A Hemispheric Agenda for the Defense of Freedom of Expression

Office of the Special Rapporteur for Freedom of Expression
Inter American Commission on Human Rights

IACHR 50 years defending HUMAN RIGHTS

Organization of American States

ISBN 978-0-8270-5447-9

OEA/Ser.L/V/II
CIDH/RELE/INF. 4/09
25 February 2009
Original: Spanish

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Office of the Special Rapporteur for Freedom of Expression
Inter American Commission on Human Rights

2010
Internet: http://www.cidh.org/relatoria
Email : cidhexpresion@oas.org

OAS Cataloging-in-Publication Data

Inter-American Commission on Human Rights. Office of the Special Rapporteur on Freedom of Expression.

Una Agenda hemisférica para la defensa de la libertad de expresión = a[n] hemispheric agenda for the defense of freedom of expression / Relatoría Especial para la Libertad de Expresión, Comisión Interamericana de Derechos Humanos.

p. ; cm. (OEA documentos oficiales ; OEA Ser.L/V/II CIDH/RELE/INF.)(OAS official records ; OEA Ser.L/V/II CIDH/RELE/INF.)

ISBN 978-0-8270-5447-9

1. Freedom of information--Legal aspects--America. 2. Freedom of speech--America. 3. Freedom of information--America. 4. Civil rights--America. 5. Human rights--America. I. Title. II Series. III. Series. OAS official records ; OEA/Ser.L. V/ II CIDH/RELE/INF.

KG576 .I58 2010 OEA Ser.L/V/II CIDH/RELE/INF. 4/09

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Book printed thanks to the financial support Swedish International Development Cooperation Agency – SIDA / ASDI

Approved by the Inter-American Commission on Human Rights on February 25, 2009[1]

[1] The incorporation of this document into the Annual Report of the IACHR was approved in February 2009 in plenary session by the Commission, composed of Luz Patricia Mejia Guerrero, Victor E. Abramovich, Felipe Gonzalez, Sir Clare Kamau Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez and Paolo G. Carozza.

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OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION
INTER AMERICAN COMMISSION ON HUMAN RIGHTS

A Hemispheric Agenda for The Defense of Freedom of Expression

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African Commission or ACHPR:	African Commission on Human and Peoples' Rights
American Convention:	American Convention on Human Rights
Declaration of Principles:	Declaration of Principles on Freedom of Expression
IACHR:	Inter-American Commission on Human Rights
ICCPR:	International Covenant on Civil and Political Rights
ILO:	International Labor Organization
Inter-American Court:	Inter-American Court of Human Rights
OAS:	Organization of American States
OSCE:	Organization for Security and Cooperation in Europe
Office of the Special Rapporteur:	Office of the Special Rapporteur for Freedom of Expression of the IACHR
UN:	United Nations

A HEMISPHERIC AGENDA FOR THE DEFENSE OF FREEDOM OF EXPRESSION

A. Introduction

1. During the final decades of the 20th Century, there was a true democratic rebirth in the Americas. This new era was characterized by the end of the military dictatorships, the decline of the Cold War culture, and the emergence of new constitutional hopes. Nevertheless, in certain areas the legal and cultural legacy of the authoritarian regimes still persisted and its influence had managed to make its way into some of the systems where democratic forms of government had been maintained. This influence was particularly notable in some areas, and such was the case of the right to freedom of expression.

2. At the beginning of the 1990s, it was not unusual to have laws that established the prior state censorship of books, films and works of art, as a manner of protecting *social morals, public order and good manners.* Journalists and critical media had few guarantees for exercising their right to express themselves freely when their thoughts or opinions might be offensive or shocking to those who held public office, to powerful sectors of society or to the majority of the population.

3. Little more than a decade ago, those who maintained that the offense of *desacato* was the only way to control *violence against the State* and maintain the majesty, dignity and legitimacy of its institutions were not minority voices. As such, the culture of secrecy prevailed, based on a pre-modern idea that the State's institutions, by virtue of simply being what they were, were worthy of the people's full trust and support. According to this view, government officials should be able to work *in peace* without the bothersome demands of transparency or requests for information, which *were time-consuming, required funds, and contributed little to the country's progress.*

4. There were also other destructive legacies of the authoritarian doctrines, including dramatically restrictive press laws and arbitrary systems for the allocation of public goods and resources fundamental to the exercise of freedom of expression, such as the distribution of government advertising, television and radio frequencies or subsidies for culture and the arts.

5. Finally, one of the most serious attacks on freedom of expression took the form of absolute impunity for crimes that had been committed with the intention of silencing a dissident opinion, an inconvenient point of view, a different way of seeing and thinking about the State and society—systematic crimes that had been committed against young students, labor and peasant leaders, indigenous people, journalists, and anyone who dared to think differently or to react against the arbitrariness of the State. Ten years ago, these victims of the worst form of censorship did not occupy an important place on the political agenda.

6. The 20th Century came to a close with a democratically renewed region. Nevertheless, at least on the topic of freedom of expression, there was still much to be done. It was within this context, marked by an authoritarian cultural and legal heritage, but also by the hope engendered by the end of the Cold War and the new momentum of our constitutional democracies, that the Office of the Special Rapporteur for freedom of expression of the IACHR was created.

7. Currently, progress in the area of freedom of expression, although insufficient, is notable: freedom of expression is enshrined in nearly all of their Constitutions,

and laws and government programs have incorporated and implemented different aspects of this right into their domestic systems. In the majority of States, mechanisms of direct censorship are virtually non-existent. Several States have repealed the offenses of *desacato* and criminal defamation (in its numerous manifestations);[2] others have added to or updated their laws with the objective of guaranteeing access to information.[3] In spite of the fact that impunity continues to be a serious problem, there have been important advances in that area.[4] During these years it has also become possible to see new aspects of the issue of freedom of expression in the region, such as forms of indirect censorship (the discriminatory placement of government advertising, the concentration of ownership of the communications media, among others) and self-censorship. Further, the inter-American system for the protection of human rights has become more accessible and effective: the last decade has seen the exponential growth of the number of individual cases handled by the IACHR and judgments handed down by the Inter-American Court of Human Rights on the issue of freedom of expression. In addition, a significant number of national courts have incorporated international standards on right to freedom of expression into their decisions.[5]

8. These advances have arisen from the consolidation or deepening of our democracies and from the vigorous, active and central participation of civil society in the defense and promotion of the right to freedom of expression throughout the region. But these advances are also a result of the advocacy of the inter-American system for the protection of human rights with respect to the right of freedom of expression during the last decade.

9. The role of the IACHR and the Inter-American Court has been fundamental to reinforce the right to freedom of expression in the inter-American legal order. The case law of the system has made clear that all of the region's inhabitants have the right to think for themselves and to express their opinions or ideas by any means and without fear of being persecuted, sanctioned or stigmatized; to participate in public debate through the means that exist to promote and enrich it; to know about other opinions and views of the world and to discuss their own with those who hold different, or completely contrary positions; to access relevant information in detail in order to exercise the political checks and balances that make possible a true, deliberative democracy. As explained below, it is reasonable to assert that the practical achievements in the effective enjoyment of freedom of expression throughout the region have been obtained, at least in part, as a consequence of the consolidation of the regional international law on the issue.

10. The task of the Office of the Special Rapporteur in this process of consolidating regional law has been to advocate the inter-American standards on the issue,

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[2] Argentina, Paraguay, Costa Rica, Peru, Panama, El Salvador, Honduras, Guatemala, among others, have repealed the offense of *desacato* from their laws. Argentina, Mexico and Panama, among others, have repealed criminal defamation (or similar crimes) in cases of expressions about public officials.

[3] In recent years, Chile, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, the Dominican Republic, Trinidad and Tobago, Uruguay, among others, have enacted laws on access to information.

[4] On this point, see: IACHR, *Special Study on the Status of Investigations into the Murder of Journalists during the 1995 – 2005 Period for Reasons that may be Related to Their Work in Journalism,* OEA/Ser. L/V/II.131 Doc. 35, March 8, 2008. Available at: http://www.cidh.org/relatoria/section/Asesinato%20de%20Periodistas%20INGLES.pdf. See also: reports from the Impunity Project, available at: http://www.impunidad.com/.

[5] On this issue, please refer to the Annual Reports of the Office of the Special Rapporteur, which discuss important comparative case law on the domestic implementation of international standards. Available at: http://www.cidh.oas.org/Relatoria/docListCat.asp?catID=24&lID=1. In particular, Chapter V of the 2009 Annual Report describes some of the most important advances in terms of the domestic incorporation (both through legislative and judicial action) of inter-American standards on freedom of thought and expression in 2009.

promote their implementation within national systems, and strengthen the operating capacity of States and the civil society organizations charged with developing the exercise and scope of the right to freedom of expression. Nevertheless, there are still unresolved issues, as well as new and important challenges.

11. The section following this chapter provides a summary of the progress made, and describes briefly the main difficulties and challenges currently facing the right to freedom of expression in the region.

B. Goals Achieved: Content and scope of the right to freedom of expression in the regional case law[6]

12. As previously mentioned, the advances in the effective enjoyment of the right to freedom of expression that have taken place in the Americas during the course of the last decade have triggered the very significant parallel development of the inter-American legal standards relative to this right. The following paragraphs provide a summary of the most important decisions on the international obligations of States with respect to the scope, content, areas of implementation, forms of exercise and limits to this fundamental right.

13. A quantitative look at the development of the case law of the IACHR and the Inter-American Court is illustrative in this respect. By 1998, the inter-American system had a short catalog of decisions that substantially addressed the issue of freedom of expression. The IACHR had referred to the topic in its country reports and had published a limited number of merits reports[7] and one thematic report[8] on issues relating to this right, while the Inter-American Court had issued two advisory opinions.[9] These important decisions laid the foundation for the subsequent development of the case law of the inter-American system in the field, particularly Advisory Opinion OC-5/85 of the Inter-American Court on the compulsory membership of journalists in a professional association, and the IACHR *Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights*. Nevertheless, in spite of the efforts made, in 1998 there were large gaps in the regional international law of the Americas with regard to the fundamental aspects of freedom of expression. Ten years later, the legal landscape has changed. The Inter-American Court issued, over the course of this decade, eleven landmark judgments[10] that made—each in its

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[6] These inter-American standards explained here are laid out in much greater detail Chapter III of the 2008 and 2009 Annual Reports of the Office of the Special Rapporteur, available at: http://www.cidh.org/Relatoria/docListCat.asp?catID=24&IID=1.

[7] Among them are the reports contained in: IACHR, Report No. 2/96. Case No. 10.325, *Steve Clark et al.* Grenada. March 1, 1996; IACHR. Report No. 11/96. Case No. 11.230. *Francisco Martorell.* Chile. May 3, 1996; IACHR, Report No. 29/96. Case No. 11.303. *Carlos Ranferí Gómez López.* Guatemala. October 16, 1996; IACHR. Report No. 38/97. Case No. 10.548. *Hugo Bustíos Saavedra.* Peru. October 16, 1997.

[8] IACHR, 1994 Annual Report, Chapter V: *Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights.* OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. Adopted during the 88th regular session.

[9] These are: I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. I/A Court H.R., *Enforceability of the Right to Reply or Correction* (arts. 14.1, 1.1 and 2 American Convention on Human Rights). Advisory Opinion OC-7/86 of August 29, 1986. Series A No. 7.

[10] I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.).* Judgment of February 5, 2001. Series C No. 73; I/A Court H.R., *Case of Ivcher Bronstein.* Judgment of February 6, 2001. Series C No. 74; I/A Court H.R., *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107. I/A Court H.R., *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111; I/A Court H.R., *Case of Palamara Iribarne*. Judgment of November 22, 2005. Series C No. 135; I/A Court H.R., *Case of Claude Reyes et al.* Judgment of September 19, 2006. Series C No. 151; I/A Court H.R. *Case of Kimel v. Argentina.* Merits, Reparations and Costs.

specific area—substantive advances in defining the scope of freedom of expression, while the IACHR, aside from the impetus given to the eleven cases decided by the Inter-American Court, adopted the Declaration of Principles on Freedom of Expression[11] and published important merits reports that have not only put the Americas in tune with the legal developments that have been taking place worldwide, but have in many cases spurred such developments. In the remaining part of this section we present a brief summary of the most important decisions rendered on the issue.

14. The legal framework provided by the inter-American system for the protection of human rights has been established among the various regional systems as the one most favorable to the rights of the individual. Article 13 of the American Convention on Human Rights places an extremely high value on freedom of expression.[12] The same is true of the American Declaration on the Rights and Duties of Man (Article IV)[13] and the Inter-American Democratic Charter (Article 4).[14] This section will provide a summary of the most important developments in the jurisprudence on the issue: (i) the individual and collective aspects of the right to freedom of expression; (ii) the different functions this right has in democratic societies and its corresponding value (or relative weight) when resolving tensions with competing rights; (iii) the forms and speech protected and *specially* protected by the right to free expression, as well as speech that is not protected; (iv) the requirements that

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Judgment of May 2, 2008. Series C No. 177. I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194, I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 20, 2009. Series C No. 207. There are other cases in which the Inter-American Court has rendered important decisions on the scope of the right to freedom of thought and expression, even though the main legal issues in such cases concerned the infringement of rights other than the right enshrined in Article 13 of the American Convention: I/A Court H.R., *Case of López Álvarez*. Judgment of February 1, 2006. Series C No. 141; I/A Court H.R., *Case of Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101; I/A Court H.R. I/A Court H.R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Judgment of August 5, 2008. Series C No. 182.

