205. *Petrina*, App. No. 78060/01 at ¶¶ 44-48 (involving an applicant who had been unsuccessful in her domestic defamation action against a journalist who alleged that she had collaborated with *Securitate*, the Romanian secret service during the Communist regime).

206. *See* App. No. 12556/03 at ¶ 44 (focusing exclusively on conflicting rights found in Article 10).

207. App. No. 42435/02 at ¶ 21 (considering competing rights under both Articles 6(2) and 10).

208. *Id.* ¶ 8.

209. *Id.* ¶ 30.

investigation.<sup>210</sup> In this case, the Court found a violation of Article 8 after establishing that the public interest nature of the publication did not justify the defamatory allegations, considering that the publication represented a “particularly grievous prejudice to the applicant’s honour and reputation that was especially harmful to his moral and psychological integrity and to his private life.”<sup>211</sup> Regrettably, the Court here exhibits one of the major shortcomings of the case law under Article 10; namely, it applies the impact criterion only from the side of the invoked right—the right to reputation—without examining the impact on the other right—the freedom of expression. This one-sided application is a substantial indication that the Court continues to practice preferential framing in its defamation case law.

Arguably, the most striking difference between the Article 8 and Article 10 case law is the distinction between statements of fact and value judgments. In two Article 8 cases, the Court found a violation largely based on the lack of proof for the factual allegations.<sup>212</sup> However, in both cases the Court also stated that even if it had considered the statement to be a value judgment, the ruling would have been the same because there was no sufficient factual basis to support the claim.<sup>213</sup>

In *Pfeifer v. Austria*, a case involving articles in a weekly publication, there was an allegation that a journalist’s harsh criticism of a professor had unleashed a witch hunt against him, which eventually caused his suicide.<sup>214</sup> Here, the Court held that the

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210. App. No. 28070/06, ¶¶ 13-17 (Eur. Ct. H.R. Apr. 9, 2009) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (quoting the defamatory information published in the newspaper, which linked the applicant to two murders and discussed the manner in which the police had interrogated him).

211. *Id.* ¶¶ 71,73 (revealing that the journalists followed the applicant on his way home and to his work place to obtain photographs and comments, thereby affecting his right to private life).

212. *Petrina v. Romania*, App. No. 78060/01, ¶¶ 47-48, 50 (Eur. Ct. H.R. Oct. 14, 2008) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>; *Pfeifer v. Austria*, App. No. 12556/03, ¶ 46-48 (Eur. Ct. H.R. Nov. 15, 2007) (HUDOC Database), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

213. *Petrina*, App. No. 78060/01 at ¶ 50; *Pfeifer*, App. No. 12556/03 at ¶ 48.

214. See App. No. 12556/03 at ¶¶ 7-11 (chronicling a series of articles published in response to one another, starting with the professor’s publication, which was

domestic court's failure to provide relief to the applicant violated his right to reputation under Article 8.<sup>215</sup> The accusation that the journalist was morally responsible for the professor's death severely maligned his reputation and lacked a sufficient factual basis.<sup>216</sup> Therefore, the defendant's freedom of expression did not outweigh the applicant's right to reputation.<sup>217</sup> In light of the Court's tendency, in an Article 10 analysis, to determine the status of the statement independently and to take a lenient attitude toward the requirement of a factual basis, it can seriously be doubted whether the result would have been the same if the case had been brought under Article 10. This further indicates that a problem of preferential framing indeed exists in the Court's defamation case law.<sup>218</sup>

## CONCLUSION

The European Court of Human Rights recognized the existence of a conflict between the right to freedom of expression and the right to reputation in defamation cases in *Chauvy v. France*.<sup>219</sup> Yet, the effect of this recognition on the legal reasoning of the Court under Article 10 has been minimal. While the legal reasoning of the Court under Article 8 appears, to a certain extent, to be more systematic, there remains a lack of consistency and transparency in the Court's reasoning under both Articles. The main problem is preferential framing, primarily caused by what can be referred to as the one-sided application of the impact criterion.

There are strong indications that the Court's ruling in a given case indeed depends on which Article is invoked by the applicant. However, the research has also discerned interesting lines of reasoning in the Court's case law, which are closely connected to the elements of the model presented in this paper. A more widespread adherence to these lines of reasoning and to the model would assist

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criticized by the applicant for including Nazi terminology and disseminating ideas typical of Nazi ideology).

215. *Id.* ¶ 49.

216. *See id.* ¶¶ 44-49 (holding first that the statement was a baseless factual accusation, but also noting that even if the statement was considered a "value judgment," it still lacked a sufficient factual basis).

217. *Id.* ¶ 49.

218. *E.g., id.* ¶ 11 (Schäffer, J., dissenting).

219. 2004-VI Eur. Ct. H.R. 211.

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the Court in developing a more consistent and transparent resolution to the conflict between freedom of expression and the right to reputation.

Considered on the whole, the Court's defamation case law clearly supports a *Praktische Konkordanz* solution to the conflict between freedom of expression and the right to reputation—where neither right is granted absolute preference. The Court advocates finding a middle ground between both rights because the freedom of expression does not confer an unlimited right to make statements that affect another's reputation, and because the right to reputation does not warrant a complete protection against all critical statements. In this respect, an important conclusion to be drawn from the research is that the criteria of the model, while designed to determine which right should take preference in the event of a conflict, can also assist in finding a practical concordance between the freedom of expression and the right to reputation *in abstracto*.