[11] The Declaration of Principles on Freedom of Expression was adopted by the IACHR in October of 2000 during its 108th regular session.

[12] This article state that: "American Convention on Human Rights. Article 13: "Freedom of Thought and Expression. 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. // 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals. // 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. // 4. Public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. // 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

[13] "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever." American Declaration on the Rights and Duties of Man. Article IV.

[14] "Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. // The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy." Inter-American Democratic Charter, Article 4.

must be demonstrated to justify a limitation to this right and the types of limitations permitted; (v) the scope of the right to access to information; and (vi) other specific developments and characteristics of the right to freedom of expression. A brief review of these distinguishing features of freedom of expression, as interpreted by the case law of the inter-American system, provides an overview of the contribution of the IACHR and the Inter-American Court to the consolidation of this right as one of the structural columns of the Inter-American system for the protection of human rights.

1. The two dimensions of freedom of expression

15. The case law of the inter-American system has characterized freedom of expression as a right with two dimensions: an individual aspect, consisting of the right of each person to express his own thoughts, ideas and information, and a collective or social aspect, consisting of society's right to obtain and receive any information (*information and ideas of any kind*), to know the thoughts, ideas and information of others, and to be well-informed.[15] Bearing in mind its dual nature, it has been explained that freedom of expression is a *means for the exchange* of information and ideas between people and for mass communication among individuals.[16] It has been held that for the average citizen, knowledge of the opinions or information held by others is just as important as his right to impart his own beliefs or information.[17] It has also been emphasized that a specific act of expression involves both dimensions simultaneously, and that a limitation to the right to freedom of expression therefore affects at the same time both the right of the person who wishes to impart information or ideas and the right of members of society to know such information or ideas.[18] In addition, the right to information and to receive the greatest quantity of diverse information and opinions requires that a special effort be made to provide access to public debate under equal conditions and without any type of discrimination. This assumes special conditions of inclusion to allow all sectors of society to exercise this right effectively.

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[15] *Cfr*. *Case of Kimel v. Argentina*. *supra* note 9, para. 53; *Case of Claude Reyes et al*. *supra* note 9, para. 76; *Case of López Álvarez*. *supra* note 9, para. 163; *Case of Herrera Ulloa, supra* note 9, paras. 109-111; *Case of Ivcher Bronstein supra* note 9, para. 146; *Case of Ricardo Canese, supra* note 9, paras. 77-80; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*. *supra* note 9, paras. 64-67; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights) *supra* note 8, pp. 30-33. See also: 1994 Annual Report, Chapter V: *Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights.* OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. Adopted during the 88th regular session. IACHR. Report No. 130/99. Case No. 11.740. *Víctor Manuel Oropeza*. Mexico. November 19, 1999. IACHR. Report No. 50/99. Case No. 11.739. *Héctor Félix Miranda*. Mexico. April 13, 1999. IACHR. Report No. 11/96, Case No. 11.230. *Francisco Martorell.* Chile. May 3, 1996.

[16] *Cfr*. *Case of Herrera Ulloa*. *supra* note 9, para. 110; *Case of Ivcher Bronstein*. *supra* note 9, para. 148; *Case of Ricardo Canese*. *supra* note 9, para. 79; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.]*, *supra* note 9, para. 66; Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights). *supra* note 9, para. 32. See also: 1994 Annual Report, Chapter V: *Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights.* OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. Adopted during the 88th regular session.

[17] *Cfr*. *Case of Ivcher Bronstein, supra* note 9, para. 148; *Case of Ricardo Canese*, *supra* note 9, para. 79; *Case of "The Last Temptation of Christ" (Olmedo Bustos y otros), supra* note 9, para. 66; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights). *supra* note 9, para. 32.

[18] *Ibid.* See also: IACHR. Report No. 11/96. Case No. 11.230. *Francisco Martorell.* May 3, 1996. IACHR. Report on the Merits No. 90/05. Case No. 12.142. *Alejandra Matus Acuña*. Chile. October 24, 2005.

2. The functions of freedom of expression

16. The two dimensions of freedom of expression (individual and collective) underscore the different functions that this right has in a democratic society. In this sense, it can be said that freedom of expression has a threefold function.

17. First, the right to freedom of expression has the function of protecting each person's ability to exercise freely his most prized faculty: the right to share with other people one's own thoughts and the thoughts of others. It is not necessary to elaborate on the relevance of this first function to freedom of expression as an autonomous right. It is sufficient to recall, for example, that the choice of one's own life project or the construction of a collective project, as well as all the creative potential of art, science, technology or politics depends, among other fundamental factors, on the respect for the human right to freedom of expression.

18. Second, the IACHR and the Inter-American Court have underscored in their case law that the importance of freedom of expression within the catalog of human rights is derived also from its structural relationship to democracy.[19] Indeed, the full exercise of the right to express one's own ideas and opinions and to circulate available information, and the ability to deliberate openly and without inhibitions on matters that concern all of us, is an indispensable condition for the consolidation, functioning and preservation of democratic systems. The development of a public opinion that is informed and conscious of its rights, citizen oversight over public administration, and the ability to demand the responsibility of government officials would not be possible if this right were not guaranteed. Along these lines, the case law has emphasized that the democratic function of freedom of expression makes it a necessary condition for preventing authoritarian systems from taking root, and for facilitating personal and collective self-determination.[20] In this respect, if the exercise of the right to freedom of expression favors not only the personal fulfillment of the individual who expresses an opinion but also the consolidation of truly democratic societies, the State has the obligation to create the conditions so that public debate satisfies both the legitimate needs of all people as consumers of specific information (entertainment, for example) and also as citizens. That is, there have to be sufficient conditions for public, plural and open deliberation to be able to occur with respect to the issues that concern all of us as citizens of a given State.[21]

19. Finally, the case law of the inter-American system has explained that freedom of expression has an important instrumental function, as it is an essential tool for

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[19] *Cfr*. I/A Court H.R., *Case of Claude Reyes et al., supra* note 9, para. 85; *Case of Herrera Ulloa*. *supra* note 9, paras. 112-113; *Case of Ricardo Canese. supra* note 9, paras. 82-82; *Case of Ivcher Bronstein*, *supra* note 9, para. 152; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*, *supra* note 9, para. 69; *Case of Tristán Donoso Vs. Panama, supra* note 9, at paras. 113, *Case of Ríos et al. Vs. Venezuela. Supra* note 9, at paras. 105, *Case of Perozo et al. Vs. Venezuela, supra* note 9, at paras. 116, *Case of Usón Ramírez v. Venezuela, supra* note 9, at paras. 47, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights). *supra* note 9, para. 70.

[20] *Cfr*. *Case of Herrera Ulloa, supra* note 9, para. 116; *Case of Ricardo Canese*, supra note 9, paras. 86; *Case of Ríos et al. Vs. Venezuela. Supra* note 9, at paras. 105, *Case of Perozo et al. Vs. Venezuela, supra* note 9, at paras. 116. See also: IACHR. Report No. 130/99. Case No. 11.740. *Case of Víctor Manuel Oropeza*. November 19, 1999.

[21] IACHR, 1994 Annual Report, Chapter V, *Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights.* February 17, 1995. Adopted during the 88th regular session.

the exercise of all other fundamental rights.[22] Indeed, freedom of expression is an essential mechanism for the exercise of the right to participation, to religious freedom, to education, to ethnic or cultural identity and, of course, to equality—understood not as the right to nondiscrimination, but rather as the right to enjoy certain basic social rights. Given the important instrumental role it plays, this right is located squarely in the center of the hemisphere's system for the protection of human rights.

3. Forms and speech that are protected and specially protected by the right to free expression and speech that is not protected

20. The case law of the IACHR and the Inter-American Court has recognized that the scope of protection of freedom of expression is nearly as broad as the possibilities for communications among people. The case law has explained that, consequently, this freedom covers a wide range of expression, in terms of both form and content. Thus, with regard to the form of protected expressions, it has been held that in principle all forms of expression are covered by Article IV of the American Declaration and Article 13 of the American Convention. Nevertheless, some specific modes of expression have received the explicit attention of the instruments and bodies of the inter-American system for the protection of human rights. While the following is not an exhaustive list, and does not purport to limit the expansive and fluid content of this freedom, the following types of expression can be identified as forms that are clearly protected by Article IV of the American Declaration and Article 13 of the American Convention: (a) oral expression in the language of one's choice, (b) written or printed expression in the language of one's choice, (c) symbolic or artistic expression in whatever form it is manifested, (d) the dissemination of ideas, thoughts, opinions, reports, information or other forms of expression, by any means of communication of one's choice, (e) the search for, procurement of, and receipt of information, ideas, opinions, thoughts and other forms of expression, including those held by the State, and (f) the possession of information or material that is expressive, printed or in any other way susceptible to possession, as well as its transport and its distribution.

21. From another perspective, in relation to the content of the speech protected by the right to freedom of expression, the IACHR and the Inter-American Court have stated that, in principle, all speech is protected by freedom of expression, regardless of its content and the degree of State and social acceptance it may be met with. This general presumption of coverage is explained by the primary obligation of neutrality of the State with regard to content, and consequently, by the need to guarantee that, in principle, no individuals, groups, ideas or means of expression are excluded *a priori* from public debate. The general presumption of coverage protects not only the dissemination of ideas and information that are received favorably or considered inoffensive or indifferent but also those that are offensive, shocking, unsettling, unpleasant or disturbing to the State or to any sector of the population, as this is required by the principles of pluralism and tolerance inherent in a democracy.[23] Nevertheless, certain speech is not protected by freedom of expression, by virtue of having been expressly prohibited in international treaties. There are international instruments that reflect the desire of States to prohibit explicitly certain speech content that

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[22] *Cfr. Case of Claude Reyes et al. supra* note 9, para. 75. See also: IACHR. Report No. 130/99. Case No. 11.740. *Víctor Manuel Oropeza.* Mexico. November 19, 1999; IACHR. Report No. 38/97. Case No. 10.548. *Hugo Bustíos Saavedra.* Peru. October 16, 1997.

[23] *Cfr. Case of Herrera Ulloa, supra* note 9, para. 113; *Case of Ivcher Bronstein supra* note 9, para. 152; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.). supra* note 9, para. 69; *Case of Ríos et al. Vs. Venezuela. supra* note 9, at paras. 105, *Case of Perozo et al. Vs. Venezuela, supra* note 9, at paras. 116. See also: IACHR, 1994 Annual Report, Chapter V: *Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights*. Adopted during the 88th regular session.

is particularly violent and that seriously violates human rights. To date, the only speech that falls into that category is speech advocating violence, war propaganda, the incitement of hatred for discriminatory reasons,[24] the direct and public incitement of genocide,[25] and child pornography.[26]

22. On the other hand, within the broad range of speech effectively guaranteed by freedom of expression, there are certain types of speech that, according to the IACHR and the Inter-American Court, enjoy a special level of protection because of their critical importance to the functioning of democracy or for the exercise of other fundamental rights. This includes political speech and speech concerning matters of public interest,[27] speech concerning public officials or candidates for public office,[28] and speech that constitutes a basic element of the personal identity or dignity of the individual[29] (such as religious speech). The presumption of coverage is even stronger with this type of speech, and the requirements that must be met in order to justify its restriction are particularly strict.

23. On this point, Principle 11 of the Declaration of Principles states: "11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as '*desacato* (insult) laws', restrict freedom of expression and the right to information."

4. Requirements that must be met to justify a restriction to the right of freedom of expression

24. The IACHR and the Inter-American Court have developed a clear line in their case law as to the requirements that must be met in the case of government limitations to freedom of expression, regardless of the authority that issues them or the form that they take, and on certain types of restrictions that are not admissible. To summarize, the IACHR and the Inter-American Court have established three requirements for a specific limitation to freedom of expression to be compatible with Article IV of the American Declaration and Article 13 of the American Convention: (a) it must be defined clearly and precisely in a law, with regard to both substance and procedure,[30] (b) it must pursue objectives authorized by the Convention,[31] and (c) it must be necessary in a democratic society to serve the

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[24] Article 13.5, American Convention on Human Rights.

[25] Article III-c) of the Convention on the Prevention and Punishment of the Crime of Genocide.

[26] Convention on the Rights of the Child, Article 34-c; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; ILO Convention No. 182 on the worst forms of child labor, Article 3-b; American Convention on Human Rights, Article 19.

[27] *Cfr*. *Case of Herrera Ulloa, supra* note 9, para. 127; *Case of Ivcher Bronstein supra* note 9, para. 155. *Case of Tristán Donoso Vs. Panama, supra* note 9, at paras. 121; *Case of Usón Ramírez v. Venezuela, supra* note 9, at paras. 86. See: IACHR, 1994 Annual Report, Chapter V: *Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights.* February 17, 1995. Adopted during the 88th regular session.

[28] *Cfr*. *Case of Palamara Iribarne*, *supra* note 9, para. 82.

[29] *Cfr*. *Case of López Álvarez*. *supra* note 9, para. 171.

[30] *Cfr*. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights) *supra* nota 8, para. 59; *Case of Kimel*. *supra* note 9, para. 63; *Case of Claude Reyes et al. supra* note 9, para. 89; *Case of Herrera Ulloa, supra* note 9, para. 121. *Case of Tristán Donoso Vs. Panama, supra* note 9, at paras. 116; *Case of Usón Ramírez v. Venezuela, supra* note 9, at paras. 49. See also: IACHR, 1994 Annual Report, Chapter V: *Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights*. February 17, 1995. 88th regular session; IACHR. Report No. 11/96. Case No. 11.230. *Francisco Martorell*. May 3, 1996..

[31] *Cfr*. *Case of Palamara Iribarne*, *supra* note 9, para. 85; *Case of Herrera Ulloa, supra* note 9, paras. 121-123; *Case of Tristán Donoso Vs. Panama, supra* note 9, at paras. 116; *Case of Usón Ramírez v. Venezuela, supra*

compelling objectives pursued,[32] strictly proportionate to the objective pursued,[33] and must be appropriate to accomplish such objectives.[34] Further, it has been established that certain types of limitations are contrary to the American Convention. Thus, the limitations imposed must not amount to censorship,[35] and therefore must be established through the subsequent imposition of liability for the abusive exercise of the right;[36] they cannot be discriminatory or have discriminatory effects;[37] they cannot be imposed through indirect mechanisms of restriction;[38] and they must be exceptional.[39]

25. Verification of compliance with the aforementioned conditions is stricter when the limitations are placed upon especially protected speech, particularly speech concerning public officials, matters of public interest, candidates for public office, and the State and its institutions.[40] In particular, the Inter-American Court and the IACHR have coincided in affirming that any restriction must be the least costly one available, and that disproportionate measures may never be imposed.

26. On this point it is relevant to recall that Principles 5, 6, 7, 10 and 11 of the Declaration of Principles on Freedom of Expression refer to these issues clearly and precisely. Thus, Principle 5 stipulates that "[p]rior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression." Furthermore, Principle 6 stipulates that "every person has the right to communicate his/her views by any means and in any form.

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note 9, at paras. 49; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights) *supra* nota 8, para. 43.

[32] *Cfr*. *Case of Herrera Ulloa, supra* note 9, paras. 121-123; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights) *supra* nota 8, para. 46; *Case of Kimel. supra* note 9*,* para. 83; *Case of Palamara Iribarne*, *supra* note 9, para.85; *Case of Tristán Donoso Vs. Panama, supra* note 9, at paras. 116; *Case of Usón Ramírez v. Venezuela, supra* note 9, at paras. 49.

[33] *Ibid.* See also, IACHR, 1994 Annual Report, Chapter V: *Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights*. February 17, 1995. 88th regular session.

[34] *Cfr*. *Case of Kimel. supra* note 9*,* para. 83; *Case of Tristán Donoso Vs. Panama, supra* note 9, at paras. 116; *Case of Usón Ramírez v. Venezuela, supra* note 9, at paras. 49.

[35] *Cfr*. *Case of Kimel*. *supra* note 9*,* para. 54; *Case of Palamara Iribarne*, *supra* note 9, para. 79; *Case of Herrera Ulloa, supra* note 9, para. 120; *Case of Tristán Donoso Vs. Panama, supra* note 9, at paras. 110. See also: IACHR. Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*. Reprinted in the Judgment of August 31, 2004, Series C No. 111.

[36] *Cfr*. *Case of Kimel. supra* note 9*,* para. 54; *Case of Palamara Iribarne*, *supra* note 9, para. 79; *Case of Tristán Donoso Vs. Panama, supra* note 9, at paras. 110; *Case of Usón Ramírez v. Venezuela, supra* note 9, at paras. 48. See also, IACHR. Report No. 11/96. Case No. 11.230. *Francisco Martorell*. May 3, 1996. IACHR, 1994 Annual Report, Chapter V: *Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights.* February 17, 1995. Adopted during the 88th regular session.

[37] *Cfr*. *Case of López Álvarez. supra* note 9, para. 170; *Case of Ríos, supra* note 9, at paras. 349; *Case of Perozo, supra* note 9, at paras. 380.

[38] American Convention on Human Rights. Article 13.3. *Cfr*. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights) *supra* nota 8, para. 47.

[39] *Cfr*. *Case of Kimel. supra* note 9*,* para. 54.

[40] *Cfr. Case of Herrera Ulloa, supra* note 9, para. 120; *Case of Kimel. supra* note 9*,* para. 54; *Case of Palamara Iribarne*, *supra* note 9, para. 79; *Case of Tristán Donoso Vs. Panama, supra* note 9, at paras. 121; *Case of Usón Ramírez v. Venezuela, supra* note 9, at paras. 86.

Compulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression. Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State" . In turn, Principle 7 states that, "Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments." Principle 10 establishes that "[p]rivacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news." Finally, Principle 11 indicates that "[p]ublic officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as 'desacato' laws, restrict freedom of expression and the right to information."

27. The IACHR has maintained that the State incurs responsibility not only by placing arbitrary limitations on the right to freedom of expression but also by failing to remove any barriers to the free and nondiscriminatory exercise of this right. In this respect, Principle 12 of the Declaration of Principles provides that "[m]onopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals."

28. Finally, the Inter-American Court has determined that the State's liability for indirect restrictions on freedom of expression may also result from actions of private parties when it fails to guarantee the exercise of the right, taking into account the foreseeability of a real or immediate risk, as long as the actions effectively restrict (even in an indirect fashion) the communication of ideas and opinions[41].

5. The right to access to information

29. The IACHR and the Inter-American Court have ascribed particular importance to the right to access to information as a vital component of the freedom of expression protected by Article 13 of the American Convention. This Article encompasses the specific right of individuals to access such information, as well as information about themselves or their assets, contained in private databases. At the same time, it imposes the positive obligation upon the State to provide its citizens access to information.[42]

30. There are multiple reasons for the importance of the right to access to information, among which the case law of the inter-American system has underscored: (a) its nature as a critical tool for democratic participation, oversight of the functioning of the State and public administration, and the oversight of corruption by public opinion—without

[41] Case of Ríos, *supra* note 9, at paras. 340; Case of Perozo, *supra* note 9, paras. 367.

[42] *Cfr*. *Case of Claude Reyes et al. supra* note 9, para. 87. IACHR. See also, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*. Reprinted in the Judgment of September 19, 2006. Series C No. 151. Para. 87. Declaration of Principles on Freedom of Expression of the IACHR, Principles 2, 3 and 4.

which citizen scrutiny of government activity and the prevention of government abuse through informed public debate would be impossible;[43] (b) its value as a means of individual and collective self-determination, especially democratic self-determination, given that it enables individuals and societies to make informed decisions on the direction of their lives; and (c) its nature as an instrument for the exercise of other human rights, especially by those who are in subordinate or vulnerable positions, as it is only through the specific knowledge of the content of human rights and their forms and means of exercise that they can be enjoyed fully and effectively.

31. As such, the case law of the inter-American system has paid considerable attention to describing the different elements of the right to access to information, explaining that: (1) it is the right of every person; (2) in principle, it is not necessary to prove a personal interest or harm in order to obtain information held by the State, except where one of the exceptional restrictions permitted by the American Convention applies; (3) it enables people to access multiple types of information, including the information that the State keeps or manages, that it produces or is required to produce, that held by those who manage public services or public money, that the State collects or is required to collect, and personal information that it is in private databases; (4) it is governed by the principles of *maximum disclosure* and *good faith*. According to the principle of maximum disclosure, all information is presumed public, except where there are exceptional restrictions provided by law; it implies the superiority of freedom of information in the case of a conflict of rules or lack of regulation and the consequent mandate for the restrictive interpretation of the exceptions regime. According to the principle of good faith, those obligated by the right to access to information should take the necessary steps to ensure that their actions guarantee the public interest and do not undermine individuals' confidence in the state's management; (5) it imposes various specific obligations upon the State, including the obligation to answer in a timely, complete and accessible manner the requests received; the obligation to provide an administrative procedure for accessing information with reasonable deadlines for making a reasoned decision or, if a restriction is applicable, provide judicial recourse to appeal the denial; the obligation to provide information to the public *motu proprio*; the obligation to bring its domestic legal system into line with the requirements of this right; the obligation to adequately implement the standards on this issue; the obligation to produce or record certain kinds of information; the obligation to clearly justify denials of information; the obligation to generate a culture of transparency and the obligation to disclose appropriate information to the public regarding the existence and mechanics of the legal instruments available to effectively enforce this right; (6) finally, given that the right to access to information is a component of the right to freedom of expression, it must be understood that it is subject to a strict and exceptional set of limitations that must be provided for by law, restrictively and in advance, must be strictly necessary and proportionate, and subject to the possibility of legal challenge in specific cases where access to information is sought.[44]

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[43] *Ibid.* See also, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*. Reprinted in the Judgment of September 19, 2006. Series C No. 151. 1999 and 2004 Joint Declarations of the UN, OAS and OSCE Special Rapporteurs for Freedom of Expression.

[44] *Cfr*. I I/A Court H.R., *Case of Claude Reyes et al. supra* note 9. See also, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile.* Reprinted in the Judgment of September 19, 2006. Series C No. 151. Inter-American Juridical Committee. *Principles on the Right to Access to Information.* (CJI/Res. 147 – LXXIII-0/08, August 7, 2008). 1999, 2004 and 2006 Joint Declarations of the UN, OAS and OSCE Special Rapporteurs for Freedom of Expression.

6. Other specific developments and characteristics of the right to freedom of expression

32. The case law of the inter-American system has paid special attention to certain manifestations of the protection of freedom of expression under the Convention. Among the specific content that has been underscored by the IACHR and the Inter-American Court, we can first note the strict interpretation of the prohibition against censorship in the American Convention. This has been applied to direct restrictions that amount to mechanisms for the prior control of expression, as well as to indirect restrictions to this right by both government authorities and private individuals[45] that, in spite of the subtle nature of the mechanisms by which they are implemented, have the same effects of inhibition, repression or silencing of free expression.[46]

33. With regard to indirect restrictions, Inter-American jurisprudence has condemned such measures in a series decisions. For example, it has condemned the obligatory membership in a professional organization as a necessary requirement to practice journalism,[47] as well as the arbitrary use of State regulatory power when used to take actions designed to intimidate a media outlet as a result of the editorial slant of its programs.[48] Another means of indirect restriction involves statements by public officials that, in context, can constitute "forms of direct or indirect interference or harmful pressure on the rights of those who seek to contribute to public deliberation through the expression and diffusion of their thoughts."[49] Likewise, the Court has held that the disproportionate or discriminatory requirement of "accreditations or authorizations for the written media to participate in official events" would constitute an indirect restriction.[50]

34. On this issue, Principle 5 of the Declaration of Principles establishes that: "[p]rior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the creation of obstacles to the free flow of information violate the right to freedom of expression." Principle 13 of the same Declaration establishes that *"*[t]he exercise of power

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[45] Cfr. Case of Ríos, *supra* note paras. 107 to 110 and 340, and Case of Perozo, *supra* note 9, paras. 118 to 121 and 367.

[46] American Convention on Human Rights. Article 13.2. Declaration of Principles on Freedom of Expression of the IACHR. *Cfr*. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights) *supra* nota 8, para. 39. I/A Court H.R., *Case of Palamara Iribarne*. *Supra* note 9. Para. 79. See also, IACHR. Report on the Merits No. 90/05. Case No. 12.142. *Alejandra Matus Acuña*. Chile. October 24, 2005. IACHR. Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*. Reprinted in the Judgment of July 2, 2004. Series C No. 107. IACHR. Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay.* Reprinted in the Judgment of August 31, 2004. Series C No. 111. IACHR. Arguments before the Inter-American Court of Human Rights in the *Case of Palamara Iribarne v. Chile*. Reprinted in the Judgment of November 22, 2005. Series C No. 135.

[47] I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 76.

[48] I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs.* Judgment of February 6, 2001. Series C No. 74. paras. 158-163.

[49] I/A Court H. R., *Case of Ríos, supra* note 9 at paras. 139 and *Case of Perozo, supra* note 9 at paras. 151.

[50] *Case of Ríos, supra* note 9 at paras. 346. and *Case of Perozo, supra* note 9 at paras. 375.

and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans; the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the dissemination of information are incompatible with freedom of expression."

35. The Inter-American Court and the IACHR have stated clearly that monopolies or oligopolies in the ownership and control of the communications media seriously violate the right to freedom of expression.[51] Consequently, it is the obligation of States to subject ownership and control of the media to general antitrust laws to prevent *de facto* or *de jure* concentration that restricts the plurality and diversity needed to ensure the full exercise of the citizens' right to information. Likewise, the IACHR has indicated that the allocation of radio and television must consider democratic criteria that guarantee true equality of opportunity for all individuals in their access to them. In this sense, it has considered fundamental the recognition of so-called community radio and has indicated, for example, that auctions that take into account only economic factors or that grant concessions without equal opportunity for all sectors of society are incompatible with democracy and with the right to freedom of expression and information guaranteed in the American Convention on Human Rights and in the Declaration of Principles on Freedom of Expression.[52]

36. Likewise, the case law has emphasized the special *status* and the rights and duties of journalists under the American Convention,[53] highlighting in particular their right to receive protection from the authorities,[54] and the guarantee of their security, independence and autonomy as conditions for free expression in democratic societies.[55]

37. In this respect, Principle 6 of the Declaration of Principles indicates that "[j]ournalistic activities must be guided by ethical conduct, which should in no case be imposed by the State." For its part, Principle 8 establishes: "Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential." Principle 9 of the same Declaration states in turn that "[t]he murder, kidnapping, intimidation and/or threats to social communicators, as well as to the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the State to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation."

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[51] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights) *supra* nota 8, para. 34; IACHR, 2002 Annual Report, Vol. III: "Report of the Office of the Special Rapporteur for Freedom of Expression". Chapter IV, paras. 37 and 38.

[52] IACHR, 2003 Annual Report, Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter VII: The situation of freedom of expression in Guatemala, para. 414.

[53] *Cfr*. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights) *supra* nota 8, para. 71, 72, and 74; *Case of Ivcher Bronstein supra* note 9, para. 85; *Case of Herrera Ulloa, supra* note 9, paras. 117-119.

[54] IACHR. Report No. 50/99. Case No. 11.739. *Héctor Félix Miranda*. Mexico. April 13, 1999. IACHR. Report No. 130/99. Case No. 11.740. *Víctor Manuel Oropeza.* Mexico. November 19, 1999. IACHR. Report No. 38/97. Case No. 10.548. *Hugo Bustíos Saavedra.* Peru. October 16, 1997.

[55] *Cfr*. *Case of Herrera Ulloa, supra* note 9. ; *Case of Kimel. supra* note 9*,* para. 117.

38. Furthermore, the Inter-American Court has stressed the particular connotations that the right to freedom of expression acquires when it is exercised by government officials, including members of the Armed Forces, and the duties that such exercise entails for those persons expressing their opinions.[56] The Inter-American case law has established that, in the case of public officials, the exercise of this fundamental freedom acquires specific features, particularly in the areas of (a) the special duties they acquire by virtue of their status as state officials; (b) the duty of confidentiality that may apply to certain types of information held by the State; (c) the right and duty of public officials to denounce human rights violations; and (d) the particular situation of members of the Armed Forces.[57] As far as the impact that statements of public officials have on the rights of others, the Inter-American Court has indicated that under certain circumstances, even when official comments do not expressly authorize, instigate, order, instruct, or promote acts of violence against individual citizens, their repetition and content can increase the "relative vulnerability" of these groups and the risk they face.[58]

39. Finally, the Inter-American case law has emphasized the peculiar features this rights acquires when exercised within an electoral context.[59] In this sense, the Inter-American Court has established that the right to freedom of thought and expression is of fundamental importance during the process of electing the authorities who will govern a State, because (i) it is an essential tool for shaping voter opinion and strengthening the political contest among the various participants and it provides instruments for the analysis of each candidate's platform, thus enabling a greater degree of transparency and oversight of future authorities and their performance; and (ii) it fosters the shaping of the collective will manifested through voting.[60] It is thus necessary to healthy democratic debate for there to be the greatest possible circulation of ideas, opinions and information regarding the candidates, their parties and their platforms during the period preceding elections, mainly through the communications media, the candidates and other individuals who wish to express themselves. It is necessary for everyone to be able to question and investigate the ability and suitability of candidates, and disagree with and challenge their platforms, ideas and opinions, so that voters can develop their voting criteria.[61] The Inter-American Court has also underscored the importance of the role of the communications media during elections, characterizing freedom of the press as one of the best means for the public to learn about and judge the attitudes and ideas of political leaders. The Court has also held that in the context of an election, newspapers play an essential role as vehicles for the exercise of the social dimension of freedom of expression, as they gather and transmit the candidates' positions' to the voters, which helps voters to have sufficient information and various criteria in order to make an informed decision.[62]

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[56] *Cfr. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Supra note 9. Para.131. See also: IACHR. Report No. 20/99. Case No. 11.317. *Rodolfo Robles Espinoza e Hijos.* Peru. February 23, 1999.

[57] These issues are extensively developed in the 2008 and 2009 Annual Reports of the Office of the Special Rapporteur. Available at: http://www.cidh.org/Relatoria/docListCat.asp?catID=24&lID=1

[58] *Case of Ríos, supra* note 9 at para. 145; *Case of Perozo, supra* note 9 at paras. 157.

[59] *See* Case of Canese, *supra* note 9 at para. 90.

[60] *See* Case of Canese, *supra* note 9 paras. 88-90.

[61] *See* Case of Canese*, surpa* note 9 para. 90.

[62] In the same sense, the Special Rapporteurs of the UN, the OSCE, the OAS and the African Commission have issues the 2009 Joint Declaration, entitled "Joint Declaration on the Media and Elections". Available at: http://www.cidh.org/Relatoria/showarticle.asp?artID=744&lID=1.

40. In sum, the decisions of the IACHR and the Inter-American Court have provided an extremely useful legal frame of reference for the inhabitants of the Americas to exercise their freedom of expression with a significant degree of legal certainty with regard to the content protected by the right and the conditions required for any possible limitation to it. Notwithstanding the above, there are still multiple problems in the implementation of the existing standards and new areas or problems that necessitate the progressive development of this legal framework. The following section addresses those issues.

C. The agenda of the Office of the Special Rapporteur for freedom of expression: persistent problems and emerging challenges

41. The Office of the Special Rapporteur has a mandate to advise the IACHR on the task of promoting, protecting and guaranteeing the right to freedom of thought and expression in the countries of the region. Bearing in mind the regional advances reviewed briefly in the previous section and the problems we face in the hemisphere, the Office of the Special Rapporteur drafted a three-year work plan that was submitted to and approved by the plenary of the IACHR in its 132nd Regular Session.[63] The work plan of the Office of the Special Rapporteur will focus on the following five issues: (i) the protection of journalists and the fight against impunity for crimes committed against members of the media in the exercise of their profession; (ii) the *decriminalization* of speech and proportionality in the subsequent imposition of sanctions; (iii) access to information and *habeas data*; (iv) direct and indirect censorship; (v) pluralism and diversity in public debate and in the communicative process. In each one of these areas, the Office of the Special Rapporteur will work transversely on the protection of subjects traditionally marginalized from public debate (like indigenous peoples, African-American communities, or women) or those who are in situations of particular vulnerability (children and adolescents, or persons living in extreme poverty).

42. The following pages explain the five areas in which the Office of the Special Rapporteur will concentrate its efforts.

1. The protection of journalists and the fight against impunity for crimes committed against members of the media in the exercise of their profession: "Keep quiet or you'll be next"[64]

43. It is clear from the origins of liberal criminal law that the preventive function of the criminal system is not achieved through cruel punishments but rather through infallible punishments. In other words, the deterring effect of criminal law is derived from the imposition of effective and proportionate sanctions against those who commit crimes that merit such sanctions. Nevertheless, at least in terms of crimes committed against journalists, this fundamental deterrence measure does not appear to be functioning in a satisfactory manner.

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[63] According to Article 15.6 of the Rules of Procedure of the IACHR, "[…] the Rapporteurs shall present their work plans to the plenary of the Commission for approval. They shall report in writing to the Commission, at least annually, on the work undertaken." IACHR. Rules of Procedure of the IACHR. Adopted by the IACHR at its 109th extraordinary session, held from December 4 to 8, 2000 and amended at its 116th regular session, held from October 7 – 25, 2002, at its 118th regular session, held from October 6 – 24, 2003, at its 126th regular session, held from October 16 – 27, 2006, at its 132nd regular session, held from July 17 – 25, 2008 and in its 137th regular session, held from October 28 to November 13, 2009.

[64] The quote is from an interview with a journalist from Ciudad Juárez who, upon leaving the funeral of a colleague murdered by drug traffickers in that city, received a call in which he was warned, with those few words, of his possible fate if he continued to report on the activities of organized crime.

44. The Inter-American Court has indicated that impunity is understood as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of [human rights]."[65] It has also made clear that States incur responsibility not only by action—when one of their agents violates the rights protected in the American Convention—but also by omission, when it fails to promote, seriously and vigorously, all of the actions necessary to prevent the commission of crimes or to prevent the violations committed from remaining in impunity.[66]

45. The region has an alarming, lingering history of impunity with regard to crimes committed against journalists and other members of the media. An investigation published by the Office of the Special Rapporteur in 2008 on the murder of journalists and media workers between 1995 and 2005 identified 157 deaths in 19 countries in the region for reasons possibly related to the practice of journalism. Nevertheless, in spite of the fact that there have been some court decisions that identified and convicted the perpetrators, the Office of the Special Rapporteur observed that the investigations opened are, in their vast majority, excessively slow and plagued by serious procedural deficiencies, to the point that they neither established the facts nor punished the guilty parties or provided reparations to the victims. Convictions (of any kind) were handed down in only 32 of the 157 cases examined. A significant number of the judgments issued do not identify the direct perpetrators, and impose sentences that are disproportionate or that have not been enforced.[67]

46. The concern of the Office of the Special Rapporteur with regard to this matter is not limited to the previously mentioned historical legacy. In spite of the advances reported in relation to the strengthening of the independence and technical capacity of the judicial branch in some States, it currently appears that there are no sufficient and appropriate measures to address decisively the debt of justice owed to the victims and to the societies adversely affected by the crimes committed to silence members of the media and journalists. In some countries, the murders and serious attacks against journalists continue to be particularly troublesome. Indeed, there is sufficient evidence of serious threats against freedom of expression from extremely violent organized crime groups that not only intimidate the population but even have the ability to terrorize and infiltrate the authorities themselves. Moreover, in those places where there are still internal armed conflicts, the aggressiveness and intolerance characteristic of the armed subjects continue to pose a grave threat to the lives and safety of journalists, critics and dissidents. Finally, in those places where there is exacerbated social tension, groups of civilians from all extremes have attacked and murdered journalists from media that do not share their point of view.[68]

47. It is true that the aforementioned problems do not affect the majority of the countries in the region. However, due to the seriousness of their effects and because of the potential of these types of practices to spread rapidly, the above-cited are probably some of

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[65] *Cfr*. I/A Court H.R., *Case of the "White Van" (Paniagua Morales et al.)*. Judgment of March 8, 1998. Series C No. 37, para. 173.

[66] *Cfr*. I/A Court H.R., *Case of Velásquez Rodríguez*. Judgment of July 29, 1988. Series C No. 4. Para. 172.

[67] In respect to this matter, see also: IACHR. *Special Study on the Status of Investigations into the Murder of Journalists during the 1995-2005 Period for Reasons That May Be Related to Their Work in Journalism.* OEA/Ser.L/V/II.131. Doc. 35. March 8, 2008. Original: Spanish. Available at: http://www.cidh.org/relatoria/section/Asesinato%20de%20Periodistas%20INGLES.pdf

[68] On these topics, see Chapter II of the 2008 and 2009 Annual Reports available at http://www.cidh.org/Relatoria/docListCat.asp?catID=24&IID=1.

the most serious problems relevant to freedom of expression on the continent. As the regional case law and the most important studies on the issue have maintained consistently, the murder, kidnapping, torture or disappearance of journalists is the most radical, violent and effective form of censorship.[69]

48. The IACHR has stated that the authorities have the duty to guarantee protection to journalists so they can exercise fully their right to freedom of expression,[70] and so they can protect their rights and their families' rights to life, safety and personal integrity. The IACHR has also maintained that in cases of attacks against journalists or other members of the media, the State's failure to investigate and administer justice generates international responsibility. In this sense, freedom of expression must be supported in practice by effective judicial guarantees that allow for the investigation, punishment and reparation of the abuses and crimes committed against journalists due to the practice of their profession.[71]

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[69] In this respect, important organizations engaged in the defense of the right to freedom of expression have been able to verify in practice what is easy to know by intuition in theory: that the death of a journalist sends the clear message to the entire community that there are topics that result very dangerous to discuss, and that the best way to save one's life is to stop investigating and remain silent. What has been demonstrated is that this message is certainly very effective and creates an environment of widespread silence and self-censorship that is very difficult to prevent and counteract. Further, it is clear that the treatment of these crimes with impunity provides the criminals with an incentive to continue committing them. Thirteen international organizations that deal with freedom of the press and freedom of expression formed an International Mission that traveled to Mexico during 2008 to learn about and analyze the situation of journalists and the communications media in the country. After conducting important empirical research, the resulting document from the Mission indicates that: "[m]any of the journalists the Mission met with affirmed that the climate in Mexico is one of terror. Armed attacks and explosions at the facilities of local media, as well as the killings and disappearances of colleagues have had a profound impact on reporters. Most of the interviewees said that they felt unprotected and abandoned by both the authorities and the media, and that they used self-censorship as the only form of self-protection." The reference to fear and self-censorship is one of the central themes of the document. Article 19. *Libertad de Prensa en Mexico: La sombra de la impunidad y la violencia*. August 2008. Available at: http://www.article19.org/pdfs/publications/mexico-la-sombra-de-la-impunidad-y-la-violencia.pdf (in Spanish). See also: *Crímenes contra Periodistas.* Proyecto Impunidad at http://www.impunidad.com; and *Global Campaign Against Impunity* at http://www.cpj.org/campaigns/impunity/.

[70] IACHR, Report No. 5/99. Case 11.739. *Héctor Félix Miranda.* Mexico. April 13, 1999; IACHR, Report No. 130/99. Case 11.740. *Víctor Manuel Oropeza*. Mexico. November 19, 1999.

[71] One of the first cases on this subject was the case of journalist Hugo Bustíos Saavedra, murdered in 1988 by a Peruvian military patrol while investigating two homicides committed in the context of the internal conflict that was taking place in Peru at the time. In this case, the IACHR held that the State was responsible, *inter alia*, for the violation of Article 13 of the American Convention given that, knowing that there were journalists in the area of conflict, the State had omitted to grant them the necessary protection. Likewise, it found that the acts of violence that occurred had prevented the free exercise of the right to freedom of expression (i) of the murdered journalist, (ii) of the other media worker who was injured by the same patrol, (iii) of the community of media and journalists that were intimidated by this type violence, and (iv) of course, of society as a whole, which is deprived of knowledge of matters of great public importance relating to the armed conflict. According to the IACHR, journalists play a fundamental role in situations of armed conflict as they enable the public to receive independent information about what is happening, at great risk to themselves. As such, it held that the State must provide them with the greatest possible protection so they may continue to exercise their right to freedom of expression in such a way that society's right to be adequately informed is satisfied. Report No. 38/97. Case 10.548. *Hugo Bustíos Saavedra*. Peru. October 16, 1997. Available at: http://www.cidh.oas.org/annualrep/97eng/Peru10548.htm. In later cases, such as the case of murdered journalist Héctor Félix Miranda in Mexico, the IACHR was clear in indicating that the only way to prevent the consequences arising from the death of a journalist and the State's omission in failing to investigate these acts fully, such as the creation of incentives to continue committing these crimes, is through the rapid action of the State in prosecuting and punishing the perpetrators. The IACHR maintained the same theory in the case of the murder of Víctor Manuel Oropeza. In that case, the IACHR did not find that the State was directly responsible for the journalist's death. Nevertheless, upon confirming that he had been the target of threats because of his publications, that there was no effort to protect him, and that the investigation of his death was deficient, the IACHR held that the victim's right to freedom of expression had been violated. IACHR. Report No. 5/99 Case 11.739. *Héctor Félix Miranda.* Mexico. April 13, 1999. Available at: http://www.IACHR.org/annualrep/98eng/merits/mexico%2011739.htm.

49. In the same vein, in all of its annual reports, the Office of the Special Rapporteur has expressed its concern over the problems it has observed. It has consistently urged States to prevent violations of human rights resulting from the exercise of freedom of expression and, in all cases, to identify, prosecute and punish the perpetrators of such violations when they have been committed. Likewise, in their 1999 Joint Declaration, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur for Freedom of Expression, affirmed that "States must ensure an effective, serious and impartial judicial process, based on the rule of law, in order to combat impunity of perpetrators of attacks against freedom of expression." The rapporteurs similarly stated in their 2000 Joint Declaration that, "[s]tates are under an obligation to take adequate measures to end the climate of impunity and such measures should include devoting sufficient resources and attention to preventing attacks on journalists and others exercising their right to freedom of expression, investigating such attacks when they do occur, bringing those responsible to justice and compensating victims." This topic was again addressed in the 2006 Joint Declaration, signed by the abovementioned rapporteurs and by the Special Rapporteur for Freedom of Expression of the African Commission on Human and People's Rights which indicated that, in particular, "States have an obligation to take effective measures to prevent such attacks, including their condemnation and investigation, the sanctioning of those responsible wherever possible, and the provision of compensation to victims where appropriate. States must also inform the public regularly of these proceedings."

50. The Office of the Special Rapporteur will continue the work of monitoring, denouncing and raising awareness on this issue, but it must also make headway in other particularly sensitive areas. First, it is necessary to identify clearly the different factors that increase the risk and prevent the effective administration of justice in the area under examination. It may be a question of normative deficiencies, such as amnesty laws or disproportionate benefits for the criminal defendant. There may be institutional deficiencies, such as a lack of technical ability on the part of the investigating bodies, or a lack of independence and impartiality in the judicial branch. The complexity of the phenomenon means that other factors may be involved, such as a lack of political will in the investigations, or even the existence of a culture of intolerance toward criticism, or the tacit acceptance of the crimes committed. Finally, there are social factors of enormous relevance that cannot be discounted, relating to the existence of powerful criminal groups that, in some places, may seriously jeopardize the State's ability to defend, guarantee, and promote human rights.

51. Once we have identified the risk factors that allow for impunity, it is fundamental to push forward those cases before the inter-American system that would pave the way for the removal of some of those obstacles. It is essential to identify and discusses the practices for the protection of journalists and the fight against impunity, such as specialized protection programs,[72] the creation of investigative bodies and specialized judges,[73] the federalization of crimes committed against journalists,[74] the allocation of

[72] See, for example, the Program to Protect Journalists created in Colombia through Decree 1592 of 2000 and those that amend and complement it, especially Decree 2816 of 2006. See also: Judgment T-1037 of 2008 of the Colombian Constitutional Court, in which the Court recognizes the importance of the program and orders the State to accommodate it to the particular needs of the profession of journalism and adapt it in accordance with the mandates of due process and other fundamental rights.

[73] For example, the creation of the Office of the Special Prosecutor for Crimes against Journalists (FEADP) within the Office of the Attorney General of the Republic in Mexico. Order A/031/06, PGR. February 15, 2006, which establishes its guidelines. In spite of the fact that its design as well as the practical implementation of this

sufficient technical and financial resources to further investigations and cases, and the increased sentences or decreased benefits associated with these types of crimes.[75] In addition, there are practices that have been fundamental in awakening the solidarity of the media themselves, and through them, society; it is fundamental to disseminate them as well.[76]

52. These practices must also be discussed (and in some cases corrected or adapted) broadly and together with the civil society organizations that have vigorously and bravely worked for years on this issue. The aim of this work is to attain the institutional and legal adjustments necessary to confront the phenomenon at hand. Finally, greater effort must be made in the areas of training and raising awareness in order to counteract the cultural phenomena that favor impunity. A State that feeds intolerance or fails to prevent the corruption of its institutions, or a society that is indifferent to the crimes committed becomes, in reality, the most serious enemy of justice.

2. From critic to criminal. The need to eliminate laws that criminalize expression and to promote proportionality in the subsequent imposition of sanctions

53. The ideal of the *model citizen* held by authoritarian regimes corresponds to the idea of a subject who turns over his deliberative and decision-making faculties—at least insofar as they concern public affairs—to the State. This subject must be grateful for the benefits conferred by the State, as if they were gifts dispensed by the grace of the rulers. Under this model, political criticism is not necessarily eliminated, but it is only tolerated if it is what the rulers themselves classify as *constructive;* that is, it does not question radically the form of decision-making, the decisions made, or the people in charge of implementing and enforcing them. The criticism that is accepted is that which is not disturbing, shocking or offensive to power. In such regimes, the State will often use its most powerful coercive tool—criminal law—to punish, repress and inhibit speech that it considers inconvenient.

54. The ideal citizen under the democracies of the Americas and, certainly, the inter-American system for the protection of human rights, is completely different. A full citizen is a thinking subject *who has the courage to use his own intelligence*[77] and who is willing to discuss with others the reasons that enable him to support a theory or make a decision. He is a rational subject who values the communicative process as one of the best ways to make appropriate decisions, and who participates not only in making decisions that affect him but also in the oversight of government. This idea of citizenship is today at the

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instrument has had difficulties, the creation of specialized bodies of this type is an important practice that should be recognized, disseminated and, of course, discussed and adapted.

[74] An example of the federalization of crimes committed in states against human rights, one of which is certainly freedom of expression, was constitutional reform 45 of December 8 in Brazil (constitutional amendment No. 45 – of December 8, 2004 - dou de 12/31/2004), according to which: "5º Nas hipóteses de grave violação de direitos humanos, o Procurador-Geral da República, com a finalidade de assegurar o cumprimento de obrigações decorrentes de tratados internacionais de direitos humanos dos quais o Brasil seja parte, poderá suscitar, perante o Superior Tribunal de Justiça, em qualquer fase do inquérito ou processo, incidente de deslocamento de competência para a Justiça Federal."

[75] For example, the Criminal Code of Colombia establishes that it is a special aggravating factor for purposes of sentencing, when the crimes of homicide, homicide of a protected person, kidnapping or torture, are committed, *inter alia*, against a journalist. See: Criminal Code of Colombia (Law 599 of 2000 and those that amend or complement it) Articles 103, 104, 135, 170 and 179.

[76] For example, *Proyecto Manizales* in Colombia or the previously cited *Misión Internacional de Documentación sobre Ataques en Contra de Periodistas y Medios de Comunicación en Mexico*.

[77] The phrase is from Immanuel Kant's Answer to the Question: What is enlightenment? (1784).

center of all political institutions and is one of the criteria for evaluating their validity and legitimacy.

55. To take seriously the idea of a democratic and activist citizenry thus entails designing institutions that enable, rather than inhibit or make difficult, the deliberation of all issues and phenomena of public relevance. On this point, the very institutions of punitive law, and especially criminal law, are of particular relevance. The use of the corrective means of the State to impose a single view of the world or to discourage the open and vigorous deliberation of all matters of public relevance is incompatible with the guiding principles of democratic regimes and, in particular, with the right to freedom of expression enshrined in Article 13 of the American Convention. There are some issues that particularly concern the Office of the Special Rapporteur with regard to this matter, such as: (i) the existence of *desacato* and criminal defamation laws, particularly when they are used to criminally prosecute those who have made critical assessments of matters of public interest or of persons who have public relevance; (ii) the use of criminal laws to protect the "honor" or "reputation" of ideas or institutions; (iii) the attempts to apply criminal offenses such as "terrorism" or "treason" to those who have limited themselves to expressing or imparting ideas or opinions that are different—or even *radically* different—from those held by government authorities; and (iv) *the criminalization* of social protest. The following paragraphs provide a brief explanation of the reasons for which these phenomena hold particular relevance for the Office of the Special Rapporteur and the way in which they must be addressed bearing in mind the Office's mandate.

2.1 "Desacato" laws and criminal laws that protect privacy and honor

56. One of the first and most important IACHR reports on the subject of freedom of expression was the Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights.[78] Six of the eleven decisions of the Inter-American Court addressing freedom of expression have examined the criminal prosecution of persons who have expressed opinions critical of government officials or candidates for public office. In these decisions, the Inter-American Court held that the measures imposed were disproportionate and found that the critical expressions of opinion concerning public officials or candidates for public office, even if they were offensive or shocking were protected by Article 13 of the American Convention.[79] In all of their reports on the issue, the IACHR and the Office of the Special Rapporteur have emphasized the need to *decriminalize* the exercise

[78] IACHR, 1994 Annual Report, Chapter V: *Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights,* OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. Adopted during the 88th regular session.

[79] These are the Judgments rendered in the following cases: *Case of Herrera Ulloa, supra* note 9, *Case of Ricardo Canese, supra* note 9, *Case of Palamara Iribarne*, *supra* note 9, *Case of Kimel*. *supra* note 9. In this sense, the Inter-American Court has indicated that although the use of criminal law is not completely incompatible with the Convention, "[t]his possibility should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception. At all stages the burden of proof must fall on the party who brings the criminal proceedings (…)." *Case of Kimel*. *supra* note 9*, para. 78*. The European Court of Human Rights issued a similar opinion in an important case on the issue in question. In that case it held: ". Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence (…).In this connection, the Court notes the recent legislative initiatives by the Romanian authorities, leading to the removal of the offence of insult from the Criminal Code and the abolition of prison sentences for defamation (…)." ECHR, *Case of Cumpana and Mazare v. Romania* (Application No. 33348/96) of December 17, 2004, para. 115.

of this freedom and to establish criteria of proportionality for the establishment of any subsequent liability that could arise from its abusive exercise, in accordance with Principles 10 and 11 of the Declaration of Principles.

57. However, in spite of the important process of criminal law reform in this area, some States have not repealed their *desacato* laws, and others continue to enforce criminal laws for the protection of honor—traditionally ambiguous—as a privileged tool for prosecuting and punishing those who express ideas and information on matters of public interest, government employees, or candidates for public office.[80]

58. According to the Declaration of Principles, sanctions for the abusive use of freedom of expression must always be proportionate and, at least as far as information or opinions about public officials, public funds, or candidates for public office is concerned, can never be criminal in nature.[81] Suffice it to say here that some of the arguments supporting this assertion refer, fundamentally, to the importance of preventing the creation of legal frameworks that allow the State to make arbitrary or disproportionate decisions that have a general chilling effect. Added to this argument is the notion that public officials accept their positions voluntarily and in full knowledge that, because of the enormous power they administer, they will be subject to a much more intense level of scrutiny. This argument is further supported by the fact that government officials have a great capacity to influence public debate, not only because of the support of the citizenry and the credibility they usually enjoy, but because they tend to enjoy real and effective opportunities to participate in the process of mass communication which, generally, citizens that do not hold such positions do not have. As such, it has been held that criticism—even offensive, radical, or disturbing criticism—must be met with more, not less debate, and that it is the citizen and not the criticized authorities who must decide whether an idea or a piece of information is worthy of attention and respect, or whether it should simply be dismissed.

59. The Office of the Special Rapporteur must continue to insist, though all of its mechanisms, upon the necessity of compliance with the provisions of Principles 10 and 11 of the Declaration of Principles. In this process it is relevant to reiterate that it is not a question of failing to protect rights such as honor or privacy, which are extremely valuable in any democracy; rather, it is about ensuring that the protection of such interests do not end up jeopardizing one of the most important conditions that make democratic societies possible.

2.2 Religious defamation and defamation of symbols or institutions

60. It would seem that the issues of religious defamation or criminal penalties for the offensive use of national symbols are problems of other regions. Indeed, unlike other regions of the world, it is not common today in the Americas to use criminal laws on the protection of national symbols or on religious defamation to prevent the criticism of political or religious leaders or suppress the views of minorities or dissidents.

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[80] On this issue, see Chapter II of the 2008 and 2009 Annual Reports of the Office of the Special Rapporteur, in which information is provided on criminal cases brought against media professionals for the dissemination of opinions or information of public interest as well as the convictions (suspended and effective) handed down during 2008 and 2009 alone with regard to this issue. It is, however, important to note that in countries such as Uruguay, Jamaica and Colombia important draft laws have been introduced to decriminalize the defense of honor in cases concerning public officials or information of public relevance.

[81] These reasons are explained in the first section of this text.

61. Nevertheless, as noted in Chapter II of this report, the criminal offense of religious or "patriotic" defamation exists in some countries in our hemisphere. High-level government officials have used such laws to initiate criminal proceedings against (that is, they have sought the prosecution, conviction and incarceration of) media directors, photographers, or journalists who published, for example, the photograph of a woman with a naked torso that parodies a religious scene, or the artistic, advertising, or symbolic use of the national flag. In some cases the criminal cases are still pending.

62. It is true that ideas of all kinds and, especially, religious convictions, as well as national symbols, are particularly valuable to significant sectors of the population and that offenses against them could affect very deep feelings and convictions that are worthy of respect. Nevertheless, the exercise of full individual and collective autonomy depends, to a large extent, on the existence of an open debate on all social ideas and phenomena. As such, the right of all persons to express, in practice and by any means, their ideas on culture, religion, national symbols or any other belief or institution must be respected. Naturally, this excludes hate or discriminatory speech directed at generating acts of violence, pursuant to the terms of Article 13 of the American Convention itself.

63. With regard to so-called *religious defamation,* the 2008 Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information,[82] stated that the concept of "defamation of religions" and the criminal offenses based on that concept are incompatible with international standards on freedom of expression. For the same reasons, the insult or defamation of patriotic symbols, or the symbols of any other idea or institution, are also incompatible with those standards.

64. Likewise, the Joint Declaration of 2008 recalls that the international standards that allow for the establishment of limits to free expression refer to the protection of the reputation of individual persons and not of beliefs or institutions that, in and of themselves, do not enjoy the right to reputation. For this reason, restrictions to freedom of expression must not be used to protect particular institutions or abstract notions, concepts or beliefs such as national symbols or cultural or religious ideas, unless the criticism in reality amounts to the advocacy of national, racial or religious hatred that incites violence.

65. The Office of the Special Rapporteur therefore must promote the abolition of these criminal offenses of religious, cultural or patriotic defamation, which do not conform

[82] Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation issued by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information. Athens. December 9, 2008. After emphasizing that there is a fundamental difference between the criticism of an idea and attacks against individual persons because of their adherence to such idea, and recognizing that the use of negative social stereotypes leads to discrimination and substantially limits the ability of persons subject to those stereotypes to be heard and to participate effectively in public debate, this Joint Declaration states that the successful promotion of equality in society is integrally linked to respect for freedom of expression and cannot be based on the repression of ideas or discussions about institutions or beliefs. This Declaration recognizes expressly that the best way to address social prejudices is through an open dialogue that exposes the harm caused by those prejudices and combats negative stereotypes. In this sense, it is acknowledged that freedom of expression includes the right of different communities to have access to the media, to express their points of view and perspectives, as well as to satisfy their information needs. Naturally, as recognized in Article 13.5 of the American Convention, restrictions to the exercise of freedom of expression are limited in scope to the advocacy of national, racial or religious hatred that constitutes incitement to violence.

to international standards. Likewise, with a view to promoting equality and the fight against cultural or religious intolerance, which adversely affects the ability of marginalized or stigmatized groups to participate adequately in public debate, it must promote the access of all social groups to the media, to express their own points of view and perspectives as well as to satisfy their information needs.

2.3 The use of the criminal offenses of "terrorism" or "treason"

66. The use of the criminal offenses of "terrorism" or "treason", among others, to prosecute individuals who express or impart opinions in opposition to those of the government, or positions that are critical of government policies, patently violate the right to freedom of expression. While it is true that neither journalists nor individuals who have dissident opinions may act outside the law, it is also true that the criminalization of a mere dissident opinion is a serious limitation to the right to freedom of expression and is radically incompatible with the provisions of Article 13 of the American Convention. It is necessary to establish clearly the difference between the appropriate use of criminal law and its use as an element of censorship or punishment of legitimate dissent.

67. In various Declarations, the four Special Rapporteurs for Freedom of Expression have indicated that "[t]he definition of terrorism, at least as it applies in the context of restrictions on freedom of expression, should be restricted to violent crimes that are designed to advance an ideological, religious, political or organized criminal cause and to influence public authorities by inflicting terror on the public.[83]" Consequently, "[t]he criminalization of speech relating to terrorism should be restricted to instances of intentional incitement to terrorism, understood as a direct call to engage in terrorism which is directly responsible for increasing the likelihood of a terrorist act occurring, or to actual participation in terrorist acts (for example by directing them)."[84] The same standard must be applied to cases that attempt to apply offenses such as treason or rebellion to the dissemination of ideas or information that government authorities find inconvenient.

68. On this point, it is the job of the Office of the Special Rapporteur to bring before the inter-American system for the protection of human rights those cases that make it possible to ensure that all States respect the difference between a dissident and a criminal, as well as to issue reports and promote training programs aimed at preventing the use of criminal law as a mechanism of censorship.

2.4 Increase of criminal offenses aimed at criminalizing social protest

69. Social protest is one of the most effective forms of collective speech. Indeed, in some circumstances it is also the only way in which certain groups can be heard. Indeed, when faced with institutional frameworks that do not favor participation, or in the face of serious barriers to access to more traditional forms of mass communication, public protest appears to be the only medium that really allows sectors of society traditionally discriminated against or marginalized from public debate to have their point of view heard and appreciated. In multiple annual reports, the Office of the Special Rapporteur made

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[83] Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation issued by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information. Athens. December 9, 2008. See also: 2002 Annual Report of the IACHR, Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression.

[84] *Ibid.*

reference to the need to design regulatory frameworks that respect the exercise of social protest and that limit it only to the extent necessary to protect other individual or social interests of equal relevance. Thus, for example, recalling what it had stated in the 2002 Annual Report, the 2005 Annual Report of the Office of the Special Rapporteur indicated that:

> The most impoverished sectors of our hemisphere face discriminatory policies and actions, their access to information on the planning and execution of measures that affect their daily lives is incipient, and the traditional channels of participation and public complaint are often cut off. As such, in many countries in the hemisphere, protest and social mobilization has become a tool with which to petition government authorities and also a channel for publicly denouncing abuses or violations of human rights.[85]

70. Later on in the same report, it indicated that:

> The *per se* criminalization of public demonstrations is, in principle, inadmissible, provided they take place in accordance with the right of free expression and the right of assembly.[86] [...] It should be recalled that in such cases, criminalization could have an intimidating effect on this form of participatory expression among those sectors of society that lack access to other channels of complaint or petition, such as the traditional press or the right of petition [...].[87] Curtailing free speech by imprisoning those who make use of this means of expression would have a dissuading effect on those sectors of society that express their points of view or criticisms of the authorities as a way of influencing the processes whereby state decisions and policies that directly affect them are made.[88] [89]

71. Naturally, strikes, road blockages, the occupation of public space, and even the disturbances that might occur during social protests can cause annoyances or even harm that it is necessary to prevent and repair. Nevertheless, disproportionate restrictions to protest, in particular in cases of groups that have no other way to express themselves publicly, seriously jeopardize the right to freedom of expression. The Office of the Special Rapporteur is therefore concerned about the existence of criminal provisions that make criminal offenses out of the mere participation in a protest, road blockages (at any time and of any kind) or acts of disorder that in reality, in and of themselves, do not adversely affect legally protected interests such as the life, security or liberty of individuals.

72. In order to guarantee the legitimate exercise of public protest as a collective form of expression while simultaneously guaranteeing the rights of third parties that may be in jeopardy, it is necessary for there to be laws that weigh the rights in question and respect

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[85] IACHR, 2005 Annual Report. Vol. II: "Report of the Office of the Special Rapporteur for Freedom of Expression." Chapter V. Para. 1.

[86] "The State classification of an act of protest as a criminal offense, when such classification is made in contravention of those principles of the punitive power of the State –for example, because the act of protest is protected by the legitimate exercise of a right—is presumed to be illegitimate criminalization..." CELS, *"El Estado frente a la protesta social- 1996-2002"* (Buenos Aires: Siglo XXI Editores Argentina 2003) p. 48.

[87] "In no way can the existence of other ways to channel a claim be a basis for the unlawfulness of an expressive act to the extent that, specifically, the choice regarding the timeliness or manner in which something is expressed is inherent in the voluntary nature of that activity—above all when, *ex ante*, the suitability of the alternative ways is at least questionable." *Ibid*, p. 70.

[88] IACHR, 2002 Annual Report, Vol. III: "Report of the Office of the Special Rapporteur for Freedom of Expression." Chapter IV. Para. 35.

[89] IACHR, 2005 Annual Report, Vol. II: "Report of the Office of the Special Rapporteur for Freedom of Expression." Chapter V. Para. 96 and 97.

strictly the requirements established in Article 13 of the American Convention as a condition for the legitimacy of any restrictions imposed. In particular, regarding this matter, it is necessary to review existing criminal law and ensure that it is in strict accordance with the limits imposed by Article 13 of the American Convention.

73. In short, freedom of expression is not an absolute right. It is true that its exercise may be abusive and cause significant individual and collective harm. But it is also true that disproportionate restrictions end up having a chilling effect, giving rise to censorship and inhibition in public debate, which is incompatible with the principles of pluralism and tolerance inherent in democratic societies. It is not easy to participate without inhibition in an open and vigorous debate on public affairs when the consequence might be criminal prosecution, the loss of all one's property or social stigmatization. It is therefore essential to bring the institutions and the punitive practices of the State in line with the imperatives of the inter-American legal framework.

3. The thousand faces of censorship

74. There is not a single argument in favor of censorship that has not been defeated by now in all of the fields of human wisdom. It is enough to read John Milton's beautiful *Areopagitica* to understand the enormous cost that humanity has had to pay on account of *indexes and censors*. In this sense, the elimination of direct or indirect censorship has been an issue on which the Office of the Special Rapporteur has worked with particular intensity. On one hand, it has pushed cases such as "The Last Temptation of Christ,"[90] which have laid the foundation for the full eradication of prior censorship in the region. Likewise, it has written various reports and opinions that have served to promote resolutely the rule established in Article 13.2 of the American Convention on Human Rights, according to which the exercise of the right to freedom of expression cannot be subject to prior censorship.[91]

75. Happily, the existence of administrative offices in charge of censoring speech is no longer common practice in the region. Nevertheless, in some countries judges or telecommunications regulatory agencies have the authority to prevent the circulation of specific information when they consider that it is the result of the abusive exercise of freedom of expression. In this area, the Office of the Special Rapporteur will continue its work to promote the repeal of legal provisions that authorize prior censorship which, regardless of the government body it comes from, is prohibited by Article 13.2 of the American Convention on Human Rights.

76. As for so-called indirect censorship, the Office of the Special Rapporteur has warned in several reports of its existence and the different forms it can take. In this respect, in its 2003 Annual Report, it stated: "*Because such indirect violations are often obscure, quietly introduced obstructions, they do not compel investigation, nor do they receive the widespread censure that do other, more direct violations.*"[92]

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[90] *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.). supra* note 9.

[91] This, for example, in its 2002 Annual Report, the Office of the Special Rapporteur stated: "The prohibition of prior censorship, with the exception present in paragraph 4 of Article 13, is absolute and is unique to the American Convention, as neither the European Convention nor the Covenant on Civil and Political Rights contains similar provisions. The fact that no other exception to this provision is provided is indicative of the importance that the authors of the Convention attached to the need to express and receive any kind of information, thoughts, opinions and ideas." IACHR, 2002 Annual Report. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III. Para. 21.

[92] IACHR, 2003 Annual Report. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter V. Para. 1.

77. In this section only four of the possible forms of indirect censorship are mentioned: the arbitrary allocation of public resources such as government advertising, frequencies or subsidies; the arbitrary use of the mechanisms of regulation and oversight; the creation of an environment of intimidation that inhibits dissident speech; the explicit or tacit authorization of barriers imposed against individuals to impede the free flow of ideas, in particular, those that are bothersome or inconvenient to economic and political power.

78. As this Office has already indicated,[93] one form of indirect censorship is the use of state authority over public resource allocation (like subsidies, government advertising, and radio and television frequencies and licenses) to reward media that are complacent before the authorities and to punish those media that are independent or critical. Some public officials believe that the advertising that the State must buy in order to meet its obligations (for example, to announce an invitation for bids or a vaccination campaign) must also serve the purpose of ensuring the loyalty of the media. It is true that, to paraphrase the well-known words of a former president, leaders do not pay to be beaten up; but neither do they pay to be applauded. They pay in order to meet their legal obligations, regardless of the informative or editorial content of the medium they must hire for such purposes.[94] Thus, for example, in the case of a vaccination campaign directed at mothers belonging to marginalized social sectors, the State must use the communications media that reach those sectors most effectively, without taking into account the editorial content of the medium. The decision must be made, then, bearing in mind the objective and legitimate purpose that must be accomplished by the publication of the information and not the medium's affinity to the government which, at any time, has the power to ascribe to it.[95]

79. To attain a non-discriminatory or arbitrary allocation of public resources, there have to be legal frameworks that require States to subject themselves to specific laws that prevent discretion in the exercise of this important function. In this respect, the Office of the Special Rapporteur has already indicated that "[i]nsufficiently precise laws and unacceptable discretionary powers constitute freedom of expression violations. It is indeed

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[93] IACHR, 2003 Annual Report. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression.

[94] On the different types and functions of so-called government advertising, the Office of the Special Rapporteur stated: "There are two types of government publicity: unpaid and paid. 'Unpaid' publicity includes press releases, the texts of legislation or legislative body meetings, and information which carries government support but which may be paid for by a private party. There are often legal obligations for national media sources to release this publicity, as a condition of the media outlets' use of the state's available frequencies and airwaves. Such conditions are usually included in states' fundamental broadcasting and press laws. 'Paid' publicity includes paid advertising in the press, on radio and on television, government-produced or –sponsored software and video material, leaflet campaigns, material placed on the Internet, exhibitions, and more. Governments use paid publicity to inform the public about important issues (i.e. ads pertaining to health and safety concerns), to influence the social behavior of individuals and business (such as encouraging voter turnout in an upcoming election), and to generate revenue through various programs (oftentimes through state-owned industry). The use of the media to transmit information is an important and useful tool for states, and provides much-needed advertising profits for media outlets." IACHR 2003 Annual Report. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter V. Para. 3.

[95] On this point, the above-cited 2003 Annual Report states: "For such determinations to be in keeping with freedom of expression principles, they must be based on criteria 'substantially related' to the prescribed viewpoint-neutral purpose. For example, if a state's goal was to promote sales of monthly passes on its city-wide public transportation system, it could legally choose to advertise only in newspapers largely distributed within that city. Newspapers from other regions that may have a very small distribution within that city would not be unfairly discriminated against by the government's choice not to advertise with them. The [criterion] of being a paper with a majority of your distribution within the city is substantially related to the program's viewpoint-neutral purpose of promoting use of its public transportation system, and thus, non-discriminatory." IACHR, 2003 Annual Report. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter V. Para. 11.

when laws pertaining to allocation of official publicity are unclear or leave decisions to the discretion of public officials that there exists a legal framework contrary to freedom of expression."[96]

80. The discretionary allocation of radio and television frequencies or of the new digital dividend spectrum or the granting of subsidies for communications, the arts or culture, present the same problems as the allocation of government advertising. In most cases there are no laws that define the rules of the game transparently, clearly and precisely, using reasonable and appropriate criteria for such allocations.[97]

81. Unlike what used to occur some years ago, this issue has now been identified as a form of indirect censorship prohibited by Article 13.3 of the American Convention. In some States draft regulations have been introduced, and in others the judicial branch—within the limits imposed upon it by its nature—has played a particularly active role in putting an end to arbitrary decisions in this area. Nevertheless, it is essential to continue the work of examining this problem and working with civil society and with governments to advocate the creation of regulations that are clear, transparent, nondiscriminatory and equitable in the allocation of public goods or services on which a very important part of the communicative process now depends.

82. The second form of indirect censorship that has been identified deals with the use of regular State mechanisms to control direct or indirect aspects of freedom of expression, with the aim of intimidating dissidents and inhibiting their critical speech. It is true, as the Office of the Special Rapporteur has reiterated consistently, that no one—not even human rights defenders, not critics or dissidents, not journalists or the media—is above the law. However, when the law is used with the purpose of eliminating or pacifying criticism or dissidence, it amounts to persecution and not a legitimate attempt to reinforce the Rule of Law. Article 13.3 of the American Convention on Human Rights referred precisely to this issue in a truly visionary way when it prohibited the restriction of the right to expression by indirect means or channels, such as the abuse of government controls.

83. To address the problem that has been described, it is necessary for States to pass laws that prevent any of their agents from being able to make arbitrary use of oversight or regulatory control in the future to silence dissident speech. As in the previous case, clear, pre-established, precise and reasonable laws are required. They must establish specifically the authorities' powers of oversight and regulation, which must pursue a legitimate aim and be strictly necessary for the accomplishment of the aim pursued. In particular, it is fundamental that the bodies with oversight or regulatory authority over the communications media be independent of the executive branch, be fully subject to due process and have strict judicial oversight.

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[96] IACHR, 2003 Annual Report. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter V. Para. 23.

[97] It is relevant to mention on this point that in the 2003 Annual Report, the Office of the Special Rapporteur recalled that there have been decisions on these issues in the European system. As such, it indicated: "Although the Court has not specifically addressed this issue in the context of government advertising, it has addressed the existence of unclear laws and overly wide discretionary powers as a violation of freedom of expression in the case of Autronic A.G. v. Switzerland (Eur. Ct. H.R., Case of Autronic A.G. v. Switzerland, May 22, 1990, Application No. 12726/87). In this case, the European Court questioned whether the broadcast license-granting laws of Switzerland were sufficiently precise since 'they [did] not indicate exactly what criteria [were] to be used by the authorities in determining applications." The Court did not decide the issue in that case, dismissing it for other reasons, but warned that such license-granting laws that did not establish clear criteria could constitute a violation of freedom of expression." IACHR, 2003 Annual Report. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter V. Para. 21.

84. The third form of indirect censorship involves systematic action meant to create an environment of intolerance and hostility toward critical or independent media and journalists so as to generate self-censorship. On this point, it is important to distinguish clearly between the legitimate response of a government that feels it has been subject to reckless or unfair distortion or judgment (which has the right to defend its position through public debate), and the systematic and disproportionate statements that tend to create a climate of hostility toward a specific medium or journalist because of his editorial position or coverage of information of public relevance. This type of conduct, when carried out systematically and within the context of high social tension, can lead, for example, to the closure of a medium due to the complete withdrawal of private advertising, the public's fear of accessing the published material, or even violence by non-State agents against journalists and the media. In this respect, as it indicated in its 2007 Annual Report, the Office of the Special Rapporteur recalls that: "[h]eads of State play a critical role in making room for tolerance and democratic coexistence; thus, they should exercise special care in terms of the impact their statements may have on freedom of expression and on other human rights, such as the right to life and to personal integrity."

85. In all of these cases it is necessary to promote standards that guide the actions of governments and that—without hindering in any way the task of defending and enforcing the law, through legitimate means, from attacks considered unfair— prevents them from using their power to block the free and uninhibited circulation of all speech and information.

86. Finally, another of the multiple forms of censorship is, as indicated in Article 13-3 of the American Convention, the failure to control abuses committed by private individuals who have the power to impede the free flow of ideas. Thus, the State is required to prevent the abuse of private power exercised, for example, through the control of newsprint, or equipment and supplies used in the dissemination of information, or through any other means meant to prevent communication and the circulation of ideas and opinions. In other words, the omissions of the State when they lead to the existence of monopolies or oligopolies or in the abusive exercise of other rights with the aim of blocking the free flow of ideas amount to a form of indirect restriction. In these cases, it is the State's obligation to intervene and prevent, for example, a paper supply or print media distribution monopoly from endangering freedom of expression.

4. State Secrets: the right to access to information and habeas data

87. The right to access to information has reached an important level of development in the region in recent years. From the perspective of international human rights law, the Judgment of the Inter-American Court in the *Case of Claude Reyes et al. v. Chile*[98] is the most important decision on the subject. Likewise, the General Assembly of the OAS has spoken on multiple occasions to the importance of this right, and it has entrusted the Office of the Special Rapporteur with the preparation of studies and conferences on the issue.[99] Likewise, the Inter-American Juridical Committee adopted in its 73rd Regular Session

[98] *Case of Claude Reyes et al*. *supra* note 9.

[99] On the subject of access to information, the General Assembly has issued several pronouncements supporting the work of the Office of the Special Rapporteur and urging the adoption of its recommendations. In its Resolution 1932 (XXXIII-O/03) of 2003, reiterated in 2004 in Resolution 2057 (XXXIV-O/04), and in 2005 in Resolution 2121 (XXXV-O/05), the General Assembly asked that the Office of the Special Rapporteur continue to prepare a report within its annual reports on the situation of access to public information in the region. In 2006, through Resolution 2252 (XXVI-O/06), it entrusted the Office of the Special Rapporteur to support the Member States who request its assistance in the drafting of laws and mechanisms on access to information. Likewise, the

a resolution on the right to access to information, which recognizes the inter-American standards on the subject and advances some important issues.[100] Finally, the Office of the Special Rapporteur, in its annual reports, has underscored the importance of the issue and the international obligations of States with regard to it.[101]

88. According to the *Case of Claude Reyes et al. v. Chile,* every person, without the need to prove a special interest, has the human right to access to information administered or produced by the State, or which should be administered or produced by the State. In this sense, the State has the international obligation to provide the public with information voluntarily and continuously, and to establish agile and efficient mechanisms for accessing the information requested.[102] Given that it is one of the protected forms of the right to freedom of expression, any restrictions to the right to access must respect the same criteria that are used to evaluate any other restriction to this right. Consequently, it is subject to a strict and exceptional system of limitations, which must be established previously and restrictively by law, pursue compelling objectives, be strictly necessary and proportionate with respect to the aims pursued, and be subject to the possibility of judicial review.

89. The Office of the Special Rapporteur faces diverse challenges on the subject of access to information. On one hand, it must continue promoting the enactment of access laws in States that do not already have such laws. On the other hand, it must also verify that the existing laws meet the applicable international standards. It is fundamental to establish whether the catalog of exceptions established by each one of these laws is consistent with the requirements of strict legality, legitimate purpose and necessity. Likewise, it is important to ascertain whether there is effective and appropriate recourse for requesting access, and whether there are effective and independent controls to prevent administrative arbitrariness on the issue.

90. Experience has shown that the existence of laws on access to information is insufficient to guarantee the right to access. Indeed, to satisfy this right adequately, it is necessary to adopt implementation measures on matters such as the custody, archiving and management of the information held by the State. Likewise, it is essential that policies and

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IACHR was asked to conduct a study on the different forms of guaranteeing all persons the freedom to seek, receive and impart public information based on the principle of freedom of expression. In 2007, the General Assembly adopted Resolution 2288 (XXXVII-O/07), which underscores the importance of the right to access to public information, takes note of the reports of the Office of the Special Rapporteur on the situation of access to information in the region, urges States to adapt their laws and entrusts the Office of the Special Rapporteur with providing advice on the issue. It also asks different organizations within the OAS, including the Office of the Special Rapporteur, to prepare a basic document on best practices and the development of common approaches or guidelines for increasing access to public information. This document was adopted in April of 2008 by the Committee on Juridical and Political Affairs. Furthermore, in 2008 the General Assembly in the Resolution 2418 (XXXVIII-O/08), ordered the Department of International Law to draft, with the collaboration of the Inter-American Juridical Committee, the Special Rapporteur for Freedom of Expression, the Department of Modernization of the State and Governance and the member states and civil society, a Model Law on Access to Public Information and a guide for its implementation, according to the international standards on the issue.

[100] Inter-American Juridical Committee. *Principles on the Right to Access to Information.* (CJI/Res. 147 - LXXIII-O/08, August 7, 2008). Available at: http://www.oas.org/cji/eng/CJI-RES_147_LXXIII-O-08_eng.pdf.

[101] Annual Reports of the Office of the Special Rapporteur for Freedom of Expression available at: http://www.cidh.org/Relatoria/docListCat.asp?catID=24&IID=1.

[102] *Cfr. Case of Claude Reyes et al. supra* note 9, para. 77. See also, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*. Reprinted in the Judgment of September 19, 2006. Series C No. 151; Inter-American Juridical Committee. *Principles on the Right to Access to Information.* (CJI/Res. 147 – LXXIII-0/08, August 7, 2008). 1999, 2004 and 2006 Joint Declarations of the UN, OAS and OSCE Special Rapporteurs for Freedom of Expression.

adequate training programs be implemented for government officials and the public in general, aimed in practice at banishing definitively the culture of secrecy. The Office of the Special Rapporteur must work toward the adoption of these implementation measures, and the selection and dissemination of best practices on the issue.

91. Furthermore, despite the previously cited standards, there are matters pending in this area that must be defined more clearly by the inter-American system of Human Rights. Thus, for example, it would be important to make progress through the individual case system in the clarification of matters such as the definition or characterization of information as *sensitive*, which must be kept secret; the right of citizens to access so-called *raw data* held by the State; and the scope of the State's positive obligation to produce or collect information in the performance of its duties.

92. Finally, it is particularly important to emphasize the right to access to information of vulnerable or marginalized groups or individuals, for whom this right is an essential condition of the meeting of their basic needs.[103] Thus, for example, States must make efforts to guarantee, especially for the poorest sectors of society, the right of access to information on mechanisms of participation, social programs and other forms of satisfying their fundamental rights; guarantee that ethnic and cultural groups have the right to have the State design policies aimed at adapting the right of access to their cultural needs, such as their language; and guarantee that women throughout the region have the right to have the State fully ensure the right to access to information on their sexual and reproductive rights through both mass and specialized dissemination, for example at all primary health care centers.

93. For its part, the right of *habeas data* has undergone a less prolific development in the case law of the inter-American system.

94. According to Principle 3 of the Declaration of Principles:

> "Every person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it."

95. In its Report on Terrorism and Human Rights,[104] the IACHR indicated that, apart from the general right to access to information held by the State, "Every person has the right to access to information about himself or herself, whether this is in the possession of a government or private entity," and "this includes the right to modify, remove or correct such information due to its sensitive, erroneous, biased or discriminatory nature"[105]. Later in the same report, the IACHR stated: "This right of access to and control over personal data represents a fundamental right in many aspects of life, since the lack of judicial mechanisms

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[103] On this point, See: IACHR, 1999 Annual Report. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II(c) Women and Freedom of Expression. IACHR, 2002 Annual Report. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter IV: Freedom of Expression and Poverty.

[104] IACHR, Report on Terrorism and Human Rights. OEA/Ser.L/V/II.116. October 22, 2002. Available at: http://www.cidh.org/Terrorism/Eng/toc.htm.

[105] IACHR, Report on Terrorism and Human Rights. Chapter III, E): Right to freedom of expression.

for the rectification, updating or removal of data would directly affect the right to privacy, honor, individual identity, property, and accountability in the collection of data." [106]

96. In particular, it is important to recall that the action of *habeas data* is the most important instrument for blocking the disclosure of erroneous or sensitive information that may adversely affect reputation, privacy or other extremely important human rights. Such is the case of the right of victims of serious human rights violations to obtain information related to the government's conduct, and to determine and demand the appropriate responsibilities.[107]

97. Because it is a right protected by Article 13 of the American Convention, access to personal information (*habeas data*) must be guaranteed expressly and sufficiently under national laws. Additionally, any restriction to its exercise must meet the aforementioned requirements of strict legality, legitimate aim and necessity. In principle, the owner of the registered or published information does not have to prove the existence of any special requirement in order to access it and request its correction or removal when appropriate. Likewise, this right must be ensured by means of effective recourse that is easily used and accessible to all. The burden of proof in a dispute over access to personal information lies with the party that administers or publishes the information, and not with its owner. Finally, there must be prompt and suitable judicial recourse available to effectively prevent private or government arbitrariness in this area.

98. The work of the Office of the Special Rapporteur consists of advocating regulations that respect the above-cited standards, and to promote the policies and implementation practices that enable the real guarantee of access to information and to *habeas data* for all of the region's inhabitants.

5. Pluralism, diversity, and freedom of expression

99. Few ideas generate greater consensus in the region than the idea that freedom of expression is essential to the proper functioning of a democratic system. This issue has been addressed by the Heads of State and Government of the Americas,[108] the

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[106] IACHR, Report on Terrorism and Human Rights. Chapter III, E): Right to freedom of expression. OEA/Ser.L/V/II.116. October 22, 2002. Available at: http://www.cidh.org/Terrorism/Eng/toc.htm.

[107] In this respect, the IACHR stated that: "The action of *habeas data* as a mechanism for ensuring the accountability of security and intelligence agencies within this context provides a means to verify that personal data has been gathered legally. The action of habeas data entitles the injured party, or his family members, to ascertain the purpose for which the data was collected and, if collected illegally, to determine whether the responsible parties are punishable. Public disclosure of illegal practices in the collection of personal data can have the effect of preventing such practices by these agencies in the future." Furthermore, the IACHR stated: "[as the Commission indicated], recourse to the action of *habeas data* has become a fundamental instrument for investigation into human rights violations committed during past military dictatorships in the Hemisphere. Family members of disappeared persons have used *habeas data* actions to obtain information concerning government conduct, to learn the fate of disappeared persons, and to exact accountability. Thus, these actions constitute an important means to guarantee the "right to truth." IACHR, Report on Terrorism and Human Rights. Available at: http://www.cidh.org/Terrorism/Eng/toc.htm.

[108] *Cfr*. Declaration of Santiago. Second Summit of the Americas, April 18-19, 1998, Santiago, Chile, in *Official Documents of the Summit Process from Miami to Santiago*, Volume I, Office of Summit Follow-up, Organization of American States; Plan of Action. Second Summit of the Americas, April 18-19, 1998, Santiago, Chile, in *Official Documents of the Summit Process from Miami to Santiago*, Volume I, Office of Summit Follow-up, Organization of American States. Plan of Action. Third Summit of the Americas, April 20-22, 2001, Québec, Canada. Available at: http://www.summit-americas.org.

General Assembly of the OAS,[109] the IACHR, the Inter-American Court and the Office of the Special Rapporteur on multiple occasions.

100. The reasoning behind the above assertion is simple: democracy is based, among other things, on the existence of a free process for the selection of collective preferences that assumes an uninhibited, robust and wide-open public debate, to use the famous phrase of Justice Brennan[110]. It is in this deliberative process where individuals can make informed decisions on the future of the society to which they belong. This is the reason for which censorship is prohibited: no one may exclude from public debate the circulation of the ideas and opinions of others. Each member of society has the power to decide which of these ideas or pieces of information are worthy of attention and which should be dismissed. This is precisely the democratic scope of freedom of expression: for all to have the opportunity to express themselves and to be heard, and that each one of us may know what others have to say.

101. If the above is true, then there is a component of freedom of expression to which we are indebted. The individual members of the social groups that have been traditionally marginalized, discriminated against, or that are in a situation of helplessness, are for various reasons systematically excluded from public debate. These groups do not have institutional or private channels for the serious, robust and constant exercise of their right to express publicly their ideas and opinions or to be informed of the issues that affect them. This process of exclusion has also deprived society of knowledge of their interests, of the needs and proposals of those who have not had the opportunity to access democratic debate on an equal footing. The effect of this phenomenon of exclusion is similar to the effect of censorship: silence.

102. People in this circumstance of invisibility include, for example, female heads of households who live in poverty (or extreme poverty), who do not have the means to express their needs or interests or to learn of alternatives that enable them to address the discrimination or violence they experience daily—women who in many of our countries must bear the effects of a sexist culture often nurtured by the powerful flow of information and opinions to which they do not have access; indigenous people who cannot communicate amongst themselves in their own language or know about the discussions, needs and proposals of different communities located beyond their borders; people of African descent who live in marginalized areas and must endure the consequences of deeply racist cultures without being able to decisively influence the debates that would help reverse processes of discrimination; rural or neighborhood communities organized around the purpose of overcoming outrageous conditions of social marginalization who cannot learn of successful alternatives for collective action or adequately inform society of their needs and proposals; young people willing to create freely but who do not have channels for the dissemination of their ideas and must give up their dreams early without having had the chance for others to know about their creative proposals. In short, millions of people whose freedom of expression is not sufficiently ensured, all of which leads to a fundamental flaw in the process of democratic deliberation.[111]

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[109] For example, Resolutions 1932 (XXXIII-O/03), 2057 (XXXIV-O/04), 2121 (XXXV-O/05), 2149 (XXXV-O/05), 2237 (XXXVI-O/06), 2287 (XXXVII-O/07), 2288 (XXXVII-O/07), 2434 (XXXVIII-O/08), 2418 (XXXVIII-O/08) and 2523 (XXXIX-O/09) of the OAS General Assembly.

[110] "[…] debate on public issues should be uninhibited, robust, and wide-open, and […] it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-271 (1964).

[111] On this same issue, see the 2007 Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on

103. The Office of the Special Rapporteur has already expressed its view on this point in its Report on Freedom of Expression and Poverty:

> The freedom of individuals to debate openly and criticize policies and institutions guards against abuses of human rights. Openness of the media not only advances civil and political liberties-it often contributes to economic, social, and cultural rights. In some instances, the use of the mass media has helped drive public awareness and bring pressure to bear for the adoption of measures for improving the quality of life of the population's most vulnerable or marginalized sectors.
>
> However, the traditional mass media are not always accessible for disseminating the needs and claims of society's most impoverished or vulnerable sectors. Thus, community media outlets have for some time been insisting that strategies and programs that address their needs be included on national agendas.[112]

104. To address the deficient protection of the freedom of expression of marginalized groups and the insufficient information of societies, the Office of the Special Rapporteur must continue working in two separate areas. First, it must insist upon the urgent necessity of enforcing antitrust laws to prevent the concentration of ownership and of control of the communications media. Second, it is necessary to ensure that the allocation of frequencies and licenses for all of the radiomagnetic spectrum—especially the new digital dividend—respects the obligation of inclusion imposed upon the States by the inter-American legal framework, thereby decisively fostering pluralism and diversity in public debate.

105. In terms of combating monopolies, all of the bodies of the inter-American system for the protection of human rights have spoken out to recall the State's obligation to prevent public or private monopolies in the ownership or control of the communications media and thereby to guarantee the plurality of the media.[113] In this respect, Principle 12 of

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Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, which stressed the "fundamental importance of diversity in the media to the free flow of information and ideas in society, in terms both of giving voice to and satisfying the information needs and other interests of all, as protected by international guarantees of the right to freedom of expression." The same Declaration also states that diversity has a complex nature, "which includes diversity of outlet (types of media) and source (ownership of the media), as well as diversity of content (media output)." Finally, the four Rapporteurs indicated that the "undue concentration of media ownership, direct or indirect, as well as government control over the media, pose a threat to diversity of the media, as well as other risks, such as concentrating political power in the hands of owners or governing elites."

[112] IACHR, 2002 Annual Report, Vol. III: "Report of the Office of the Special Rapporteur for Freedom of Expression". Chapter IV. Paras. 37 and 38.

[113] The Inter-American Court addressed this point when it held that: "[i]t is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, *inter alia*, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists [...] the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights) *supra* nota 8, para. 34. The IACHR has also spoken to this point, among others, in Principle 12 of the Declaration of Principles de Freedom of expression. Likewise, the IACHR stated that: "one of the fundamental requirements of the right to freedom of expression is the need for a broad plurality of information. In today's society, mass media such as television, radio and the press have an undeniable power with regard to the education of all of its inhabitants on cultural, political, religious and other matters. If these media are controlled by a limited number of individuals, or by just one, a society is in fact being created in which a limited number of individuals, or by a single one, exercise control over information and—directly or indirectly—over the information that the rest of the people receive. This lack of plurality in information is a serious obstacle to the functioning of democracy. Democracy requires the confrontation

the Declaration of Principles on Freedom of Expression states that "[m]onopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals."

106. As indicated in Principle 12 of the Declaration of Principles, aside from the effective enforcement of antitrust laws, it is necessary to ensure that State-administered goods and services, which are vital to the full exercise of freedom of expression, be allocated in accordance with the values and principles underlying the entire inter-American legal framework, that is, in accordance with the principles of freedom, equality and nondiscrimination.[114]

107. It is necessary, among other things, for States to recognize and facilitate access under equal conditions, for the commercial, social and public uses of radio or television, not only the electromagnetic spectrum, but also the new digital dividend. It is indispensable to remove all disproportionate or discriminatory restrictions that prevent radio and television operators of all kinds to fully accomplish the commercial, social or public mission they undertake. It is fundamental that the allocation of frequencies processes be open, public and transparent, and that they be submitted to clear, pre-established rules and requirements that are strictly necessary, fair and equitable. It is necessary for this process to guarantee that disproportionate or unequal barriers to access to the media are not imposed, and that the arbitrary or discriminatory allocation, withdrawal, or non-renewal of frequencies or licenses is prevented. It is essential that all allocation and regulatory procedures be guided by a technical body that is independent of the government, enjoys autonomy in the face of political pressures and changes, is subject to all the guarantees of due process, and is subject to judicial review.

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of ideas; it requires debate and discussion. When this debate does not exist, or is weakened due to the fact that the sources of information are limited, the main pillar of democratic functioning comes under attack." IACHR 2003 Annual Report. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter VII: The situation of freedom of expression in Guatemala.

[114] About the obligation of inclusion imposed within the inter-American legal framework, the Inter-American Court has established that: "This general obligation to respect and guarantee human rights, without any discrimination and on an equal footing, has various consequences and effects that are defined in specific obligations. The Court will now refer to the effects derived from this obligation. // In compliance with this obligation, States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons. // In addition, States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations. // Because of the effects derived from this general obligation, States may only establish objective and reasonable distinctions when these are made with due respect for human rights and in accordance with the principle of applying the norm that grants protection to the individual. // Non-compliance with these obligations gives rise to the international responsibility of the State, and this is exacerbated insofar as non-compliance violates peremptory norms of international human rights law. Hence, the general obligation to respect and ensure human rights binds States, regardless of any circumstance or consideration, including a person's migratory status." I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paras. 102-106.

108. Rules such as the above allow for the protection of commercial channels and radio stations from abusive influences and provide them with the security that they will not be subject to arbitrary decisions, whatever their orientation may be. These types of rules also encourage the existence of state or public television channels and radio stations that are independent of governments and vitally promote the circulation of ideas and information not usually included in commercial programming (because of low profitability), and not generally given air time on social or community channels or radio stations (because of high production costs or because of the topics covered). Finally, regulations such as the ones proposed would enable the recognition and promotion of social communications media such as community channels and radio stations, which play an essential role in the democracies of our region.[115] These cases deal with a normative frame to promote the vitality of democracy if we bear in mind that the communicative process must satisfy not only the consumer needs of society's inhabitants (legitimate entertainment needs, for example) but also their information needs.

109. In sum, it is incumbent upon the Office of the Special Rapporteur to make use of the instruments available to it to promote studies, cases or opinions that bring attention to the serious effects of the lack of pluralism and diversity in public debate, disseminate best practices with regard to the issue, and promote international standards and their incorporation into domestic legal systems. If we are to take seriously the notion that we are all equal in dignity and rights, we can do no less than to give voice to those who have been voiceless.

[115] Specifically on the protection of community radio, the Report on freedom of expression in Guatemala, adopted by the IACHR in 2003, stated: "The Commission and its Office of the Special Rapporteur maintain that community radio is positive because it promotes the culture and history of communities, provided that it is done within the legal framework. The Commission recalls that the issuance or renewal of broadcasting licenses must be subject to a clear, fair and objective procedure that takes into account the importance of the communications media in ensuring that all sectors of [...] society participate in an informed manner in the democratic process. In particular, community radio is of major importance in the promotion of national culture, development and education among [...] different communities [...]. Therefore, auctions that consider only financial criteria or that grant concessions without providing equal opportunities for all sectors are incompatible with democracy and with the right to freedom of expression guaranteed in the American Convention on Human Rights and in the Declaration of Principles on Freedom of Expression." IACHR 2003 Annual Report. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter VII: The situation of freedom of expression in Guatemala. Para. 414.